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Montana Code Annotated

Annotations 2006



Parks, Recreation, Sports & Gambling • Civil Procedure

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PREFACE TO VOLUME 4
(Annotations — February 2006)

Annotations to this volume include case notes of applicable court decisions through public domain citation 2005 MT 224, volume 328 Montana Reports page 354, volume 120 Pacific Reporter (3rd Series) page 382, volume 395 Federal Supplement (2nd Series) page 1362, volume 428 Federal Reporter (3rd Series) page 240, and volume 126 Supreme Court Reporter page 675. Digests of Montana Attorney General's opinions are provided through volume 51 opinion number 12 of the Report and Official Opinions of Attorney General. Citations to the Administrative Rules of Montana implementing or authorized by a section of law and adopted through Issue 24 of the 2005 Montana Administrative Register are also included.

Amendment notes listed under compiler's comments are intended to explain only amendments made in the year indicated and may not accurately reflect current statutory language because of subsequent amendment.

The annotations are provided as a convenience to the user and are not intended to be an exhaustive compilation of the law under a given statute or in a given area.

TITLE 23
PARKS, RECREATION, SPORTS, AND GAMBLING

CHAPTER 1
PARKS

Chapter Administrative Rules

Title 12, chapter 8, ARM State park system — public use regulations.

Chapter Law Review Articles

MEIC v. DEQ: An Inadequate Effort to Address the Meaning of Montana's Constitutional Environmental Provisions, Horwich, 62 Mont. L. Rev. 269 (2001).

Protecting and Preserving Our National Parks in the Twenty First Century: Are Additional Reforms Needed Above and Beyond the Requirements of the 1998 National Parks Omnibus Management Act?, Ansson & Hooks, 62 Mont. L. Rev. 213 (2001).

Interface Between the Recreation and Land Use Act and the Sovereign Immunity Act—Blanket Immunity for the Commonwealth in State Park Actions?, Nussbaum, 70 Pa. B.A.Q 112 (1999).

Judge Applies Disabilities Act to Wild Forest: Access for Handicapped Ordered for State Park, Spencer, 220 N.Y.L.J. 1 (1998).

Tort Immunity Act: Park Restroom, Postel, 136 Chi. Daily L. Bull. 1 (1990).

Chapter Collateral References

State's liability for personal injuries from criminal attack in state park. 59 ALR 4th 1236.

Part 1
State Parks

23-1-101. Purpose.

Collateral References

States *key* 45.

81A C.J.S. States §138.

23-1-102. Powers and duties of department of fish, wildlife, and parks.

Compiler's Comments

2001 Amendment: Chapter 125 in (1) inserted last sentence relating to acquisition by condemnation; and made minor changes in style. Amendment effective October 1, 2001.

Interim Study Bill — Eminent Domain: Chapter 125, L. 2001, was enacted as a result of an interim study. See Eminent Domain in Montana, published by the Legislative Environmental Policy Office, May 2001.

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

1981 Amendments: Chapter 230 inserted "for the purposes outlined in 87-1-209(2)" following "condemnation" near the beginning of the section.

Chapter 418 inserted ", for any of the purposes of this part," after "A contract" and "and, if the contract or obligation pertains to acquisition of areas or sites in excess of either 100 acres or $100,000 in value, until the board of land commissioners has specifically approved such acquisition" near the middle of the section.

Administrative Rules

Title 12, chapter 8, ARM State park system — public use regulations.

ARM 12.11.3210 Helena Valley Equalizing Reservoir regulations.

ARM 12.11.5101 Castle Rock Reservoir regulations.

Case Notes

Nature of Easement — When Deprivation of Property Occurs: A landowner brought an action to prevent the state from opening a fishing access site and from paving a road to the site, based on a claimed fee title to the roadway. The District Court granted the state a summary judgment as a matter of law. The Supreme Court found the landowner's interest was an ordinary easement.

The words "private road" did not clearly indicate intent to create in him an "exclusive" easement. The state's use of the road cannot be declared inconsistent with the landowner's on the basis of speculation. Furthermore, under various statutory provisions, the state obtained its land lawfully. The plaintiff had not yet been deprived of his property interest. Any damages remained speculative at the time of the decision. The summary judgment was accordingly affirmed. Titeca v. St., 194 M 209, 634 P2d 1156, 38 St. Rep. 1533 (1981).

Bailments: When state, as bailee of road roller given it by federal government, was in lawful possession, it was lawfully entitled to that possession as against anyone with no better right. It could vindicate that possession accordingly and to that end maintain an action in claim and delivery when there was an unauthorized sale to third person by State Park Commission (now Department of Fish, Wildlife, and Parks) employee purporting to act for state. State ex rel. Olsen v. Sundling, 128 M 596, 281 P2d 499 (1955).

Collateral References

States *key* 67, 73.

81A C.J.S. States §138.

23-1-103. Acceptance of title to recreational and camping grounds by board of land commissioners.

Collateral References

States *key* 85.

59 Am. Jur. 2d Parks, Squares, and Playgrounds §§4, 5.

23-1-104. Connecting roads.

Compiler's Comments

1991 Amendment: Substituted references to Department of Transportation for references to Department of Highways. Amendment effective July 1, 1991.

Collateral References

Highways *key* 99, 105(1).

23-1-105. Fees and charges.

Compiler's Comments

2005 Amendment: Chapter 596 in (6) in first sentence substituted "61-3-321(18)(a)" for "61-3-321(11)(a)". Amendment effective January 1, 2006.

2003 Amendments — Composite Section: Chapter 114 in (5) near middle of first sentence substituted "17-2-102(2)(a)" for "17-2-102(1)(b)(i)". Amendment effective October 1, 2003.

Chapter 601 in (1) at end of first sentence inserted reference to subsection (6); inserted (6) concerning restriction on charging day-use fees to registered vehicle owners; and made minor changes in style. Amendment effective January 1, 2004.

The amendments to this section made by Ch. 507, L. 2003, were rendered void by sec. 4, Ch. 507, L. 2003, a coordination section.

Saving Clause: Section 4, Ch. 601, L. 2003, was a saving clause.

Severability: Section 5, Ch. 601, L. 2003, was a severability clause.

2001 Amendment: Chapter 126 in middle of second sentence in (1) after "department" inserted exception clause; inserted (5) establishing an enterprise fund to manage state park visitor services revenue; and made minor changes in style. Amendment effective March 26, 2001.

1991 Amendments: Chapter 339 inserted (4) excepting money collected from fees and charges from requirements of 17-6-105; and made minor change in style. Amendment effective April 4, 1991.

Chapter 662 inserted (3) relating to responsibility of registered owner of a vehicle for fees; and made minor change in style. Amendment effective April 26, 1991.

1989 Amendment: At end of first sentence substituted "subsection (2)" for "subsections (2) and (3)"; deleted former (2) that read: "(2) Any Montana resident as defined in 87-2-102 who is 62 years of age or older may purchase a "Montana state golden years pass" for $1 which, when attached to his or her vehicle, allows the passengers of that vehicle to camp free in Montana state parks, recreation areas, and fishing access sites. This pass is valid for the lifetime of the individual"; in (2), at beginning before "fees", inserted "overnight camping", substituted "must be discounted 50% for a campsite rented by a person" for "are waived for a person", and after "resident of Montana" substituted "as defined in 87-2-102 and either 62 years of age or older or" for "not residing in an institution and who is"; and made minor changes in phraseology. Amendment effective March 29, 1989.

1985 Amendment: In (2) reduced age requirement from 65 to 62; in (3) before "person", deleted "totally disabled" and after "person", added remainder of sentence waiving fees for certified disabled Montana resident not residing in an institution; and deleted last sentence of former (3)(a) and all of (3)(b) that read: "A person claiming waiver under this subsection shall provide to the department proof that he is totally disabled, as certified by a licensed Montana physician.

(b) For purposes of this section, "totally disabled" means a physical or mental condition that results in the individual having no reasonable prospect of regular employment of any kind, which condition is expected to last for the rest of his life."

1983 Amendments: Chapter 188 inserted (3) allowing fee waiver for totally disabled person and made related references thereto.

Chapter 277, in (1), substituted reference to state special revenue fund for reference to earmarked revenue fund.

Administrative Rules

ARM 12.8.301 Montana State Golden Years Pass.

Collateral References

States *key* 87, 127.

23-1-106. Rules — penalties — enforcement.

Compiler's Comments

1991 Amendment: Inserted (3) relating to offense of refusing to exhibit certain permits or documents; inserted (4) relating to enforcement of chapter; and inserted (5) providing that Department is a criminal justice agency and its authorized officers are peace officers with enumerated powers. Amendment effective April 26, 1991.

Administrative Rules

ARM 12.8.201 through 12.8.213 State parks — public use regulations.
ARM 12.8.301 Montana State Golden Years Pass.
ARM 12.11.2308 Hebgen Lake.
ARM 12.11.3501 Harrison Lake.
ARM 12.11.3601 Fort Peck Reservoir.
ARM 12.11.5101 Castle Rock Reservoir.
Title 12, chapter 11, subchapter 65, ARM Blackfoot River special recreation permit program.

Collateral References

Public Lands *key* 8.
73 C.J.S. Public Lands §4.

23-1-108. Acquisition of certain state parks, monuments, or historical sites.

Compiler's Comments

1991 Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

1985 Amendment: In (1) changed date for submitting proposals from December 1 to July 1.

Law Review Articles

The Free Exercise Clause and Historic Preservation Law: Suggestions for a More Coherent Free Exercise Analysis, Black, 72 Tul. L. Rev. 1767 (1998).

Historic Preservation Collides With Property Interests, Goldshore & Wolf, 147 N.J.L.J. 32 (1997).

Effects of Historic and Cultural Resources and Indian Religious Freedom on Lands Development: A Practical Primer, Stern & Slade, 35 Nat. Resources J. 133 (1995).

Access Reigns Supreme: Title III of the Americans With Disabilities Act and Historic Preservation, Fondo, 9 B.Y.U.J. Pub. L. 99 (1994).

The Road Through Our Ruins: Archaeology and Section (4)(f) of the Department of Transportation Act, Olesh, 28 Wm. & Mary L. Rev. 155 (1986).

23-1-109. Establishment of Montana agricultural center and museum of the Northern Great Plains.

Compiler's Comments

2005 Amendment: Chapter 98 in second sentence near beginning after "shall" substituted "acquire" for "have jurisdiction, custody, and control of", near middle after "corporation" inserted "or transfer ownership of the facility to a qualified local government entity for less than fair

market value", and before "provides" inserted "as applicable" and inserted third sentence providing for the department's right to reclaim ownership if property ceases to be used as an agricultural center and museum; and made minor changes in style. Amendment effective March 24, 2005.

2001 Amendment: Chapter 97 in second sentence after "but" substituted "may" for "shall", after "facility to" substituted "a qualified local government entity or nonprofit corporation" for "the city of Fort Benton", and after "so long as the" substituted "local government entity or nonprofit corporation" for "city of Fort Benton". Amendment effective March 21, 2001.

Saving Clause: Section 2, Ch. 97, L. 2001, was a saving clause.

23-1-110. Improvement or development of state park or fishing access site — required public involvement — rules.

Compiler's Comments

Preamble: The preamble to Ch. 367, L. 1991, provided: "WHEREAS, it is in the best interests of the State of Montana that the state parks and fishing access site systems have an improvement and development policy that reflects the concerns of a majority of the users of Montana's state parks and fishing access sites."

1991 Statement of Intent: The statement of intent attached to Ch. 367, L. 1991, provided: "A statement of intent is required for this bill because [section 1] [23-1-110] requires the fish and game commission [now fish, wildlife, and parks commission] to adopt rules establishing a policy for certain development of state parks and fishing access sites. It is intended that the policy address, at a minimum:

(1) the desires of park and fishing access site users and the public;
(2) the capacity of the park or fishing access site for development;
(3) environmental impacts associated with development;
(4) the long-range ability of the state to maintain the improvements;
(5) the protection of natural, cultural, and historical park and fishing access site features; and
(6) potential impacts on tourism."

1991 Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

Administrative Rules

Title 12, chapter 8, subchapter 6, ARM Procedures for considering improvements to parks and fishing access sites.

23-1-115. Short title.

Compiler's Comments

Preamble: The preamble attached to Ch. 501, L. 1993, provided: "WHEREAS, certain Montana state parks still retain the unique, primarily undeveloped character for which they were originally acquired; and

WHEREAS, there is an abundance of other state and federal land that has been developed beyond its primitive condition and that is readily available to the recreating public; and

WHEREAS, there are also numerous well-developed private sector recreational opportunities in Montana; and

WHEREAS, Montana should provide a variety of recreational opportunities for its residents; and

WHEREAS, Montana residents have the right to use primarily undeveloped state parks without regard to their ability to pay; and

WHEREAS, budget constraints militate against further improvement of Montana's primarily undeveloped state parks."

23-1-116. Primitive parks established.

Compiler's Comments

1995 Amendment: Chapter 476 in (1) substituted "Big Pine management area" for "Lambeth (Lake Mary Ronan) state park". Amendment effective June 30, 1995.

Preamble: The preamble attached to Ch. 476, L. 1995, provided: "WHEREAS, the state's recreational boating safety program would be substantially strengthened if the Department of Fish, Wildlife, and Parks could delegate part of the administration and enforcement to counties; and

WHEREAS, the 1993 Legislature temporarily allocated 25% of the boat fee in lieu of tax to the motorboat account to improve regional boating facilities under the control of the Department of Fish, Wildlife, and Parks and created the Boating Advisory Council, composed of public members, to advise the Department on the expenditure of those funds; and

WHEREAS, the 1995 Legislature finds it appropriate to authorize the Department to contract with counties for boating safety administration and enforcement and to continue both the allocation for regional boating facilities and the Boating Advisory Council for an additional 7 years."

23-1-117. Limit on development of primitive parks.

Compiler's Comments

2005 Amendment: Chapter 234 in (1) at beginning substituted exception clause for "As of October 1, 1993"; inserted (3) allowing limited development of Lost Creek state park to include a camp host pad; and made minor changes in style. Amendment effective April 15, 2005.

2001 Amendment: Chapter 264 at beginning of (1) substituted "Except as permitted in Headwaters state park for the limited purposes provided in subsections (3) through (5)" for "As of October 1, 1993"; inserted (3) allowing the Headwaters state park orientation area to be rebuilt and expanded, for expected increased visitation during the Lewis and Clark bicentennial, to include an unstaffed information kiosk, sanitation facilities, more parking, and more information signs; inserted (4) allowing improvement, but not enlargement, of the parking area at the confluence of the Madison and Jefferson Rivers; and inserted (5) allowing interpretive and directional signs to be installed at Headwaters state park. Amendment effective April 19, 2001, and terminates December 31, 2003.

Preamble: The preamble attached to Ch. 264, L. 2001, provided: "WHEREAS, the bicentennial celebration of the Lewis and Clark Expedition in 2005 will make Montana a national destination; and

WHEREAS, Headwaters State Park, which marks the confluence of the Jefferson, Madison, and Gallatin Rivers into the Missouri River, was a primary destination of the Expedition and will also be a destination of many visitors during the bicentennial; and

WHEREAS, Headwaters State Park, with its particular historical and cultural significance, extensive and rich Native American history, and natural beauty, will provide an opportunity for visitors to engage in the history of the Lewis and Clark Expedition in a setting that remains mostly primitive, allowing people to see the area in much the same way that it was viewed by the Corps of Discovery; and

WHEREAS, some limited modifications to the park are advisable for purposes of public education, safety, and convenience, given the anticipated influx of visitors, while still retaining the primitive character of the remainder of the park in keeping with the spirit of the Montana Primitive Parks Act."

23-1-121. Park rangers — qualifications — powers and duties.

Compiler's Comments

Effective Date: Section 14, Ch. 662, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 26, 1991.

23-1-122. Enforcement powers of park rangers and game wardens.

Compiler's Comments

Effective Date: Section 14, Ch. 662, L. 1991, provided: "[This act] is effective on passage and approval." Approved April 26, 1991.

23-1-126. Good neighbor policy — public recreational lands.

Compiler's Comments

Preamble: The preamble attached to Ch. 474, L. 1999, provided: "WHEREAS, Montanans recognize that landowners have a responsibility to be good stewards of their land; and

WHEREAS, the citizens of Montana, through their state government, own many acres of land throughout the state; and

WHEREAS, public lands should be used to set an example of good land stewardship; and

WHEREAS, the Legislature desires that management of state recreational lands should complement the rights of neighboring landowners to use and enjoy their private lands."

Effective Date: This section is effective October 1, 1999.

23-1-127. Maintenance priority — maintenance defined.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

23-1-128. Protection of riparian vegetation — limit on motorized camping, operation of off-highway vehicles.

Compiler's Comments

2005 Amendment: Chapter 542 near middle of (1) substituted "61-1-101" for "61-1-102". Amendment effective January 1, 2006.

Effective Date: This section is effective October 1, 1999.

Part 2
State Scientific and Recreational Park

23-1-201. Establishment of state scientific and recreational park.

Compiler's Comments

Name Change — Directions to Code Commissioner: Pursuant to sec. 36, Ch. 308, L. 1995, in this section the Code Commissioner changed "university of Montana" to "university of Montana-Missoula".

Location: The state scientific and recreational park is located at Yellow Bay on Flathead Lake.

Part 3
Montana Conservation Corps

Part Compiler's Comments

Preamble: The preamble to Ch. 556, L. 1989, provided: "WHEREAS, Article IX, section 1, of the Montana Constitution states that the Legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, to maintain, protect, and conserve the valuable and nonrenewable resources of the state parks, programs need to be implemented that will assure preservation of state parks, economic productivity, and scenic beauty, as well as public health and safety and social benefit, as they continue to be subject to public use; and

WHEREAS, conservation work programs have proven highly successful and cost-effective in assisting in the protection, conservation, rehabilitation, and improvement of scenic, historical, archaeological, scientific, and recreational resources.

THEREFORE, the Legislature finds that:

(1) it is appropriate to provide a work experience program for unemployed or economically disadvantaged youth, adults, and volunteers who would work without pay that will enable them to serve society, learn practical skills, and establish sound work records that will in turn provide opportunities for future employment and education; and

(2) benefits will accrue to the maintenance and economic productivity of the state park system, to the state economy, and to the participants who benefit from exposure to a fundamental work ethic through their experience in safeguarding and improving state resources as a result of corps employment opportunities."

Coordination Requirements — Consolidation of Programs Authorized: Section 8, Ch. 556, L. 1989, provided: "(1) The governor shall assure that program activities under [this act] [this part] are coordinated with programs administered under the federal Job Training Partnership Act and any other relevant employment, training, education, or work program in this state.

(2) The governor may consolidate the program established in [section 1] [23-1-301] with other programs in order to maximize coordination of program activities as required in subsection (1) and to prevent overlapping and duplication of services."

23-1-301. Montana conservation corps — purpose and intent

Compiler's Comments

1999 Amendment: Chapter 150 in (1) in second sentence after "corps" deleted "is part of the Montana community service corps provided for under Title 90, chapter 14, part 1, and". Amendment effective October 1, 1999.

1993 Amendment: Chapter 534 in (1) inserted second sentence regarding Montana Community Service Corps; in (2), after "lands", inserted "and to perform community service activities"; and in (3), at end of first sentence, inserted "and the programs established under Title

90, chapter 14, part 1" and in last sentence, after "program", inserted "have the authority to". Amendment effective April 24, 1993.

Effective Date: Section 10, Ch. 556, L. 1989, provided that this section is effective July 1, 1989.

23-1-302. Definitions.

Compiler's Comments

1995 Amendments: Chapter 418 in definition of state agencies substituted "environmental quality" for "state lands". Amendment effective July 1, 1995.

Chapter 546 in definition of state agencies substituted "public health and human services" for "social and rehabilitation services" and after "state lands" deleted "family services". Amendment effective July 1, 1995.

Transition: Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

Saving Clauses: Section 503, Ch. 418, L. 1995, was a saving clause.

Section 571, Ch. 546, L. 1995, was a saving clause.

Effective Date: Section 10, Ch. 556, L. 1989, provided that this section is effective July 1, 1989.

23-1-303. Powers and duties of the division.

Compiler's Comments

2001 Amendment: Chapter 465 in (2) near middle after "recipients of" deleted "FAIM" and after "defined in" substituted "53-4-201" for "53-2-902"; and made minor changes in style. Amendment effective July 1, 2001.

Retroactive Applicability: Section 45, Ch. 465, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to payments made after January 1, 2001, for mental health services provided to children with serious emotional disturbances for whom mental health services are not provided by any other public mental health services program and whose family income is at or below 150% of the federal poverty level."

1997 Amendment: Chapter 486 in (2), after "including", substituted "those recipients of FAIM financial assistance, as defined in 53-2-902" for "those state general assistance (GA) and federal aid to families with dependent children (AFDC) recipients". Amendment effective May 2, 1997.

Saving Clause: Section 50, Ch. 486, L. 1997, was a saving clause.

1995 Amendment: Chapter 546 at end of (2) substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

1989 Statement of Intent: The statement of intent attached to Ch. 556, L. 1989, provided: "A statement of intent is required for this bill because [section 3] [23-1-303] authorizes the department of fish, wildlife, and parks to adopt rules relating to the Montana conservation corps.

It is the intent of the legislature that the rules address the following:

(1) procedures for recruitment and employment of corpsmembers;

(2) procedures for review and approval of work experience projects;

(3) a corpsmember code of conduct and grievance procedure;

(4) standards and procedures to evaluate and report on the performance of corpsmembers and the corps program;

(5) training procedures and programs for corpsmembers; and

(6) other rules necessary to accomplish the purposes of the Montana conservation corps program."

Effective Date: Section 10, Ch. 556, L. 1989, provided that this section is effective July 1, 1989.

23-1-311. Work experience projects — criteria — standards — land use exceptions.

Compiler's Comments

Effective Date: Section 10, Ch. 556, L. 1989, provided that this section is effective July 1, 1989.

23-1-312. Eligibility for employment in program — referrals.

Compiler's Comments

1995 Amendment: Chapter 546 in (1)(d) substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

Effective Date: Section 10, Ch. 556, L. 1989, provided that this section is effective July 1, 1989.

23-1-313. Term of enrollment — compensation — exemption from employee benefits.

Compiler's Comments

1995 Amendment: Chapter 308 at end of (5), after "education", deleted "or vocational-technical center". Amendment effective July 1, 1995.

Effective Date: Section 10, Ch. 556, L. 1989, provided that this section is effective July 1, 1989.

23-1-314. Prohibited activities.

Compiler's Comments

Effective Date: Section 10, Ch. 556, L. 1989, provided that this section is effective July 1, 1989.

CHAPTER 2
RECREATION

Part 1
Development of Outdoor Recreational Resources

Part Attorney General's Opinions

Indian Tribes as Appropriate Public Agency Under Federal Land and Water Conservation Fund Act: An Indian tribe located within the territorial boundaries of the State of Montana which exercises the powers of local self-government is an "appropriate public agency" to be eligible to receive funds for projects under the federal Land and Water Conservation Fund Act of 1965, 16 U.S.C. §460*l*, et seq. 37 A.G. Op. 21 (1977).

23-2-102. Department of fish, wildlife, and parks to implement federal act.

Compiler's Comments

Federal Act: The Land and Water Conservation Fund Act of 1965 is compiled at 16 U.S.C. §§460*l*-4 through 460*l*-11.

Part 3
Recreational Use of Streams

Part Compiler's Comments

Case Law: The rights and liabilities of landowners and the public regarding recreational use of streams were the subject of extensive discussion and holdings in Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984), relating to the Beaverhead River, and Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984), relating to the Dearborn River. This part 3 is the legislative reaction to those two cases and the questions and problems they discuss.

Part Administrative Rules

Title 12, chapter 4, subchapter 1, ARM Management of recreational use of streams and rivers.

Part Attorney General's Opinions

Right to Trap on Streams Not Governed by Stream Access Law: The right to trap fur-bearing animals between the ordinary high-water marks of a stream is not governed by Title 23, ch. 2, part 3, but rather is dependent upon whether the trapper has license, invitation, or privilege to enter or remain upon land and whether the trapper has secured a license to trap. 41 A.G. Op. 36 (1985).

Part Law Review Articles

Public Use of the Banks and Beds of Montana Streams, Stone, 52 Mont. L. Rev. 107 (1991).

Preserving Stream Flows in Montana Through the Constitutional Public Trust Doctrine: An Underrated Solution, Clifford, 16 Pub. Land L. Rev. 117 (1995).

Stream Access in Montana After Galt v. State, Hunter, 8 Pub. Land L. Rev. 177 (1987).

Ownership of Abandoned Navigable Riverbeds: To Whom Does the Windfall Blow?, DePuy, 8 Pub. Land L. Rev. 115 (1987).

Public's Right of Way on Rivers Expanded: Decision Embraces 'Recreational Use' Test, Spencer, 220 N.Y.L.J. 1 (1998).

Wild and Scenic Rivers Designations, Pratt, 20 Colo. Law. 925 (1991).

Riparian Rights in the West, Dellapenna, 43 Okla. L. Rev. 51 (1990).

Equitable Apportionment—Priorities and New Uses, Simms, 29 Nat. Resources J. 549 (1989).

23-2-301. Definitions.

Compiler's Comments

1991 Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

Composite Section: Chapter 429 and Ch. 556, L. 1985, each contained very similar provisions restricting public recreational use of diverted waters. Composite sections were prepared by the Code Commissioner. The provisions of Ch. 429 were merged with this section and 23-2-302, and language contained in Ch. 429 but not contained in Ch. 556 was added to this section and 23-2-302. Specifically, in (6)(b) after "water system", the phrase from Ch. 429 "excluding the lake, stream, or reservoir from which the system obtains water" was inserted because Ch. 429 was more restrictive on this point. The intent of Ch. 429 is preserved in (6) of this section and 23-2-302(2). Chapter 429, L. 1985, provided: "Recreational use of diverted surface waters prohibited. The right of the public to make recreational use of surface waters does not include the right to make recreational use of the following surface waters without permission or contractual arrangement with the owner:

(1) irrigation and drainage canals and ditches;

(2) manmade flood control channels;

(3) municipal, industrial, and domestic water systems, excluding the lakes, streams, and reservoirs from which the systems obtain water;

(4) hydroelectric power inlet and discharge facilities; or

(5) any other waters while they are diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has provided public access."

Attorney General's Opinions

Snowmobiling on Frozen Streams — Landowner Permission Necessary: Landowner permission is required for snowmobiling on the frozen surfaces of streams. 41 A.G. Op. 36 (1985).

Trapping Not "Recreational Use": As defined in this section, "recreational use" does not include the trapping of fur-bearing animals on state waters. 41 A.G. Op. 36 (1985).

23-2-302. Recreational use permitted — limitations — exceptions.

Compiler's Comments

Composite Section: Chapter 429 and Ch. 556, L. 1985, each contained very similar provisions restricting public recreational use of diverted waters. Composite sections were prepared by the Code Commissioner. The provisions of Ch. 429 were merged with this section and 23-2-301, and language contained in Ch. 429 but not contained in Ch. 556 was added to this section and 23-2-301. Specifically, in (2) in the lead-in, after "without permission", the word "of" was deleted and the phrase "or contractual arrangement with" was inserted, and at the end of (2)(c), after "3", the phrase "except for impoundments or diverted waters to which the owner has provided public access" was inserted. These phrases from Ch. 429 were inserted because Ch. 429 was more broad on the first point and more restrictive on the second point than was Ch. 556. The intent of Ch. 429 is preserved in (2) of this section and 23-2-301(6). Chapter 429, L. 1985, provided: "Recreational use of diverted surface waters prohibited. The right of the public to make recreational use of surface waters does not include the right to make recreational use of the following surface waters without permission or contractual arrangement with the owner:

(1) irrigation and drainage canals and ditches;

(2) manmade flood control channels;

(3) municipal, industrial, and domestic water systems, excluding the lakes, streams, and reservoirs from which the systems obtain water;

(4) hydroelectric power inlet and discharge facilities; or

(5) any other waters while they are diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has provided public access."

Statement of Intent: The statement of intent attached to Ch. 556, L. 1985, provided: "A statement of intent is required for House Bill 265 [Ch. 556, L. 1985] because section 2(5) [23-2-302(5)] directs the fish and game commission [now fish, wildlife, and parks commission] to adopt rules governing recreational use of surface waters.

In its implementation of this bill, the long-range goal of the commission must be to preserve, protect, and enhance the surface waters of this state while facilitating the public's exercise of its recreational rights on surface waters. The commission shall strive to permit broad exercise of

public rights, while protecting the water resource and its ecosystem. In adopting the procedural rules required by section 2 [23-2-302(5)], the commission shall emphasize that in close cases the decision must be to protect the environment by restricting or continuing to restrict recreational use, since it is easier to prevent environmental degradation than it is to repair it.

In developing the rules implementing House Bill 265 [Ch. 556, L. 1985], the commission shall make every effort to make the process uncomplicated and clear. As provided in subsection (5)(b) [23-2-302(5)(b)], the commission must issue written findings and an order whenever a request is made for restrictions on recreational use of a surface water or for the lifting of previously imposed limitations on recreational use of a surface water. The commission may adopt rules providing for summary dismissal of requests when a substantially similar request has been received and acted upon within a brief time prior to the second or subsequent requests if, during the time period since the first request, it is unlikely that there has been a change in the situation upon which the commission based its earlier decision.

In developing the rules establishing criteria for determination upon a request made under subsections (5)(a) [23-2-302(5)(a)] or (5)(b) [23-2-302(5)(b)], the commission shall require that each of the following factors that is relevant to the decision must be considered in the determination:

(a) whether public use is damaging the banks and land adjacent to the water body;

(b) whether public use is damaging the property of landowners underlying or adjacent to the water body;

(c) whether public use is adversely affecting wildlife or birds;

(d) whether public use is disrupting or altering natural areas or biotic communities;

(e) whether public use is causing degradation of the water quality of the water body; and

(f) any other factors relevant to the preservation of the water body in its natural state.

In making its decision after a request has been made for restrictions of recreational use, the commission may impose any reasonable limitation on the recreational use of surface waters including complete prohibition of a particular type of recreation, prohibition of a particular type of recreation in certain specified areas, such as within a specified distance of a residence or other structure, or in an appropriate case, prohibition of all recreation. The commission shall prohibit all recreation on private impoundments that have been licensed for a private use.

The commission shall protect the safety of the public by prohibiting hunting within a specified distance of occupied dwellings."

Administrative Rules

Title 12, chapter 4, subchapter 1, ARM Management of recreational use of streams and rivers.

Case Notes

Public Recreational Use Rights Statute — Constitutionality: Following Curran and Hildreth decisions, which held that the public trust doctrine provides the public with a constitutional right to use the bed and banks of navigable streams up to the high-water mark despite a landowner's fee title, the Legislature enacted a statute providing public recreational use of streams. Plaintiff filed suit requesting the court to declare the recreational use statute an unconstitutional taking of private property without just compensation. Plaintiff then appealed after the trial court upheld the statute's constitutionality and awarded the state summary judgment. The Supreme Court ruled unconstitutional 23-2-302(2)(d), (2)(e), and (2)(f), which provided the public a right to hunt big game, build duck blinds and boat moorages, and camp overnight so long as not within sight of an occupied dwelling or within 500 yards of an occupied dwelling, whichever is less. The court further held as unconstitutional 23-2-311(3)(e), which required a landowner to pay costs of constructing a portage route around artificial barriers. The public has a right of use of the bed and banks up to the high-water mark but only such use as is necessary to utilization of the water itself. Any use of the bed and banks must be of minimal impact. Galt v. St., 225 M 142, 731 P2d 912, 44 St. Rep. 103 (1987).

Attorney General's Opinions

Access to Rivers and Streams Via County Road Right-of-Way and Bridges: Given that the public has the right to use public highways in any manner and for any purpose consistent with or reasonably incidental to public travel, this right includes the use of public rights-of-way created by county roads to gain access to rivers and streams. Using a county road right-of-way as an access point to a river or stream right-of-way is consistent with and reasonably incidental to the public's right to travel on county roads. Further, a bridge and its abutments, as part of a public highway, offer the same access to rivers and streams for recreational use as the highway to which they are attached. However, the public's right of access is not unlimited and is subject to the

following limitations: (1) the recreating public must stay within the county road and bridge right-of-way, which is assumed to be 60 feet unless otherwise stated by petition or dedication; (2) access may be limited by the reasonable exercise of a governing body's police power to control the use of roads for purposes such as safety and parking; and (3) use of a public highway may be limited by the manner in which it was created, such as a road created by prescriptive easement, which is limited both in size and usage to the original use during the prescriptive period and may include access for hunting, fishing, and recreation. 48 A.G. Op. 13 (2000).

Right to Trap on Streams Not Governed by Stream Access Law: The right to trap fur-bearing animals between the ordinary high-water marks of a stream is not governed by Title 23, ch. 2, part 3, but rather is dependent upon whether the trapper has license, invitation, or privilege to enter or remain upon land and whether the trapper has secured a license to trap. 41 A.G. Op. 36 (1985).

Snowmobiling on Frozen Streams — Landowner Permission Necessary: Landowner permission is required for snowmobiling on the frozen surfaces of streams. 41 A.G. Op. 36 (1985).

Law Review Articles

Legal Background on Recreational Use of Montana Waters, Stone, 32 Mont. L. Rev. 1 (1971).

Private Wetlands and Public Values: "Navigable Waters" and the Significant Nexus Test Under the Clean Water Act, Schmidt, 26 Pub. Land & Resources L. Rev. 97 (2005).

The Shadow of the Mono Lake Decision, Summerville, 6 Pub. Land L. Rev. 203 (1985).

Tribal Bedlands Claims Since Montana v. U.S., Cole, 6 Pub. Land L. Rev. 119 (1985).

Forging Public Rights in Montana's Waters, Thorson, Brown, & Desmond, 6 Pub. Land L. Rev. 1 (1985).

Recreational Use of Montana's Waterways: An Analysis of Public Rights, 3 Pub. Land L. Rev. 133 (1982).

In the Aftermath of the Bighorn River Decision: Montana Has Title, Indian Law Doctrines Are Clouded, and Trust Questions Remain, Arnott, 2 Pub. Land L. Rev. 1 (1981).

Floating on Uncharted Headwaters: A Look at the Laws Governing Recreational Access on Waters of the Intermountain West, Burns, 5 Wyo. L. Rev. 560 (2005).

Collateral References

Navigable Waters *key* 1 through 36; Waters and Water Courses *key* 89, 90.

65 C.J.S. Navigable Waters §§1 through 81, 103 through 125; 93 C.J.S. Waters §§1 through 4, 15 through 23, 71 through 75.

78 Am. Jur. 2d Waters §§1 through 9, 15 through 31, 59 through 116, 346 through 358, 375 through 394.

Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned. 6 ALR 4th 1030.

Recreational Use of Montana's Waterways, A Report to the 49th Legislature, Montana Legislative Council, December 1984.

Water Rights Adjudication/Stream Access for Recreational Use, State Bar of Montana, November 1984.

23-2-311. Right to portage — establishment of portage route.

Case Notes

Public Recreational Use Rights Statute — Constitutionality: Following Curran and Hildreth decisions, which held that the public trust doctrine provides the public with a constitutional right to use the bed and banks of navigable streams up to the high-water mark despite a landowner's fee title, the Legislature enacted a statute providing public recreational use of streams. Plaintiff filed suit requesting the court to declare the recreational use statute an unconstitutional taking of private property without just compensation. Plaintiff then appealed after the trial court upheld the statute's constitutionality and awarded the state summary judgment. The Supreme Court ruled unconstitutional 23-2-302(2)(d), (2)(e), and (2)(f), which provided the public a right to hunt big game, build duck blinds and boat moorages, and camp overnight so long as not within sight of an occupied dwelling or within 500 yards of an occupied dwelling, whichever is less. The court further held as unconstitutional 23-2-311(3)(e), which required a landowner to pay costs of constructing a portage route around artificial barriers. The public has a right of use of the bed and banks up to the high-water mark but only such use as is necessary to utilization of the water itself. Any use of the bed and banks must be of minimal impact. Galt v. St., 225 M 142, 731 P2d 912, 44 St. Rep. 103 (1987).

23-2-321. Restriction on liability of landowner and supervisor.

Compiler's Comments

1987 Amendment: Near end of (1), before "is owed no duty", deleted "does not have the status of invitee or licensee and".

Landowner Liability — Preamble: The preamble to Ch. 209, L. 1987, provided: "WHEREAS, the Montana Supreme Court in Limberhand v. Big Ditch Co., [218] Mont. [132], 706 P.2d 491 (1985), replaced the traditional invitee, licensee, and trespasser standards for measuring landowner liability with a single standard of reasonable care; and

WHEREAS, this single standard adopted by the Montana Supreme Court conflicts with the policy of restricted landowner liability established by the Legislature in sections 23-2-321 and 70-16-302, MCA."

Law Review Articles

Landowner Liability in Montana, Nelson, 47 Mont. L. Rev. 109 (1986).

Collateral References

Effect of statute limiting landowner's liability for personal injury to recreational user. 47 ALR 4th 262.

23-2-322. Prescriptive easement not acquired by recreational use of surface waters.

Compiler's Comments

Applicability: Section 10, Ch. 556, L. 1985, provided: "Sections 5 [23-2-322] and 6 [amending 70-19-405] apply only to a prescriptive easement that has not been perfected prior to [the effective date of this act]." The act was effective April 19, 1985.

Case Notes

Adverse Possession — Requirements Not Met When Boundary Unascertained: While a property boundary line was unascertained, there could be no "open . . . notorious, hostile, adverse" use necessary under this section to establish a prescriptive easement. Zavarelli v. Might, 230 M 288, 749 P2d 524, 45 St. Rep. 211 (1988).

Collateral References

Implied acceptance, by public use, of dedication of beach or shoreline adjoining public waters. 24 ALR 4th 294.

Part 4
Management of Smith River

Part Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 512, L. 1989, provided: "A statement of intent is required for this bill because rulemaking authority is granted to the fish and game commission [now fish, wildlife, and parks commission] in [section 6] [23-2-408] for the administration of the Smith River waterway. The grant of rulemaking authority is described in detail in [section 6] [23-2-408]. The authority of the commission to regulate recreational and commercial use and minimize conflicts for the protection of the water and canyon resources of the Smith River is through the rulemaking process.

The legislature intends that the fish and game commission [now fish, wildlife, and parks commission] adopt rules regulating use as the need for restrictions is created by increased recreational use. The commission will have time to carefully develop rules balancing all interests after providing opportunity for public input and discussion."

Severability: Section 10, Ch. 512, L. 1989, was a severability clause.

Effective Date: Section 11, Ch. 512, L. 1989, provided that this part is effective April 12, 1989.

23-2-403. Definitions.

Compiler's Comments

1991 Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

23-2-408. Rulemaking authority.

Compiler's Comments

1989 Statement of Intent: The statement of intent attached to Ch. 512, L. 1989, provided: "A statement of intent is required for this bill because rulemaking authority is granted to the fish and game commission [now fish, wildlife, and parks commission] in [section 6] [23-2-408] for the administration of the Smith River waterway. The grant of rulemaking authority is described in

detail in [section 6] [23-2-408]. The authority of the commission to regulate recreational and commercial use and minimize conflicts for the protection of the water and canyon resources of the Smith River is through the rulemaking process.

The legislature intends that the fish and game commission [now fish, wildlife, and parks commission] adopt rules regulating use as the need for restrictions is created by increased recreational use. The commission will have time to carefully develop rules balancing all interests after providing opportunity for public input and discussion."

23-2-409. Allocation of user fees — expenditure of Smith River corridor enhancement account.

Compiler's Comments

2005 Amendment: Chapter 86 in (1) near end after "treasury in" substituted "an account in the state special revenue fund" for "a state revenue fund"; inserted (2) specifying how money in the corridor enhancement account must be expended; and made minor changes in style. Amendment effective March 24, 2005.

Saving Clause: Section 2, Ch. 86, L. 2005, was a saving clause.

23-2-410. Penalty — enforcement.

Compiler's Comments

1991 Amendment: Inserted (2) providing that Department is a criminal justice agency and its authorized officers are peace officers with enumerated powers. Amendment effective April 26, 1991.

Part 5
Boats

Part Administrative Rules

Title 12, chapter 11, subchapter 3, ARM Boating regulations.
ARM 12.11.330 Definition of "vessel".
ARM 12.11.331 Snowmobiles on public waters.
ARM 12.11.3210 Helena Valley Equalizing Reservoir regulations.
ARM 12.11.1501 Castle Rock Reservoir regulations.

Part Law Review Articles

Recreational Boating Accidents: Which Law Applies?, Donius, 37 Trial 42 (2001).
Products Liability and Pleasure Boats, Nixon, 29 J. Mar. L. & Com. 243 (1998).
Practice Guide: Pleasure Boats, Anderson & Famulari, 4 U.S.F. Mar. L.J. 1 (1992).
Admiralty Jurisdiction Over the Recreational Boater, Hacker, 49 Ins. Couns. J. 376 (1982).

Part Collateral References

Products liability: sufficiency of evidence to support product misuse defense in actions concerning automobiles, boats, aircraft, and other vehicles. 63 ALR 4th 18.

Boat as within automobile guest statute. 98 ALR 2d 547.

Public regulation requiring mufflers or similar noise-preventing devices on motor vehicles, aircraft, or boats. 49 ALR 2d 1202.

23-2-501. Declaration of policy.

Case Notes

Authority of Game Warden to Approach Boat to Promote Safety — Particularized Suspicion Unnecessary: Initially concerned for the safety of the occupants of a seemingly unoccupied watercraft, a game warden looked into the live well of Boyer's boat and in the process found unlawfully killed game fish. Boyer contended that the warden had initiated an investigatory stop without the requisite particularized suspicion of wrongdoing, as required in 46-5-401, and that the evidence was therefore unlawfully seized. The Supreme Court disagreed. The warden was acting within his express authority to enforce outdoor recreation laws, including the safety of persons and property connected with the use of watercraft, and thus the warden's approach of Boyer's boat was lawful. St. v. Boyer, 2002 MT 33, 308 M 276, 42 P3d 771 (2002).

No Duty for State to Warn of Hazards on Rivers: Drugge brought an action against the state on behalf of the estate of a relative who died in a boating accident. The Supreme Court upheld the dismissal of the suit, ruling that the constitutional vesting to the state of ownership of the waters within the state boundaries did not create a duty based on liability or other tort law for the state to warn of hazards on rivers. Drugge v. St., 254 M 292, 837 P2d 405, 49 St. Rep. 798 (1992).

Collateral References

12 Am. Jur. 2d Boats and Boating §4, et seq.

23-2-502. Definitions.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 130 in definition of certificate of number in two places and in definition of identifying number after "motorboat" inserted "or sailboat". Amendment effective October 1, 2005.

Chapter 237 in definition of registration decal near middle after "payment of" deleted "all", after "fees" inserted "in lieu of tax", and near end after "indicated on the" substituted "decal" for "sticker"; inserted definition of validation decal; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 596 in definition of registration decal after "authorized agent" inserted "as defined in 61-1-101"; and made minor changes in style. Amendment effective January 1, 2006.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendments — Composite Section: Chapter 477 deleted definition of certificate of ownership that read: ""Certificate of ownership" means a certificate issued by the department of justice identifying the owner of a motorboat or sailboat 12 feet in length or longer"; and made minor changes in style. Amendment effective January 1, 2004.

Chapter 592 in definition of certificate of number near beginning after "issued" deleted "annually" and at end after "required" inserted "by the department of justice"; deleted definition of license decals that read: ""License decals" means the serially numbered license stickers issued annually by the county treasurer and displayed as required by law"; in definition of motorboat in (a) after "including a" deleted "canoe, kayak" and after "watercraft" deleted "rubber raft" and in (b) after "guard" deleted "of the United States government"; inserted definition of registration decal; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

2001 Amendment: Chapter 55 inserted definition of sailboat; and made minor changes in style. Amendment effective October 1, 2001.

1991 Amendment: In definition of motorboat inserted "personal watercraft"; in definition of personal watercraft, after "vessel", deleted "12 feet in length or less", after "uses an" substituted "outboard motor or an inboard engine" for "internal combustion engine", and at end substituted "on the vessel rather than by the conventional method of sitting or standing in the vessel" for "position"; and made minor changes in style. Amendment effective April 29, 1991.

1989 Amendments: Chapter 83 in definition of owner changed "lien holder" to "lienholder".

Chapter 577 in definition of motorboat, after "vessel", inserted "including a canoe, kayak, rubber raft, or pontoon"; and inserted definition of personal watercraft. Amendment effective April 20, 1989.

Retroactive Applicability: Section 9, Ch. 577, L. 1989, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

1987 Amendment: Inserted definitions of certificate of ownership, dealer, lienholder, manufacturer, and security interest.

Code Commissioner Correction: The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title 61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent

intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

Administrative Rules

ARM 12.11.330 Definition of "vessel".

23-2-505. Owner's civil liability.

Collateral References

12 Am. Jur. 2d Boats and Boating §5, et seq.

Liability for injuries to, or death of, water-skiers. 34 ALR 5th 77.

Liability of owner or operator of motorboat for injury or damage. 63 ALR 2d 343, superseded in part by 98 ALR 3d 1127, 71 ALR 3d 1018.

23-2-506. Enforcement.

Compiler's Comments

1991 Amendment: At beginning deleted "It shall be the duty of the department to enforce the sections of this law. The state fish, wildlife, and parks director shall employ all the necessary personnel to comply with this section"; and inserted (1) providing that Department is a criminal justice agency and its authorized officers are peace officers with enumerated powers. Amendment effective April 26, 1991.

Administrative Rules

ARM 12.11.340 Enforcement authority.

23-2-507. Penalty.

Compiler's Comments

2001 Amendment: Chapter 257 in (1) in second sentence substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1995 Amendment: Chapter 509 in (1), at end of second sentence, substituted "general fund" for "motorboat account of a special revenue fund" and deleted third sentence that read: "The moneys shall be used only by the department for enforcement of this part, as amended"; and made minor changes in style. Amendment effective July 1, 1995.

1989 Amendments: Chapter 44 inserted (2) relating to sanctions for violations of 23-2-525(4). Amendment effective March 6, 1989.

Chapter 83 near end of (1) substituted "a special revenue fund" for "an earmarked fund".

1987 Amendment: Near beginning of second sentence, after "forfeitures", inserted "except those paid to a justice's court"; and made minor changes in phraseology.

Noise Limitation Exception: See compiler's comments to 23-2-526.

Collateral References

Criminal liability for injury or death caused by operation of pleasure boat. 8 ALR 4th 886.

23-2-508. Certificate of title.

Compiler's Comments

2003 Amendment: Chapter 477 in (1) near middle after "certificate of" substituted "title" for "ownership"; in (2) at beginning substituted "Unless expressly exempted, the provisions of Title 61, chapter 3, parts 1 and 2, apply to" for "The owner of" and at end after "longer" deleted "shall apply for a certificate of ownership and a certificate of number with the county treasurer of the county in which the owner resides, upon forms furnished by the department of justice. The forms must require the following information"; deleted former (2)(a) through (2)(j) that read: "(a) name of the owner;

(b) residence of the owner, by town or county;

(c) business or home address of the owner;

(d) name and address of any lienholder;

(e) amount due under any contract or lien;

(f) name of the manufacturer;

(g) model number or name;

(h) identification number;

(i) name and address of the dealer or other person from whom acquired, if known; and

(j) other information that the department of justice may require"; deleted former (3) through (8) that read: "(3) The application is to be accompanied by documentation of

ownership, such as an invoice, a bill of sale, a foreign title, an official certificate of boat number, a fee in lieu of tax receipt, or a certificate of ownership of a trailer purchased with the motorboat or sailboat. An applicant who fails to provide proof of ownership shall provide a certified statement describing how the motorboat or sailboat 12 feet in length or longer was acquired, from whom acquired, if known, and other information requested by the department of justice.

(4) If a certificate of ownership has previously been issued under the provisions of this part, the application for a new certificate must be accompanied by the immediately previous certificate. This subsection does not apply to motorboats or sailboats 12 feet in length or longer that are purchased as new and unused vessels or that were operated when the provisions of this part were not in force and effect.

(5) A motorboat or sailboat 12 feet in length or longer that does not have a manufacturer's or other identifying number on the motorboat or sailboat must be assigned an identification number by the department. A fee of $1 must be paid to the department for an assignment of number.

(6) Upon completion of the application, the county treasurer shall issue to the applicant two copies of the certificate of number application, one of which must be marked "file copy". The treasurer shall forward one copy and the original application for a certificate of ownership to the department of justice, which shall enter the information contained in the application upon the corresponding records of its office and shall furnish the applicant a certificate of ownership containing that information in the application considered necessary by the department and a permanent boat number. The certificate of ownership need not be renewed annually and is valid as long as the person holding it owns the vessel.

(7) The owner shall at all times retain possession of the certificate of ownership, except when it is being transmitted to and from the department of justice for endorsement or cancellation.

(8) Upon application for a certificate of ownership, a fee of $5 must be paid to the county treasurer, which must be forwarded by the county treasurer to the department of justice and deposited in the general fund"; in (3) near middle after "certificate of" substituted "title" for "ownership"; deleted former (10) through (20) that read: "(10) The department of justice may not file a voluntary security interest or lien unless it is accompanied by or specified in the application for a certificate of ownership of the boat encumbered. If the approved lien notice is transmitted to the department of justice, the security agreement or other lien instrument that creates the security interest must be retained by the secured party. A copy of the security agreement is sufficient as a lien notice if it contains the name and address of the debtor and the secured party, the complete boat description, the amount of the lien, and the signature of the debtor. The department of justice shall file voluntary security interests and liens by entering the name and address of the secured party upon the face of the certificate of ownership. Involuntary liens must be filed against the record of the boat encumbered. The department of justice shall mail a statement certifying the filing of a security interest or lien to the secured party. The department of justice shall mail the certificate of ownership to the owner at the address given on the certificate; however, if the transfer of ownership and filing of the security interest are paid for by a creditor or secured party, the department of justice shall return the certificate of ownership to the county treasurer of the county in which the boat is to be registered. The owner of a boat is the person entitled to operate and possess the boat.

(11) A security interest in a boat held as inventory by a dealer must be perfected in accordance with Title 30, chapter 9A.

(12) Whenever a security interest or lien is filed against a boat that is subject to two security interests previously perfected under this section, the department of justice shall endorse on the face of the certificate of ownership: "NOTICE. This boat is subject to additional security interest on file with the Department of Justice." No other information regarding the additional security interests need be endorsed on the certificate.

(13) Satisfactions or statements of release filed with the department of justice under this part must be retained for a period of 8 years after receipt, after which they may be destroyed.

(14) Except as provided in subsection (15), a voluntary security interest or lien is perfected on the date the lien notice is delivered to the county treasurer. On that date, the county treasurer shall issue to the secured party a receipt evidencing the perfection. Perfection under this section constitutes constructive notice to subsequent purchasers or encumbrancers, from the date of delivery of the lien notice to the county treasurer, of the existence of the security interest.

(15) Voluntary security interests or lien filings that do not require transfer of ownership are perfected on the date the lien notice and the certificate of ownership or manufacturer's statement of origin are received by the department of justice. On that date, the department of

justice shall issue to the secured party a receipt evidencing the perfection. Perfection under this subsection constitutes constructive notice to subsequent purchasers or encumbrancers, from the date the lien notice is delivered to the department of justice, of the existence of the security interest.

(16) Upon default under a chattel mortgage or conditional sales contract covering a boat, the mortgagee or vendor has the same remedies as in the case of other personal property. In case of attachment of a boat, all the provisions of 27-18-413, 27-18-414, and 27-18-804 are applicable, except that deposits must be made with the department of justice.

(17) A conditional sales vendor or chattel mortgagee or assignee who fails to file a satisfaction of a chattel mortgage, assignment, or conditional sales contract within 15 days after receiving final payment is required to pay the department of justice the sum of $1 for each day that the person fails to file the satisfaction.

(18) Upon receipt of notice of any involuntary liens or attachments against the record of any boat registered in this state, the department of justice shall within 24 hours mail to the owner, conditional sales vendor, mortgagee, or their assignee a notice showing the name and address of the lien claimant, the amount of the lien, the date of execution of the lien, and, in the case of attachment, the full title of the court, the action, and the name of the attorney for the plaintiff or the name of the attaching creditor, or both.

(19) It is not necessary to refile with the department of justice any instruments on file in the office of the county clerk and recorder on October 1, 1989.

(20) A fee of $4 must be paid to the department of justice to file any security interest or other lien against a boat. The $4 fee must cover the cost of filing a satisfaction or release of the security interest and the cost of entering the satisfaction or release on the records of the department of justice and deleting the endorsement of the security interest from the face of the certificate of ownership. A fee of $4 must be paid to the department of justice for issuing a certified copy of a certificate of ownership subject to a security interest or other lien on file with the department of justice or for filing an assignment of any security interest or other lien on file with the department of justice. All fees provided for in this section must be paid to the county treasurer for deposit in the state general fund in accordance with 15-1-504"; and made minor changes in style. Amendment effective January 1, 2004.

The amendments to this section made by Ch. 562, L. 2003, were rendered void by sec. 83(1)(a), Ch. 477, L. 2003.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

2001 Amendment: Chapter 574 in (5) at end of first sentence after "department" deleted "of fish, wildlife, and parks"; in (8) after "paid to the county treasurer" deleted "$3.50 of"; in (20) in last sentence near middle substituted "state general fund" for "general fund"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendment: Chapter 482 at beginning of (10) deleted "A security interest in a boat is not valid as against creditors, subsequent purchasers, or encumbrancers unless a lien notice, showing that a security interest has been created, has been perfected as provided in this section. The lien notice must be filed on a form approved by the department of justice", in first sentence substituted "voluntary security interest or lien" for "security interest or other lien", at beginning of second sentence, before "lien", inserted "approved", in fourth sentence substituted "voluntary security interests and liens" for "security interest or lien", and inserted fifth sentence requiring involuntary liens to be filed against record of encumbered boat; at end of (11), after "9", deleted "and no endorsement on the certificate of title is necessary for perfection"; at beginning of (14) inserted exception clause and near beginning, after "lien", deleted "as provided in this section"; inserted (15) providing that voluntary security interests or lien filings not requiring ownership transfer are perfected on date Department of Justice receives lien notice and certificate of ownership, requiring Department to issue secured party receipt evidencing perfection, and providing that perfection constitutes constructive notice to subsequent purchasers or encumbrancers from date lien notice is delivered to Department; near beginning of (18) substituted "notice of any involuntary liens" for "liens, notice of liens dependent on possession"; and made minor changes in style.

1991 Amendments: Chapter 16 in (10), at end of second sentence, deleted brackets from phrase "of justice"; and made minor changes in style.

Chapter 463 in (10), in first sentence, substituted "perfected" for "filed with the department of justice"; in (12), near middle of first sentence after "perfected", deleted "by filing"; and in (14) substituted first and second sentences regarding perfection of a security interest for former first sentence that read: "The filing of a security interest or other lien as herein provided perfects a

security interest that has attached at the time the certificate of ownership noting the interest is issued" and at beginning of third sentence substituted "Perfection under this section" for "Issuance of a certificate of ownership" and near middle substituted "date of delivery of the lien notice to the county treasurer" for "time of filing".

1989 Amendments: Chapter 165 inserted (10) through (19) regarding filing of security interests for boats (see 1989 Session Law for text); and made minor changes in phraseology.

Chapter 398 at end of (8) and at end of (19) substituted reference to general fund for reference to motor vehicle recording account of the state special revenue fund. Amendment effective July 1, 1989.

Chapter 535 in (8) decreased fee from $6 to $5 and decreased amount for deposit in motor vehicle recording account from $4 to $3.50.

1987 Amendment: In (3), before "tax receipt", the Code Commissioner inserted "fee in lieu of" and after "tax receipt" deleted "certification from the department of revenue that the motorboat or sailboat 12 feet in length or longer is listed with the applicant's taxable property", pursuant to sec. 13, Ch. 649, L. 1987, directing the Code Commissioner to change references to taxes on boats to reflect the fee in lieu of tax on boats imposed by Ch. 649, L. 1987. Amendment applicable to motorboats and sailboats registered on or after January 1, 1988.

23-2-511. Operation of unnumbered motorboats or sailboats prohibited — display of registration and validation decals.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 130 in (1) in two places, in (1)(a), in (1)(b), and in (2) in four places after "motorboat" inserted "or sailboat" (amendment in fourth place rendered void by Ch. 596 amendment); in (1) in first sentence after "any description" inserted "or a sailboat on the waters of this state"; in (1)(c) substituted "a motorboat" for "the boat"; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 237 in (1) at end of first sentence and near middle of second sentence after "registration" substituted "and validation decals" for "decal"; in (2) near beginning after "motorboat" deleted "from a registered boat dealer or manufacturer", in two places increased allowable operation of transferred motorboat from 30 days to 40 days, and near middle after "displaying the" substituted "registration and validation decals" for "numbers and registration decal"; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 596 in (2) in two places increased time from 30 days to 40 days and near end after "days" substituted "a temporary registration permit has been issued under 61-3-224" for "a bill of sale or other evidence of transfer reciting the date of the transfer of ownership is retained in the motorboat". Amendment effective January 1, 2006.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendment: Chapter 592 in (1) in introductory clause at end of first sentence and near middle of second sentence after "valid" substituted "registration decal" for "license decals"; in (2) near middle after "numbers and" substituted "registration" for "license"; and made minor changes in style. Amendment effective January 1, 2004.

The amendments to this section made by Ch. 246, L. 2003, were rendered void by sec. 47, Ch. 592, L. 2003, a coordination section.

Applicability: Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

1991 Amendment: In (2), in two places, increased time from 20 days to 30 days.

1987 Amendment: Inserted (1)(c) relating to required temporary permit for out-of-state motorboats.

1985 Amendment: In (2) substituted present language allowing transferred motorboat to be operated on state waters for 20 consecutive days following transfer without numbers and license decals if bill of sale or transfer evidence is retained in motorboat and exhibited upon request for: "Any person who operates a motorboat on the waters of this state without displaying the appropriate numbers and license decals as required by this section is punishable by a fine not to exceed $10. However, the arresting officer may issue a courtesy citation in lieu of the penalty provided for in this subsection."

Collateral References

12 Am. Jur. 2d Boats and Boating §§23, 24.

23-2-512. Identifying number.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 237 in (1) inserted fifth sentence regarding issuance of validation decals; inserted (2) providing that the fine for failing to display validation decals may not exceed court costs; inserted (3) allowing only verbal warnings until December 31, 2007; in (4) near middle of first sentence after "filed within" substituted "40 days" for "a reasonable time" and inserted second sentence requiring simultaneous issuance of new validation decals; in (6) near beginning of first sentence after "number and" substituted "validation decals" for "a registration decal" and inserted second through fifth sentences regarding issuance and renewal of validation decals; inserted (7) describing validation decals; in (8) near beginning of first sentence after "within" substituted "40 days" for "a reasonable time"; in (10)(a) at beginning of first, second, and third sentences after "The" and near beginning of sixth sentence after "other than the" inserted "identifying" and inserted eighth sentence regarding placement of validation decal; inserted (12) regarding reimbursement of programming costs incurred in fiscal year 2005; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 542 in (1) at end of second sentence substituted "the fee prescribed in 61-3-321(10)" for "a fee of $3.50 in calendar year 2004 and, in each subsequent year, $15.50"; deleted former (2) that read: "(2) The applicant, upon the filing of the application, shall pay to the county treasurer the fee in lieu of tax required under 23-2-517 for a motorboat 10 feet in length or longer, a sailboat 12 feet in length or longer, or a personal watercraft before the application for certification or, if applicable, recertification may be accepted by the county treasurer"; deleted former (9) that read: "(9) Fees, other than the fee in lieu of tax, collected under this section must be transmitted to the department of revenue, as provided in 15-1-504, for deposit in the state general fund"; and made minor changes in style. Amendment effective January 1, 2006.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendment: Chapter 592 in (1) at end of second sentence after "$3.50" inserted "in calendar year 2004 and, in each subsequent year, $15.50"; in (2) near beginning after "required" inserted "under 23-2-517", near middle after "watercraft" deleted "for the current year of certification", and after "certification or" inserted "if applicable"; in (5) near beginning after "number and" substituted "a registration decal issued" for "the license decals assigned" and after "part" substituted "are effective" for "continue in effect for a period not to exceed 1 year" and deleted former second sentence that read: "Certificates of number and license decals must show the date of expiration and may be renewed by the owner in the same manner provided for in the initial securing of the certificate"; deleted former (6) that read: "(6) Certificates of number expire on December 31 of each year and may not be in effect unless renewed under this part"; in (8)(a) in sixth sentence near beginning after "the number" deleted "and license decal" and inserted seventh sentence concerning placement of a registration decal; and made minor changes in style. Amendment effective January 1, 2004.

The amendments to this section made by Ch. 246, L. 2003, were rendered void by sec. 47, Ch. 592, L. 2003, a coordination section.

Applicability: Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

2001 Amendments — Composite Section: Chapter 257 in (10)(a) in first sentence substituted "department of revenue, as provided in 15-1-504, for deposit" for "state treasurer, who shall deposit the fees"; in (10)(b) substituted reference to department of revenue for reference to state treasurer; (amendment in subsection (10)(b) by Ch. 574 rendered amendment by Ch. 257 void) and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 in (1) at end of second sentence substituted "$3.50" for "$2.50"; at beginning of (10) deleted "Except as provided in subsection (10)(b)" and at end substituted "state general fund" for "motorboat or sailboat certificate identification account of the state special revenue fund" and deleted former second sentence that read: "These fees must be used only for the administration and enforcement of this part, as amended"; deleted former (10)(b) that read: "(b) Of the fee collected under the provisions of subsection (1), 20% must be deposited by the state treasurer in an account in the state special revenue fund to the credit of the department to be used to acquire and maintain marine sewage pumpout equipment and other boat facilities"; in (11) near end after "abandoned" deleted "or frauded"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1993 Amendment: Chapter 126 in second sentence of (1) increased fee from $2 to $2.50; at beginning of (10)(a) inserted exception clause; inserted (10)(b) allocating 20% of the fee for acquisition and maintenance of marine pumpout equipment and other boat facilities; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: In (1) increased fee from $2 to $2.50; at beginning of (10)(a) inserted exception clause; and inserted (10)(b) providing for deposit of fee and using it for education and for acquiring decibel meters. Amendment effective April 29, 1991, and terminates July 1, 1993.

Termination Date: Section 13, Ch. 728, L. 1991, provided: "The amendments to section 23-2-512 provided in [section 10] [23-2-512] terminate July 1, 1993."

1989 Amendment: Throughout section, after "sailboat(s)('s)", inserted reference to personal watercraft. Amendment effective April 20, 1989.

Retroactive Applicability: Section 9, Ch. 577, L. 1989, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

1987 Amendment: Throughout section, after "motorboat", inserted "or sailboat(s)('s)"; in first sentence of (1), after "owned", deleted "or taxable" and in second sentence increased application fee from $1 to $2; deleted former (2) that read: "(2) Before filing the application with the county treasurer, the applicant shall submit it to the county assessor, who shall enter on the application, in a space to be provided for that purpose, the market value and taxable value of the motorboat for the year for which the application for registration is made"; in (2) substituted "fee in lieu of tax required for a motorboat 10 feet in length or longer or a sailboat 12 feet in length or longer" for "registration fee and the personal property taxes assessed against the motorboat or vessel" and in three places substituted "certification" and "recertification" for "registration" and "reregistration"; in (3), before "fee", inserted "the certification"; in (10), after "Fees", inserted "other than the fee in lieu of tax"; and in (11) made minor changes in phraseology. Amendment applicable to motorboats and sailboats registered on or after January 1, 1988.

1985 Amendment: In (7) changed "April 30" to "December 31".

Code Commissioner Correction: The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title 61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

Collateral References

12 Am. Jur. 2d Boats and Boating §§23, 24.

23-2-513. Dealer's or manufacturer's identifying number — premises — inspection — bond — judgment — temporary registration permit.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 237 in (1) near beginning of second sentence after "number" inserted "and the registration decal", near middle after "exchanging" inserted "or performance testing", and at end inserted "or potential buyer"; in (4) near middle of first sentence after "23-2-512" deleted "(1) and (8)"; in (5) near beginning of first sentence after "number" inserted "and the registration decal" and near middle after "23-2-512" deleted "(8)"; in (6) deleted former first sentence that read: "A person other than a dealer or manufacturer or an employee of a dealer or manufacturer may not display or use a dealer's or manufacturer's identifying number", in first sentence after "number" inserted "and the registration decal", after "motorboats" inserted "or sailboats that are for sale", and after "owned" inserted "or on consignment", and inserted second sentence regarding consignment boats; in (11) in second sentence increased expiration period of temporary registration from 30 to 40 days (amendment rendered void by Ch. 596 amendment) and inserted fourth sentence requiring a dealer to remove any registration decal prior to sale; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 542 in (4) and (5) in first sentence substituted reference to 23-2-512(7) for reference to 23-2-512(8) (amendment rendered void by Ch. 237 amendment); and in (11) at end of first sentence substituted reference to 61-1-101 for reference to 61-1-603 (amendment rendered void by Ch. 596 amendment). Amendment effective January 1, 2006.

Chapter 596 substituted (11) concerning an application for a certificate of title and issuance of temporary registration permit for former text that read: "Prior to the delivery of a motorboat or a sailboat 12 feet in length or longer to a purchaser, the dealer shall issue and affix to a motorboat or a sailboat constructed after October 31, 1972, a temporary registration permit, as defined in 61-1-603. The temporary registration permit expires 30 days after the date of issuance. The dealer shall keep a copy of the temporary registration permit for the dealer's records and shall send a copy of the temporary registration permit to the department of justice." Amendment effective January 1, 2006.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendments — Composite Section: Chapter 477 inserted (11) pertaining to the use of a temporary registration permit by a dealer; and made minor changes in style. Amendment effective January 1, 2004.

Chapter 592 in (3)(a) and (3)(b) substituted "registration decal" for "set of license decals"; in (4) near middle of first sentence after "23-2-512(1) and" substituted "(8)" for "(9), as amended"; in (5) near end of first sentence after "23-2-512" substituted "(8)" for "(9), as amended"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

1991 Amendment: Inserted (8) requiring dealer to maintain a principal place of business and requiring inspection of the business; inserted (9) establishing procedures for renewal of dealer's license; and inserted (10) requiring an annual bond for dealer and establishing procedure for collecting on bond.

1989 Amendment: In (4) and (5) changed reference to 23-2-512(10) to reference to 23-2-512(9).

1985 Amendment: Near end of (4) changed "April 30" to "December 31".

Code Commissioner Correction: The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title 61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

Collateral References

12 Am. Jur. 2d Boats and Boating §§23, 24.

23-2-514. Exemption from numbering provisions.

Compiler's Comments

2005 Amendment: Chapter 130 throughout section in four places after "motorboat" inserted "or sailboat"; in (1) in last sentence after "principal use" inserted "of the motorboat or sailboat"; and made minor changes in style. Amendment effective October 1, 2005.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendment: Chapter 592 in (1) at end before "decal" substituted "registration" for "license"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

Collateral References

12 Am. Jur. 2d Boats and Boating §22, et seq.

23-2-515. Registration decal to be displayed.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 130 in (2)(c) in two places after "sailboat" inserted "or personal watercraft"; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 542 in (1) in second sentence near beginning substituted "registration fee" for "fee in lieu of tax" and near middle after "required by" substituted "61-3-321(10)" for "15-16-202 for motorboats 10 feet in length or longer, sailboats 12 feet in length or longer, or personal watercraft"; and made minor changes in style. Amendment effective January 1, 2006.

Chapter 596 in second sentence near beginning substituted "23-2-517" for "15-16-202". Amendment effective January 1, 2006. The amendment by Ch. 596 was rendered void by the Ch. 542 amendment.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendment: Chapter 592 throughout section substituted reference to registration decal for reference to license decals; in (1) in second sentence near end after "number and" inserted "if applicable"; in (2)(a) at end after "justice" deleted "and shall be a color differing from the preceding year"; in (2)(b) at end after "numbered" deleted "and have the expiration date of December 31 of the appropriate year printed thereon"; inserted (2)(c) providing that registration decals do not expire while the boat remains in the same ownership; in (3) near middle after

"displayed" substituted "on the left" for "only in the following manner: one valid license decal on each"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

1989 Amendment: In (1), in first sentence after "sailboat", inserted "or personal watercraft" and substituted "23-2-512 or 23-2-513" for "23-2-512 and 23-2-513" and in second sentence, after "tax", inserted "as required by 15-16-202" and after "longer" substituted "or personal watercraft" for "as required by 15-16-202"; and made minor changes in style. Amendment effective April 20, 1989.

Retroactive Applicability: Section 9, Ch. 577, L. 1989, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

1987 Amendments — Composite Section: Chapter 421 in (1) substituted "as required by 15-16-202" for "for the current year".

Chapter 649 near beginning of (1) substituted "motorboat or sailboat" for "boat" and in second sentence substituted "the fee in lieu of tax for motorboats 10 feet in length or longer and sailboats 12 feet in length or longer" for "a certificate of tax of personal property showing payment of tax on the motorboat". Amendment applicable to motorboats and sailboats registered on or after January 1, 1988.

In preparation of the composite of the Ch. 421 and Ch. 649 amendments to this section, the Code Commissioner, pursuant to the instructions in sec. 13, Ch. 649, to change references to taxes on boats to references to the fee in lieu of tax on boats, in (1) changed "receipt of a certificate of tax" to "proof of payment of the fee in lieu of tax".

1985 Amendment: Near end of (2) changed "April 30" to "December 31".

Code Commissioner Correction: The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title 61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

Collateral References

12 Am. Jur. 2d Boats and Boating §§22, 23.

23-2-519. Penalty — disposition.

Compiler's Comments

2005 Amendment: Chapter 542 in (1) near beginning and near middle substituted "registration fee" for "fee in lieu of tax" and substituted "61-3-321(10)" for "23-2-517". Amendment effective January 1, 2006.

Repeal of Termination Dates: Section 1, Ch. 322, L. 2005, repealed sec. 10, Ch. 476, L. 1995, and sec. 4, Ch. 95, L. 2001, which terminated the amendments to this section June 30, 2006.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendment: Chapter 592 in (1) and in (2)(a) after "watercraft" deleted "motorized canoe, motorized rubber raft"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

Extension of Termination Date: Section 4, Ch. 95, L. 2001, amended sec. 10, Ch. 476, L. 1995, by extending the termination date imposed by Ch. 476 to June 30, 2006.

1995 Amendment: Chapter 476 in temporary version in (1) reduced fine from five times fee to four times fee. Amendment effective June 30, 1995.

Preamble: The preamble attached to Ch. 476, L. 1995, provided: "WHEREAS, the state's recreational boating safety program would be substantially strengthened if the Department of Fish, Wildlife, and Parks could delegate part of the administration and enforcement to counties; and

WHEREAS, the 1993 Legislature temporarily allocated 25% of the boat fee in lieu of tax to the motorboat account to improve regional boating facilities under the control of the Department of Fish, Wildlife, and Parks and created the Boating Advisory Council, composed of public members, to advise the Department on the expenditure of those funds; and

WHEREAS, the 1995 Legislature finds it appropriate to authorize the Department to contract with counties for boating safety administration and enforcement and to continue both the allocation for regional boating facilities and the Boating Advisory Council for an additional 7 years."

Termination: Section 10, Ch. 476, L. 1995, provided: "[Sections 1 and 3] [23-2-534 and 23-2-519] terminate June 30, 2002."

1989 Amendment: In (1) and (2)(a), after "sailboat", inserted "personal watercraft, motorized canoe, motorized rubber raft, or motorized pontoon". Amendment effective April 20, 1989.

Retroactive Applicability: Section 9, Ch. 577, L. 1989, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to taxable years beginning after December 31, 1988."

23-2-521. Equipment.

Compiler's Comments

2005 Amendment: Chapter 130 in (3)(b) after "motorboat" inserted "or vessel"; and made minor changes in style. Amendment effective October 1, 2005.

1991 Amendment: In (3)(a), after "exhaust noise", substituted "to 90 dbA or less when measured at a distance of 1 meter from the muffler at idle speed in accordance with the stationary sound level measurement procedure for pleasure motorboats (SAE J2005)" for "at full throttle to 86 dbA or less when measured at a distance of 50 feet"; inserted (3)(b)(iii) exempting vessels operated by government agents performing certain functions; and made minor changes in style. Amendment effective April 29, 1991.

1987 Amendment: Inserted (3) relating to exhaust muffler requirements; and inserted (4) prohibiting the installation of sirens on all vessels not authorized as emergency vessels.

Administrative Rules

ARM 12.11.301 Personal flotation devices and life preservers.
ARM 12.11.305 Ventilation systems.
ARM 12.11.310 Fire extinguishers.
ARM 12.11.315 Lights.
ARM 12.11.320 Sound producing devices on motorboats.
ARM 12.11.325 Measuring length of boat.

Collateral References

12 Am. Jur. 2d Boats and Boating §§10, 11.

23-2-522. Discharge of waste from vessel prohibited.

Compiler's Comments

1995 Amendment: Chapter 418 in (2) substituted "department of environmental quality" for "department of health and environmental sciences"; and made minor changes in style. Amendment effective July 1, 1995.

1991 Statement of Intent: The statement of intent attached to Ch. 728, L. 1991, provided: "(1) A statement of intent is required for this bill because in [section 9] [23-2-522] the department of health and environmental sciences [now department of public health and human services] is authorized to adopt rules to provide for the installation, location, and operation of vessel pumpout stations. The legislature intends that those rules regulate facilities to transfer and dispose of sewage from marine sanitation devices, floating restrooms, and onshore toilets, all of which must be operated in a manner to prevent the discharge of sewage into the waters of the state and maintained in good working order and regularly cleaned. The rules may require a vessel pumpout facility to be equipped with a meter to measure use of the facility.

(2) A statement of intent is further required because 23-2-529 requires the fish and game commission [now fish, wildlife, and parks commission] to adopt rules regarding the proper observation and safe towing of persons on water skis or similar devices. It is intended that the commission's determination of the necessity for rules be based on the density of use of a body of water. Where applicable, the rules should address:

(a) the proper and continuous observation of the person being towed; and

(b) display of a flag when the person being towed falls into the water, including the size, color, condition, and mounting of the flag and the length of time the flag should be displayed.

(3) It is the intent of the legislature that the department of fish, wildlife, and parks evaluate and report to the 53rd legislature on the effect of 23-2-523(9)."

Effective Date: Section 14(1), Ch. 728, L. 1991, provided that [section 9], codified as subsections (2) through (5) of this section, is effective on passage and approval. Approved April 29, 1991.

23-2-523. Prohibited operation and mooring — enforcement.

Compiler's Comments

1997 Amendment: Chapter 42 in (9) substituted "rule adopted under 23-2-521" for "commission rule adopted under 23-2-521(9)"; and made minor changes in style. Amendment effective March 12, 1997.

1995 Amendment: Chapter 345 in (10), at beginning of second sentence, substituted "A person 13 or 14 years of age" for "After December 31, 1993, a person under 15 years of age" and at end inserted "or unless accompanied by a person 18 years of age or older"; in (11)(b), at beginning, substituted "by a person 13 or 14 years of age" for "after December 31, 1993, by a person under 15 years of age"; and made minor changes in style. Amendment effective April 10, 1995.

1991 Amendments: Chapter 728 inserted (1)(a) prohibiting dangerous maneuvers; inserted (1)(b) prohibiting crossing or jumping a wake in proximity to a vessel or waterskier; at end of (6) substituted "United States coast guard approved personal flotation device in good and serviceable condition" for "life preserver, buoyant vest, or ski belt"; inserted (9) providing more restrictive noise standard for certain lakes; inserted (10) restricting operation of motorboats by persons 12 or younger and requiring safety certificate for operators under 15; inserted (11) prohibiting person in charge of motorboat from allowing operation by persons 12 or younger or persons under 15 who do not have a safety certificate; and made minor changes in style. Amendment effective April 29, 1991.

Chapter 789 at end of (2) inserted reference to combination of drugs and alcohol; and made minor changes in style.

1991 Statement of Intent: The statement of intent attached to Ch. 728, L. 1991, provided: "(1) A statement of intent is required for this bill because in [section 9] [23-2-522] the department of health and environmental sciences [now department of public health and human services] is authorized to adopt rules to provide for the installation, location, and operation of vessel pumpout stations. The legislature intends that those rules regulate facilities to transfer and dispose of sewage from marine sanitation devices, floating restrooms, and onshore toilets, all of which must be operated in a manner to prevent the discharge of sewage into the waters of the state and maintained in good working order and regularly cleaned. The rules may require a vessel pumpout facility to be equipped with a meter to measure use of the facility.

(2) A statement of intent is further required because 23-2-529 requires the fish and game commission [now fish, wildlife, and parks commission] to adopt rules regarding the proper observation and safe towing of persons on water skis or similar devices. It is intended that the commission's determination of the necessity for rules be based on the density of use of a body of water. Where applicable, the rules should address:

(a) the proper and continuous observation of the person being towed; and

(b) display of a flag when the person being towed falls into the water, including the size, color, condition, and mounting of the flag and the length of time the flag should be displayed.

(3) It is the intent of the legislature that the department of fish, wildlife, and parks evaluate and report to the 53rd legislature on the effect of 23-2-523(9)."

1987 Amendment: Substituted existing (2) (see 1987 Session Law) for former (2) that read: "No person may operate or knowingly permit any person to operate any motorboat or vessel or manipulate any water skis, surfboard, or similar device or other contrivance while intoxicated or under the influence of any narcotic drug, barbiturate, or marijuana."

Case Notes

Failure to Instruct Jury on Greater Duty of Care in Situation of Greater Danger — Reversible Error: The Schuffs were injured while riding in Jackson's boat when Jackson failed to negotiate a submerged rock formation that he knew was there. Jackson admitted error during operation of the boat but maintained that his conduct nevertheless conformed to that of an ordinary prudent boater under the same or similar circumstances. The jury found that Jackson was not negligent, and the Schuffs appealed. The Supreme Court agreed. The fact that Jackson admitted error did

not establish negligence per se. Evidence was sufficient for the jury to find that Jackson was operating the boat in a manner consistent with other ordinarily prudent boaters under the same circumstances. Further, the Schuffs failed to timely object to Jackson's interjection of the defenses of unavoidable accident and assumption of risk, so motion for a new trial was properly denied on those grounds. However, the Supreme Court found that the jury instructions did not include information regarding the possible greater duty of care in situations in which the danger is known to be greater or on Jackson's statutory duty not to operate the boat at a speed greater than would permit stopping the boat within an assured clear distance. Failure to properly instruct the jury was prejudicial error, so the case was remanded for a new trial. Schuff v. Jackson, 2002 MT 215, 311 M 312, 55 P3d 387 (2002), followed in Dale v. Three Rivers Tel. Co-ops, Inc., 2004 MT 74, 320 M 401, 87 P3d 489 (2004).

Travel in and Through County in Private Conveyance Adequate to Establish Venue — Boat as Private Conveyance: Diesen's boat collided with Hallock's boat in Fort Peck Lake, in either Valley County or Garfield County. Diesen was convicted in Valley County Justice's Court of boating under the influence, and he appealed. In District Court, Diesen moved for dismissal, alleging that the venue was improper because the state had failed to prove that any element of the offense had occurred in Valley County. The District Court applied 46-3-114 in concluding that Diesen's boat was a private conveyance and held that because the state proved beyond a reasonable doubt that the boat traveled in and through Valley County on its way to Fort Peck Marina, the Valley County Justice's Court was an appropriate venue. The Supreme Court affirmed denial of Diesen's motion to dismiss. St. v. Diesen, 2000 MT 1, 297 M 459, 992 P2d 1287, 57 St. Rep. 1 (2000).

Collateral References

12 Am. Jur. 2d Boats and Boating §16, et seq.

36 Am. Jur. POF2d Ski Boat, Negligent Operation, pp. 525 through 604; 43 Am. Jur. POF2d Negligent Operation of Pleasure Boat, p. 395.

Liability of owner or operator of pleasure boat for injury or death of guest passenger. 35 ALR 4th 104.

Insurance: construction and effect of provision of homeowner's, premises, or personal liability insurance policy covering or excluding watercraft. 26 ALR 4th 967.

Liability of owner or operator of powered pleasure boat for injuries to swimmer or bather struck by boat. 98 ALR 3d 1127.

Nonparticipant liability for injury or death of nonparticipant caused by water skiing. 67 ALR 3d 1218.

Liability for injuries to or death of water skiers. 8 ALR 3d 675.

23-2-525. Restricted areas.

Compiler's Comments

1999 Amendment: Chapter 569 in (3) in first sentence after "may not" deleted "without permission", after "operate" deleted "or knowingly permit any person to operate", after "within" substituted "75" for "50", and after "fishing" inserted "or hunting waterfowl" and inserted second sentence regarding vessel operation when operation within 75 feet of a person fishing or hunting waterfowl is unavoidable; in (4)(a), in (4)(b) in two places, and in (4)(c) increased size of safety zone from 100 feet to 200 feet; and made minor changes in style. Amendment effective June 1, 1999.

Preamble: The preamble attached to Ch. 569, L. 1999, provided: "WHEREAS, Montana waters will experience a great increase in traffic by recreationists celebrating the bicentennial of the Lewis and Clark expedition and retracing the routes of the famous explorers; and

WHEREAS, the increased recreational use of Montana waters by every manner of recreationist, motorized as well as nonmotorized users, has led to a corresponding increase in conflicts between river users; and

WHEREAS, in other states, conflicts between recreational users of waters have escalated to the point of violence and even deaths of recreationists; and

WHEREAS, the use of personal watercraft has grown immensely in Montana, and the irresponsible use of personal watercraft conflicts with the ability of lakeshore cabin owners and homeowners to enjoy their pursuit of happiness through peaceful relaxation; and

WHEREAS, it is in the interests of public health, safety, welfare, and protection of property that measures be taken in Montana to reduce potential conflicts between recreational users of Montana waters before this state experiences similar problems."

1991 Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

1989 Amendment: Inserted (4) relating to operating requirements in area of "diver-down" symbol. Amendment effective March 6, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 44, L. 1989, provided: "A statement of intent is required for this bill because 23-2-525(4)(c) grants rulemaking authority to the fish and game commission [now fish, wildlife, and parks commission]. The department shall, when adopting rules, consult with law enforcement agencies, organizations representing diving interests, and search and rescue organizations within the state in order for these organizations and agencies to assist with adopting rules that will be appropriate for their activities and duties. It is intended that the commission may, after a public hearing, establish areas where, because of diver safety or water traffic, underwater diving is not allowed."

23-2-526. Overloading — overpowering — noise limitations.

Compiler's Comments

1991 Amendment: At beginning of (3) inserted exception clause, after "motorboat" inserted "or personal watercraft", and after "50 feet" inserted "or emits exhaust noise in excess of 90 dbA measured 1 meter from the muffler at idle speed in accordance with the stationary sound level measurement procedure for pleasure motorboats (SAE J2005)". Amendment effective April 29, 1991.

Noise Limitation Codification: Subsection (3) of this section was enacted by sec. 2, Ch. 694, L. 1983, without a codification instruction. The subsection was codified in this section for convenience, and to avoid any apparent change in meaning, the Code Commissioner has added language to 23-2-507 excepting the subsection from the penalty provision. Near the beginning of the subsection, a reference to "this part" was changed to "45-8-101 and 45-8-111" by the Code Commissioner to reflect the apparent intent to tie the noise limitation to disorderly conduct and public nuisance statutes. See also 87-1-506, which was amended by Ch. 694 to provide enforcement authority in fish and game wardens.

23-2-527. Collisions, accidents, and casualties.

Collateral References

12 Am. Jur. 2d Boats and Boating §§35 through 89.

23-2-529. Waterskis and surfboards.

Compiler's Comments

1991 Amendment: In (1), after "operator is", substituted "accompanied by an observer. If the operator is 12 years of age or younger, there must be a second person, at least 18" for "at least 12 years of age and there is a second person, at least 12" and inserted last sentence concerning rules on observation and towing; in (2), after "may not", inserted "operate a motorboat or vessel towing a person", after "contrivances" inserted "nor may a person engage in those activities", before "sunset" deleted "1 hour after", and before "sunrise" deleted "1 hour before"; and made minor changes in style. Amendment effective April 29, 1991.

1991 Name Change: Section 2, Ch. 28, L. 1991, directed the Code Commissioner to change the name of the Fish and Game Commission to the Fish, Wildlife, and Parks Commission wherever the name appears in the MCA. Accordingly, the name was changed in this section as directed.

1991 Statement of Intent: The statement of intent attached to Ch. 728, L. 1991, provided: "(1) A statement of intent is required for this bill because in [section 9] [23-2-522] the department of health and environmental sciences [now department of public health and human services] is authorized to adopt rules to provide for the installation, location, and operation of vessel pumpout stations. The legislature intends that those rules regulate facilities to transfer and dispose of sewage from marine sanitation devices, floating restrooms, and onshore toilets, all of which must be operated in a manner to prevent the discharge of sewage into the waters of the state and maintained in good working order and regularly cleaned. The rules may require a vessel pumpout facility to be equipped with a meter to measure use of the facility.

(2) A statement of intent is further required because 23-2-529 requires the fish and game commission [now fish, wildlife, and parks commission] to adopt rules regarding the proper observation and safe towing of persons on water skis or similar devices. It is intended that the commission's determination of the necessity for rules be based on the density of use of a body of water. Where applicable, the rules should address:

(a) the proper and continuous observation of the person being towed; and

(b) display of a flag when the person being towed falls into the water, including the size, color, condition, and mounting of the flag and the length of time the flag should be displayed.

(3) It is the intent of the legislature that the department of fish, wildlife, and parks evaluate and report to the 53rd legislature on the effect of 23-2-523(9)."

Collateral References

36 Am. Jur. POF2d Ski Boat, Negligent Operation, pp. 525 through 604.

Liability for injuries to, or death of, water-skiers. 34 ALR 5th 77.

Nonparticipant liability for injury or death of nonparticipant caused by water skiing. 67 ALR 3d 1218.

Liability for injuries to or death of water skiers. 8 ALR 3d 675.

23-2-530. Education program.

Compiler's Comments

1991 Amendment: At end inserted "including a home study testing program for motorboat operators". Amendment effective April 29, 1991.

23-2-531. Personal watercraft operation.

Compiler's Comments

1999 Amendment: Chapter 569 in (3)(a) after "(3)(b)" inserted "or when towing a waterskier from or to a dock or shore", after "within" substituted "200" for "100", and at end substituted "river" for "within 50 feet of a dock, swimmer, swimming raft, nonmotorized boat, or anchored vessel on a river, except as provided in 23-2-525(4)"; in (3)(b) after "greater than" substituted "the minimum speed necessary to operate a" for "minimum maneuvering speed for a standup"; inserted (4) prohibiting personal watercraft operation on restricted waters; and made minor changes in style. Amendment effective June 1, 1999.

Preamble: The preamble attached to Ch. 569, L. 1999, provided: "WHEREAS, Montana waters will experience a great increase in traffic by recreationists celebrating the bicentennial of the Lewis and Clark expedition and retracing the routes of the famous explorers; and

WHEREAS, the increased recreational use of Montana waters by every manner of recreationist, motorized as well as nonmotorized users, has led to a corresponding increase in conflicts between river users; and

WHEREAS, in other states, conflicts between recreational users of waters have escalated to the point of violence and even deaths of recreationists; and

WHEREAS, the use of personal watercraft has grown immensely in Montana, and the irresponsible use of personal watercraft conflicts with the ability of lakeshore cabin owners and homeowners to enjoy their pursuit of happiness through peaceful relaxation; and

WHEREAS, it is in the interests of public health, safety, welfare, and protection of property that measures be taken in Montana to reduce potential conflicts between recreational users of Montana waters before this state experiences similar problems."

1995 Amendment: Chapter 345 inserted (3) regulating speed and distance applicable to the operation of certain personal watercraft; and made minor changes in style. Amendment effective April 10, 1995.

Effective Date: Section 14(1), Ch. 728, L. 1991, provided that this section is effective on passage and approval. Approved April 29, 1991.

Law Review Articles

Personal Watercraft: Waking to the Danger, Lewis, 27 Trial 70 (1991).

23-2-532. Restrictions on manufacture and sale.

Compiler's Comments

Effective Date: Section 14(1), Ch. 728, L. 1991, provided that this section is effective on passage and approval. Approved April 29, 1991.

23-2-533. Use of allocated funds for boating facilities.

Compiler's Comments

Repeal of Termination Dates: Section 1, Ch. 322, L. 2005, repealed sec. 6, Ch. 511, L. 1993, sec. 9, Ch. 476, L. 1995, and secs. 2 and 3, Ch. 95, L. 2001, which terminated this section June 30, 2006.

2001 Amendment — Coordination: Section 247, Ch. 574, L. 2001, a coordination section, amended sec. 5(1), Ch. 95, L. 2001, which amended this section. Chapter 574 deleted former (1) that read: "(1) At the time the fee in lieu of tax imposed under 23-2-516 is collected, the payor shall designate the fish, wildlife, and parks administrative region in which the majority of the

payor's boating activities take place. Upon receipt of the fee in the motorboat account in the state special revenue fund, the department shall earmark the fee for use in the designated region"; in (1) at beginning substituted "Funds allocated" for "All fees designated" and after "account" deleted "by 23-2-518(2)"; in (1)(a) after "improve" deleted "regional" and inserted "operate, or maintain" and at end deleted "under the control of the department and, in conjunction with other funds in the motorboat account"; in (2) in two places substituted "funds" for "fees"; and made minor changes in style. Amendment effective July 1, 2001.

Extension of Termination Date: Sections 2 and 3, Ch. 95, L. 2001, amended sec. 6, Ch. 511, L. 1993, and sec. 9, Ch. 476, L. 1995, by extending the termination dates imposed by those sections to June 30, 2006.

1995 Amendment: Chapter 476 in (2), in first sentence, inserted "in conjunction with other funds in the motorboat account". Amendment effective June 30, 1995.

Preamble: The preamble attached to Ch. 476, L. 1995, provided: "WHEREAS, the state's recreational boating safety program would be substantially strengthened if the Department of Fish, Wildlife, and Parks could delegate part of the administration and enforcement to counties; and

WHEREAS, the 1993 Legislature temporarily allocated 25% of the boat fee in lieu of tax to the motorboat account to improve regional boating facilities under the control of the Department of Fish, Wildlife, and Parks and created the Boating Advisory Council, composed of public members, to advise the Department on the expenditure of those funds; and

WHEREAS, the 1995 Legislature finds it appropriate to authorize the Department to contract with counties for boating safety administration and enforcement and to continue both the allocation for regional boating facilities and the Boating Advisory Council for an additional 7 years."

Extension of Termination Date: Section 9, Ch. 476, L. 1995, amended sec. 6, Ch. 511, L. 1993, to extend the termination date from June 30, 1995, to June 30, 2002.

Effective Date: Section 5, Ch. 511, L. 1993, provided: "[This act] is effective July 1, 1993."

Termination: Section 6, Ch. 511, L. 1993, provided: "[This act] terminates June 30, 1995."

23-2-534. Funding of state recreational boating safety program — certification of county programs — administration by counties.

Compiler's Comments

Repeal of Termination Dates: Section 1, Ch. 322, L. 2005, repealed sec. 10, Ch. 476, L. 1995, and sec. 4, Ch. 95, L. 2001, which terminated this section June 30, 2006.

2001 Amendment — Coordination: Section 247, Ch. 574, L. 2001, a coordination section, amended sec. 5(2), Ch. 95, L. 2001, which amended this section. Chapter 574 in (2) in first sentence substituted "allocate funds to the department" for "designate any amount of boat fees in lieu of tax, unless otherwise allocated by 23-2-518(2), or other funds for collection by the department". Amendment effective July 1, 2001.

Extension of Termination Date: Section 4, Ch. 95, L. 2001, amended sec. 10, Ch. 476, L. 1995, by extending the termination date imposed by Ch. 476 to June 30, 2006.

Preamble: The preamble attached to Ch. 476, L. 1995, provided: "WHEREAS, the state's recreational boating safety program would be substantially strengthened if the Department of Fish, Wildlife, and Parks could delegate part of the administration and enforcement to counties; and

WHEREAS, the 1993 Legislature temporarily allocated 25% of the boat fee in lieu of tax to the motorboat account to improve regional boating facilities under the control of the Department of Fish, Wildlife, and Parks and created the Boating Advisory Council, composed of public members, to advise the Department on the expenditure of those funds; and

WHEREAS, the 1995 Legislature finds it appropriate to authorize the Department to contract with counties for boating safety administration and enforcement and to continue both the allocation for regional boating facilities and the Boating Advisory Council for an additional 7 years."

Effective Date: Section 8, Ch. 476, L. 1995, provided that this section is effective June 30, 1995.

Termination: Section 10, Ch. 476, L. 1995, provided: "[Sections 1 and 3] [23-2-534 and 23-2-519] terminate June 30, 2002."

23-2-535. Alcohol concentration standards — evidence admissible — administration of tests.

Compiler's Comments

1991 Amendment: In (1) substituted "inferences" for "presumptions" and changed subsection reference to 61-8-401; in (2), before "amount", inserted "any measured", after "amount" inserted "or detected presence", substituted "person" for "person's blood", inserted reference to analysis of person's blood, breath, or urine, and inserted reference to drugs or combination of drugs and alcohol; in (3), before "test", deleted "chemical" and substituted "any measured amount or detected presence of alcohol" for "the alcoholic content of his blood"; and in (4), before "alcohol", deleted "blood" and after "testing done to" deleted "determine the blood alcohol concentration of".

23-2-536. Creation of boating advisory council — appointment of members — duties.

Compiler's Comments

Repeal of Termination Dates: Section 1, Ch. 322, L. 2005, repealed sec. 6, Ch. 511, L. 1993, sec. 9, Ch. 476, L. 1995, and secs. 2 and 3, Ch. 95, L. 2001, which terminated this section June 30, 2006.

Extension of Termination Date: Sections 2 and 3, Ch. 95, L. 2001, amended sec. 6, Ch. 511, L. 1993, and sec. 9, Ch. 476, L. 1995, by extending the termination dates imposed by those sections to June 30, 2006.

1997 Amendment: Chapter 42 in (3), after "2-15-102", deleted "(8)". Amendment effective March 12, 1997.

1995 Amendment: Chapter 476 in temporary version in (1), at end, substituted "in the motorboat account in the state special revenue fund" for "made available under 23-2-518(2)"; in (2), before "five members", inserted "at least"; and in (4), at end of first sentence, substituted "motorboat account in the state special revenue fund" for "fees collected under 23-2-518(2)". Amendment effective June 30, 1995.

Preamble: The preamble attached to Ch. 476, L. 1995, provided: "WHEREAS, the state's recreational boating safety program would be substantially strengthened if the Department of Fish, Wildlife, and Parks could delegate part of the administration and enforcement to counties; and

WHEREAS, the 1993 Legislature temporarily allocated 25% of the boat fee in lieu of tax to the motorboat account to improve regional boating facilities under the control of the Department of Fish, Wildlife, and Parks and created the Boating Advisory Council, composed of public members, to advise the Department on the expenditure of those funds; and

WHEREAS, the 1995 Legislature finds it appropriate to authorize the Department to contract with counties for boating safety administration and enforcement and to continue both the allocation for regional boating facilities and the Boating Advisory Council for an additional 7 years."

Extension of Termination Date: Section 9, Ch. 476, L. 1995, amended sec. 6, Ch. 511, L. 1993, to extend the termination date from June 30, 1995, to June 30, 2002.

Effective Date: Section 5, Ch. 511, L. 1993, provided: "[This act] is effective July 1, 1993."

Termination: Section 6, Ch. 511, L. 1993, provided: "[This act] terminates June 30, 1995."

23-2-540. Personal watercraft dealers — additional registration requirements.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Part 6
Snowmobiles

Part Administrative Rules

ARM 12.6.601 and 12.6.602 Snowmobile regulations.

Part Case Notes

Driving Snowmobile Under Influence — Construction With Other Law — Snowmobile Law Penalty Alone Applies: In enacting this part, the Legislature duplicated the motor vehicle code concerns for regulation of snowmobiles upon streets, roads, and highways with respect to registration and licensing, accidents, enforcement, unlawful operation, penalties, and disposition of fines and forfeitures and provided a statutory scheme that supplants the motor vehicle code regarding snowmobiles. The Legislature clearly intended to impose a civil penalty for operating a snowmobile while under the influence in violation of 23-2-632, but the civil label of the penalty is not alone dispositive. Review of the statutory scheme and attendant penalties

leads the court to conclude that the penalties in 23-2-642(2) and (3) are punitive in nature and constitute criminal penalties. Therefore, defendant could not be charged under 61-8-401, the law relating to driving a motor vehicle under the influence, because to hold otherwise would allow conflicting criminal penalties. Defendant could only be charged under 23-2-632. St. v. Delap, 237 M 346, 772 P2d 1268, 46 St. Rep. 856 (1989).

Part Attorney General's Opinions

Snowmobiling on Frozen Streams — Landowner Permission Necessary: Landowner permission is required for snowmobiling on the frozen surfaces of streams. 41 A.G. Op. 36 (1985).

Part Law Review Articles

Snowmobiles in Yellowstone: Conflicting Priorities in Setting National Park Policy and the Paradox of Judicial Activism for Recreational Business, Bissegger, 25 J. Land, Resources, & Envtl. L. 109 (2005).

Part Collateral References

7A Am. Jur. 2d Automobiles and Highway Traffic §§1, 5.

Liability for injury or damage caused by snowplowing or snow removal operations and equipment. 83 ALR 4th 5.

Products liability: general recreational equipment. 77 ALR 4th 1121.

Snowmobile operation as DWI or DUI. 56 ALR 4th 1092.

Products liability. 81 ALR 3d 394, §4 superseded by 66 ALR 4th 622.

Criminal liability based on violation of statute or ordinance regulating operation of snowmobile. 45 ALR 3d 1438.

Accidents involving negligence in operation of snowmobile, skimobile, or similar vehicle. 42 ALR 3d 1422.

23-2-601. Definition of terms.

Compiler's Comments

2005 Amendment: Chapter 542 in introductory clause deleted reference to 23-2-626. Amendment effective January 1, 2006.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendments — Composite Section: Chapter 477 in introductory clause after "23-2-601" inserted "23-2-602, 23-2-611, 23-2-614 through 23-2-619, 23-2-621, 23-2-622, 23-2-626, 23-2-631 through 23-2-635, and 23-2-641"; substituted certificate of title for certificate of ownership as defined term; in definition of owner near middle after "certificate of" substituted "title" for "ownership"; and made minor changes in style. Amendment effective January 1, 2004.

Chapter 592 in definition of certificate of registration after "payment of" substituted "fees due in order for the snowmobile to be validly registered" for "taxes, decal fees, and registration fees for a given registration year"; inserted definition of registration decal; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

Code Commissioner Correction: The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title 61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

23-2-602. Report of stolen and recovered snowmobiles.

Compiler's Comments

1993 Amendment: Chapter 351 substituted present language regarding report of stolen and recovered snowmobiles in the same manner as motor vehicles for former section that read: "The sheriff of every county of the state and the chief of police or commissioner of police of every city shall make an immediate report to the department of justice of all snowmobiles reported to him as stolen or recovered, upon forms provided by the department of justice. Upon receipt of such information, the department of justice shall file the same in an index to be known as the "stolen and recovered snowmobile index". The department of justice shall file reports of stolen and recovered snowmobiles reported to it from other states. Once a month the department of justice shall prepare a list of all snowmobiles stolen or recovered during the previous month and forward a copy of the same to every sheriff and all police departments in cities of the first, second, and third class. Such list shall also be forwarded to the secretary of state or other proper official in each state of the United States. Before a certificate of ownership may be issued under 23-2-601 through 23-2-644, the motor and serial number on the snowmobile for which such certificate is to be issued shall be checked against the stolen and recovered snowmobile index." Amendment effective April 16, 1993.

Code Commissioner Correction: The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title 61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

23-2-611. Certificate of title.

Compiler's Comments

2003 Amendment: Chapter 477 in (1) in first sentence and second sentence after "certificate of" substituted "title" for "ownership"; in (2) substituted "Unless expressly exempted, the provisions of Title 61, chapter 3, parts 1 and 2, apply to snowmobiles" for former language that read: "(2) The owner of a snowmobile shall apply for a certificate of ownership with the county treasurer of the county in which the owner resides, upon forms to be furnished for this purpose. The forms must require the following information:

(a) the name of the owner;
(b) the residence of the owner, by town and county;
(c) the business or home mailing address of the owner;
(d) the name and address of any lienholder;
(e) the amount due under any contract or lien;
(f) the name of the manufacturer;
(g) the model number or name;
(h) the identification number; and
(i) the name and address of the dealer or other person from whom acquired"; deleted former (3) through (19) that read: "(3) The application must be accompanied by documentation of ownership, such as an invoice, notarized bill of sale from the immediately previous owner, foreign title, official certificate of snowmobile number, or fee in lieu of tax receipt.

(4) The application must be signed by at least one owner or by a properly authorized officer or representative of the owner.

(5) If a certificate of ownership has previously been issued under the provisions of 23-2-601 through 23-2-644, the application for a new certificate must be accompanied by the immediately previous certificate. This subsection does not apply to snowmobiles that are purchased as new and unused machines or that were operated when the provisions of 23-2-601 through 23-2-644 were not in force and effect.

(6) Upon completion of the application, on forms furnished by the department of justice, the county treasurer shall issue to the applicant two copies of the application, one of which must be marked "file copy". The treasurer shall forward one copy and the original application to the department of justice, which shall enter the information contained in the application upon the corresponding records of its office and shall furnish the applicant with a certificate of ownership, which must contain that information in the application considered necessary by the department of justice, and a permanent ownership number. The certificate of ownership is not to be renewed annually and is valid as long as the person holding it owns the snowmobile.

(7) The owner shall at all times retain possession of the certificate of ownership, except when it is being transmitted to and from the department of justice for endorsement or cancellation.

(8) Upon application for a certificate of ownership, a fee of $5 must be paid to the county treasurer, which must be forwarded by the county treasurer to the department of justice and deposited in the general fund.

(9) The department of justice may not file a voluntary security interest or lien unless it is accompanied by or specified in the application for a certificate of ownership of the snowmobile encumbered. If the approved lien notice is transmitted to the department of justice, the security agreement or other lien instrument that creates the security interest must be retained by the secured party. A copy of the security agreement is sufficient as a lien notice if it contains the name and address of the debtor and the secured party, the complete snowmobile description, the amount of the lien, and the signature of the debtor. The department of justice shall file voluntary security interests and liens by entering the name and address of the secured party upon the face of the certificate of ownership. Involuntary liens must be filed against the record of the snowmobile encumbered. The department of justice shall mail a statement certifying the filing of a security interest or lien to the secured party. The department of justice shall mail the certificate of ownership to the owner at the address given on the certificate; however, if the transfer of ownership and filing of the security interest are paid for by a creditor or secured party, the department of justice shall return the certificate of ownership to the county treasurer of the county in which the snowmobile is to be registered. The owner of a snowmobile is the person entitled to operate and possess the snowmobile.

(10) A security interest in a snowmobile held as inventory by a dealer must be perfected in accordance with Title 30, chapter 9A.

(11) Whenever a security interest or lien is filed against a snowmobile that is subject to two security interests previously perfected under this section, the department of justice shall endorse on the face of the certificate of ownership: "NOTICE. This snowmobile is subject to additional security interest on file with the Department of Justice." Other information regarding the additional security interests need not be endorsed on the certificate.

(12) Satisfactions or statements of release filed with the department of justice under this part must be retained for a period of 8 years after receipt, after which they may be destroyed.

(13) Except as provided in subsection (14), a voluntary security interest or lien is perfected on the date the lien notice is delivered to the county treasurer. On that date, the county treasurer shall issue to the secured party a receipt evidencing the perfection. Perfection under this section constitutes constructive notice to subsequent purchasers or encumbrancers, from the date of delivery of the lien notice to the county treasurer, of the existence of the security interest.

(14) Voluntary security interests or lien filings that do not require transfer of ownership are perfected on the date the lien notice and the certificate of ownership or manufacturer's statement of origin are received by the department of justice. On that date, the department of justice shall issue to the secured party a receipt evidencing the perfection. Perfection under this subsection constitutes constructive notice to subsequent purchasers or encumbrancers, from the date the lien notice is delivered to the department of justice, of the existence of the security interest.

(15) Upon default under a chattel mortgage or conditional sales contract covering a snowmobile, the mortgagee or vendor has the same remedies as in the case of other personal property. In case of attachment of a snowmobile, all the provisions of 27-18-413, 27-18-414, and 27-18-804 are applicable, except that deposits must be made with the department of justice.

(16) A conditional sales vendor or chattel mortgagee or assignee who fails to file a satisfaction of a chattel mortgage, assignment, or conditional sales contract within 15 days after receiving final payment is required to pay the department of justice the sum of $1 for each day that the satisfaction is not filed.

(17) Upon receipt of notice of any involuntary liens or attachments against the record of any snowmobile registered in this state, the department of justice shall within 24 hours mail to the owner, conditional sales vendor, mortgagee, or their assignee a notice showing the name and address of the lien claimant, the amount of the lien, the date of execution of the lien, and, in the case of attachment, the full title of the court, the action, and the name of the attorney for the plaintiff or the name of the attaching creditor, or both.

(18) It is not necessary to refile with the department of justice any instruments on file in the office of the county clerk and recorder on October 1, 1989.

(19) A fee of $4 must be paid to the department of justice to file any security interest or other lien against a snowmobile. The $4 fee must cover the cost of filing a satisfaction or release of the

security interest and the cost of entering the satisfaction or release on the records of the department of justice and deleting the endorsement of the security interest from the face of the certificate of ownership. A fee of $4 must be paid to the department of justice for issuing a certified copy of a certificate of ownership subject to a security interest or other lien on file with the department of justice or for filing an assignment of a security interest or other lien on file with the department of justice. All fees provided for in this section must be paid to the county treasurer for deposit in the state general fund in accordance with 15-1-504"; and made minor changes in style. Amendment effective January 1, 2004.

The amendments to this section made by Ch. 562, L. 2003, were rendered void by sec. 83(1)(a), Ch. 477, L. 2003.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

2001 Amendment: Chapter 574 in (8) after "paid to the county treasurer" deleted "$3.50 of"; in (19) in last sentence near middle substituted "state general fund" for "general fund"; and made minor changes in style. Amendment effective July 1, 2001.

1993 Amendments — Composite Section: Chapter 351 near beginning of first sentence of (1), after "any", inserted "private or" and inserted second sentence precluding necessity of ownership certificate for certain snowmobiles used only on private land; inserted (3) requiring documentation of ownership; and made minor changes in style. Amendment effective April 16, 1993.

Chapter 482 at beginning of (9) deleted two sentences that provided that a security interest in a snowmobile is not valid against subsequent purchasers or encumbrancers unless a lien notice has been perfected as provided in this section and filed on a form approved by the Department of Justice, in first sentence, before "security", inserted "voluntary" and before "lien" deleted "other", at beginning of second sentence, before "lien", inserted "approved", in fourth sentence substituted "voluntary security interests and liens" for "security interest or lien", and inserted fifth sentence requiring involuntary liens to be filed against the record of the encumbered snowmobile; in (10), after "9", deleted "and no endorsement on the certificate of title is necessary for perfection"; at beginning of (13) inserted exception clause and near beginning substituted "voluntary security interest or lien" for "security interest or other lien as provided in this section"; inserted (14) providing that voluntary security interests or lien filings not requiring ownership transfer are perfected on date Department of Justice receives lien notice and certificate of ownership, requiring Department to issue secured party receipt evidencing perfection, and providing that perfection constitutes constructive notice to subsequent purchasers or encumbrancers from date lien notice is delivered to Department; near beginning of (17) substituted "notice of any involuntary liens" for "liens, notice of liens dependent on possession"; and made minor changes in style.

A gender neutral change in (16) was slightly different in the two chapters. The codified chose the more appropriate of the two.

1991 Amendments: Chapter 16 in (8), at end of second sentence, deleted brackets from phrase "of justice"; and made minor changes in style.

Chapter 463 in (8), in first sentence, substituted "perfected" for "filed with the department of justice" and in second sentence deleted brackets from phrase "of justice"; in (10), near middle of first sentence after "perfected", deleted "by filing"; and in (12) substituted first and second sentences regarding perfection of a security interest for former first sentence that read: "The filing of a security interest or other lien as herein provided perfects a security interest that has attached at the time the certificate of ownership noting the interest is issued" and at beginning of third sentence substituted "Perfection under this section" for "Issuance of a certificate of ownership" and near middle substituted "date of delivery of the lien notice to the county treasurer" for "time of filing".

1989 Amendments: Chapter 164 inserted (8) through (17) regarding filing of security interests for snowmobiles (see 1989 Session Law for text); and made minor changes in punctuation and phraseology.

Chapter 398 at end of (7) and at end of (17) substituted reference to general fund for reference to motor vehicle recording account of the state special revenue fund; and made minor changes in punctuation. Amendment effective July 1, 1989.

Chapter 535 in (7) increased fee from $3 to $5 and increased amount for deposit in motor vehicle recording account from $2 to $3.50; and made minor change in phraseology.

Code Commissioner Correction: The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title

61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

23-2-614. Exemptions.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 130 in (1)(a) and in (2) after "registration decals" substituted "certificates of title, and certificates" for "and certification"; and made minor changes in style. Amendment effective October 1, 2005.

Chapter 542 in (1)(a), (1)(b), and (2) deleted reference to 23-2-626. Amendment effective January 1, 2006.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendments — Composite Section: Chapter 477 in three places after "23-2-601" inserted "23-2-602, 23-2-611, 23-2-614 through 23-2-619, 23-2-621, 23-2-622, 23-2-626, 23-2-631 through 23-2-635, and 23-2-641"; and made minor changes in style. Amendment effective January 1, 2004.

Chapter 591 in (1)(a) at end after "subdivision" substituted "of the United States or another state" for "thereof, any snowmobile registered in a country other than the United States and to be temporarily used within this state for a period of not more than 30 days, or to any snowmobile registered in another state of the United States but to be temporarily used within this state for not more than 30 days"; and made minor changes in style. Amendment effective July 1, 2003.

Chapter 592 in (1) near beginning of first sentence and in (2) near beginning of introductory clause before "decals" substituted "registration" for "tax-paid"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

23-2-615. Nonresident temporary-use permits — use of fees.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 477 in (3) after "certificate of" substituted "title" for "ownership"; and made minor changes in style. Amendment effective January 1, 2004.

Chapter 591 deleted former (1)(a)(ii) that read: "(ii) the make, model, year, and serial number of the snowmobile"; in (1)(b) near middle of first sentence after "fee of" substituted "$15, of which 50 cents is a search and rescue surcharge" for "$6" and in second sentence after "must be" substituted "permanently affixed" for "displayed"; in (2) after "valid" substituted "during the fiscal year in which it is issued" for "for a consecutive 30-day period as designated by the permit"; inserted (4)(b) providing that a nonresident temporary-snowmobile-use permit is not required for a snowmobile that will be used only on trails that are managed jointly by agreement between Montana and another state; in (5) at beginning of introductory clause inserted exception clause, near middle after "must be" deleted "remitted to the department of revenue and", and at end substituted "special revenue fund to the credit of the department and used as follows" for "general fund"; inserted (5)(a) through (5)(d) concerning uses of permit fee money; and made minor changes in style. Amendment effective July 1, 2003.

The amendments to this section made by sec. 4, Ch. 534, L. 2003, and sec. 2, Ch. 591, L. 2003, were rendered void by sec. 3, Ch. 591, L. 2003, a coordination section.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

2001 Amendments — Composite Section: Chapter 257 in (5) substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 in (5) at end substituted "transferred to the state treasurer and deposited in the state general fund" for "turned over to the state treasurer and placed in the state special revenue fund to the credit of the department of fish, wildlife, and parks, with one-half to be used in administering this section and one-half to be used in the development, maintenance, and operation of snowmobile facilities". Amendment effective July 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1993 Amendment: Chapter 351 inserted (4) exempting racing snowmobiles from permitting requirements; and made minor changes in style. Amendment effective April 16, 1993.

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

23-2-616. Registration and registration decal — application and issuance — use of certain fees.

Compiler's Comments

2005 Amendment: Chapter 542 in (3) near beginning of first sentence after "registration fee" substituted "prescribed in 61-3-321(11)" for "of $6.50 in calendar year 2004 and, in each subsequent year, $20.50" and in second sentence substituted "proper fee" for "proper fees, including the fee in lieu of tax"; in (5) at end deleted "and the fee in lieu of property tax on the snowmobile as required by 15-16-202"; in (6) near end after "forwarded to the" substituted "state" for "department of revenue"; deleted former (7) and (8) that read: "(7) The county treasurer shall credit all fees in lieu of tax collected on snowmobiles to the state general fund.

(8) The fee imposed in subsection (3) is a one-time fee except on change of ownership. When ownership of the snowmobile changes, the new owner shall pay the fee in subsection (3)"; and made minor changes in style. Amendment effective January 1, 2006.

Section 132, Ch. 596, L. 2005, a coordination section, rendered the amendment made by sec. 25, Ch. 596, L. 2005, void.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendments — Composite Section: Chapter 477 in (2)(a) at beginning substituted "A Montana resident who owns a snowmobile operated on public land shall register the snowmobile" for "Application for registration must be made to the county treasurer upon forms to be furnished by the department of justice for this purpose, which may be obtained" and after "resides" deleted "The application must contain the following information" and former (2)(a) through (2)(g) that read: "(a) the name and address of the owner;

(b) the certificate of ownership number;

(c) the make of the snowmobile;

(d) the model name of the snowmobile;

(e) the year of manufacture;

(f) a statement evidencing payment of the fee in lieu of property tax as required by 15-16-202; and

(g) other information that the department of justice may require"; inserted (2)(b) pertaining to when a county treasurer shall register a snowmobile; inserted (2)(c) requiring the county treasurer to update the electronic record; in (3) in first sentence at beginning substituted "The owner registering a snowmobile shall pay" for "The application must be accompanied by" and near middle after "been registered" substituted "show the county treasurer the registration receipt" for "by the registration certificate" and in second sentence at beginning inserted "Upon

payment of the proper fees, including the fee in lieu of tax" and after "shall" deleted "sign the application and"; in (4) near beginning before "application" deleted "signed"; in (5) near beginning after "may not" substituted "register a snowmobile" for "accept any application" and near end after "year and" inserted "if required" (last insertion rendered void by Ch. 592 amendment); and made minor changes in style. Amendment effective January 1, 2004.

Chapter 592 in (1) near middle after "registered and" substituted "a registration decal" for "there", after "place on" substituted "the left side" for "both sides", and at end after "cowl" deleted "a decal as visual proof that the fee in lieu of property tax has been paid on it for the current year and the immediately previous year as required by 15-16-202"; in (3) near beginning of first sentence after "by a" substituted "registration" for "decal-registration" and after "$6.50" inserted "in calendar year 2004 and, in each subsequent year, $20.50" and in third sentence after "treasurer" deleted "for reregistration"; in (4) near middle after "applicant a" inserted "registration" and at end after "justice" deleted "and of a different color than the preceding year, numbered in sequence"; in (5) near middle after "paid the" substituted "registration" for "decal-registration" and near end after "snowmobile" deleted "for the current year and the immediately previous year"; in (6) near beginning after "payment of" substituted "registration" for "decal-registration"; inserted (8) providing for a one-time fee and requiring that the new owner pay the fee when ownership changes; and made minor changes in style. Amendment effective January 1, 2004.

The amendments to this section made by sec. 3, Ch. 246, L. 2003, and sec. 5, Ch. 534, L. 2003, were rendered void by sec. 47(1) and (3)(b), Ch. 592, L. 2003, a coordination section.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

2001 Amendments — Composite Section: Chapter 257 in (6)(a) substituted "department of revenue, as provided in 15-1-504, for deposit" for "state treasurer and placed"; in (6)(b) substituted "department of revenue, as provided in 15-1-504, for deposit" for "state treasurer and deposited"; (amendment in subsection (6)(b) rendered void by Ch. 574) and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 in (3) near beginning of first sentence substituted "decal-registration fee of $6.50" for "decal fee of $5, a registration fee of 50 cents"; in (5) near middle substituted "decal-registration fee" for "decal and registration fees"; in (6) near beginning substituted "decal-registration fees" for "the decal fees" and at end substituted "state general fund" for "state special revenue fund to the credit of the department, with $2.50 designated for use in enforcing the purposes of 23-2-601 through 23-2-644 and $2.50 designated for use in the development, maintenance, and operation of snowmobile facilities" and deleted former second sentence that read: "All money collected from payment of the registration fee must be forwarded to the state treasurer and deposited in the general fund"; in (7) at end substituted "state general fund" for "county motor vehicle suspense fund provided for in 61-3-509"; and made minor changes in style. Amendment effective July 1, 2001.

The amendments to this section in sec. 8, Ch. 191, L. 2001, were rendered void by sec. 255(6), Ch. 574, L. 2001, a coordination section.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1993 Amendment: Chapter 351 at beginning of (1) inserted exception clause; near beginning of (3) increased decal fee from $2 to $5; in first sentence of (6) increased from $1 to $2.50 the amount designated for enforcement and from $1 to $2.50 the amount designated for snowmobile facilities; and made minor changes in style. Amendment effective April 16, 1993.

1989 Amendment: At end of (6) substituted reference to general fund for reference to motor vehicle recording account of the state special revenue fund. Amendment effective July 1, 1989.

1987 Amendment: In (1) and (5), at end, inserted "and the immediately previous year as required by 15-16-202"; and in (2)(f), at end, inserted "as required by 15-16-202".

Code Commissioner Correction: The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title 61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

1983 Amendment: Substituted references to state special revenue fund for references to earmarked revenue fund.

Disposition of Fee in Lieu of Tax: Section 17, Ch. 712, L. 1979, provided: "The county treasurer shall credit all fees in lieu of tax collected on snowmobiles to the county motor vehicle suspense fund provided for in 61-3-509." The history to 23-2-616 reflects that this language was codified as subsection (6), but the language was inadvertently not codified. The language was codified as subsection (7) when the MCA was published in 1981.

Case Notes

Flathead Reservation Indians: This section is invalid as conflicting with federal law insofar as it requires the payment of a motor vehicle tax or other personal property taxes by members of the Confederated Salish and Kootenai Tribes residing on the Flathead Reservation. Moe v. Confederated Salish and Kootenai Tribes, 425 US 463, 48 L Ed 2d 96, 96 S Ct 1634 (1976).

Attorney General's Opinions

Bill Title Held Sufficient to Identify Subject Matter: Senate Bill 254 (1973) as codified in 23-2-616 sufficiently identifies the subject matter embraced within sections 2 and 3 of the bill as codified in 23-2-617 and 23-2-619, respectively, because the codified sections have a natural and logical connection and can reasonably be said to relate, directly or indirectly, to one general subject of legislation: snowmobile decals. Thus, the title to Senate Bill 254 as codified meets the requirements of Art. V, sec. 11(3), Mont. Const., requiring that each bill contain only one subject. 35 A.G. Op. 64 (1974).

23-2-617. Duplicate decal.

Compiler's Comments

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendment: Chapter 592 at beginning substituted "If a registration decal" for "In the event any decal indicating that the fee in lieu of property tax has been paid on a snowmobile for the current year"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

23-2-619. Dealer registration certificate — use of fees — temporary registration permit.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 542 in (1)(a) and (9)(a) deleted reference to 23-2-626; and made minor changes in style. Amendment effective January 1, 2006.

Chapter 596 substituted (8) concerning an application for a certificate of title and a temporary registration permit for former text that read: "Prior to the delivery of a snowmobile to the purchaser, the dealer shall issue and affix to the snowmobile a temporary registration permit. The temporary registration permit expires 20 days after the date of issuance. The dealer shall keep a copy of the temporary registration permit for the dealer's records and shall send a copy of the temporary registration permit to the department of justice". Amendment effective January 1, 2006.

2003 Amendment: Chapter 477 in (1) and (9) after "23-2-601" inserted "23-2-602, 23-2-611, 23-2-614 through 23-2-619, 23-2-621, 23-2-622, 23-2-626, 23-2-631 through 23-2-635, and 23-2-641"; inserted (8) pertaining to a dealer's use of a temporary registration permit; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

1999 Amendment: Chapter 384 at beginning of (1)(a) inserted reference to licensing under 61-4-101; inserted (1)(b) establishing requirements to qualify as dealer; in (3)(a) substituted "A dealer shall file a bond in the amount of $5,000" for "A bond is not required of the dealer"; inserted (3)(b) establishing requirements for bond; inserted (3)(c) requiring judgment before

payment on bond required; and made minor changes in style. Amendment effective October 1, 1999.

1993 Amendment: Chapter 351 near beginning of (5) increased from three or more to five or more the number of snowmobile sales applicable to renewal of dealer registration; and made minor changes in style. Amendment effective April 16, 1993.

1989 Amendment: At end of (8)(b) substituted reference to general fund for reference to motor vehicle recording account of the state special revenue fund. Amendment effective July 1, 1989.

Code Commissioner Correction: The Code Commissioner has substituted the department of justice for the division of motor vehicles in this section, because sec. 14, Ch. 503, L. 1985, repealed 2-15-2002, which had statutorily created the division, and sec. 1, Ch. 503 amended Title 61, Motor Vehicles, to substitute "department" for "division" throughout that title. The apparent intent was to eliminate the statutory status of the division, and therefore the Code Commissioner has changed statutory references accordingly (see 1-11-101(2)(g)).

1983 Amendment: Substituted references to state special revenue fund for references to earmarked revenue fund.

23-2-621. Registration of a snowmobile owned and operated solely as a collector's item.

Compiler's Comments

Effective Date: Section 14, Ch. 351, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 16, 1993.

23-2-622. Registration of racing snowmobile not required.

Compiler's Comments

2003 Amendment: Chapter 477 near end after "certificate of" substituted "title" for "ownership", after "requirements of" substituted "61-3-216 through 61-3-222" for "23-2-611", and near end after "23-2-616" inserted "or 61-3-224". Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

1997 Amendment: Chapter 42 near end substituted "23-2-611" for "23-6-611". Amendment effective March 12, 1997.

Effective Date: Section 14, Ch. 351, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 16, 1993.

23-2-631. Operation on public roads, streets, and highways.

Compiler's Comments

2005 Amendment: Chapter 542 in (3), (4)(a), and (4)(b) deleted reference to 23-2-626. Amendment effective January 1, 2006.

2003 Amendment: Chapter 477 in (3), (4)(a), and (4)(b) after "23-2-601" inserted "23-2-602, 23-2-611, 23-2-614 through 23-2-619, 23-2-621, 23-2-622, 23-2-626, 23-2-631 through 23-2-635, and 23-2-641"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

1995 Amendment: Chapter 210 in (4) inserted introductory clause concerning subsection (4)(b) or (4)(c); inserted (4)(b) concerning requirements for operating a snowmobile on roads, streets, or highways; and made minor changes in style.

23-2-632. Unlawful operation of snowmobiles.

Compiler's Comments

1993 Amendment: Chapter 351 near beginning of (1), before "highway", inserted "public" and after "highway" inserted "established snowmobile trail, public snowmobile area on public lands or waters, or lands or waters under easement or lease for snowmobiling and adjacent snowmobiling areas on private lands or waters where public snowmobiling is permitted"; near beginning of (1)(a), after "for motor vehicles", inserted "unless travel on the street, highway, or trail has been closed to motor vehicle traffic or unless drifting snow or snow cover has rendered travel by motor vehicles impractical or impossible"; deleted former (1)(b) that read: "(b) while under the influence of intoxicating liquor or narcotics or habit-forming drugs"; near beginning of (2), after "snowmobile", substituted "in violation of subsection (1)" for "on a public street or highway"; and made minor changes in style. Amendment effective April 16, 1993.

Case Notes

Driving Snowmobile Under Influence — Construction With Other Law — Snowmobile Law Penalty Alone Applies: In enacting Title 23, ch. 2, part 6, the Legislature duplicated the motor

vehicle code concerns for regulation of snowmobiles upon streets, roads, and highways with respect to registration and licensing, accidents, enforcement, unlawful operation, penalties, and disposition of fines and forfeitures and provided a statutory scheme that supplants the motor vehicle code regarding snowmobiles. The Legislature clearly intended to impose a civil penalty for operating a snowmobile while under the influence in violation of this section (see 1993 amendment), but the civil label of the penalty is not alone dispositive. Review of the statutory scheme and attendant penalties leads the court to conclude that the penalties in 23-2-642(2) and (3) are punitive in nature and constitute criminal penalties. Therefore, defendant could not be charged under 61-8-401, the law relating to driving a motor vehicle under the influence, because to hold otherwise would allow conflicting criminal penalties. Defendant could be charged only under this section. St. v. Delap, 237 M 346, 772 P2d 1268, 46 St. Rep. 856 (1989).

23-2-633. Other unlawful operation.

Compiler's Comments

1995 Amendment: Chapter 206 at beginning of first sentence of (1) inserted "use the snowmobile" and after "livestock" inserted "including ostriches, rheas, and emus" and at end of second sentence inserted "by use of snowmobiles"; at beginning of (3) inserted "operate the snowmobile"; and made minor changes in style.

Applicability: Section 14, Ch. 206, L. 1995, provided: "[This act] applies to tax years beginning after December 31, 1995."

Attorney General's Opinions

Snowmobiling on Frozen Streams — Landowner Permission Necessary: Landowner permission is required for snowmobiling on the frozen surfaces of state waters between the ordinary high-water marks. 41 A.G. Op. 36 (1985). (See 23-2-632(1).)

23-2-634. Regulation of snowmobile noise.

Compiler's Comments

2005 Amendment: Chapter 542 in (4) and (5) deleted reference to 23-2-626. Amendment effective January 1, 2006.

2003 Amendment: Chapter 477 in (4) and (5) after "23-2-601" inserted "23-2-602, 23-2-611, 23-2-614 through 23-2-619, 23-2-621, 23-2-622, 23-2-626, 23-2-631 through 23-2-635, and 23-2-641"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

1993 Amendment: Chapter 351 in (6)(a), in two places, and in (6)(b), after reference to lands, inserted "or waters"; at end of (6)(b), after "consent", deleted "provided that total sound produced by such an event may not exceed 50 dbA at any point 50 feet or more outside the area under the control of the sponsoring entity"; and made minor changes in style. Amendment effective April 16, 1993.

Administrative Rules

ARM 12.6.602 Snowmobile sound pressure level regulation and certification.

23-2-635. Accidents involving snowmobiles.

Compiler's Comments

1993 Amendment: Chapter 351 near beginning of first sentence, after "upset", substituted "in which" for "upon a public street or highway where", after "person" deleted "or where property damage exceeds $100", and at end substituted "the nearest law enforcement agency" for "a state or local law enforcement agency responsible for collecting reports of accidents involving motor vehicles" and inserted second sentence concerning reporting an accident involving personal injury or a fatality immediately or as soon as practicable; and made minor changes in style. Amendment effective April 16, 1993.

23-2-641. Enforcement.

Compiler's Comments

2005 Amendment: Chapter 542 in (1) in two places deleted reference to 23-2-626. Amendment effective January 1, 2006.

2003 Amendment: Chapter 477 in (1) in two places after "23-2-601" inserted "23-2-602, 23-2-611, 23-2-614 through 23-2-619, 23-2-621, 23-2-622, 23-2-626, 23-2-631 through 23-2-635, and 23-2-641"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

1993 Amendment: Chapter 351 deleted former first sentence of (1) that read: "The following persons may enforce the provisions of 23-2-601 through 23-2-644: the enforcement officers employed by the department, with respect to violations relating to wildlife or birds, discharging firearms, or sound level limitations"; in (2)(b), after "patrol", inserted "authorized officers of the department" and at end substituted "this part" for "23-2-601 through 23-2-644"; and made minor changes in style. Amendment effective April 16, 1993.

1991 Amendment: In (2)(a) deleted reference to Department's enforcement personnel and inserted language providing that Department is a criminal justice agency and its authorized officers are peace officers with enumerated powers; and made minor changes in style. Amendment effective April 26, 1991.

Administrative Rules

ARM 12.6.602 Snowmobile sound pressure level regulation and certification.

23-2-642. Penalties.

Compiler's Comments

2005 Amendment: Chapter 542 in (1) at end substituted "registration fee payable under 61-3-321" for "fee in lieu of tax payable under 23-2-626"; in (2) and in two places in (3) deleted reference to 23-2-626; and made minor changes in style. Amendment effective January 1, 2006.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendments — Composite Section: Chapter 477 in three places after "23-2-601" inserted "23-2-602, 23-2-611, 23-2-614 through 23-2-619, 23-2-621, 23-2-622, 23-2-626, 23-2-631 through 23-2-635, and 23-2-641"; and made minor changes in style. Amendment effective January 1, 2004.

Chapter 592 in (1) near beginning after "current" inserted "registration", after "decal" deleted "indicating that the fee in lieu of property tax has been paid", and after "snowmobile" deleted "for the current year during the time provided in 23-2-601 through 23-2-644"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

1993 Amendment: Chapter 351 at end of (1) substituted "in an amount equal to five times the applicable fee in lieu of tax payable under 23-2-615.1 [renumbered 23-2-626]" for "of not less than $10 or more than $50"; at beginning of second sentence of (2) substituted "If the violation is willful, the person" for "A person who willfully violates any other provision of 23-2-601 through 23-2-644 or a rule adopted pursuant thereto"; in (3) substituted "subsection (2)" for "subsections (2) and (3)"; and made minor changes in style. Amendment effective April 16, 1993.

Case Notes

Driving Snowmobile Under Influence — Construction With Other Law — Snowmobile Law Penalty Alone Applies: In enacting Title 23, ch. 2, part 6, the Legislature duplicated the motor vehicle code concerns for regulation of snowmobiles upon streets, roads, and highways with respect to registration and licensing, accidents, enforcement, unlawful operation, penalties, and disposition of fines and forfeitures and provided a statutory scheme that supplants the motor vehicle code regarding snowmobiles. The Legislature clearly intended to impose a civil penalty for operating a snowmobile while under the influence in violation of 23-2-632 (prior to 1993 amendment), but the civil label of the penalty is not alone dispositive. Review of the statutory scheme and attendant penalties leads the court to conclude that the penalties in subsections (2) and (3) of this section are punitive in nature and constitute criminal penalties. Therefore, defendant could not be charged under 61-8-401, the law relating to driving a motor vehicle under the influence, because to hold otherwise would allow conflicting criminal penalties. Defendant

could only be charged under 23-2-632. St. v. Delap, 237 M 346, 772 P2d 1268, 46 St. Rep. 856 (1989).

23-2-644. Deposit of funds from fines and forfeitures.

Compiler's Comments

2005 Amendment: Chapter 542 deleted reference to 23-2-626 and near end substituted "state as provided in 15-1-504" for "department of revenue". Amendment effective January 1, 2006.

2003 Amendment: Chapter 477 after "23-2-601" inserted "23-2-602, 23-2-611, 23-2-614 through 23-2-619, 23-2-621, 23-2-622, 23-2-626, 23-2-631 through 23-2-635, and 23-2-641"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

2001 Amendment: Chapter 257 substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1995 Amendment: Chapter 509 at end substituted "state general fund" for "state special revenue fund to the credit of the department to be used only for snowmobile safety and education"; and made minor changes in style. Amendment effective July 1, 1995.

1987 Amendment: Near beginning, after "snowmobiles", inserted "except those collected by a justice's court".

1983 Amendment: Substituted reference to state special revenue fund for reference to earmarked revenue fund.

23-2-651. Purpose.

Compiler's Comments

1999 Amendment: Chapter 145 substituted current text recognizing snowmobiling as major recreational sport and industry and enumerating legitimate interests for former text that read: "The legislature recognizes that there are inherent risks in the sport of snowmobiling that are essentially impossible for a snowmobile area operator to eliminate but that should be known by a reasonable and prudent snowmobiler. The purpose of 23-2-651 through 23-2-656 is to define those areas of responsibility and the acts for which a snowmobile area operator is liable for death or injury to any person or property and those risks for which a snowmobiler expressly assumes or must be considered to have voluntarily assumed the risk of death or injury and for which there can be no recovery"; and made minor changes in style. Amendment effective March 23, 1999.

23-2-652. Definitions.

Compiler's Comments

1999 Amendment: Chapter 145 in introductory clause substituted "23-2-655" for "23-2-656"; and in definition of snowmobile area operators in first sentence after "trails and" inserted "for the designation of". Amendment effective March 23, 1999.

23-2-653. Snowmobile area operators — duties.

Compiler's Comments

1999 Amendment: Chapter 145 at beginning of (1) inserted "Consistent with the duty of reasonable care owed by a snowmobile area operator to a snowmobiler"; substituted (2) concerning duty of reasonable care for former text that read: "(2) A snowmobile area operator is liable for death or injury to a snowmobiler or other person or property only for an act or omission that constitutes gross negligence"; in (3) deleted former second sentence that read: "A snowmobile area operator who attempts to eliminate, alter, control, or lessen the risk inherent in the sport of snowmobiling is liable only for an act or omission that constitutes gross negligence"; and made minor changes in style. Amendment effective March 23, 1999.

23-2-654. Snowmobiler's assumption of responsibility — duties.

Compiler's Comments

1999 Amendment: Chapter 145 substituted (1) concerning operation of snowmobile for former text that read: "(1) A snowmobiler shall accept all legal responsibility for injury or damage of any kind to the extent that the injury or damage results from risks inherent in the sport of snowmobiling and has the duty to regulate personal conduct at all times so that injury to self or other persons or property that results from the risks inherent in the sport of snowmobiling is avoided. The risks inherent in the sport of snowmobiling include variations in terrain, surface or subsurface snow or ice conditions, cornices, avalanches, poor visibility, bare spots, rocks,

trees, other forms of forest growth or debris, and plainly marked trail maintenance equipment"; substituted (2)(a) concerning knowledge of ability, equipment, and terrain and trail changes for former text that read: "(a) knowing the range of the snowmobiler's own ability to snowmobile any slope, trail, or area and for snowmobiling within the limits of the snowmobiler's ability considering the conditions"; at end of (2)(b) inserted "so as to prevent injury to self and others"; inserted (3) concerning legal responsibility for enumerated risks inherent in snowmobiling; and made minor changes in style. Amendment effective March 23, 1999.

1993 Amendment: Chapter 351 near beginning of first sentence of (1) substituted "shall accept" for "assumes the risk and", after "responsibility for" substituted "injury or damage of any kind to the extent that the injury or damage results from risks inherent in the sport of snowmobiling and has the duty to regulate personal conduct at all times so that" for "death or", and at end inserted "is avoided" and at beginning of second sentence substituted "risks inherent in the sport of snowmobiling include" for "assumption of risk includes but is not limited to death or injury caused by the following"; and made minor changes in style. Amendment effective April 16, 1993.

Part 7
Tramways — Ski Areas

Part Case Notes

Duty of Reasonable Care: Under Montana law a passenger tramway or ski lift is not a common carrier, and its operation requires only a duty of reasonable and ordinary care and is not held to the higher standards of a common carrier. Pessl v. Bridger Bowl, 164 M 389, 524 P2d 1101 (1974).

Part Law Review Articles

Snowboarding Liability: Past, Present and Future, Hecht, 15 Marq. Sports L. Rev. 249 (2004).

Criminal Verdict in Skier Case Could Help Plantiffs in Civil Suits, Hellwese, 37 Trial 16 (2001).

Court Sustains Liability of State in Ski Accident, Spencer, 216 N.Y.L.J. 1 (1996).

Allocation of the Risks of Skiing: A Call for the Reapplication of Fundamental Common Law Principles, Ferguson, 67 Denver U.L. Rev. 165 (1990).

Ski Liability Law Cuts New Trails: Reckless Skiers Face Criminal Prosecution, Victims Face Low Recovery Rates, Rubin, 26 Trial 108 (1990).

Trends in Ski Liability Law, Rubin, 21 Trial Law. Q. 51 (1990).

Duel Permits for Ski Resorts: An Analysis of the Forest Service Special Use Policy, Lovett, 1985 Utah L. Rev. 765 (1985).

Part Collateral References

Theaters *key* 6(23), (26).

65A C.J.S. Negligence §367.

40A Am. Jur. 2d Hotels §116.

Liability for injury or damage caused by snowplowing or snow removal operations and equipment. 83 ALR 4th 5.

23-2-702. Definitions.

Compiler's Comments

1997 Amendment: Chapter 346 deleted definitions of area, Board, industry, and operator (see 1997 Session Law for text); inserted definitions of ski area operator, skier, and ski trails; and made minor changes in style. Amendment effective July 1, 1997.

1989 Amendment: Inserted definition of Board; and deleted definition of Department as Department of Commerce. Amendment effective January 1, 1990.

1987 Amendment: In (2) substituted "department of commerce" for "department of administration" and changed corresponding code reference.

23-2-703. Tramways not common carriers or public utilities.

Case Notes

Duty of Reasonable Care: Under Montana law a passenger tramway or ski lift is not a common carrier, and its operation requires only a duty of reasonable and ordinary care and is not held to the higher standards of a common carrier. Pessl v. Bridger Bowl, 164 M 389, 524 P2d 1101 (1974).

Collateral References

Carriers *key* 235, 280(1).

23-2-731. Purpose.

Compiler's Comments

1989 Amendment: Substituted entire section (see 1989 Session Law for text) for former language that read: "It is recognized that there are inherent risks in the sport of skiing that are essentially impossible to eliminate by the ski area operator but that should be known by the skier. It is the purpose of 23-2-731 through 23-2-737 to define those areas of responsibility and affirmative acts for which the ski area operator is liable for loss, damage, or injury and those risks for which the skier expressly assumes or shall be considered to have voluntarily assumed the risk of loss or damage and for which there can be no recovery." Amendment effective April 4, 1989.

Applicability: Section 6(2), Ch. 429, L. 1989, provided: "[This act] applies to courses of action arising after [the effective date of this act]." Effective April 4, 1989.

Case Notes

DECISION PRIOR TO 1989 AMENDMENT

Skier Responsibility Statutes Unconstitutional: Although there is a legitimate state interest in defining ski area operator liability and protecting the economic vitality of the ski industry, as expressed in this section, 23-2-736 and 23-2-737 (now repealed) are needlessly overbroad in that they prohibit a skier from obtaining legal recourse against an operator even if the injury is proximately caused by the negligent or even intentional actions of the operator. The sections violate the equal protection guarantee of both the state and federal constitutions because they do not bear even a minimum rational relationship to the stated purpose. Brewer v. Ski-Lift, Inc., 234 M 109, 762 P2d 226, 45 St. Rep. 1769 (1988).

Collateral References

65A C.J.S. Negligence §367.

23-2-733. Duties of operator regarding ski areas.

Compiler's Comments

1995 Amendment: Chapter 140 in (6), before "skier responsibility code", inserted "current" and at end, after "association", deleted "and that is current on April 4, 1989".

1989 Amendment: At beginning inserted "Consistent with the duty of reasonable care owed by a ski area operator to a skier"; near beginning of (1), before "vehicles", substituted "grooming" for "maintenance"; at end of (2) substituted "ski trails" for "ski slopes, trails, and areas"; at end of (3) substituted "and the relative degree of difficulty of the ski trails at that area" for "and slopes"; near beginning of (5) inserted "at the start of each day", after "trails" deleted "or slopes", and at end inserted "and amend those designations as openings and closures occur during the day"; inserted (6) and (7) relating to posting skier responsibility code and copy of 23-2-736; and made minor changes in phraseology. Amendment effective April 4, 1989.

Applicability: Section 6(2), Ch. 429, L. 1989, provided: "[This act] applies to courses of action arising after [the effective date of this act]." Effective April 4, 1989.

Case Notes

Ski Area's Duties Not Limited to Statutory Duties: In response to an injured skier's allegations of negligence, the ski area asserted that its duties were limited to those set forth in this section and that because the skier did not allege any breach of the statutory duties, the ski area was entitled to judgment as a matter of law. Applying a court's role in statutory construction to simply ascertain and declare what is contained in this section's terms and substance without inserting what has been omitted, the Supreme Court found that in neither the original enactment of this section nor in subsequent amendments did the Legislature provide that a ski area's only duties were those enumerated in this section and that there was no other duty of due care owed by operators to skiers. The duty of due care is imposed by 27-1-701. In holding that the operator's duties were not limited to those listed in this section, the court interpreted this section in a way that would give it effect rather than in a way that would render it unconstitutional. Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782, 51 St. Rep. 348 (1994).

Collateral References

Liability for injury or damage caused by snowplowing or now removal operations and equipment. 83 ALR 4th 5.

Ski resort's liability for skier's injuries resulting from condition of ski run or slope. 55 ALR 4th 632.

23-2-734. Duties of operator with respect to passenger tramways.

Compiler's Comments

1997 Amendment: Chapter 346 in first sentence, after "tramway", deleted "in accordance with the rules of the board" and at beginning of second sentence substituted "An operator has the duty" for "However, nothing in this section relieves an operator from the duty". Amendment effective July 1, 1997.

1989 Amendment: At end of first sentence changed "department" to "board". Amendment effective January 1, 1990.

1987 Amendment: At end of first sentence, after "department", deleted "of administration".

Case Notes

Duty of Reasonable Care: Under Montana law a passenger tramway or ski lift is not a common carrier, and its operation requires only a duty of reasonable and ordinary care and is not held to the higher standards of a common carrier. Pessl v. Bridger Bowl, 164 M 389, 524 P2d 1101 (1974).

Collateral References

Lift or tow: liability for injury or death from ski lift, ski tow, or similar device. 95 ALR 3d 203.

23-2-736. Skier's conduct — inherent risks.

Compiler's Comments

1997 Amendment: Chapter 42 in (2)(c) substituted "that is posted as provided in 23-2-733" for "that is current on April 4, 1989"; and made minor changes in style. Amendment effective March 12, 1997.

1989 Amendment: Substituted (1) and (2) relating to affirmative duty of a skier (see 1989 Session Law for text) for former language that read: "(1) A skier assumes the risk and all legal responsibility for injury to himself or loss of property that results from participating in the sport of skiing by virtue of his participation. The assumption of risk and responsibility includes but is not limited to injury or loss caused by the following: variations in terrain, surface or subsurface snow or ice conditions, bare spots, rocks, trees, other forms of forest growth or debris, lift towers and components thereof, pole lines, and plainly marked or visible snowmaking equipment.

(2) A skier is responsible for knowing the range of his own ability to ski any slope, trail, or area and for skiing within the limits of his ability, skiing only on designated slopes and trails, maintaining control of speed and course at all times while skiing, heeding all posted warnings, and refraining from acting in a manner that may cause or contribute to the injury of anyone. The responsibility for collisions with a person or object while skiing is the responsibility of the person or persons and not the responsibility of the ski area operator"; near beginning of (3), after "person", deleted "who is skiing"; at end of (3)(b) substituted "point" for "area"; inserted (4) relating to risks inherent in skiing; and made minor changes in phraseology. Amendment effective April 4, 1989.

Applicability: Section 6(2), Ch. 429, L. 1989, provided: "[This act] applies to courses of action arising after [the effective date of this act]." Effective April 4, 1989.

Case Notes

DECISIONS AFTER 1989 AMENDMENT

Assumption of Risk Not Separate Defense in Ski Area Operator Negligence Action: The defense of assumption of risk, other than as specified in Montana's skier responsibility statutes, is not a separate defense in a claim by skiers for injuries that are alleged to result from the negligence of ski area operators. Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782, 51 St. Rep. 348 (1994).

Skier Responsibility Law — Questionable Skiing Conditions as Precluding Summary Judgment: Mead was injured in a skiing accident, but the District Court summarily dismissed his damages claim because the injury resulted from inherent risks of skiing, as set forth in this section. However, disputed questions of fact existed as to whether the injury was a result of variations in skiing terrain and whether Mead was skiing beyond the designated trail. Those questions were issues to be decided by the finder of fact after consideration of all the evidence; therefore, summary judgment was inappropriate. Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782, 51 St. Rep. 348 (1994).

DECISION PRIOR TO 1989 AMENDMENT

Skier Responsibility Statutes Unconstitutional: Although there is a legitimate state interest in defining ski area operator liability and protecting the economic vitality of the ski industry, as

expressed in 23-2-731, 23-2-737 (now repealed) and this section are needlessly overbroad in that they prohibit a skier from obtaining legal recourse against an operator even if the injury is proximately caused by the negligent or even intentional actions of the operator. The sections violate the equal protection guarantee of both the state and federal constitutions because they do not bear even a minimum rational relationship to the stated purpose. Brewer v. Ski-Lift, Inc., 234 M 109, 762 P2d 226, 45 St. Rep. 1769 (1988).

Collateral References

Theaters *key* 6(23), (26).

65A C.J.S. Negligence §174(6).

Products liability: skiing equipment. 76 ALR 4th 256.

Part 8
Off-Highway Vehicles

Part Law Review Articles

Some Practical Advice on How to Perfect a Security Interest in an All-Terrain Vehicle, Laurence, 1996 Ark. L. Notes 59 (1996).

ATV Industry Stalls Rollover Standard: Inaction Upsets Safety Goals, Deppa, 26 Trial 66 (1990).

Chrome on the Range: Off-Road Vehicles on Public Lands, Bleich, 15 Ecology L.Q. 159 (1988).

Part Collateral References

Operation of mopeds and motorized recreational two-, three-, and four-wheeled vehicles as within scope of driving while intoxicated statutes. 32 ALR 5th 659.

Products liability: all-terrain vehicles (ATV's). 83 ALR 4th 70.

23-2-801. Definition.

Compiler's Comments

2003 Amendment: Chapter 477 deleted definition of certificate of ownership that read: ""Certificate of ownership" means a document issued by the department of justice as prima facie evidence of ownership as provided in 23-2-811"; in (2)(c) near middle after "otherwise" substituted "issued a certificate of title and registered" for "licensed" and at end inserted "unless the vehicle is used for off-road recreation on public lands"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

1989 Amendment: At beginning of (1)(b)(iii) inserted exception clause; inserted definition of certificate of ownership; and deleted definition of Department. Amendment effective January 1, 1990.

23-2-802. Exemptions.

Compiler's Comments

1991 Amendment: Inserted (2) exempting a licensed motorcycle or quadricycle used for certain purposes; and made minor changes in style.

23-2-804. Decal required.

Compiler's Comments

2005 Amendment: Chapter 542 deleted former (1)(a)(i) that read: "(i) the fee in lieu of tax provided for in 23-2-803"; in (1)(a) at end inserted reference to subsection (5) of 61-3-321; in (1)(b) near middle of first sentence inserted reference to subsection (8) of 61-3-321; and made minor changes in style. Amendment effective January 1, 2006.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendments — Composite Section: Chapter 477 in (1)(b) inserted second sentence providing method for a county treasurer to check registration status. Amendment effective January 1, 2004.

Chapter 592 in (1) at end of introductory clause after "paid" deleted "for the current year"; in (2) at end after "numbered" deleted "and have the expiration date of December 31 of the appropriate year printed on the decal"; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

2001 Amendments — Composite Section: Chapter 257 in (3) in second sentence substituted "department of revenue, as provided in 15-1-504, for deposit" for "state treasurer, who shall deposit the money"; at end of (3)(b) deleted: "except that:

(i) no money may be spent for this purpose before January 1, 1991; and

(ii) evaluation for development of a program plan must begin January 1, 1991"; (amendments in subsections (3) and (3)(b) rendered void by Ch. 574) and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 in (1)(a)(ii) at end substituted "61-3-321" for "23-2-817"; deleted former (1)(c) that read: "(c) the off-highway decal fee provided for in this section"; deleted former (3) that read: "(3) The off-highway decal fee is $5, which the county treasurer shall collect and transmit to the state treasurer, who shall deposit the money in an interest-bearing account in the state special revenue fund to the credit of the department of fish, wildlife, and parks. The decal fee and the interest and income to the account must be spent as follows:

(a) 40% must be used to enforce the provisions of this section; and

(b) 60% must be spent to develop and implement a comprehensive program and to plan appropriate off-highway vehicle recreation use except that:

(i) no money may be spent for this purpose before January 1, 1991; and

(ii) evaluation for development of a program plan must begin January 1, 1991"; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1991 Amendment: In (1), near beginning before "recreation", inserted "off-road"; and made minor changes in style.

1989 Amendment: Near beginning of (1), after "person", inserted "for recreation on public lands", near middle, after "department", inserted "of justice and issued by the county treasurer", and after "proof that" inserted "the following fees have been paid for the current year"; inserted (1)(a)(ii) requiring payment of the registration fee; inserted (1)(b) requiring proof of payment of registration and taxation fees; inserted (1)(c) requiring proof of payment of decal fee; inserted (3) regarding off-highway decal fee; and made minor changes in form and phraseology. Amendment effective January 1, 1990.

Coordination — Amendments Void: Section 16, Ch. 599, L. 1989, provided: "If House Bill No. 477 [Ch. 433, L. 1989], including amendments to 23-2-803 [now repealed] to require deposit of a portion of the fee in lieu of tax on off-highway vehicles in the noxious weed trust fund, is passed and approved, the following provisions of [this act] are void:

(1) [section 11] [61-3-510, now repealed]; and

(2) those amendments to 23-2-804 relating to imposition of weed control fee on off-highway vehicles." House Bill No. 477 was approved April 4, 1989; therefore, a reference in 23-2-804 to the weed control fee and the amendment to 61-3-510 (now repealed) regarding off-highway vehicles, as enacted in sections 7 and 11 of House Bill No. 165 [Ch. 599, L. 1989], are void.

23-2-806. Enforcement.

Compiler's Comments

1991 Amendment: In (1) inserted reference to park rangers; inserted (2) providing that Department is a criminal justice agency and its authorized officers are peace officers with enumerated powers; and inserted (3) relating to park rangers not carrying firearms. Amendment effective April 26, 1991.

1989 Amendment: At beginning substituted "department of fish, wildlife, and parks" for "department's". Amendment effective January 1, 1990.

23-2-807. Penalty — disposition.

Compiler's Comments

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendment: Chapter 592 in (1) near beginning after "display a" substituted "valid" for "current" and near end after "vehicle" deleted "for the current year". Amendment effective January 1, 2004.

Applicability: Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

2001 Amendment: Chapter 257 in (2) substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

1995 Amendment: Chapter 509 in (2) substituted "state general fund" for "account created under 23-2-804(3)" and deleted second and third sentences that read: "Fifty percent of this money and the interest earned on it must be used for off-highway vehicle safety and education. The remaining 50% of the money and the interest earned on it must be used for enforcement." Amendment effective July 1, 1995.

1989 Amendments: Chapter 83 in (2) (temporary version) substituted "special revenue fund" for "earmarked revenue fund".

Chapter 599 near beginning of (1), after "tax", inserted "registration fees, decal fees, and, when applicable, taxes on licensed vehicles" and at end, after "fine", substituted "of $50" for "equal to five times the fee in lieu of tax that is due on the off-highway vehicle for the current year"; at end of first sentence of (2) substituted "account created under 23-2-804(3)" for "earmarked revenue fund to the credit of the department", at beginning of second sentence inserted "Fifty percent of this money and the interest earned on it must", and inserted last sentence regarding use of remaining 50% of money and interest; and made minor change in phraseology. Amendment effective January 1, 1990.

23-2-809. Duplicate decal.

Compiler's Comments

2005 Amendment: Chapter 542 at end substituted "forward the fee to the state, as provided in 15-1-504, for deposit in the state general fund" for "distribute the fee as provided in 23-2-803"; and made minor changes in style. Amendment effective January 1, 2006.

Applicability: Section 2, Ch. 325, L. 2005, amended sec. 50, Ch. 592, L. 2003, to read: "Section 50. Applicability. [This act] applies to:

(1) registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004;

(2) vehicle counts for the purposes of 15-1-122(4), regardless of whether a vehicle was registered or reregistered prior to January 1, 2004."

Retroactive Applicability: Section 4, Ch. 325, L. 2005, provided: "(1) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to the registration, reregistration, fees, and taxes on vehicles and vessels registered on or after January 1, 2004.

(2) [Section 2] [not codified] applies retroactively, within the meaning of 1-2-109, to vehicle counts made after January 1, 2004."

2003 Amendments — Composite Section: Chapter 114 at end substituted "23-2-803" for "23-2-804(3)". Amendment effective October 1, 2003.

Chapter 592 near beginning after "paid" deleted "for the current year" and at end substituted "23-2-803" for "23-2-804(3)". Amendment effective January 1, 2004.

Applicability: Section 50, Ch. 592, L. 2003, provided: "[This act] applies to vehicles and vessels registered on or after January 1, 2004."

Effective Date: Section 17, Ch. 599, L. 1989, provided that this section is effective January 1, 1990.

23-2-814. Nonresident temporary-use permits.

Compiler's Comments

2003 Amendment: Chapter 477 in (4) after "certificate of" substituted "title" for "ownership". Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

2001 Amendments — Composite Section: Chapter 257 in first sentence in (5) and in second sentence in (6) substituted reference to department of revenue for reference to state treasurer; and made minor changes in style. Amendment effective July 1, 2001.

Chapter 574 in (5) at end substituted "in the state general fund" for "in the account created under 23-2-804(3). The money collected by payment of fees under this section must be spent as follows:

(a) 40% to be used in administering this section; and

(b) 60% to be used to plan, develop, and implement a comprehensive program for appropriate off-highway vehicle recreation use"; and at end of (6) substituted "in the state general fund" for "in the account created under 23-2-804(3). Fifty percent of this money and the interest earned on it must be used for off-highway vehicle safety and education. The remaining 50% of the money and the interest earned on it must be used for enforcement." Amendment effective July 1, 2001.

Applicability: Section 49, Ch. 257, L. 2001, provided: "[This act] applies to remittances of state money made to the department of revenue for fiscal years beginning after June 30, 2001."

23-2-818. Dealer registration certificate — temporary registration permit.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 542 in (7) at end of first sentence substituted reference to 61-1-101 for reference to 61-1-603. Amendment effective January 1, 2006. The amendment by Ch. 542 was rendered void by the Ch. 596 amendment.

Chapter 596 substituted (7) concerning an application for a certificate of title and a temporary registration permit for former text that read: "Prior to delivery of an off-highway vehicle to a purchaser, the dealer shall issue and affix to the off-highway vehicle a temporary registration permit, as defined in 61-1-603. The dealer shall keep a copy of the temporary registration permit for the dealer's records and shall send a copy of the temporary registration permit to the department of justice." Amendment effective January 1, 2006.

2003 Amendment: Chapter 477 inserted (7) pertaining to a dealer's use of temporary registration permits; and made minor changes in style. Amendment effective January 1, 2004.

Applicability: Section 85(1), Ch. 477, L. 2003, provided that this section applies to motor vehicle certificates of title and registrations on or after January 1, 2004.

2001 Amendment: Chapter 574 in (7)(b) at end substituted "in the state general fund" for "in the account provided in 23-2-804(3). This money and the interest earned on it must be used for off-highway vehicle safety and education programs." Amendment effective July 1, 2001.

1999 Amendment: Chapter 384 inserted (1)(b) establishing requirements to qualify as dealer; in (3)(a) substituted "A dealer shall file a bond in the amount of $5,000" for "No bond is required of the dealer"; inserted (3)(b) establishing requirements for bond; inserted (3)(c) requiring judgment before payment on bond required; and made minor changes in style. Amendment effective October 1, 1999.

1989 Amendment: Substituted "general fund" for "motor vehicle recording account of the state special revenue fund".

Effective Date: Section 17, Ch. 599, L. 1989, provided that this section is effective January 1, 1990.

23-2-821. Off-highway crossings of public roads — use of certain forest development roads.

Compiler's Comments

1999 Amendment: Chapter 95 inserted (3) establishing when an off-highway vehicle may be operated on or across a forest development road. Amendment effective October 1, 1999.

Part 9
Cave Conservation Act

Part Compiler's Comments

Preamble: The preamble attached to Ch. 264, L. 1993, provided: "WHEREAS, caves are uncommon geologic phenomena; and

WHEREAS, minerals deposited in caves may be rare and occur in unique forms of great beauty that are irreplaceable if destroyed; and

WHEREAS, archaeological resources of significant cultural, scientific, and historic value also occur in caves and are irreplaceable; and

WHEREAS, organisms that live in caves are unusual, limited in number, and could become threatened and endangered species in the absence of protection; and

WHEREAS, caves are a natural conduit for ground water flow, are highly subject to pollution, and thus have far-reaching effects transcending property boundaries.

THEREFORE, the Legislature finds it appropriate to protect these unique natural and cultural cave resources."

CHAPTER 3
ATHLETICS
BOXING AND WRESTLING

Chapter Law Review Articles

Boxing at the Crossroads (panel discussion), 11 Seton Hall J. Sport L. 193 (2001).

Giving Violence a Sporting Chance: A Review of Measures Used to Curb Excessive Violence in Professional Sports, Melnik, 17 J. Legis. 123 (1990).

Sports Agents Representing Athletes: The Need for Comprehensive State Legislation, Rypma, 24 Val. U.L. Rev. 481 (1990).

Chapter Collateral References

Recovery in tort for wrongful interference with chance to win game, sporting event, or contest. 85 ALR 4th 1048.

Products liability: competitive sports equipment. 76 ALR 4th 201.

Liability for injury to one attending wrestling or boxing match or exhibition. 14 ALR 3d 993.

Part 3
General

23-3-301. Definitions.

Compiler's Comments

2001 Amendment: Chapter 483 in definition of department substituted reference to department of labor and industry for reference to department of commerce and at end substituted "part 17" for "part 18". Amendment effective July 1, 2001.

Part 4
Board of Athletics

23-3-401. Board organization — compensation — department to keep records.

Compiler's Comments

2001 Amendment: Chapter 492 in (1) deleted former second sentence that read: "Two of the members of the board constitute a quorum to do business, and except as provided in 23-3-402, the concurrence of at least two members is necessary to take board action." Amendment effective October 1, 2001.

1993 Amendment: Chapter 11 in (1) substituted annual election requirement for former requirement that the Board meet before April 1 of each year; and made minor changes in style.

1983 Correction: The Code Commissioner corrected an erroneous internal reference in second sentence of (1). The reference was to "section 6", which is codified as 23-3-404, but should have been to "section 4", now codified as 23-3-402.

Administrative Rules

ARM 24.117.101, 24.117.201, and 24.117.202 Organizational and procedural rules — public participation.

23-3-402. Enforcement of rules by board member — board designees.

Administrative Rules

ARM 24.117.906 Inspectors.

23-3-403. Board member conflict of interest.

Compiler's Comments

1985 Amendment: In (1) after "wrestler", deleted "or an amateur boxer"; and at end of (2), (3), and (4) after "match", deleted "or an amateur boxing match".

23-3-404. Board jurisdiction — license required — contestant participation.

Compiler's Comments

1985 Amendment: In (1) after "exhibition", inserted "including "so you think you are tough" boxing matches and mud wrestling" and after "involving", inserted "recognition".

Administrative Rules

ARM 24.117.301 Definitions.
ARM 24.117.402 and 24.117.406 Boxing and wrestling licenses — fees.
ARM 24.117.502 Promoter-matchmaker.
ARM 24.117.702 Boxing contestants.
ARM 24.117.705 Managers.
ARM 24.117.706 Elimination-type events.
ARM 24.117.901 through 24.117.904 Boxing officials.
ARM 24.117.1202 Wrestling contestants.
ARM 24.117.1203 Referee.

23-3-405. Rules.

Compiler's Comments

2005 Amendment: Chapter 202 in (3)(c) at end deleted "and the attendance of a licensed physician at ringside and must"; inserted (3)(e) relating to attendance of specified health care professionals; and made minor changes in style. Amendment effective April 8, 2005.

Name Change — Directions to Code Commissioner: Pursuant to sec. 33, Ch. 519, L. 2005, in (3)(e)(ii) the code commissioner substituted "physician assistant" for "physician assistant-certified".

2003 Amendment: Chapter 375 in (2)(a) in first sentence after "include" deleted "but are not limited to the following" and after "granting" deleted "renewal" and in second sentence before "qualifications" inserted "License"; in (2)(b) inserted introductory clause making adoption of certain rules discretionary; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 14, Ch. 375, L. 2003, was a saving clause.

1985 Amendment: Inserted (2)(f) authorizing the Board to adopt rules to review decisions of officials.

Statement of Intent: The statement of intent attached to HB 691 (Ch. 506, L. 1983) provided: "A statement of intent is required for this bill because it grants rulemaking authority to the Board of Athletics. Qualifications for licensure to conduct boxing or wrestling events or to act as a referee, manager, or judge should be based primarily on particular knowledge required for the particular license and the integrity of the applicant, as indicated by past activities. To this end, the rules should address means of determining knowledge and integrity, such as affidavits or references evidencing experience and good reputation in the particular field.

The Board should also look to the regulations established by the World Boxing Association for guidance.

The intention of the legislature is that the Board may not meet within 48 hours of any wrestling or boxing match or exhibition over which it has jurisdiction."

Administrative Rules

Title 24, chapter 117, ARM Regulation of boxing and wrestling participants, promoters, officials, matches, and equipment.

Part 5
Licenses

23-3-501. Licenses — fees.

Compiler's Comments

2005 Amendment: Chapter 467 in (4) after "fee" deleted "commensurate with costs for that license"; and made minor changes in style. Amendment effective July 1, 2005.

2003 Amendment: Chapter 375 near beginning of (1) before "license" deleted "renewable"; in (2) before "licenses" deleted "renewable"; at end of (3) after "rule" deleted "and may be renewed upon payment of a fee set by the board"; and made minor changes in style. Amendment effective July 1, 2003.

Saving Clause: Section 14, Ch. 375, L. 2003, was a saving clause.

1997 Amendment: Chapter 492 in (1), near beginning, and in (2) substituted "renewable" for "annual"; inserted (3) concerning expiration of license; in (4), after "Each application for", deleted "an original" and after "under this section" deleted "or renewal of a license"; and made minor changes in style. Amendment effective July 1, 1997.

Administrative Rules

ARM 24.117.402 and 24.117.406 Boxing and wrestling licenses — fees.
ARM 24.117.502 Promoter-matchmaker.
ARM 24.117.705 Managers.
Title 24, chapter 117, subchapter 9, ARM Boxing officials.
ARM 24.117.1203 Referee.

23-3-502. Bond — conditions.

Administrative Rules

ARM 24.117.406 General licensing requirements.

Part 6
Reporting Requirements
Penalties

23-3-601. Report of ticket sales — tax on gross receipts — disposition of money received.

Compiler's Comments

1983 Amendment: In (2), substituted "state special revenue fund" for "earmarked revenue fund".

Administrative Rules

ARM 24.117.502 Promoter-matchmaker.

23-3-603. Discipline.

Administrative Rules

ARM 24.117.404 Contracts and penalties.
ARM 24.117.702 Boxing contestants.
ARM 24.117.902 Referee.

CHAPTER 4
HORSERACING

Chapter Administrative Rules

Title 32, chapter 28, ARM Horseracing.

Chapter Law Review Articles

Tax Considerations in Owning Thoroughbred Race Horses, Dilley, R. Weber, & E. Weber, 87 Tax Notes 1253 (2000).

Horse Sense and the UCC: The Purchase of Racehorses, Kropp, Landen, & Heyd, 1 Marq. Sports L.J. 171 (1991).

Practice and Procedure Before Racing Commissions, Klein & Garrison, 78 Ky. L.J. 477 (1990).

Thoroughbred Racing—Getting Back on Track, Meeker, 78 Ky. L.J. 435 (1990).

Chapter Collateral References

Recovery in tort for wrongful interference with chance to win game, sporting event, or contest. 85 ALR 4th 1048.

Veterinarian's liability for malpractice. 71 ALR 4th 811.

Part 1
Administration

23-4-101. Definitions.

Compiler's Comments

2001 Amendment: Chapter 483 in definition of department substituted reference to department of livestock for reference to department of commerce and at end substituted "part 31" for "part 18". Amendment effective July 1, 2001.

1997 Amendment: Chapter 18 in definition of immediate family, near middle after "chapter", inserted "who have a permanent or continuous residence in the household of the official or licensee". Amendment effective February 11, 1997.

Severability: Section 9, Ch. 18, L. 1997, was a severability clause.

1995 Amendment: Chapter 207 in definition of race meet, in (a), inserted language expanding race meet to include simulcast horseraces, mule races, and greyhound races and inserted (b) excluding live greyhound racing; inserted definition of racing; in definitions of simulcast and simulcast facility inserted reference to mule race or greyhound race; and made minor changes in style. Amendment effective March 23, 1995.

1989 Amendments: Chapter 192 in definition of race meet inserted "or mules"; and in definition of Board of Stewards substituted "race" for "racing". Amendment effective March 20, 1989.

Chapter 557 at end of definition of race meet inserted "The term includes simulcast races"; and inserted definitions of simulcast and simulcast facility. Amendment effective April 15, 1989.

1983 Amendment: Inserted (3) defining immediate family; inserted (4) defining minor; in (5) after "corporations" inserted "fair boards"; in (6) after "means" deleted "an exhibition of thoroughbred, purebred, or" and inserted "racing of"; after "registered" substituted "horses" for "horseracing"; inserted (7) defining steward; and inserted (8) defining Board of Stewards.

1981 Amendment: Substituted "department of commerce" for "department of professional and occupational licensing" in (2) and changed internal references to the department and the board.

Administrative Rules

ARM 32.28.202 Definitions.

Collateral References

Gaming *key* 2.

38 C.J.S. Gaming §§2 through 8.

38 Am. Jur. 2d Gambling §1, et seq.

23-4-102. Presiding officer — quorum — costs — salary.

Compiler's Comments

1997 Amendment: Chapter 18 in (1), at beginning of second sentence, increased from three to four the number of Board members necessary to constitute a quorum; and made minor changes in style. Amendment effective February 11, 1997.

Severability: Section 9, Ch. 18, L. 1997, was a severability clause.

1989 Amendment: In (3) increased salary of Board members from $25 to $50 a day.

23-4-104. Duties of board.

Compiler's Comments

1989 Amendments: Chapter 192 in first sentence substituted "race" for "horserace"; and in (9), relating to responsibility of trainers, inserted "and mules". Amendment effective March 20, 1989.

Chapter 557 inserted (12) relating to time, conduct, and supervision of simulcast races; and inserted (13) relating to licensing, approval, and regulation of simulcast facilities. Amendment effective April 15, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 557, L. 1989, provided: "A statement of intent is required for this bill because it delegates new rulemaking and licensing authority to the board of horseracing.

This bill will expand existing simulcast wagering and allow for regulated parimutuel wagering on simulcast races at satellite facilities year around. For this purpose, the bill delegates authority to the board to adopt rules governing the time, conduct, and supervision of simulcast races and parimutuel betting with respect to simulcast races, as well as rules for licensing, approval, and regulation of simulcast facilities.

This bill authorizes the board to license simulcast facilities."

1983 Amendment: In introductory clause substituted "horserace" for "race"; in (5) before "presiding steward" inserted "executive secretary"; and added (9) through (11) requiring the Board to adopt rules for establishing the absolute liability of trainers, licensing or renewal of suspended licenses, and setting of license fees.

1983 Statement of Intent: The statement of intent attached to Ch. 563, L. 1983, provided: "A statement of intent is required for this bill because it expands the existing rulemaking authority of the Board of Horseracing granted under a previous act.

It is contemplated that the rules shall address the following:

1. absolute responsibility of trainers for the condition of horses, regardless of the acts of third parties;

2. refusal to license persons whose licenses have been suspended or revoked by another horse racing jurisdiction;

3. exclusion from race courses in this state persons considered detrimental to the best interests of racing;

4. standards to be applied in determining conditions under which a license may be renewed if it has been suspended;

5. summary ruling during race meets by stewards, stay of imposition of summary penalties, and assessment of interest and penalty on late payment of fines; and

6. retention of purses pending final disposition of complaints, protests or appeals; allowing and regulating exotic wagering; and providing for the disposition of the 2% wagering share allocation under 23-4-202(4)(d) and for the other purposes specified.

It is the intent of the Legislature, that if the Board decides to authorize new forms of racing not currently engaged in in Montana, it shall do so after holding public hearings to determine the effects of these forms of racing on the existing saddle racing program in Montana. The Board should consider both economic and safety impacts on the existing racing and breeding industry."

Administrative Rules

ARM 32.28.101 Board organization.

Title 32, chapter 28, subchapter 2, ARM Procedural rules.

Title 32, chapter 28, subchapter 3, ARM Additional administrative rules of procedure.

Title 32, chapter 28, subchapter 4, ARM Powers and duties of executive secretary.

Case Notes

Statute Constitutes Valid Delegation of Legislative Authority: This statute gives the Board definite instructions as to what particular areas of the horseracing business require regulation. The Board's medication and veterinary rules and regulations were adopted pursuant to a valid delegation of legislative authority. In re Peila, 249 M 272, 815 P2d 139, 48 St. Rep. 655 (1991).

Collateral References

Propriety of exclusion of persons from horseracing tracks for reasons other than color or race. 64 ALR 5th 769.

Disciplinary proceedings against horse trainer or jockey. 59 ALR 5th 203.

Disciplinary proceedings against horse trainer or jockey. 52 ALR 3d 206.

23-4-105. Authority of board.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 314 in second sentence after "deposited in" substituted "a state special revenue" for "the board's agency fund" and after "account" inserted "and are statutorily appropriated to the board as provided in 17-7-502" and in fourth sentence after "currently" substituted "authorized" for "engaged". Amendment effective July 1, 2007.

Chapter 467 at beginning of first sentence after "shall" deleted "subject to 37-1-101 and 37-1-121"; and made minor changes in style. Amendment effective July 1, 2005.

1997 Amendment: Chapter 18 inserted second and third sentences regarding deposit and distribution of collected funds; and made minor changes in style. Amendment effective February 11, 1997.

Severability: Section 9, Ch. 18, L. 1997, was a severability clause.

1989 Amendments: Chapter 192 in first sentence substituted "racing" for "horseracing". Amendment effective March 20, 1989.

Chapter 557 near beginning of second sentence inserted "including new forms of simulcast racing". Amendment effective April 15, 1989.

1983 Amendment: Substituted existing language requiring the Board, subject to 37-1-101 and 37-1-121, to license and regulate horseracing and to review race meets held in the state for "The board shall, subject to 37-1-101 and 37-1-121, license, regulate, and supervise race meets

held in this state under this chapter and shall have the places where race meets are held visited and inspected at least once a year."

23-4-106. Executive secretary — powers and duties — staff — prohibition on racing activities.

Compiler's Comments

1997 Amendment: Chapter 18 near beginning of (4) substituted "staff member" for "a member of his staff"; and made minor changes in style. Amendment effective February 11, 1997.

Severability: Section 9, Ch. 18, L. 1997, was a severability clause.

1991 Amendment: Inserted (2)(d) concerning prescribing duties and salary of state stewards; and made minor change in style. Amendment effective April 16, 1991.

1989 Amendment: In first sentence of (4) inserted "or mule" and in second sentence substituted "race" for "racing". Amendment effective March 20, 1989.

Administrative Rules

Title 32, chapter 28, subchapter 4, ARM Powers and duties of executive secretary.

Part 2
Race Meets

Part Collateral References

Exclusion of persons: propriety of exclusion of persons from horseracing tracks for reasons other than color or race. 90 ALR 3d 1361.

23-4-201. Licenses.

Compiler's Comments

2005 Amendment: Chapter 467 in (2) in second sentence after "chapter" deleted "subject to 37-1-101(6)"; and made minor changes in style. Amendment effective July 1, 2005.

1989 Amendment: Near beginning of (1) inserted "including simulcast race meets under the parimutuel system"; inserted (6) relating to who may apply for a license to hold a simulcast race meet; and made minor changes in phraseology. Amendment effective April 15, 1989.

1983 Amendment: In (2) and (3), substituted existing language requiring race meet participant to be licensed and charged fee by the Board for former text, which read: "(2) A person who participates in a race meet shall be licensed and charged an annual fee not to exceed $15, which shall be paid to the department and used for expenses of the board, subject to 37-1-101(6). Each person holding a license under this chapter and every owner, trainer, jockey, and attendant at a racecourse in this state shall comply with this chapter and with the rules adopted and orders issued by the board.

(3) A person who has been convicted of a crime involving moral turpitude may not be issued a license of any kind, nor may a license be issued to a person who has violated this chapter or the rules of the board or who has failed to pay the fees, taxes, or moneys required under this chapter."; in (5) after "fair board" inserted "and an independent racing association"; and after "race meets" deleted "in conjunction with its regularly scheduled fair shall".

Administrative Rules

Title 32, chapter 28, subchapter 7, ARM Occupational licenses.

Collateral References

Gaming *key* 4; Theaters and Shows *key* 3.

38 C.J.S. Gaming §§9 through 13, 58, 86; 86 C.J.S. Theaters and Shows §22.

38 Am. Jur. 2d Gambling §§14, 17 through 19.

23-4-202. Penalty for violations of law — authority of board — judicial review.

Compiler's Comments

2005 Amendment: Chapter 314 in (2) near end after "whom the board" inserted "or board of stewards"; in (4)(d) in first sentence after "deposited in" substituted "a state special revenue" for "the board's agency fund" and after "account" inserted "and statutorily appropriated to the board as provided in 17-7-502"; and made minor changes in style. Amendment effective July 1, 2007.

1997 Amendment: Chapter 18 substituted (4)(d) regarding set aside and distribution of exotic wagers for former language that read: "setting aside up to 2% of exotic wagering on races, including simulcast races, to be used as a bonus for owners pursuant to 23-4-304(2). Up to 30% of the amount set aside may be used to defray administrative costs in addition to the 20% already withheld under 23-4-302". Amendment effective February 11, 1997.

Severability: Section 9, Ch. 18, L. 1997, was a severability clause.

1995 Amendment: Chapter 509 in (3), at end, inserted "Fines collected under this subsection must be deposited in the general fund"; and made minor changes in style. Amendment effective July 1, 1995.

1989 Amendment: Near beginning of (4)(d) inserted "including simulcast races"; inserted (4)(e) relating to using 2% of exotic wagering on live racing for distribution to certain purses; inserted (4)(h) relating to standards for simulcast facilities; inserted (4)(i) relating to conduct and supervision of simulcast races and betting; and made minor changes in phraseology. Amendment effective April 15, 1989.

1983 Amendment: In (2), after first "board" inserted "or, upon the board's authorization, the board of stewards of a race meet at which they officiate"; at end of (2) added "as defined by rules of the board"; at beginning of (3) inserted "As its own formal act or through an act of a board of stewards of a race meet,"; in (3) increased maximum fine from $500 to $1,000; at end of (4) added "The rules may include provisions for the following:"; inserted (4)(a) through (4)(f) requiring the Board to promulgate rules relating to penalties for violating horseracing statutes; and inserted (5) granting the District Court or the First Judicial District exclusive jurisdiction to review horseracing cases.

Statement of Intent: The statement of intent attached to Ch. 563, L. 1983, provided: "A statement of intent is required for this bill because it expands the existing rulemaking authority of the Board of Horseracing granted under a previous act.

It is contemplated that the rules shall address the following:

1. absolute responsibility of trainers for the condition of horses, regardless of the acts of third parties;

2. refusal to license persons whose licenses have been suspended or revoked by another horse racing jurisdiction;

3. exclusion from race courses in this state persons considered detrimental to the best interests of racing;

4. standards to be applied in determining conditions under which a license may be renewed if it has been suspended;

5. summary ruling during race meets by stewards, stay of imposition of summary penalties, and assessment of interest and penalty on late payment of fines; and

6. retention of purses pending final disposition of complaints, protests or appeals; allowing and regulating exotic wagering; and providing for the disposition of the 2% wagering share allocation under 23-4-202(4)(d) and for the other purposes specified.

It is the intent of the Legislature, that if the Board decides to authorize new forms of racing not currently engaged in in Montana, it shall do so after holding public hearings to determine the effects of these forms of racing on the existing saddle racing program in Montana. The Board should consider both economic and safety impacts on the existing racing and breeding industry."

Administrative Rules

Title 32, chapter 28, subchapter 15, ARM Corrupt practices and penalties.

Case Notes

Opportunity for Presentation of Factual Contentions of Both Sides of Dispute Required to Meet Due Process Requirements in Stewards' Decision: The portion of ARM 8.22.302 (transferred to ARM 32.28.302) providing that the Board of Horseracing may not substitute its judgment for that of the stewards as to the weight of the evidence on questions of fact is unconstitutional in situations in which the stewards make a factual determination without affording both sides an opportunity to be heard. Deference to the stewards' decision is appropriate only if the stewards have weighed the factual contentions of both sides of the dispute. The stewards' failure to contact one racing contestant on race day regarding their decision to disqualify a horserace winner constituted a violation of that contestant's due process right to an opportunity to be heard. In these cases, the Board of Horseracing should not defer to the stewards' decision but rather should conduct a de novo administrative hearing and make its own findings of fact. Smith v. Bd. of Horseracing, 1998 MT 91, 288 M 249, 956 P2d 752, 55 St. Rep. 363 (1998).

Statute and Regulations Not Unconstitutionally Vague: The regulations enacted by the Board clearly define prohibited conduct to persons of common intelligence, and the statute clearly sets out the sanctions for violation of Board regulations. The statutes and regulations pertinent to the present case are not unconstitutionally vague. In re Peila, 249 M 272, 815 P2d 139, 48 St. Rep. 655 (1991).

23-4-203. Race meets — when lawful.

Compiler's Comments

1989 Amendment: Near beginning, before "race", inserted "live or simulcast"; and after "racetrack or" inserted "simulcast facility or". Amendment effective April 15, 1989.

23-4-204. Race exclusively for Montana-bred horses — bonus for winner.

Compiler's Comments

2005 Amendment: Chapter 314 in (3) in first sentence after "deposited in" substituted "a state special revenue account" for "the board's agency fund account" and inserted second sentence statutorily appropriating the funds to the board as provided in 17-7-502. Amendment effective July 1, 2007.

1997 Amendment: Chapter 18 in (1) inserted third sentence requiring a 20% higher purse in races involving Montana-bred horses; in (2), at end of first sentence, inserted requirement that 10% of the first money be paid within 30 days; in (3) substituted language regarding deposit and distribution of simulcast wagering for former language that read: "Two percent of exotic wagering on a simulcast race shall be placed in a fund to be distributed by the board, in addition to existing Montana breeders' awards, on a percentage basis of actual breeders' awards earned"; deleted former (4) that read: "(4) Up to 10% of the amount set aside for Montana breeders' awards may be used to defray administrative costs in addition to the 20% withheld under 23-4-302"; and made minor changes in style. Amendment effective February 11, 1997.

Severability: Section 9, Ch. 18, L. 1997, was a severability clause.

1989 Amendment: Inserted (3) relating to placing 2% of exotic wagering on simulcast races in a fund for distribution to Montana breeders; and inserted (4) relating to using 10% of amount set aside to defray administrative costs. Amendment effective April 15, 1989.

1983 Amendment: In (1), after "valuable" deleted "thoroughbred, purebred, quarter horse, appaloosa, or"; and near middle of (1) after "state" inserted "unless, in the board's judgment, there is an insufficient number of Montana-bred horses for such a race".

23-4-205. Public liability insurance.

Compiler's Comments

1989 Amendment: Near middle inserted "or operate a simulcast facility". Amendment effective April 15, 1989.

Collateral References

Liability for injury or death of participant in automobile or horse race at public track. 13 ALR 4th 623.

Liability of owner or operator of horseracing or dogracing track for injury from racing operations or condition of premises. 87 ALR 2d 1179, superseded in part by 13 ALR 4th 623, 77 ALR 3d 1300.

Part 3
Parimutuel Betting

Part Administrative Rules

Title 32, chapter 28, subchapter 16, ARM Parimutuel operations.

23-4-301. Parimutuel betting — other betting illegal.

Compiler's Comments

1993 Amendment: Chapter 449 near end of (1) inserted reference to 23-5-502. Amendment effective April 21, 1993.

1991 Amendment: In (3), after "may", substituted "simulcast live races at" for "on the day a race meet is conducted, also provide" and deleted last two sentences that provided: "The board shall approve only intrastate races and races of national prominence to the Montana racing season. However, the board has authority to approve races from other states during the off-season." Amendment effective April 20, 1991.

1989 Amendment: Near middle of first sentence of (3) substituted "simulcast facility" for "enclosure", at end of first sentence substituted "simulcast races approved by the board" for "the following simulcast or televised races:

(a) the Kentucky derby;
(b) the Preakness;
(c) the Belmont;
(d) the Travers;
(e) the all-American futurity;

(f) the Arlington million; and

(g) the Marlboro cup", and inserted last two sentences relating to races the Board may approve; inserted (5) relating to combining parimutuel pools of simulcast facility and racing facility conducting intrastate simulcast race meet; inserted (6) relating to distribution of negotiated purse money from intrastate and interstate simulcast racing to tracks conducting live racing; and made minor changes in punctuation and phraseology. Amendment effective April 15, 1989.

1987 Amendment: Inserted (3) listing televised races on which licensee may conduct parimutuel betting.

1983 Amendment: Near end of (2), after "conducted" deleted "by the licensee at the race meet, if the parimutuel system is conducted".

Administrative Rules

Title 32, chapter 28, subchapter 16, ARM Parimutuel operations.

Title 32, chapter 28, subchapter 18, ARM Rules of trifecta and pick (N) wagering.

Law Review Articles

And They're Off: The Legality of Interstate Pari-Mutuel Wagering and Its Impact on the Thoroughbred Horse Industry, Bishop, 89 Ky. L.J. 711 (2001).

Collateral References

Gaming *key* 6; States *key* 21.

38 C.J.S. Gaming §28; 81A C.J.S. States §36.

38 Am. Jur. 2d Gambling §§17 through 19, 44 through 47, 74.

23-4-302. Distribution of deposits — breakage.

Compiler's Comments

2005 Amendment: Chapter 314 in (3) near end of first sentence after "deposit it in" substituted "a state special revenue" for "the board's agency fund" and inserted second sentence statutorily appropriating the funds to the board as provided in 17-7-502. Amendment effective July 1, 2007.

1997 Amendment: Chapter 18 in (1), near middle, increased amount allowed for breakage on exotic wagering from 25% to 26%; in (2), near middle after "may not exceed", substituted "26%, unless the signal originator percentage is higher, in which case the Montana simulcast licensee may adopt the same percentage withheld as the place where the signal originated" for "25%"; in (3), near beginning after "1% of", substituted "the total amount wagered on the race meet and deposit it in the board's agency fund account. The board shall then distribute all funds collected under this subsection to live race purses or for other purposes that the board considers appropriate for the good of the existing horseracing industry" for "its total parimutuel handle of the simulcast facility and give it to the local fair board. The money must be used to operate or enhance the county fairgrounds facility"; and made minor changes in style. Amendment effective February 11, 1997.

Severability: Section 9, Ch. 18, L. 1997, was a severability clause.

1991 Amendment: In middle of (2) increased percentage from 24% to 25%. Amendment effective April 20, 1991.

1989 Amendment: In (1) substituted "24%" for "22%"; inserted (2) relating to distribution requirements for simulcast race pools; and inserted (3) relating to distributions to local fair board. Amendment effective April 15, 1989.

1983 Amendment: Near middle of section, after "an amount which" inserted "in the case of exotic wagering on races, shall not exceed 22%, and in all other races".

23-4-303. Licensee's right to withhold deposits.

Compiler's Comments

1999 Amendment: Chapter 584 at beginning inserted reference to 15-10-420 and at end inserted "provided for in 23-4-302"; and made minor changes in style. Amendment effective May 10, 1999.

Severability: Section 172, Ch. 584, L. 1999, was a severability clause.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

23-4-304. Gross receipts — department's percentage — collection and allocation.

Compiler's Comments

2005 Amendment: Chapter 314 in (1)(a) in sixth sentence after "deposited in", in (1)(b) in seventh sentence after "deposited in", and in (2) near middle after "passing through" substituted

"a state special revenue" for "the board's agency fund"; and inserted (3) statutorily appropriating the funds to the board as provided in 17-7-502. Amendment effective July 1, 2007.

1997 Amendment: Chapter 18 in (1)(a) inserted sixth and seventh sentences regarding deposit and distribution of gross receipts; in (1)(b), at end, inserted seventh and eighth sentences regarding deposit and distribution of exotic wagers; substituted (2) regarding use of exotic wager proceeds for former (2) through (4) that read: "At the end of the racing season, sums collected under 23-4-202(4)(d) must be distributed by the department, after first passing through the board's agency fund account, to the licensed owners of those Montana-bred horses or mules finishing in the money at the meet from which th sums derived. The owner's award must be calculated as follows:

(a) divide the total amount collected under 23-4-202(4)(d) by the total amount won by Montana-bred horses or mules;

(b) multiply the quotient derived under subsection (2)(a) by the total amount of money won by each owner's Montana-bred horses or mules.

(3) For purposes of the owner's award under subsection (2), "owner" means the individual, partnership, corporation, person, or other entity that owns the horse or mule at the time of entry.

(4) Licensees may not consider the sums available under 23-4-202(4)(d) when establishing purses"; and made minor changes in style. Amendment effective February 11, 1997.

Severability: Section 9, Ch. 18, L. 1997, was a severability clause.

1989 Amendments: Chapter 192 in first sentence of (2) and at end of (2)(a) and (2)(b) inserted "or mules"; and near middle of (3) inserted "or mule". Amendment effective March 20, 1989.

Chapter 557 inserted (1)(b) relating to reimbursement required to be paid to Department. Amendment effective April 15, 1989.

1983 Amendment: At end of (1), inserted last sentence requiring licensee to pay the Department all sums collected on exotic wagering on races; and inserted (2) through (4) relating to the allocation of horse owners' awards.

23-4-305. Deposit of unclaimed money.

Compiler's Comments

1983 Amendments: Chapter 277 substituted reference to state special revenue fund for reference to earmarked revenue fund.

Chapter 563 substituted existing language requiring each licensee holding a race meet to report to the Board within 30 days of the end of the meet the total value of all unclaimed winning tickets from each parimutuel pool for "Each licensee holding a horse race meeting shall within 30 days of the end of the meeting pay to the department for deposit in the earmarked revenue fund for the board of horse racing all unclaimed winning ticket money from any parimutuel pool." This made the amendment by Ch. 277 ineffective.

CHAPTER 5
GAMBLING

Chapter Compiler's Comments

Transfer of Functions: Chapter 642, L. 1989, which transferred administration of parts 1 through 6 of this chapter from the Departments of Commerce and Revenue and from local governments to the Department of Justice, contained in sections 66 and 67 provisions stating that 2-15-131 through 2-15-137 govern the transfer of functions and that the Governor shall by executive order implement Ch. 642 and may by such order assign, consistent with Ch. 642, to the Department of Justice functions allocated to the Departments of Commerce and Revenue by the 51st Legislature and relating to parts 1 through 6 of this chapter.

Chapter Law Review Articles

The Economic Winners and Losers of Legalized Gambling, Kearney, 58 Nat'l Tax J. 281 (2005).

A Guide Through the Pitfalls of Gaming Law, Faiss & Cabot, 56 INTER-ALIA 17 (1991).

Compulsive Gambling: A Selected, Annotated Bibliography, Haythorn, 82 L. Libr. J. 147 (1990).

Rolling the Dice: Should Intoxicated Gamblers Recover Their Losses?, Hallam, 85 Nw. U.L. Rev. 240 (1990).

The Future of Gambling in Indian Country, Sokolow, 15 Am. Indian L. Rev. 151 (1990).

Chapter Collateral References

38 C.J.S. Gaming §§1 through 13, et seq.

38 Am. Jur. 2d Gambling §1, et seq.

Validity of state or local gross receipts tax on gambling. 21 ALR 5th 812.

Recovery in tort for wrongful interference with chance to win game, sporting event, or contest. 85 ALR 4th 1048.

Construction and application of statute or ordinance prohibiting or regulating bookmaking or pool selling. 84 ALR 4th 740.

Validity, construction, and application of statute or ordinance prohibiting or regulating use or occupancy of premises for bookmaking or pool selling. 82 ALR 4th 356.

Validity of statute or ordinance prohibiting or regulating bookmaking or pool selling. 80 ALR 4th 1079.

Validity, construction, and application of statute or ordinance prohibiting or regulating use of messenger services to place wagers in pari-mutuel pool. 78 ALR 4th 483.

Validity, construction, and application of statutes or ordinances involved in prosecutions for transmission of wagers or wagering information related to bookmaking. 53 ALR 4th 801.

Validity, construction, and application of statutes or ordinances involved in prosecutions for possession of bookmaking paraphernalia. 51 ALR 4th 796.

Admissibility of expert testimony as to modus operandi of crime—modern cases. 31 ALR 4th 798.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon. 98 ALR 3d 694.

Law of forum against wagering transactions as precluding enforcement of claim based on gambling transactions valid under applicable foreign law. 71 ALR 3d 178.

Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 ALR 3d 663.

Right or duty to refuse telephone, telegraph, or other wire service in aid of illegal gambling operations. 30 ALR 3d 1143.

Gambling in private residence as prohibited or permitted by anti-gambling laws. 27 ALR 3d 1074.

Validity of criminal legislation making possession of gambling or lottery devices or paraphernalia presumptive or prima facie evidence of other incriminating facts. 17 ALR 3d 491.

Constitutionality of statutes providing for destruction of gambling devices. 14 ALR 3d 366.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gambling "devices" within criminal statute or ordinance. 1 ALR 3d 726.

Criminal conspiracies as to gambling. 91 ALR 2d 1148.

Admissibility, in prosecution for gambling or gaming offense, of evidence of other acts of gambling. 64 ALR 2d 823.

Entrapment to commit offense with respect to gambling or lotteries. 31 ALR 2d 1212.

Validity, construction, and application of 18 USCS §1955 prohibiting illegal gambling businesses. 21 ALR Fed. 708.

Validity and construction of federal statute (18 USC §1084(a)) making transmission of wagering information a criminal offense. 5 ALR Fed. 166.

Validity and construction of federal statute (18 USC §1953) dealing with interstate transportation of wagering paraphernalia—federal cases. 17 L Ed 2d 984.

Part 1
General Provisions, Proceedings, and Penalties

Part Administrative Rules

Title 23, chapter 16, ARM Department of Justice rules regulating gambling — Gambling Control Division.

Part Case Notes

Gambling — Non-Indian Defendants for Crimes Committed on Reservation — Criminal Law Jurisdiction — Standing: The state has jurisdiction over non-Indian defendants for crimes committed on the reservation when there is no Indian victim. Non-Indian defendants do not have standing to raise the argument that the action of the state interferes with the self-government of the Blackfeet Reservation. The state has authority to regulate gambling by non-Indians on the

Blackfeet Reservation. State ex rel. Poll v. District Court, 257 M 512, 851 P2d 405, 50 St. Rep. 387 (1993).

Groups Empowered to Legalize Gambling: The term "the people", as used in Art. III, sec. 9, Mont. Const., is synonymous with the voters of the entire State of Montana and not the voters of a local government unit. Therefore, the Legislature or "the people" of the entire state are the only two groups empowered to legalize forms of gambling in this state. Anaconda-Deer Lodge County v. Lorello, 181 M 195, 592 P2d 1381 (1979).

Part Law Review Articles

Internet Gambling Law, Kelly, 26 Wm. Mitchell L. Rev. 117 (2000).

The Supreme Court's Botched Surgery of the Indian Gambling Regulatory Act, Bride 24 J. Legis. 149 (1998).

An Introduction and Overview of Taxation and Indian Gaming, Taylor, 29 Ariz. St. L.J. 251 (1997).

Economic Development and Gaming, Green, 9 St. Thomas L. Rev. 149 (1996).

Video Gambling Devices, Rychlak, 37 U.C.L.A. L. Rev. 555 (1990).

23-5-110. Public policy of state concerning gambling.

Compiler's Comments

1993 Amendment: Chapter 398 in (2) and (3) extended reference from parts 1 through 6 to parts 1 through 8.

23-5-111. Construction and application.

Compiler's Comments

1993 Amendment: Chapter 398 near beginning, after "constitution", substituted "parts 1 through 8 of this chapter" for "Chapter 642, Laws of 1989" and at end substituted "those parts" for "Chapter 642, Laws of 1989"; and deleted former (2) that read: "(2) This chapter applies only to public gambling activities within the state of Montana."

Effective Date: Section 75, Ch. 642, L. 1989, provided that subsection (1) of this section (enacted by sec. 65 of Ch. 642) is effective May 5, 1989, and subsection (2) is effective October 1, 1989.

Administrative Rules

ARM 23.16.3001 Illegal gambling — presumption.

ARM 23.16.3002 Procedure upon presumption.

Case Notes

DECISIONS UNDER FORMER SECTION 23-5-106
WHICH PROHIBITED BRACE AND BUNCO

Confidence or Bunco Game: Any game which is outlawed by this statute (23-5-106, now repealed) may be a confidence or bunco game, for the design and conduct of those who use it give it its character under this statute. St. v. Hale, 134 M 131, 328 P2d 930 (1958).

Gambling Devices: The games described in this section (23-5-106, now repealed) are purported gambling devices so contrived, although masked as legitimate operations, as to bilk the victim of his wager by manipulation. These games do not depend upon the active or passive emotions of the victim. St. v. Hale, 134 M 131, 328 P2d 930 (1958).

Morocco: Defendant who used and dealt with game of "Morocco", a confidence game and bunco game, to win money from his victim was properly convicted of the crime prohibited by this section (23-5-106, now repealed). St. v. Hale, 134 M 131, 328 P2d 930 (1958).

Penalty: The penalty of violating this statute (23-5-106, now repealed) is imposed upon every person who uses or deals with any game commonly known as a confidence game or bunco, as well as one who wins. St. v. Hale, 134 M 131, 328 P2d 930 (1958).

Purpose of Statute: This statute (23-5-106, now repealed) is aimed at the person who uses or deals with a confidence game, or bunco game, and not so much against the inanimate paraphernalia so used. This statute covers a separate and distinct crime from that covered by section 94-1806, R.C.M. 1947 (now repealed). St. v. Hale, 134 M 131, 328 P2d 930 (1958).

Attorney General's Opinions

"Crane Games" Illegal: A "crane game", also known as a "crane machine" or "skill crane", which involves the operation of a mechanical, electromechanical, or electronic device where money or some other thing of value is risked for gain or prize, other than the chance to win a replay, is an unauthorized gambling device used for gambling activity and is prohibited (prior to 1991 enactment of Title 23, ch. 6, authorizing amusement games). 43 A.G. Op. 39 (1989).

Collateral References

38 Am. Jur. 2d Gambling §§12, 18.

23-5-112. Definitions.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 134 in definition of manufacturer inserted (b) relating to testing; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 201 in definition of illegal gambling enterprise inserted (e) concerning internet gambling; inserted definition of internet gambling; and made minor changes in style. Amendment effective October 1, 2005.

1997 Amendments: Chapter 13 in definition of license, near middle, substituted reference to sports tab game seller for reference to sports tab card manufacturer; and made minor changes in style.

Chapter 252 in definition of illegal gambling enterprise inserted (d) to include credit gambling; and made minor changes in style.

1995 Amendment: Chapter 546 in definition of senior citizen center substituted "department of public health and human services" for "department of family services". Amendment effective July 1, 1995.

1993 Amendments — Composite Section: Chapter 398 throughout section substituted "parts 1 through 8" for "parts 1 through 6"; inserted definition of gift enterprise; in definition of illegal gambling enterprise, at end of (b), substituted "including activities authorized by 23-5-160" for "include an activity in which a participant rolls one or more dice for a chance to obtain a drink or music" and in (c), after "5", inserted "and 8"; in definition of license, after "means", substituted "a license for an operator, dealer, card room contractor, manufacturer of devices not legal in Montana, sports tab card manufacturer, manufacturer of electronic live bingo or keno equipment" for "an operator's license"; in definition of lottery deleted "or "gift enterprise"" as defined term, at beginning of last sentence substituted "The term" for "However, "gift enterprise"", and at end substituted "of this title" for "cash or merchandise attendance prizes or premiums that the county fair commissioners of agricultural fairs and rodeo associations may give away at public drawings at fairs and rodeos"; and made minor changes in style.

Chapter 626 in definition of bingo, near end, substituted "one or more" for "a"; in definition of distributor, in (a), substituted "a licensed manufacturer, distributor, or route operator" for "another person" and in (b), after "sells", deleted "leases, or otherwise furnishes" and substituted "a licensed distributor, route operator, or operator" for "another person for use in public"; in definition of license substituted references to other manufacturer's, distributor's, and route operator's license for reference to manufacturer-distributor license; in definition of manufacturer, after "device", inserted "and who sells the equipment directly to a licensed distributor, route operator, or operator"; in definition of promotional game of chance inserted last sentence regarding disposition or distribution of property; inserted definition of route operator; and made minor changes in style.

The definition of license, amended by both chapters in a manner not creating a conflict, was slightly reworded by the codifier for grammatical purposes.

1991 Amendments: Chapter 473 in definition of card game table or table inserted reference to a table operated by a senior citizen center; in definition of live card game, at end, inserted "or in a senior citizen center"; inserted definition of senior citizen center; and made minor changes in style.

Chapter 523 in definition of gambling inserted language excluding amusement games regulated by Title 23, chapter 6, part 1. Amendment effective April 22, 1991.

Chapter 647 inserted definitions of card game tournament, nonprofit organization, and promotional game of chance; in definition of gambling inserted language excluding a promotional game of chance; in definition of illegal gambling device inserted (a) concerning pull tab devices and (b) concerning apparatus used for conducting illegal gambling enterprises, such as faro, roulette, or craps or certain slot machines; in definition of illegal gambling enterprise, in introductory clause after "violates", inserted "or is not specifically authorized by", inserted (a) concerning card games involving a bank, inserted (b) concerning dice games, and inserted (c) concerning sports betting; in definition of public gambling inserted (c) concerning a place the public does not have access to that solicits players; in definition of raffle, after "means a", substituted "form of lottery" for "gift enterprise", after "participant" substituted "pays valuable consideration for a ticket to become eligible" for "buys a chance or chances", and inserted last sentence concerning random selection of winners; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: This section was substantially expanded by insertion of 28 new definitions (see 1989 Session Law for text). Formerly, it only defined slot machine, which was redefined (see 1987 MCA for former text), and person. In definition of person, after "religious", deleted "fraternal"; and made minor changes in phraseology.

Administrative Rules

ARM 23.16.101 Definitions.

Case Notes

Poker Machines as Slot Machines: "Draw-80" poker machines, which were activated by a player inserting quarters, the player being awarded credits redeemable in cash for winning, were indistinguishable from slot machines under 23-5-101 (renumbered 23-5-112) and were therefore illegal [prior to the 1985 enactment of part 6 of this chapter]. Gallatin County v. D&R Music & Vending, Inc., 208 M 138, 676 P2d 779, 41 St. Rep. 224 (1984).

Attorney General's Opinions

"Crane Games" Illegal: A "crane game", also known as a "crane machine" or "skill crane", which involves the operation of a mechanical, electromechanical, or electronic device where money or some other thing of value is risked for gain or prize, other than the chance to win a replay, is an unauthorized gambling device used for gambling activity and is prohibited (prior to 1991 enactment of Title 23, ch. 6, authorizing amusement games). 43 A.G. Op. 39 (1989).

Collateral References

38 C.J.S. Gaming §§2 through 8.

38 Am. Jur. 2d Gambling §§1 through 4, 27, et seq.

23-5-113. Department as criminal justice agency.

Compiler's Comments

2005 Amendment: Chapter 134 deleted former (2) that read: "(2) Upon conviction for any violation of parts 1 through 8 of this chapter, the court may order any property seized by a department or local law enforcement agent during a lawful search to be forfeited to the department, sold, if necessary, and disposed of under 23-5-123"; and made minor changes in style. Amendment effective July 1, 2005.

1993 Amendment: Chapter 398 in (1) and (2) extended reference from parts 1 through 6 to parts 1 through 8.

1991 Amendment: Inserted (2) concerning seizure of property. Amendment effective July 1, 1991.

Administrative Rules

ARM 23.16.1931 Inspection and seizure of machines.

ARM 23.16.1932 Investigation of licensee.

ARM 23.16.3002 Procedure upon presumption of illegal gambling.

23-5-114. Department employees — activities prohibited.

Compiler's Comments

1991 Amendment: In (1), in introductory clause after "department", deleted "a former department employee during the first 365 days following termination of employment, or any peace officer or prosecutor" and at end, after "gambling", inserted "as designated by the attorney general"; in (1)(a) substituted "officer of a business" for "officer or manager of a corporation"; inserted (1)(b) concerning employment in a capacity involving conducting gambling activity or maintaining records for the activity; deleted former (2) that read: "(2) receive or share in, directly or indirectly, any profit of a gambling activity regulated by the department"; inserted (1)(d) concerning participation in a gambling activity; inserted (2) applying prohibitions to former employees during the first year following termination of employment; and made minor changes in style. Amendment effective April 26, 1991.

23-5-115. Powers and duties of department — licensing.

Compiler's Comments

1999 Amendment: Chapter 416 in (6) after "disclose" inserted "confidential criminal justice" and after "information" substituted language regarding information obtained in tax reporting processes, personal information, or trade secrets for language that read: "obtained in the application or tax reporting processes, except for general statistical reporting or studies or as provided in 23-5-116". Amendment effective October 1, 1999.

1993 Amendment: Chapter 398 throughout section extended reference from parts 1 through 6 to parts 1 through 8.

1991 Amendment: At end of (6) inserted reference to 23-5-116. Amendment effective July 1, 1991.

Effective Date: Section 75, Ch. 642, L. 1989, provided that subsection (2) of this section is effective May 5, 1989, and the remaining subsections are effective October 1, 1989.

Administrative Rules

Title 23, chapter 16, subchapter 1, ARM Gambling licenses generally.
Title 23, chapter 16, subchapter 2, ARM Gambling generally.
Title 23, chapter 16, subchapter 3, ARM Shake-a-day games.
Title 23, chapter 16, subchapter 4, ARM Card dealer licenses.
Title 23, chapter 16, subchapter 5, ARM Gambling operator licenses.
Title 23, chapter 16, subchapter 10, ARM Poker runs.
ARM 23.16.1101 Card game tournaments.
Title 23, chapter 16, subchapter 12, ARM Poker and other card games.
Title 23, chapter 16, subchapter 13, ARM Live keno games.
Title 23, chapter 16, subchapter 17, ARM Sports pools and sports tab games.
Title 23, chapter 16, subchapter 18, ARM Video gambling machines — general.
Title 23, chapter 16, subchapter 19, ARM Video gambling machine specifications.
Title 23, chapter 16, subchapter 20, ARM Manufacturers of gambling devices not legal in Montana.
Title 23, chapter 16, subchapter 21, ARM Automated accounting and reporting system implementation.
Title 23, chapter 16, subchapter 23, ARM Electronic live bingo and keno equipment.
Title 23, chapter 16, subchapter 24, ARM Live keno and bingo recordkeeping.
Title 23, chapter 16, subchapter 26, ARM Raffles.
Title 23, chapter 16, subchapter 28, ARM Calcutta pools.
Title 23, chapter 16, subchapter 30, ARM Illegal gambling — presumption and procedure.
Title 23, chapter 16, subchapter 31, ARM Casino nights.
Title 23, chapter 16, subchapter 32, ARM Fantasy sports leagues.
Title 23, chapter 16, subchapter 35, ARM Promotional games of chance.
Title 23, chapter 16, subchapter 38, ARM Carnival games.

23-5-116. Disclosure of information.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 416 in (1) after "disclose" substituted language requiring department, upon request, to disclose information concerning current or former gambling license applicant or licensee or other person engaged in gambling and outlining exceptions for former language in (1) and (2) that read: "from a license or permit application:

(a) the applicant's name;

(b) the address of the business where the activity under the license or permit is to be conducted;

(c) the name of each person who has an ownership interest in the business; and

(d) the types of permits requested by the applicant.

(2) The department shall, upon request, disclose:

(a) public criminal justice information, as defined in 44-5-103, as required by 44-5-301;

(b) all records and other information, except confidential criminal justice information, as defined in 44-5-103, that relates to:

(i) a sanction imposed under 23-5-136, for a violation of this chapter or a department rule; or

(ii) any other civil or administrative sanction or penalty imposed under a provision of this chapter or a department rule for a violation of this chapter or a department rule"; at beginning of (2) substituted "Notwithstanding the limitations set forth in subsection (1)" for "In addition to the information enumerated in subsections (1) and (2)"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 424 inserted (3) relating to providing status of tax payments. Amendment effective July 1, 1999.

1995 Amendments: Chapter 132 inserted (3)(c) allowing Department to provide certain gambling information to gambling regulatory agencies of jurisdictions outside the state; and made minor changes in style. Amendment effective March 13, 1995.

Chapter 178 inserted (2) requiring disclosure of criminal justice information and records and other information relating to sanctions imposed; in (3) inserted reference to subsection (2); and made minor changes in style. Amendment effective March 21, 1995.

Effective Date: Section 58(1), Ch. 647, L. 1991, provided that this section is effective on passage and approval. Approved April 26, 1991.

Administrative Rules

ARM 23.16.206 Public disclosure of information.

23-5-117. Premises approval.

Compiler's Comments

1995 Amendment: Chapter 480 in (4) extended time of permissible renewal from 1996 to 2001.

1993 Amendment: Chapter 398 at end of (1) substituted "subsections (2) and (3)" for "subsections (2) through (4)".

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this section is effective July 1, 1991.

23-5-118. Transfer of ownership interest.

Compiler's Comments

1993 Amendment: Chapter 398 inserted (1) defining licensed gambling operation; in (2) inserted exception clause, after "writing" inserted "and receive approval from the department", and at end substituted "the operation" for "his premises"; inserted (3) relating to applicability of section to certain transfers of security interests; and made minor changes in style.

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this section is effective July 1, 1991.

Administrative Rules

ARM 23.16.115 through 23.16.119 Transfer of an interest in a gambling operation.

23-5-119. Appropriate alcoholic beverage license for certain gambling activities.

Compiler's Comments

2003 Amendment: Chapter 110 inserted (4) concerning granting gambling permits. Amendment effective March 24, 2003.

1999 Amendment: Chapter 263 at beginning of (1) inserted exception clause; inserted (1)(d) concerning beer and wine licenses under 16-4-109, (1)(e) concerning all-beverage licenses under 16-4-202, and (1)(f) concerning all-beverage licenses under 16-4-208; inserted (3) concerning licensees granted gambling operator's licenses under 23-5-177; and made minor changes in style. Amendment effective April 5, 1999.

Severability: Section 12, Ch. 465, L. 1997, was a severability clause.

23-5-123. Disposal of fines and penalties for violation of gambling laws.

Compiler's Comments

2005 Amendment: Chapter 134 near beginning after "penalties" deleted "forfeitures, and confiscated money"; and made minor changes in style. Amendment effective July 1, 2005.

2002 Amendment: Chapter 13 after "deposited" deleted "one-half" and at end deleted "and one-half in the general fund of the county in which the violation occurred". Amendment effective August 16, 2002.

1993 Amendment: Chapter 398 near middle extended reference from parts 1 through 6 to parts 1 through 8.

1989 Amendment: Rewrote section to provide that all money collected for violation of parts 1 through 6 or of a rule be deposited one-half in the state general fund and one-half in the county's general fund. Section formerly provided that money seized and confiscated by reason of a violation of Montana gambling laws be deposited with the county to the credit of the poor fund.

Collateral References

38 C.J.S. Gaming §§82, 83.

38 Am. Jur. 2d Gambling §179.

23-5-130. Allowable compensation for route operator.

Compiler's Comments

Applicability: Section 25, Ch. 626, L. 1993, provided: "[Section 16] [23-5-130] applies to agreements entered into after October 1, 1993."

23-5-131. Losses at illegal gambling may be recovered in civil action.

Compiler's Comments

1989 Amendment: Replaced former remedy (see 1987 MCA for text) with provisions allowing recovery for money, property, or other thing of value lost while playing or betting at an illegal gambling device or enterprise and paid within 1 year of the loss; allowing recovery for the loss, costs of the action, and exemplary damages; and allowing joinder as a defendant of a person with an interest in the illegal gambling device or enterprise.

Case Notes

Racing Entry Fee as Alleged Bet: A complaint in an action to recover the amount of $2 lost by plaintiff as an alleged bet on a horserace, with exemplary damages, under this section, alleging in substance that defendant fair association had given notice that it would conduct horseracing for purses, at which any owner or co-owner of a horse competing in the races would be required to pay an entrance fee of $2 and that no person other than such owner or co-owners would be permitted to pay an entrance fee; that plaintiff, representing himself to be a co-owner of a certain horse, paid the required fee; that the horse did not win; that the purse plus an amount equal to the entrance fees for that horse was paid to the owners of the winning horse; that the purse was made up of funds belonging to the association and that the association did not have any interest in the outcome of the race, did not state a cause of action and demurrer thereto was properly sustained. Toomey v. Penwell, 76 M 166, 245 P 943 (1926).

Constitutionality: The antigambling law was not rendered invalid by the insertion of this section. The right to exemplary damages thus given is in the nature of a penalty and constitutes a part of the penalty provided by the act. St. v. Ross, 38 M 319, 99 P 1056 (1909).

Collateral References

38 C.J.S. Gaming §§26, 40 through 43.

38 Am. Jur. 2d Gambling §§212, 225 through 263.

23-5-135. Discharge of defendant.

Compiler's Comments

1989 Amendment: Rewrote section providing that defendant in an action brought under 23-5-131 may move for dismissal if he has paid plaintiff the gambling loss, costs of the action, and exemplary damages agreed upon by the parties or assessed by the court and providing that the action does not bar any other action under state law. See 1987 MCA for former language relating to discharge of defendant.

23-5-136. Injunction and other remedies.

Compiler's Comments

2002 Amendment: Chapter 13 in (3)(a) deleted last sentence that read: "The local government portion of the penalty payment is statutorily appropriated to the department, as provided in 17-7-502, for deposit to the county or municipal treasury." Amendment effective August 16, 2002.

1993 Amendments: Chapter 398 in (1) extended reference from parts 1 through 6 to parts 1 through 8.

Chapter 626 in (1)(a), at beginning, inserted "upon clear and convincing evidence".

1991 Amendment: Inserted (2) concerning issuance of warrant for distraint; and in (3)(a), at end of first sentence, substituted "distributed as provided in 23-5-123" for "deposited in the state's general fund as required by 23-5-123" and inserted second sentence statutorily appropriating local government portion of penalty. Amendment effective July 1, 1991.

Administrative Rules

ARM 23.16.1901 General specifications of video gambling machines.

ARM 23.16.2806 Misrepresentation — penalties.

ARM 23.16.3002 Procedure upon presumption of illegal gambling.

Collateral References

38 Am. Jur. 2d Gambling §§141 through 185.

23-5-151. Gambling prohibited.

Compiler's Comments

1989 Amendment: Rewrote section to provide exception prohibiting gambling not allowed by statute; former language made gambling not allowed by law a misdemeanor.

Administrative Rules

Title 23, chapter 16, subchapter 30, ARM Illegal gambling — presumption and procedure.

Case Notes

DECISIONS AFTER 1989 AMENDMENT

Gambling — Non-Indian Defendants for Crimes Committed on Reservation — Criminal Law Jurisdiction — Standing: The state has jurisdiction over non-Indian defendants for crimes committed on the reservation when there is no Indian victim. Non-Indian defendants do not have standing to raise the argument that the action of the state interferes with the self-government of the Blackfeet Reservation. The state has authority to regulate gambling by non-Indians on the Blackfeet Reservation. State ex rel. Poll v. District Court, 257 M 512, 851 P2d 405, 50 St. Rep. 387 (1993).

DECISIONS PRIOR TO 1989 AMENDMENT

Football Parlay Card: When football parlay card fixed the point spread and the odds and gave the house the benefits of ties, it was an integral part of the game necessary in order to play it, and thus a "device" within the meaning of this section (as it read prior to the 1989 amendment). U.S. v. Thompson, 409 F. Supp. 1044 (D.C. Mont. 1976).

Federal Travel Act: Sale by out-of-state manufacturers of punchboards and pull tabs to distributors in Montana did not constitute facilitation of unlawful activity in violation of former Montana gambling laws within the meaning of the Federal Travel Act (18 U.S.C. §1952). U.S. v. Gibson Specialty Co., 507 F2d 446 (9th Cir. 1974).

Constitutionality: Voters' approval of gambling option submitted with 1972 Montana Constitution did not repeal previous laws against gambling or validate the 1937 amendment of this section previously held unconstitutional. State ex rel. Woodahl v. District Court, 162 M 283, 511 P2d 318 (1973).

Valuable Consideration: When one is required to make an outlay of money in order to participate in a scheme whereby an award is made by chance, the participant pays valuable consideration for the chance to participate, notwithstanding the fact he may also receive merchandise at the same time that the outlay is made. St. v. Cox, 136 M 507, 349 P2d 104 (1960).

Punchboards:

In an action for violation of this section (23-5-201, defining "lottery", now repealed), it was no defense that the defendant had offered to pay for the operation of such punchboards in accordance with Ch. 201, L. 1951, which purported to license trade stimulators such as punchboards, since it was not competent for the Legislature to authorize lotteries in view of Art. XIX, sec. 2, 1889 Mont. Const., and the case of State ex rel. Harrison v. Deniff, 126 M 109, 245 P2d 140 (1952). St. v. Tursich, 127 M 504, 267 P2d 641 (1954).

Punchboards constitute a lottery. State ex rel. Harrison v. Deniff, 126 M 109, 245 P2d 140 (1952).

Numbers Games: A numbers game, whether called Chinese lottery, "The Crown Game", "The Crown punchboard game", or any other name, is a lottery. State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P2d 1029 (1950).

Prosecution of Gambling Laws: Actions for violation of the gambling laws may be prosecuted under either this section and 23-5-103 (renumbered 23-5-152) or under section 94-1001, R.C.M. 1947, et seq. (now repealed), the abatement law, or under each and all of such sections. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P2d 988 (1950).

Slot Machines:

Information charging defendant with the operation of slot machines was not subject to demurrer as not charging an offense. St. v. Israel, 124 M 152, 220 P2d 1003 (1950).

There is nothing in this law that makes it lawful for any person or any religious, fraternal, or charitable organization or any private home to run, conduct, or keep any slot machine within the State of Montana. St. v. Israel, 124 M 152, 220 P2d 1003 (1950).

The operation of all slot machines is prohibited to all persons without exception. [Decided prior to the 1985 enactment of part 6 of this chapter.] State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P2d 1029 (1950).

Slot machines are not included among the enumerated "hickey" games or among the "trade stimulators" from which the ban was lifted by the 1937 amendment known as the "Hickey Law". St. v. Israel, 124 M 152, 220 P2d 1003 (1950); State ex rel. Olsen v. Crown Cigar Store, 124 M 310, 220 P2d 1029 (1950).

A so-called mint vending machine, which by the insertion of a nickel and pulling a lever will bring the operator a package of mint of the value of 5 cents and which may or may not in addition bring to him trade checks good for 5 cents in trade (and which also may be operated by the insertion of a trade check, in which event trade checks but not mint may or may not be paid), is a

gambling device; the machine appeals to the operator's propensities to gamble and lures him into continuing his play in the hope that he may gain an amount much greater than the amount risked. Marvin v. Sloan, 77 M 174, 250 P 443 (1926).

Bingo and Keno: [Prior to the enactment of 23-5-403, now repealed, the] game of "keno" was held to be a lottery and prohibited by this law (23-5-201, defining "lottery", now repealed). Gambling is a generic term, embracing within its meaning all forms of play or game for stakes wherein one or the other participating stands to win or lose as a matter of chance. Play at lottery is gambling. State ex rel. Leahy v. O'Rourke, 115 M 502, 146 P2d 168 (1944).

Bank Night: In an action by the state to enjoin the operation of "bank night" drawings as a lottery under this section (23-5-201, defining "lottery", now repealed), submitted on an agreed statement of facts wherein it was stipulated among other matters that "the money that is used for the purpose of purchasing the defense bond is received from the rental of the store and office properties of the defendant corporation in the theater buildings and not from the sale of admission tickets to the theater", it was held, on the facts presented, that the scheme did not constitute a lottery, and second part of Art. XIX, sec. 2, 1889 Mont. Const., was not self-executing. State ex rel. Stafford v. Fox-Great Falls Theatre Corp., 114 M 52, 132 P2d 689 (1942), overruling State ex rel. Dussault v. Fox-Missoula Theatre Corp., 110 M 441, 101 P2d 1065 (1940).

Game of Skill as Gambling Device: An innocent game involving the element of skill alone becomes a gambling device when players bet on the outcome. State ex rel. Dussault v. Kilburn, 111 M 400, 109 P2d 1113, 135 ALR 99 (1941).

Pinball Machine: A "pinball" machine, equipped with a sloping plane studded with pins and containing holes into which a small ball, catapulted by means of a spring, must fall to enable the player to win and which pays off in trade checks, is a gambling device under the provisions of this section, and while the evidence shows that by long practice a certain amount of skill may be developed, with the patronizing public it is purely a game of chance, and the building in which it is used was a nuisance under section 94-1002, R.C.M. 1947 (now repealed). State ex rel. Dussault v. Kilburn, 111 M 400, 109 P2d 1113, 135 ALR 99 (1941).

Requisites of Lottery: The legal requisites necessary to charge the offense of operating a lottery under this section (23-5-201, defining "lottery", now repealed) are the offering of a prize, the awarding of the prize by chance, and the giving of a consideration for an opportunity to win the prize. St. v. Hahn, 105 M 270, 72 P2d 459 (1937), overruled on other grounds in St. v. Bosch, 125 M 566, 242 P2d 477 (1952).

Amount of Stakes Immaterial: This section makes no distinction as to the amount of the stakes involved; hence, it is immaterial that the stakes were merely treats or cigars. St. v. Dumphy, 57 M 229, 187 P 897 (1920).

Sufficiency of Charge:

The allegation that the defendant did carry on, conduct, and cause to be conducted the game described is sufficient to charge an offense without regard to the expression "as owner and proprietor thereof", which may be regarded as surplusage. St. v. Tudor, 47 M 185, 131 P 632 (1913).

The particular name of a game of chance played with cards for money need not be stated in the information. St. v. Duncan, 40 M 531, 107 P 510 (1910).

An information charging a violation of the antigambling law in the words of this section was sufficient, and it was not necessary to describe the game in detail or set out the means by which it was carried on. St. v. Ross, 38 M 319, 99 P 1056 (1909).

An information charging defendant with permitting a game of chance to be played upon his premises is not defective because of its failure to set forth the names of the persons permitted to play. St. v. Radmilovich, 40 M 93, 105 P 91 (1909).

Attorney General's Opinions

Pull Tabs: A nonprofit charitable organization may not sell pull tab devices to a bar if the bar profits from distribution of the pull tabs. 36 A.G. Op. 16 (1975).

Electronic Bingo and Keno Machines Unlawful Under Former Law: The electronic machines distributed by Treasure State Games, Inc., which purported to duplicate the games of bingo and keno, constituted gambling games which were not authorized by the Bingo and Raffles Law [as it read prior to the 1985 amendment of 23-5-412]. 36 A.G. Op. 7 (1975), superseded by Treasure State Games, Inc. v. St., 170 M 189, 551 P2d 1008 (1976).

"Bonanza" Machines Illegal: A "bonanza" machine vended a displayed coupon and displayed the next coupon, which was hidden, when a quarter was inserted in the machine. The coupons were of various values that the vendee could read before inserting the coin. Thus, the vendee knew the value of the displayed coupon but not the value of the next coupon. The coupons

granted discounts or were redeemable in cash or merchandise. This machine was a gambling device and a lottery and was illegal. 32 A.G. Op. 7 (1967).

Collateral References

38 C.J.S. Gaming §§84 through 87.

38 Am. Jur. 2d Gambling §26, et seq.

Paraphernalia or appliances used for recording gambling transactions or receiving or furnishing gambling information as gaming "devices" within criminal statute or ordinance. 1 ALR 3d 726.

23-5-152. Possession of illegal gambling device or conducting illegal gambling enterprise prohibited — exceptions.

Compiler's Comments

2005 Amendment: Chapter 134 in (4)(b)(ii) near middle inserted "tested". Amendment effective July 1, 2005.

1997 Amendment: Chapter 354 in (3)(a), at end, deleted "and are manufactured only for export from the state"; in (3)(b), in first sentence after "device", deleted "for export from the state"; in (4)(a), at end, inserted "may conduct only those activities authorized under this subsection (4)"; in (4)(b), at beginning, inserted "A licensee" and after "device" inserted "including an illegal video gambling machine"; inserted (4)(c) regarding conditions under which a licensee may bring an illegal gambling machine into the state; and made minor changes in style. Amendment effective April 22, 1997.

1993 Amendment: Chapter 626 in (3)(b), after "may not manufacture", deleted "or possess"; inserted (3)(c)(i) through (3)(c)(iii) specifying conditions under which illegal gambling devices may be brought into state; in (3)(c)(iv), at beginning, inserted "the licensee has notified" and after "department" inserted "to bring the illegal gambling device into the state" and in second sentence substituted "licensee" for "person"; and made minor changes in style.

1991 Amendments: Chapter 211 inserted (3)(c) allowing importation of illegal gambling devices under certain conditions. Amendment effective March 27, 1991.

Chapter 647 in (1) inserted references to subsections (3) and (4); in (1)(a), after "control or", deleted "to purposely or knowingly"; inserted (1)(b) concerning operation of illegal gambling enterprise; at beginning of (2) substituted "Subsection (1)" for "This section"; inserted (4) concerning possession of illegal gambling device for display purposes; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: At beginning of (1) inserted exception clause, inserted two references to purposely or knowingly, and near end of first sentence substituted "an illegal gambling device" for a list of prohibited devices and deleted former penalty provision; inserted (2) regarding rules and licenses relating to devices for export; and made minor changes in phraseology.

Administrative Rules

ARM 23.16.209 Display of illegal devices.

ARM 23.16.2001 Manufacture of devices not legal in state — license — fee — reporting requirements — inspection of records — reports.

Case Notes

Prosecution of Gambling Laws: Actions for violation of the gambling laws may be prosecuted under either this section and 23-5-102 (renumbered 23-5-151) or as a nuisance under the abatement law. State ex rel. Replogle v. Joyland Club, 124 M 122, 220 P2d 988 (1950).

Collateral References

38 C.J.S. Gaming §§93, 99 through 105.

38 Am. Jur. 2d Gambling §82, et seq.

23-5-153. Possession and sale of antique slot machines.

Compiler's Comments

2005 Amendment: Chapter 134 in (3)(a)(i) inserted "or private"; in (3)(a)(ii) substituted text relating to inoperability for "owned and operated by the state, a county, or a city"; and made minor changes in style. Amendment effective July 1, 2005.

1991 Amendment: In (3)(b), after "manufacturer-distributor", inserted "or a person licensed under subsection (4)", after "possess" deleted "and sell", and at end inserted "for purposes of commercially selling or otherwise supplying the machines"; inserted (4) limiting sales of antique slot machines and providing for license fee; and inserted (5) concerning sale of antique slot machines by authorized persons. Amendment effective July 1, 1991.

1989 Amendments: Chapter 364 in (1), at end after "an antique slot machine is", substituted "a mechanically or electronically operated slot machine that at any present time is more than 25 years old" for "a slot machine manufactured prior to 1950, the operation of which is exclusively mechanical in nature and is not aided in whole or in part by any electronic means"; and made minor changes in phraseology.

Chapter 642 deleted former (1) making it a misdemeanor to have or use a slot machine and providing exceptions; deleted first sentence of former (2) that read: "The provisions of subsection (1) and 23-5-121 do not apply to antique slot machines possessed, located, and used in accordance with subsections (2) through (5)"; in (3) inserted "A licensed manufacturer-distributor may possess and sell antique slot machines"; corrected internal references; and made minor changes in phraseology.

Coordination Instruction: Section 73(3), Ch. 642, L. 1989, provided: "(3) The reference copy of House Bill No. 448 of the 51st legislature is amended to delete the amendments made to 23-5-104(1). Subsection (1) of 23-5-104 and the first sentence of 23-5-104(2) are deleted, as provided in [section 22], and the amendments to the remainder of 23-5-104 by [section 22] and House Bill No. 448 take effect." House Bill No. 448 became Ch. 364, L. 1989.

1983 Amendment: In (1), inserted proviso exempting from punishment the noncommercial or charitable operation of antique slot machines located in private dwellings or on display in public museums owned by the state or a local government; (2) through (5), providing for the legal possession and noncommercial operation or display of antique slot machines, were enacted as a separate section but codified as part of this section.

Case Notes

Poker Machines as Slot Machines: "Draw-80" poker machines, which were activated by a player inserting quarters, the player being awarded credits redeemable in cash for winning, were indistinguishable from slot machines under 23-5-101 (renumbered 23-5-112) and were therefore illegal [prior to the 1985 enactment of part 6 of this chapter]. Gallatin County v. D&R Music & Vending, Inc., 208 M 138, 676 P2d 779, 41 St. Rep. 224 (1984).

Probable Cause in Pleading: Defendants were charged with illegal possession of a slot machine. The District Court dismissed for lack of probable cause, saying the game was essentially the same as that previously found legal in Treasure St. Games v. St., 170 M 189, 551 P2d 1008 (1976). On appeal, the Supreme Court found the dismissal to be error, saying the State need not demonstrate a prima facie case in the charging documents but only show probable cause to believe an offense has been committed. The affidavit showed probable cause. St. v. Johnson, 203 M 153, 660 P2d 101, 40 St. Rep. 359 (1983).

Collateral References

38 C.J.S. Gaming §§1 through 13.

38 Am. Jur. 2d Gambling §87, et seq.

23-5-154. Soliciting participation in illegal gambling activity prohibited.

Compiler's Comments

1991 Amendment: Near beginning, after "who", inserted "purposely or knowingly" and after "person to" substituted "participate in an illegal gambling enterprise or use" for "play or engage in the use of". Amendment effective July 1, 1991.

1989 Amendment: Rewrote section to provide for misdemeanor punishable under 23-5-161 for inducing person to play illegal device. See 1987 MCA for former text relating to same general subject and providing a penalty or a fine between $100 and $1,000 and jail time of 3 months to 1 year, or both.

Collateral References

38 C.J.S. Gaming §110.

23-5-156. Offering or obtaining anything of value by fraud or operation of illegal gambling device or enterprise.

Compiler's Comments

1997 Amendment: Chapter 252 in (1), near beginning after "gambling", inserted "offers or" and after "exceed" substituted "$750" for "$300"; in (2), near beginning after "gambling", inserted "offers or" and after "exceeds" substituted "$750" for "$300"; and inserted (3) establishing fraudulent gambling as part of a common scheme as a felony.

1991 Amendment: In (1) and (2) substituted "in an activity involving gambling" for "by gambling". Amendment effective July 1, 1991.

23-5-157. Gambling on cash basis — penalties.

Compiler's Comments

1997 Amendment: Chapter 252 in (1)(a), near beginning of first sentence after "23-5-413", inserted "and card games authorized in part 3 of this chapter and normally scored using points", in fourth sentence, after "credit card", substituted "is used to obtain cash on the premises of a licensee then it must be delivered and accepted unconditionally" for "note, IOU, or other evidence of indebtedness may not be offered or accepted as part of the price of participation in the gambling activity or as payment of a debt incurred in the gambling activity", and inserted fifth sentence prohibiting the holding of evidence of indebtedness pending the outcome of a gambling activity; inserted (1)(b) defining and prohibiting credit gambling; in (2), after "guilty of a", substituted "criminal offense under 23-5-156" for "misdemeanor" and after "23-5-161 or" inserted "23-5-162"; deleted (2)(b) that read: "(b) a felony upon conviction of a third or subsequent offense and must be punished in accordance with 23-5-162"; and made minor changes in style.

1993 Amendments: Chapter 398 in first sentence of (1), before "cash", inserted "made in", inserted second sentence authorizing use of check or credit card to obtain cash to gamble, in third sentence substituted "cash" for "money", and deleted last sentence that read: "The use of a check or credit card to pay for other goods or services in the establishment or to obtain cash is not a violation of this section"; and made minor changes in style.

Chapter 626 inserted (2)(b) prescribing punishment for felony conviction; and made minor changes in style.

23-5-158. Minors not to participate — penalty — exception.

Compiler's Comments

1997 Amendment: Chapter 550 in (2) substituted "youth in need of intervention" for "youth in need of supervision". Amendment effective July 1, 1997.

1993 Amendment: Chapter 626 in (1) substituted "subsection (3)" for "subsection (2)"; and inserted (2) prohibiting minors from participating in gambling activity.

1991 Amendment: In (1), at beginning of first sentence, inserted exception clause and in second sentence substituted "subsection" for "section"; and inserted (2) allowing a minor to sell or buy certain raffle tickets. Amendment effective July 1, 1991.

Administrative Rules

ARM 23.16.1926 Location of machines on premises.

23-5-159. Illegal sale, assignment, lease, or transfer of license — penalty.

Compiler's Comments

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this section is effective July 1, 1991.

Administrative Rules

ARM 23.16.121 Leasing of license prohibited.

23-5-160. Shaking dice for a drink or music or in a shake-a-day game.

Compiler's Comments

1993 Amendment: Chapter 626 in (1)(b), near middle, after "customer may win", inserted "merchandise or a portion or" and inserted last sentence authorizing offer of more than one game; and made minor changes in style.

Administrative Rules

Title 23, chapter 16, subchapter 3, ARM Shake-a-day games.

23-5-161. Criminal liabilities — misdemeanor.

Compiler's Comments

1993 Amendment: Chapter 398 in two places extended reference from parts 1 through 6 to parts 1 through 8; and made minor changes in style.

Collateral References

38 Am. Jur. 2d Gambling §§141 through 185.

23-5-162. Criminal liabilities — felony.

Compiler's Comments

1993 Amendment: Chapter 398 in three places extended reference from parts 1 through 6 to parts 1 through 8.

1991 Amendment: Inserted (2) providing for revocation of licenses or permits. Amendment effective July 1, 1991.

Collateral References

38 Am. Jur. 2d Gambling §§141 through 185.

23-5-165. Fishing derbies and wagering on natural occurrences.

Compiler's Comments

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this section is effective July 1, 1991.

23-5-171. Authority of local governments to regulate gambling.

Compiler's Comments

1993 Amendment: Chapter 398 in (1) extended reference from parts 1 through 6 to parts 1 through 8.

23-5-172. Prosecution.

Compiler's Comments

1993 Amendment: Chapter 398 extended reference from parts 1 through 6 to parts 1 through 8.

23-5-176. Qualifications for licensure.

Compiler's Comments

1991 Amendment: At beginning of (2) inserted exception clause; in (2)(a), after "prior", inserted "financial or other"; inserted (2)(b) concerning previous felony conviction; inserted (3) exempting determination from 37-1-203 and 37-1-205; inserted (4) concerning denial of license or permit based upon falsification; and made minor changes in style. Amendment effective July 1, 1991.

Administrative Rules

Title 23, chapter 16, subchapter 5, ARM Gambling operator licenses.

Case Notes

No Clear Legal Duty to Issue Gambling Licenses and Permits — Activity Unlawful Under Federal Law — Writ of Mandamus Properly Denied: The Department of Justice, Gambling Control Division, denied gambling licenses and permits to the plaintiffs, business owners who operate within the boundaries of the Flathead Indian Reservation. The denial of licenses was based on the determination of the U.S. Attorney that the operation of video gambling machines would no longer be lawful on Indian lands absent a tribal-state compact. The plaintiffs filed a petition for a writ of mandamus ordering the state to issue the licenses and permits. The writ was denied. The plaintiffs appealed on the grounds that the state had a clear legal duty under state law to issue the licenses and permits. On appeal, the Supreme Court rejected the state's contention that state gambling laws specifically authorize it to refuse to process the plaintiffs' applications. However, because the plaintiffs seek to conduct gambling operations on the Flathead Indian Reservation, federal statutes must be considered in conjunction with state law. State law that conflicts with the purpose and operation of a federal statute, regulation, or policy is preempted by the federal law. State licensure of Class III gaming under the facts of this case would frustrate the federal policy underlying the Indian Gaming Regulatory Act (IGRA). The Supreme Court concluded that absent a ruling of a federal court as to the applicability of IGRA to non-Indians, such as the plaintiffs in this case, and given the apparent conflict between Montana licensing statutes and federal statutes regulating gambling on Indian lands, there is no clear legal duty requiring the state to issue gambling licenses and permits to the plaintiffs. The District Court did not err in denying the petition for a writ of mandamus. Larson v. St., 275 M 314, 912 P2d 783, 53 St. Rep. 158 (1996).

23-5-177. Operator of gambling establishment — license — fee.

Compiler's Comments

2003 Amendment: Chapter 110 inserted (2)(b) concerning fingerprints; and made minor changes in style. Amendment effective March 24, 2003.

1991 Amendments: Chapter 473 at end of (1) inserted "for which a permit must be obtained from the department"; in (5)(c), near beginning after "table", substituted "for which a permit has been issued" for "licensed" and near end, before "number", substituted "permit" for "license number or decal" and before "game" deleted "licensed"; in (6) substituted "permits" for "licenses" and after "games" substituted "issued" for "licensed"; and in (7), after "table", substituted "permit" for "license".

Chapter 647 at end of (1) inserted "for which a permit must be obtained from the department"; inserted (2) concerning material submitted for operator's license; inserted (3) requiring premises approval; inserted (4) limiting operator's licenses per premises; in (5)(c), after "table", substituted "for which a permit has been issued" for "licensed", after "game and" substituted "permit" for "license number or decal", and at end, before "game", deleted "licensed"; in (6), after "other", substituted "permits" for "licenses" and after "games" substituted "issued" for "licensed"; in (7), near middle, substituted "video gambling machine, bingo, keno" for "gambling device", after "table" substituted "permit" for "license", and substituted "machine" for "device"; and substituted (8) concerning license charge and refund for former text that read: "The department may not charge a fee for the issuance of an operator's license". Amendment effective July 1, 1991.

Administrative Rules

Title 23, chapter 16, subchapter 5, ARM Gambling operator licenses.

23-5-180. Property subject to forfeiture.

Compiler's Comments

Effective Date: Section 17, Ch. 134, L. 2005, provided: "[This act] is effective July 1, 2005."

23-5-181. Petition — summons — service — answer.

Compiler's Comments

Effective Date: Section 17, Ch. 134, L. 2005, provided: "[This act] is effective July 1, 2005."

23-5-182. Effect of failure to answer — hearing date following answer.

Compiler's Comments

Effective Date: Section 17, Ch. 134, L. 2005, provided: "[This act] is effective July 1, 2005."

23-5-183. Rebuttable presumption of forfeiture — rebuttal of presumption.

Compiler's Comments

Effective Date: Section 17, Ch. 134, L. 2005, provided: "[This act] is effective July 1, 2005."

23-5-184. Disposition of property.

Compiler's Comments

Effective Date: Section 17, Ch. 134, L. 2005, provided: "[This act] is effective July 1, 2005."

23-5-185. Pursuing violation by or determining suitability for licensure of person whose license has expired.

Compiler's Comments

Effective Date: Section 17, Ch. 134, L. 2005, provided: "[This act] is effective July 1, 2005."

Part 2
Calcutta Pools

Part Administrative Rules

Title 23, chapter 16, ARM Department of Justice rules regulating gambling.

Title 23, chapter 16, subchapter 28, ARM Calcutta pools.

Part Attorney General's Opinions

Calcutta Pool Specifications: Calcutta pools must be auction pools and are not legalized forms of sports bookmaking. A legal Calcutta pool exists if: (1) bets vary in amount and are "sold" at auction; (2) the pool is "fully subscribed", i.e., all competitors in the event—either individually or as part of the "field"—are wagered on, so that the auctioneer or the house does not have an interest in the outcome of the event beyond a commission paid from the pool for conducting the event; (3) the amount a bettor can win varies with the size of the pool rather than with odds set by the auctioneer or the house; and (4) the rules of the particular Calcutta pool do not allow more than one wager per competitor, or "field", per pool. 42 A.G. Op. 39 (1987).

23-5-221. Definition.

Compiler's Comments

1989 Amendment: In introductory clause, near beginning after "auction pool", deleted "in which persons bid or wager money, with winnings awarded based on the outcome of an event, except that" and inserted "conducted by an organization authorized by the department. The Calcutta pool must be an auction pool in which"; and inserted (1), (2), (3), (4), (5), and (7) stating the elements of and restrictions on auction pools.

Administrative Rules

ARM 23.16.2801 Definitions.

ARM 23.16.2802 Restrictions on Calcutta pools.

23-5-223. Penalty.

Compiler's Comments

1989 Amendment: Changed punishment from a fine of not more than $1,000 or a jail term of not more than 3 months, or both, to that provided in 23-5-161; and made minor change in phraseology.

Administrative Rules

ARM 23.16.2806 Misrepresentation — penalties.

Part 3
Card Games Act

Part Administrative Rules

Title 23, chapter 16, ARM Department of Justice rules regulating gambling.

Title 23, chapter 16, subchapter 11, ARM Card game tournaments.

Title 23, chapter 16, subchapter 12, ARM Poker and other card games.

Part Case Notes

One Player Versus House Prohibited: [Prior to the 1985 enactment of part 6 of this chapter, plaintiff] brought a declaratory judgment action seeking to have "Draw-80" poker machines declared illegal. Plaintiff questioned whether the Montana Card Games Act authorizes the playing of poker in which the house competes against a single player. The court determined that the machine represents the house with programmed retainage. The court held that games where one player vies against the house are illegal because the legislative purpose of the Montana Card Games Act is to ban casino-type gambling. Gallatin County v. D&R Music & Vending, Inc., 208 M 138, 676 P2d 779, 41 St. Rep. 224 (1984).

"Poker All Keno" Not Authorized by Card Games Law: A gambling game using 52 balls marked with playing card symbols that were mixed and drawn in the same manner as keno but paid off by the house based upon hands of various types of poker is not authorized under the card games law at Title 23, ch. 5, part 3. The players of the game compete against the house rather than other players, and it is therefore a casino type or banking game which the Legislature did not intend to authorize under Title 23, ch. 5, part 3. Goott v. St., 193 M 108, 630 P2d 232, 38 St. Rep. 1037 (1981).

No Probable Cause: Police detectives did not have probable cause to enter an upstairs room of an inn, arrest defendants for participating in a card game on unlicensed premises, and search the room because of the inability of the informant's tip to satisfy the two-pronged Aguilar test. St. v. Robey, 176 M 298, 577 P2d 1226 (1978).

23-5-306. Live card game table — permit — fees — disposition of fees.

Compiler's Comments

1997 Amendment: Chapter 465 in (1) after "23-5-177 and", substituted "who holds an appropriate license" for "a license" and after "premises" inserted "as provided in 23-5-119".

Severability: Section 12, Ch. 465, L. 1997, was a severability clause.

1993 Amendment: Chapter 626 inserted (1)(b) authorizing issuance of annual permit for live card games; in (1)(b)(i), after "January 15, 1989", deleted "and the premises were not on that date licensed under 16-4-401(2) but"; in (1)(b)(ii), after "other consumable product", deleted "an operator's license and an annual permit for the placement of live card game tables may be granted to the person who legally operated the premises on January 15, 1989"; inserted (1)(b)(iii) and (1)(b)(iv) specifying other conditions for issuing annual permit; and made minor changes in style.

1992 Special Session Amendment: Chapter 18 at beginning of (4) inserted exception clause; and inserted (5) requiring transfer of balance of funds to the general fund on June 30, 1993. Amendment effective February 4, 1992.

Termination: Section 2, Ch. 18, Sp. L. January 1992, provided that this section terminates July 1, 1993.

23-5-308. Card game dealers — license.

Compiler's Comments

1993 Amendment: Chapter 317 at beginning of (1) inserted exception clause. Amendment effective April 12, 1993.

1991 Amendment: In (1), after "game", inserted "of panguingue or poker"; in (5)(b)(ii) substituted "a completed license application and the fee required under subsection (2)" for "an application for a permanent license"; and made minor changes in style. Amendment effective July 1, 1991.

Administrative Rules

Title 23, chapter 16, subchapter 4, ARM Card dealer licenses.

23-5-309. Requirements for conducting card games.

Compiler's Comments

1993 Amendments: Chapter 317 near beginning of (1), after "23-5-317", inserted "and 23-5-318"; and at beginning of (2) inserted exception clause. Amendment effective April 12, 1993.

Chapter 398 near beginning inserted "23-5-310".

1991 Amendment: At beginning of (1) inserted exception clause and near middle substituted "for which a permit has been issued and" for "in the presence and under the control of a licensed dealer"; inserted (2) regarding play in the presence and under control of a dealer; and made minor changes in style. Amendment effective July 1, 1991.

23-5-311. Authorized card games.

Compiler's Comments

1989 Amendment: Rewrote content of former (1) as (2) and inserted reference to description in rules; inserted (3) providing that this part 3 does not apply to machines authorized under part 6; and made minor changes in phraseology.

Administrative Rules

ARM 23.16.1101 Card game tournaments.

ARM 23.16.1202 Types of card games authorized.

Case Notes

Poker Machines Illegal: [Prior to the 1985 enactment of part 6 of this chapter, a] declaratory action was brought seeking to have electronic poker machines declared illegal. The District Court found the machines authorized under this section, and the Supreme Court reversed. The Supreme Court held that while "poker" is not precisely defined by statute, the word "is of ancient and common understanding". It is a game played by individuals with one player pitting his skills and talents against those of other players. No variation of poker involves only one player. It is a game played with playing cards, not with electronic images displayed on a screen. Poker is a game of skill and chance. It is not a game programmed so that no one wins a certain percentage of the time. The electronic game played on the "Draw-80" machines is not poker and is not authorized by the Montana Card Games Act. Gallatin County v. D&R Music & Vending, Inc., 208 M 138, 676 P2d 779, 41 St. Rep. 224 (1984).

Card Games — Statute Constitutional: A declaratory judgment action yielded a District Court order declaring 23-5-311 constitutional. That order was appealed. The Supreme Court on review held the statute did not deny equal protection, was not special legislation, and was not void for vagueness. A criminal statute need not apply to all areas that may be injurious to public health to comply with equal protection requirements. Mere classification of the subjects of legislation does not deny equal protection. If all persons in the same class are treated alike, there is no violation of equal protection requirements. The statute was general and operated uniformly and equally on all persons in Montana and thus was a general law, not local or special legislation in the constitutional sense. The claim the term "poker" was vague was rejected because the appellant lacked standing to challenge the constitutionality of the statute because he was not injured or jeopardized by the alleged vagueness of the word "poker". Palmer v. St., 191 M 534, 625 P2d 550, 38 St. Rep. 447 (1981).

Powers of Local Government to Regulate Gambling Limited as to Legislatively Approved Games: The Legislature intended to grant only discretionary licensing power to local governments concerning gambling; thus, in response to a petition for initiative, local governmental bodies are without the power under the Montana Card Games Act and the Bingo and Raffles Law to limit or prohibit gambling and the approved forms thereof. DeLong v. Downes, 175 M 152, 573 P2d 160 (1977).

Collateral References

38 Am. Jur. 2d Gambling §§37, 39.

23-5-312. Prizes not to exceed three hundred dollars.

Compiler's Comments

1993 Amendment: Chapter 626 in (1) inserted second sentence regarding awarding of prizes; inserted (2) regarding application of prize limit provided in subsection (1); and made minor changes in style.

1989 Amendment: Increased maximum prize from $100 to $300; and made minor changes in phraseology.

23-5-313. Rules of play to be posted — rake-off approved.

Compiler's Comments

1989 Amendment: In first sentence, after "posted", inserted "within the sight of the players at a live card game table"; after "premises of" substituted "a licensed operator" for "any licensed establishment where such game is conducted"; deleted provisions for announcing amount of each rake-off and taking rake-off only at end of each game; and made minor changes in phraseology.

Administrative Rules

ARM 23.16.1240 Posting of rules.

23-5-317. Tournaments.

Compiler's Comments

1993 Amendment: Chapter 626 inserted (6) limiting to licensed dealers dealing of cards at tournament; and made minor changes in style.

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this section is effective July 1, 1991.

Administrative Rules

ARM 23.16.1101 Card game tournaments.

23-5-318. Poker run defined — authorization — conditions.

Compiler's Comments

Effective Date: Section 5, Ch. 317, L. 1993, provided: "[This act] is effective on passage and approval." Approved April 12, 1993.

Administrative Rules

Title 23, chapter 16, subchapter 10, ARM Poker runs.

23-5-321. Issuance of permits by local governing bodies prohibited.

Compiler's Comments

1989 Amendment: Rewrote section to provide that local governments may not issue permits for live card games or tables. See 1987 MCA for former text allowing local governments to license live card games.

Proration of 1989 Fee: Chapter 642, L. 1989, transferred administration of parts 1 through 6 of this chapter to the Department of Justice and amended various fee provisions. Section 69 provided: "A fee imposed under 23-5-321, 23-5-421, 23-5-612, 23-5-625, or 23-5-631 between [the effective date of this section] [May 5, 1989] and October 1, 1989, must be prorated to cover only the period between the date the permit or license takes effect and October 1, 1989."

Case Notes

Constitutional Question Not Answered: A challenge to the constitutionality of 23-5-321 and 23-5-322 (now repealed) was not properly before the Supreme Court because of noncompliance with Rule 38, M.R.App.Civ.P. (now M.R.App.P.). Rule 38 requires that notice be given of the existence of a constitutional question so that the Attorney General has an opportunity to appear and defend the acts of the Legislature. Bradbrook v. Billings, 174 M 27, 568 P2d 527 (1977).

23-5-324. Card room contractor's license — fee — submission of contract.

Compiler's Comments

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this section is effective July 1, 1991.

Administrative Rules

ARM 23.16.1245 License.

23-5-331. Penalty.

Compiler's Comments

1989 Amendment: Near beginning substituted "purposely or knowingly" for "willfully"; at end substituted "punishable pursuant to 23-5-161" for "and upon conviction shall be punished by

a fine of not more than $1,000 or by imprisonment in the county jail for not more than 3 months, or both"; and made minor changes in phraseology.

Part 4
Bingo and Raffles

Part Administrative Rules

Title 23, chapter 16, ARM Department of Justice rules regulating gambling.
Title 23, chapter 16, subchapter 13, ARM Live keno games.
Title 23, chapter 16, subchapter 23, ARM Electronic live keno and bingo equipment.
Title 23, chapter 16, subchapter 24, ARM Live keno and bingo recordkeeping.
Title 23, chapter 16, subchapter 26, ARM Raffles.

23-5-405. Authorized live bingo, keno, and raffles.

Administrative Rules

ARM 23.16.2602 Random selection processes.

23-5-406. Exempt charitable organizations and facilities.

Compiler's Comments

1997 Amendment: Chapter 42 in (4), near end, substituted "personal care" for "personal nursing care". Amendment effective March 12, 1997.

1991 Amendment: In (1)(a) substituted "granted an" for "qualified for" and inserted references to (c)(8) or (c)(19) of 26 U.S.C. 501; in (1)(a)(i), after "on", inserted "or before", substituted "the permit fee" for "license fees", and at end deleted "An organization qualified under that section"; in (1)(a)(ii) substituted "permit fee imposed by" for "license fees under"; at beginning of (1)(b)(i) inserted "limit its live bingo and keno"; at end of (1)(b)(ii) and (1)(b)(iii) deleted "or raffles"; in (1)(b)(iii), before "permit", deleted "cost-free"; inserted (2) concerning activities conducted at a long-term care facility or retirement home; in (3), after "permit of", substituted "an organization or a facility provided for in subsection (1) or (2)" for "a qualified organization", after "determines" inserted "that the organization or facility", and after "keno" deleted "or raffles"; inserted (4) defining retirement home; and made minor changes in style. Amendment effective July 1, 1991.

23-5-407. Live bingo or keno permit — fees — disposition of fees.

Compiler's Comments

1991 Amendment: In (1) inserted last sentence providing a June 30 expiration date for a permit; in (2), at end, deleted "may not be prorated" and decreased fee from $500 to $250; at end of (3) substituted "purposes" for "costs"; and made minor changes in style. Amendment effective July 1, 1991.

23-5-409. Bingo and keno tax — records — distribution — statement and payment.

Compiler's Comments

1991 Amendment: In (1) changed tax to "1% of the gross proceeds" from "5% of the net income" and deleted last two sentences that read: "For purposes of this section, "net income" means gross proceeds, as defined in 23-5-112, minus the cost of equipment, supplies, personnel, and advertising allocated to the games. If in any year 5% of net income does not equal 1% of gross proceeds, then the licensee shall pay a tax of 1% of gross proceeds"; and in (2) and (3), after "gross proceeds", deleted "and net income". Amendment effective July 1, 1991.

Administrative Rules

ARM 23.16.2401 Definitions.
ARM 23.16.2402 Live keno and bingo recordkeeping.
ARM 23.16.2407 Actual cash profit bank deposit required by licensed operator.
ARM 23.16.2410 Penalties.

23-5-412. Card prices and prizes — exception.

Compiler's Comments

2005 Amendment: Chapter 134 inserted (3)(b) relating to bingo patterns; and made minor changes in style. Amendment effective July 1, 2005.

1993 Amendment: Chapter 626 in (1)(b) substituted "game" for "award"; in (1)(c) substituted "bingo or keno games" for "awards" and substituted "prize" for "award"; and inserted (5) applying the prize limit in subsection (1) to promotional games of chance.

1991 Amendment: At beginning of (1) inserted exception clause; inserted (3) concerning approved variations on the game of keno; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: In first sentence, relating to price of card, inserted "or keno"; in second sentence deleted provision that "a prize must be paid in tangible personal property if the game is played on a player-operated electronic video game machine" (under other Ch. 642 amendments, machines are no longer regulated by this part); in third sentence, relating to prizes, inserted "or keno card"; at end inserted three sentences relating to playing successive games on the same card, remaining on the premises while the card is played, the caller keeping the card, and time of payment; and made minor changes in phraseology.

1985 Amendment: Substituted first two sentences allowing bingo prizes to be paid in either tangible personal property or cash, not exceeding the value of $100 for each award, for former language that read: "Bingo prizes must be in tangible personal property only and not in money, cash, stocks, bonds, evidences of indebtedness, or other intangible personal property and must not exceed the value of $100 for each individual bingo award."

Administrative Rules

ARM 23.16.1301 Play of successive keno games.
ARM 23.16.1304 Approved keno variations.
ARM 23.16.1305 Methods of identifying player on card.
ARM 23.16.1306 Wager recording requirements and bet limits.
ARM 23.16.2406 Prize awards for live keno and bingo games.

Case Notes

Plurality Language in Charge Permissible: Defendants were charged with "maintaining a bingo/keno game in which cards/chances may be purchased in excess of $.50 in violation of 23-5-412". The District Court dismissed for lack of probable cause, saying the plurality language of the charge did not state an offense. On appeal, the Supreme Court found the dismissal to be error, saying the State need not demonstrate a prima facie case in the charging documents but only show probable cause to believe an offense has been committed. St. v. Johnson, 203 M 153, 660 P2d 101, 40 St. Rep. 359 (1983).

Electronic Bingo and Keno Games: This section includes electronic devices known as "Bonus Bingo" and "Raven Keno" that operate so as to select winning numbers or symbols at random. Treasure State Games, Inc. v. St., 170 M 189, 551 P2d 1008 (1976).

23-5-413. Raffle prizes — permits — exceptions.

Compiler's Comments

1993 Amendments: Chapter 26 in (1)(a), at beginning in exception clause, inserted reference to subsection (1)(c) and deleted former third sentence that read: "The board of county commissioners may not charge a permit fee or an investigative fee for a raffle conducted by a religious corporation sole or a nonprofit organization if the organization presents sufficient documentation of its nonprofit status"; inserted (1)(c) providing that a permit is not required for a raffle conducted by a religious corporation sole or a nonprofit organization; and substituted present (6)(a) concerning compliance with subsections (3) and (4) for former language that read: "In addition to complying with the requirements of subsections (1) through (5), a religious corporation sole or a nonprofit organization as defined in 23-5-112 shall provide the following information to the board of county commissioners when applying for a raffle permit:

(i) the cost and number of raffle tickets to be sold;

(ii) the charitable purposes the proceeds of the raffle are intended to benefit; and

(iii) the proposed prizes and their value."

Chapter 288 inserted (6)(c)(i)(B) relating to a prize of real property; and made minor changes in style.

1991 Amendment: At beginning of (1)(a) inserted exception clause and inserted last sentence exempting a religious corporation sole and a nonprofit organization from the fee; inserted (1)(b) concerning multicounty raffles; inserted (2) concerning ownership of prizes before sale of tickets; substituted (6)(a) and (6)(b) concerning information submitted by a religious corporation sole or a nonprofit organization (see 1991 Session Law for text) for former text that read: "(3) (a) the restrictions of subsection (1) do not apply to a raffle conducted by a nonprofit corporation, religious corporation sole, or other nonprofit organization if the corporation or organization is permitted by the board of county commissioners to conduct the raffle. The board of county commissioners may not charge a permit fee or an investigative fee for a raffle conducted by a nonprofit veterans' organization.

(b) The nonprofit organization or corporation seeking permission under subsection (3)(a) shall apply to the board of county commissioners for the permit and provide the following information:

(i) the cost and number of raffle tickets to be sold;

(ii) the charitable purposes the proceeds of the raffle are intended to benefit; and

(iii) the proposed prizes and their value.

(c) A veterans' organization seeking exemption from the permit fee or an investigative fee shall present evidence of the organization's nonprofit status to the board of county commissioners.

(d) The proceeds from the sale of the raffle tickets may be used only for charitable purposes or to pay for prizes. The raffle prize must be in tangible personal property only and not in money, cash, stock, bonds, evidence of indebtedness, or other intangible personal property. None of the proceeds may be used for the administrative cost of conducting the raffle"; inserted (6)(c) providing special prize restrictions for raffles conducted by a religious corporation sole or a nonprofit organization; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: Chapter 91 in (1) increased from $1,000 to $5,000 the allowable value of raffle prizes; inserted last sentence of (3)(a) that read: "The board of county commissioners may not charge a license fee or an investigative fee for a raffle conducted by a nonprofit veterans' organization"; inserted (3)(c) that read: "(c) A veterans' organization seeking exemption from the license fee or an investigative fee shall present evidence of the organization's nonprofit status to the board of county commissioners"; and made minor changes in phraseology and form. Section 73, Ch. 642, L. 1989, in (3)(a) and (3)(c) changed "license fee" to "permit fee".

Chapter 642 in (1), in first sentence, deleted provision that prizes "must be in tangible personal property only and not in money, cash, stocks, bonds, evidences of indebtedness, or other intangible personal property"; inserted (2) requiring a separate permit for each raffle and relating to time of issuance, an accounting, and a sales restriction; in (3)(a) deleted provision for a separate license for each raffle; in (3)(b), near beginning, inserted "nonprofit"; deleted (3)(d) requiring an accounting to the Board of County Commissioners for each raffle; corrected internal reference; and made minor changes in phraseology.

23-5-414. Restrictions on bingo and keno.

Compiler's Comments

1989 Amendment: In first sentence, before "bingo", inserted "live"; deleted former (2) through (4) allowing raffles only within Montana, allowing no more than 15 bingo or keno machines (such machines are, under other Ch. 642 amendments, no longer regulated by this part), allowing a further restriction on machine numbers by a local government, limiting time of day during which machines may be played, and allowing a local government to establish time during which machines may be played; and made minor changes in phraseology.

1987 Amendment: In (1), after "bingo", inserted "or keno"; inserted (3) establishing a limit on the allowable number of licensed bingo or keno machines per establishment; and in version effective July 1, 1988, inserted (4) relating to hours of play for bingo or keno machines.

23-5-424. Manufacturer's license for electronic bingo or keno equipment — license and processing fees.

Compiler's Comments

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this section is effective July 1, 1991.

Administrative Rules

ARM 23.16.2302 and 23.16.2303 Manufacturer license and fees.

ARM 23.16.2306 Manufacturer recordkeeping requirement.

23-5-425. Examination and approval of electronic bingo and keno equipment — fee.

Compiler's Comments

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this section is effective July 1, 1991.

Administrative Rules

ARM 23.16.2303 Examination of equipment — fee.

23-5-426. Electronic live bingo and keno equipment specifications — rules.

Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 647, L. 1991, provided: "A statement of intent is required for this bill because [sections 13, 20, and 44] [23-5-426, 23-5-512, and 23-5-715] grant rulemaking authority to the department of justice.

[Section 13] [23-5-426] requires the department to adopt rules describing electronic live bingo and keno equipment that may be approved for use in Montana. The rules must ensure that the electronic equipment use a random selection process to determine the outcome of each bingo or keno game.

[Section 20] [23-5-715] requires the department to adopt rules to administer the laws governing casino nights. The rules must address but are not limited to:

(1) procedures for applying for a casino night permit;

(2) the type of documentation to be submitted as part of the application to establish an organization's nonprofit status; and

(3) the conduct of games operated during a casino night to ensure that illegal gambling activities are not offered.

[Section 44] [23-5-512] requires the department to adopt rules describing the types of sports pools authorized under 23-5-501, 23-5-503, and [section 44] [23-5-512]."

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this section is effective July 1, 1991.

Administrative Rules

ARM 23.16.2304 and 23.16.2305 Equipment specifications and modifications.

23-5-431. Criminal penalty.

Compiler's Comments

1989 Amendment: At beginning substituted "purposely or knowingly" for "willfully", substituted "a violation" for "the willful violation", and at end substituted "punishable pursuant to 23-5-161" for a fine of up to $1,000, jail time of up to 3 months, or both; and made minor changes in phraseology.

Part 5
Sports Pools

Part Administrative Rules

Title 23, chapter 16, ARM Department of Justice rules regulating gambling.

Title 23, chapter 16, subchapter 17, ARM Sports pools.

Part Collateral References

38 Am. Jur. 2d Gambling §§50, 74.

23-5-501. Definitions.

Compiler's Comments

Purported Amendment — Coordination: Section 3, Ch. 449, L. 1993, provided: "If House Bill No. 411 is passed and approved and if it includes a section amending the definition of "sports pool" in 23-5-501 to delete the words "or animals" at the end of the definition, then the portion of that section of House Bill No. 411 that deletes the words "or animals" is void." House Bill No. 411 was approved as Ch. 626, L. 1993, and sec. 13, Ch. 626, contained the indicated amendment to 23-5-501. Because removal of the words "or animals" was the only amendment to the section, the effect of the Ch. 449 coordination section was to render the Ch. 626 amendment to this section void.

1991 Amendment: Deleted definition of nonprofit organization that read: ""Nonprofit organization" means a charitable, religious, scholastic, educational, veterans', fraternal, beneficial, civic, or service organization, other than one established for the purpose of conducting or participating in a sports pool"; substituted current definition of sports pool for former definition that read: ""Sports pool" means a card divided into squares or spaces, with the names of the participants in the pool written within such squares or spaces, for which consideration in money is paid by the person playing for each square or space for the chance to win money or other items of value on any sports event wherein the participants in such sports event are natural persons or animals"; and inserted definitions of sports tab and sports tab game. Amendment effective July 1, 1991.

1989 Amendment: Inserted introductory clause and definition of nonprofit organization.

23-5-502. Sports pools and sports tab games authorized — tax.

Compiler's Comments

1997 Amendments: Chapter 13 in (2), at beginning of first sentence, substituted "sports tab game seller licensed under 23-5-513" for "manufacturer licensed under 23-5-115", after "sports tabs" deleted "to a licensed operator", and after "collect from the" substituted "purchaser" for "operator" and at beginning of second sentence substituted "sports tab game seller" for "manufacturer".

Chapter 465 in (1)(a), after "premises", inserted "appropriately" and at end inserted "as provided in 23-5-119"; in (1)(b), in first sentence after "that are", inserted "appropriately" and after "premises" inserted "under 23-5-119"; and made minor changes in style.

Severability: Section 12, Ch. 465, L. 1997, was a severability clause.

1993 Amendment: Chapter 449 inserted (1)(b) allowing racing between pigs, gerbils, or hamsters under certain conditions and allowing sports pools on the race. Amendment effective April 21, 1993.

1991 Amendment: In (1), after "pools", inserted "and sports tab games" and at end inserted exception clause; and inserted (2) concerning collection and payment of tax. Amendment effective July 1, 1991.

23-5-503. Rules.

Compiler's Comments

1997 Amendment: Chapter 13 in (1), at end of second sentence, substituted "sports tab game seller licensed under 23-5-513" for "manufacturer licensed under 23-5-115"; and made minor changes in style.

1991 Amendment: In (1), near beginning of first sentence after "card", inserted "or other device", after "recording the" substituted "sports pool or sports tab game must" for "pool and upon which the squares or spaces appear shall", near middle, after "event", inserted "or series of events", and after "total amount" inserted "or percentage" and inserted second sentence requiring that sports tabs be purchased from a licensee; in (2) deleted former first sentence that read: "A chance to participate in a sports pool may not be sold other than upon the premises in which the sports pool is conducted", at beginning of first sentence inserted reference to "sports tab", near middle, after "sold for", substituted "the same amount" for "a consideration", and near end, after "pool", inserted "or sports tab game" and inserted second sentence concerning chances for a series of events; in (3)(a) inserted reference to subsection (3)(b) and inserted second sentence concerning payout on a sports tab game; at end of (3)(b) inserted "or sports tab game"; inserted (4) concerning participation by the person or nonprofit organization conducting the pool or game; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendments: Chapter 22 in last sentence of (2) inserted exception clause; and inserted (3) allowing a nonprofit organization to retain up to 50% of the value of a sports pool.

Chapter 642 increased maximum price of a chance from $1 to $5 and maximum payout from $100 to $500; and made minor changes in phraseology.

Administrative Rules

ARM 23.16.1701 Definitions.
ARM 23.16.1702 Sports pool card.
ARM 23.16.1703 Sale of chances.
ARM 23.16.1704 Prizes.

23-5-509. Penalty.

Compiler's Comments

1989 Amendment: At beginning changed mental state from "willfully" to "purposely or knowingly"; changed punishment from a fine not to exceed $1,000 or a county jail term not to exceed 3 months, or both, to that provided in 23-5-161; and made minor changes in phraseology.

23-5-512. Sports pool design — department rules.

Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 647, L. 1991, provided: "A statement of intent is required for this bill because [sections 13, 20, and 44] [23-5-426, 23-5-512, and 23-5-715] grant rulemaking authority to the department of justice.

[Section 13] [23-5-426] requires the department to adopt rules describing electronic live bingo and keno equipment that may be approved for use in Montana. The rules must ensure that the electronic equipment use a random selection process to determine the outcome of each bingo or keno game.

[Section 20] [23-5-715] requires the department to adopt rules to administer the laws governing casino nights. The rules must address but are not limited to:

(1) procedures for applying for a casino night permit;

(2) the type of documentation to be submitted as part of the application to establish an organization's nonprofit status; and

(3) the conduct of games operated during a casino night to ensure that illegal gambling activities are not offered.

[Section 44] [23-5-512] requires the department to adopt rules describing the types of sports pools authorized under 23-5-501, 23-5-503, and [section 44] [23-5-512]."

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this section is effective July 1, 1991.

Part 6
Video Gaming Machine Control Law

Part Compiler's Comments

Machine Manufacturer Bill Acceptors Allowed — Coordination: Sections 1 and 2, Ch. 344, L. 1989, amended 23-5-606 and 23-5-609 to allow machine manufacturer bill acceptors on video draw poker and keno machines. Section 4, Ch. 344, L. 1989, was a coordination instruction that required the Department of Justice by rule to allow machine manufacturer bill acceptors if the provisions of S.B. No. 431 repealing 23-5-606 and 23-5-609 were passed and approved. Senate Bill No. 431 was passed and approved May 5, 1989.

Part Administrative Rules

Title 23, chapter 16, ARM Department of Justice rules regulating gambling.

Title 23, chapter 16, subchapter 18, ARM Video gambling machines — general.

Title 23, chapter 16, subchapter 19, ARM Video gambling machine specifications.

ARM 23.16.2001 Manufacture of gambling devices not legal in Montana.

Part Case Notes

DECISION UNDER FORMER LAW

Used Poker Machine Licensing — Temporary Restraining Order and Preliminary Injunction Proper: It was reasonable for the District Court to issue a temporary restraining order and a preliminary injunction when the court found that plaintiffs risked losing their used, unmodified video poker machines unless they could buy modification kits or new machines within 3 days and kits were not available. Under these circumstances, plaintiffs would suffer irreparable injury if they lost use of the used machines or had to buy more expensive new machines. As none of the criteria of the court orders changed or contravened the Video Draw Poker Machine Control Law of 1985, the Department of Revenue was not prevented under 27-19-103 from executing its duties. Further, it was also proper for the court to structure terms of the final order to protect licensees and limit the time for them to come into compliance with the new law. Mont. Tavern Ass'n v. St., 224 M 258, 729 P2d 1310, 43 St. Rep. 2180 (1986).

Part Law Review Articles

Video Gambling Devices, Rychlak, 37 UCLA L. Rev. 555 (1990).

23-5-602. Definitions.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 134 in definition of bingo machine and keno machine in (a) near end of second sentence inserted "bonus games"; inserted definitions of bonus game and poker machine; deleted definition of draw poker machine that read: ""Draw poker machine" means an electronic video gambling machine that, upon insertion of cash, is available to play or simulate the play of the game of draw poker as defined by rules of the department. The machine uses a video display and microprocessors in which, by the skill of the player, by chance, or by both, the player may receive free games or credits that may be redeemed for cash.

(b) The term does not include a slot machine or a machine that directly dispenses coins, cash, tokens, or anything else of value"; and made minor changes in style. Amendment effective July 1, 2005.

Chapter 319 deleted definition of available connection date that read: ""Available connection date" means the date on which the department begins to accept applications for connection of machines to the automated accounting and reporting system"; inserted definition of electronically captured data; and made minor changes in style. Amendment effective July 1, 2005.

2003 Amendment: Chapter 210 inserted definition of available connection date; and made minor changes in style. Amendment effective April 3, 2003.

1999 Amendment: Chapter 424 inserted definitions of licensed machine owner and permitholder; and made minor changes in style. Amendment effective July 1, 1999.

1993 Amendment: Chapter 626 deleted definition of video gambling machine manufacturer-distributor that read: ""Video gambling machine manufacturer-distributor" means a person who assembles, produces, makes, or supplies video gambling machines or associated equipment for sale, use, or distribution in the state."

1991 Amendment: Changed defined term from net machine income to gross income. Amendment effective July 1, 1991.

1989 Amendment: In definition of associated equipment substituted "gambling machine" for "draw poker machine" and at end inserted "and cabinetry"; deleted definitions of Department, licensed establishment, licensee, manufacturer-distributor, used keno machine, used video draw poker machine, and video draw poker machine (see 1987 MCA for former text); inserted definitions of bingo machine, draw poker machine, and video gambling machine manufacturer-distributor; in definition of keno machine, after "video", substituted "gambling" for "game", after "play" substituted "keno as defined by rules of the department" for "or simulate the play of the game of keno or bingo as provided in part 4 of this chapter", and in last sentence inserted "slot machine or a"; in definition of net machine income substituted "gambling machine" for "draw poker or keno machine"; and made minor changes in phraseology and punctuation.

1987 Amendments: Chapter 154 in (2) changed "department of revenue" to "department of commerce".

Chapter 317 inserted definitions of associated equipment and manufacturer-distributor; and in (5), in two places, inserted "or association".

Chapter 603 inserted definitions of keno machine, licensed establishment with respect to licensure of video draw poker machines, net machine income, and used keno machine; at beginning of (4)(a) inserted "with respect to the licensure of keno machines" and at end inserted "or an establishment licensed under 23-5-421"; and in (5), after "poker machines", inserted "or keno machines".

Administrative Rules

ARM 23.16.1802 Definitions.

ARM 23.16.1901 General specifications of video gambling machines.

ARM 23.16.1910A Bonus games.

23-5-603. Video gambling machines — possession — play — restriction.

Compiler's Comments

1997 Amendment: Chapter 465 in (3), after "premises", inserted "appropriately" and inserted "as provided in 23-5-119".

Severability: Section 12, Ch. 465, L. 1997, was a severability clause.

1991 Amendment: At beginning of (1) substituted "licensed operator" for "person"; in (3)(a), after "sold", substituted "or" for "and normally"; inserted (3)(b) concerning preventing access to machines by minors; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: Substituted (1) restricting play to approved number of video gambling machines for former provision prohibiting placement of machines in a licensed establishment unless licensed under 23-5-612; inserted first sentence of (2) regarding machines authorized by this part; in (2) deleted provision that a person under 18 could not play video draw poker or video keno (but see 23-5-158, enacted by Ch. 642) and at end inserted two sentences relating to rules for replacement of a machine needing repair and a fee exemption for a replacement machine; inserted (3) relating to where machines may be placed; deleted former (2) through (4) relating to hours of play, allowing a local government to establish its own hours, and stating that part 3 of this chapter does not apply to draw poker or keno machines; and made minor changes in phraseology.

1987 Amendments: Chapter 603 in temporary version in first sentence, after "poker", inserted "bingo, or keno" and in second and third sentences, after "poker", inserted "or keno". Chapter 603 in version effective July 1, 1988, in (1) in first sentence, after "poker", inserted "bingo, or keno" and in second sentence, after "poker", inserted "or keno"; and in (4), after "poker", inserted "or keno".

Chapter 652 in version effective July 1, 1988, inserted (2) relating to restriction on hours of play for video draw poker or keno machines; and inserted (3) authorizing local governing body to determine proper playing hours for video draw poker machines.

Administrative Rules

ARM 23.16.1807 Issuance of permit decal.

ARM 23.16.1822 Permit not transferable.

ARM 23.16.1913 Use of temporary replacement or loaner machines — permit required — reporting.

ARM 23.16.1924 Prohibited machines.

ARM 23.16.1925 Possession of unlicensed machines by manufacturer, distributor, owner, or repair service.

ARM 23.16.1926 Location of machines on premises.

ARM 23.16.1929 Repairing machines — approval.

23-5-607. Expected payback — verification.

Compiler's Comments

1989 Amendment: Near beginning substituted "gambling machine" for "draw poker or keno machine"; deleted provision prohibiting Department from publishing or disseminating income figures or other statistics obtained in the payback verification process in a manner that would allow identification of a particular machine or its owner; and made minor changes in phraseology.

1987 Amendments: Chapter 163 inserted last sentence concerning confidentiality.

Chapter 603 near beginning of second sentence, before "machine", inserted "video draw poker or keno".

Administrative Rules

ARM 23.16.1802 Definitions.

ARM 23.16.1905 Safety specifications.

ARM 23.16.1906 General video gaming machine software specifications.

ARM 23.16.1907 Video draw poker software.

ARM 23.16.1910 Restrictions on optional game format or features.

ARM 23.16.1911 Software information to be provided to the department.

ARM 23.16.1924 Prohibited machines.

23-5-608. Limitation on amount of money played and value of prizes — payment of credits in cash.

Compiler's Comments

1995 Amendment: Chapter 227 in (1)(a) increased payout for video draw poker from $100 to $800.

1989 Amendment: At beginning of (1) substituted "gambling machine" for "draw poker or keno machine" and increased maximum payout from $100 to $800 a game for a video keno or bingo machine; and made minor changes in style and phraseology.

1987 Amendments: Chapter 211 inserted (2) requiring licensee to pay player in cash all credits shown on valid ticket voucher. (Chapter 640, L. 1987, inserted subsection (4)(f) of 23-5-606. The Code Commissioner has corrected the reference in (2) to reflect this insertion.)

Chapter 603 in (1), before "machine", inserted "video draw poker or keno".

Administrative Rules

ARM 23.16.1910 Restrictions on optional game format or features.

ARM 23.16.1924 Prohibited machines.

23-5-610. Video gambling machine gross income tax — records — distribution — quarterly statement and payment.

Compiler's Comments

2005 Amendment: Chapter 319 deleted former (2) that read: "(2) (a) A licensed machine owner is entitled to a tax credit for each video gambling machine for which a permit has been issued under this part if:

(i) the permit was active for the video gambling machine prior to the available connection date;

(ii) the department determines that the video gambling machine is incapable, in the form in which it was approved by the department, of communicating with the automated accounting and reporting system authorized by 23-5-637; and

(iii) the licensed machine owner participates in the automated accounting and reporting system and incurs actual hardware or software costs prior to January 1, 2005, for conversion of the video gambling machine to make it compatible with the automated system.

(b) The amount of the tax credit allowed under subsection (2)(a) is $250 for each video gambling machine or the actual hardware and software cost necessary for conversion of the video gambling machine to the automated accounting and reporting system, whichever is less"; deleted former (3) that read: "(3) If a tax credit is claimed under subsection (2)(a), the credit is deducted from the tax due for the quarter or quarters that begin after the video gambling machine for which the tax credit is claimed is connected to the automated accounting and reporting system authorized by 23-5-637"; in (3) near beginning of first sentence after "under this part" deleted "but not connected to the department's automated accounting and reporting system"; deleted former (5)(b) that read "(b) For each video gambling machine issued a permit under this part that is connected to the department's automated accounting and reporting system, the department shall, within 5 working days after the end of each quarter, complete and deliver to the licensed machine owner (with a copy sent to the licensed operator, if different from the licensed machine owner, on whose premises the machine is placed) a statement showing the total gross income from the video gambling machine, together with the total amount due the state as video gambling machine gross income tax for the preceding quarter. The licensed machine owner shall remit the total amount due the state under this subsection within 25 days after the end of each quarter"; in (4) at beginning deleted "Except as provided in subsection (7)"; deleted former (7) that read: "(7) Receipts from the taxes collected under this section are pledged and dedicated to guarantee repayment of loans participated in under 23-5-638 in an amount sufficient to meet the prepayment obligation for the fiscal year during which the loans are made. The amount of taxes pledged by this subsection is the dollar amount of loan participation under 23-5-638 and must be allocated to a separate account in the short-term investment pool. The board of investments is not entitled to use the proceeds from taxes collected under this section to repay a loan made under 23-5-638 unless the board certifies that all other commercially available means of collection on the loan have been exhausted"; and made minor changes in style. Amendment effective July 1, 2005.

Termination Provision Repealed: Section 6, Ch. 319, L. 2005, repealed Sec. 10, Ch. 424, L. 1999, which terminated the 1999 amendments to this section December 31, 2005. Effective July 1, 2005.

2003 Amendment: Chapter 210 in (2)(a)(i) at end substituted "prior to the available connection date" for "during the 12-month period ending December 31, 2001". Amendment effective April 3, 2003.

2001 Amendments — Composite Section: Chapter 198 at end of (2)(a)(i) substituted "during the 12-month period ending December 31, 2001" for "on December 31, 2000"; and near middle of (2)(a)(iii) substituted "January 1, 2005" for "December 31, 2003". Amendment effective April 5, 2001.

(Temporary version) Chapter 574 in (7) near beginning of first sentence after "from the" deleted "state's share of". Amendment effective July 1, 2001.

(Both versions) In (6) after "forward" deleted "one-third"; deleted former (6)(b) that read: "(b) The department shall, in accordance with the provisions of 15-1-501, forward the remaining two-thirds of the tax collected under subsection (5) to the treasurer of the county or the clerk, finance officer, or treasurer of the city or town in which the licensed machine is located, for deposit to the county or municipal treasury. Counties are not entitled to proceeds from taxes on income from video gambling machines located in incorporated cities and towns. The two-thirds local government portion of tax collected under subsection (5) is statutorily appropriated, as provided in 17-7-502, to the department for deposit to the county or municipal treasury"; and made minor changes in style. Amendment in temporary version effective July 1, 2001.

Retroactive Applicability: Section 3, Ch. 198, L. 2001, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to video gambling machine permits that were active after December 31, 2000."

Section 257(2), Ch. 574, L. 2001, provided: "[Section 143] [23-5-610] applies retroactively, within the meaning of 1-2-109, to April 1, 2000."

1999 Amendment: (Temporary version) Chapter 424 in (1) in first sentence substituted "licensed machine owner shall pay" for "licensed operator issued a permit under this part shall pay" and substituted "issued a permit" for "licensed" and in second sentence after "licensed" substituted "machine owner" for "operator"; inserted (2) and (3) relating to a tax credit; in (4) in first sentence substituted "machine owner" for "operator issued a permit under this part" and substituted "each video gambling machine issued a permit under this part" for "each machine"; in (5)(a) in first sentence substituted "For each video gambling machine issued a permit under this part but not connected to the department's automated accounting and reporting system, a licensed machine owner shall" for "A licensed operator issued a permit under this part shall",

after "each quarter" inserted "and in the manner prescribed by the department", and after "gross income" deleted "from each video gambling machine licensed to the operator"; inserted (5)(b) relating to tax statements and payments for video gambling machines connected to the automated accounting and reporting system; in (6)(a) inserted exception clause; inserted (7) relating to the pledge and use of video gambling machine taxes for loan guarantees; and made minor changes in style. Amendment effective July 1, 1999, and terminates December 31, 2005.

(Version effective January 1, 2006) In (1) in first sentence substituted "licensed machine owner shall pay" for "licensed operator issued a permit under this part shall pay" and substituted "issued a permit" for "licensed" and in second sentence after "licensed" substituted "machine owner" for "operator"; inserted (2) and (3) relating to a tax credit; in (4) in first sentence substituted "machine owner" for "operator issued a permit under this part" and substituted "each video gambling machine issued a permit under this part" for "each machine"; in (5)(a) in first sentence substituted "For each video gambling machine issued a permit under this part but not connected to the department's automated accounting and reporting system, a licensed machine owner shall" for "A licensed operator issued a permit under this part shall", after "each quarter" inserted "and in the manner prescribed by the department", and after "gross income" deleted "from each video gambling machine licensed to the operator"; inserted (5)(b) relating to tax statements and payments for video gambling machines connected to the automated accounting and reporting system; and made minor changes in style.

1995 Amendment: Chapter 18 in (4)(a) and near beginning of (4)(b), after "15-1-501", deleted reference to subsection (6); and made minor changes in style.

1993 Amendments — Composite Section: Chapter 398 in (1), in second sentence after "amounts", inserted "stolen", after "insurance" inserted "or under a court order", and after "theft" inserted "and if the theft is the result of either unauthorized entry and physical removal of the money from the machines or of machine tampering and the amounts stolen are documented"; and made minor changes in style.

Chapter 455 near beginning of (4)(a) and (4)(b) inserted "in accordance with the provisions of 15-1-501(6)"; and made minor changes in style. Amendment effective April 21, 1993.

A style change was slightly different in the two chapters. The codifier chose the more appropriate of the two.

Retroactive Applicability: Section 35, Ch. 455, L. 1993, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all tax periods beginning after December 31, 1992, and to taxes collected by audit after December 31, 1992, or taxes collected after December 31, 1992, if the payment was made after the date on which the tax was payable."

1992 Special Session Amendment: Chapter 15, Sp. L. July 1992, at end of (4)(a) inserted reference to surtax imposed by 23-5-646.

Effective Date: Section 38, Ch. 15, Sp. L. July 1992, provided that this act is effective on passage and approval. The act became effective pursuant to Article VI, sec. 10, of the Montana Constitution due to the passage of 25 days after delivery without gubernatorial action on the bill. Effective August 14, 1992.

Retroactive Applicability — Termination: Section 39(4), Ch. 15, Sp. L. July 1992, provided that this section applies to tax liabilities for calendar quarters beginning after June 30, 1992, and before July 1, 1993. This section terminates upon receipt of taxes for the quarter ending June 30, 1993.

1991 Amendment: Throughout section substituted reference to gross income for reference to net income and inserted "licensed" before "operator"; inserted second sentence of (1) concerning amounts stolen from machines; in (2), near middle of first sentence after "income", inserted "from each machine"; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: In five places substituted "gambling machine" for "draw poker and keno machine"; at beginning of (1), (2), and (3) substituted "An operator issued a permit under this part" for "Each licensee"; at end of (2) deleted "its agents, or employees"; in second sentence of (4)(b), before "cities", inserted "incorporated"; and made minor changes in phraseology.

Administrative Rules

ARM 23.16.1802 Definitions.

ARM 23.16.1826 Quarterly reporting requirements.

ARM 23.16.1827 Record retention requirements.

Collateral References

Validity of state or local gross receipts tax on gambling. 21 ALR 5th 812.

23-5-611. Machine permit qualifications — limitations.

Compiler's Comments

2005 Amendment: Chapter 319 in (1)(c) near end substituted "video keno, bingo, or combination poker-keno-bingo gambling" for "bingo and keno". Amendment effective July 1, 2005.

2003 Amendment: Chapter 210 in (1)(b) near middle after "bingo" inserted "or combination poker-keno-bingo"; and made minor changes in style. Amendment effective April 3, 2003.

1997 Amendment: Chapter 465 in (1)(a), after "23-5-177 and", substituted "who holds an appropriate license" for "a license" and after "premises" inserted "as provided in 23-5-119"; and made minor changes in style.

Severability: Section 12, Ch. 465, L. 1997, was a severability clause.

1991 Amendment: At end of (3) deleted "and no more than 10 may be draw poker machines". Amendment effective July 1, 1991.

1989 Amendment: In (1)(a) inserted operator's license requirement; deleted former (1)(b) requiring a license applicant to disclose previous involvement as an owner or operator of gambling devices or establishments; inserted (1)(b), a grandfather clause for premises not licensed to sell alcoholic beverages and not operated principally for gaming purposes; inserted (1)(c), a grandfather clause for premises operated principally for gaming purposes; inserted (2) requiring a permit applicant to disclose information required by the Department; in (3) substituted "20 machines of any combination and no more than 10 may be draw poker machines" for "five machines"; deleted former (3) giving one denied a license a right to a hearing; and made minor changes in phraseology.

1987 Amendment: Inserted (1)(b) requiring applicant for video draw poker license to disclose previous gambling operation ownership or employment and gambling convictions.

Administrative Rules

ARM 23.16.1803 Application for permit, fee, and permit requirements.
ARM 23.16.1807 Issuance of permit decal.
ARM 23.16.1808 Licenses issued under temporary authority.
ARM 23.16.1822 Permit not transferable.

23-5-612. Machine permits — fees.

Compiler's Comments

2005 Amendment: Chapter 528 in (1) near middle after "of the" substituted "fee" for "fees" and after "provided in" substituted "subsection (2)" for "subsections (2) and (4)"; and deleted former (4) that read: "(4) (a) In addition to the annual permit fee charged under subsection (2), the department shall charge a $10 annual permit surcharge fee for each video gambling machine that is on a licensed premises having fewer than 20 machines and a $20 annual permit surcharge fee for each machine that is on a licensed premises having 20 machines. The annual permit surcharge fee must be prorated as provided in subsection (2)(a).

(b) The annual permit surcharge fee charged under subsection (4)(a) must be deposited in the state general fund." Amendment effective April 28, 2005.

Applicability: Section 3, Ch. 528, L. 2005, provided: "[This act] applies to permit fees charged on or after June 30, 2005."

2003 Amendments — Composite Section: Chapter 29 in (2)(a) in first sentence increased annual permit fee from $200 to $220; and in (3) near beginning of first sentence after "deposit" substituted "$120 of the annual permit fee or for a prorated fee shall deposit $90 for three quarters, $60 for two quarters, and $30 for one quarter" for "50% of the total permit fee". Amendment effective July 1, 2003.

Chapter 471 near beginning of (1) inserted reference to subsection (4); inserted (4) imposing annual permit surcharge fee and requiring deposit of surcharge fee in state general fund; and made minor changes in style. Amendment effective April 23, 2003.

Applicability: Section 5(2), Ch. 471, L. 2003, provided that this section applies to annual permit fees charged after June 30, 2003.

1997 Amendment: Chapter 354 in (3), near beginning of first sentence after "shall", substituted "deposit" for "retain", near middle, after "subsection (2)(b)", inserted "in the state special revenue fund", and at end inserted "and for other purposes provided by law". Amendment effective July 1, 1997.

1993 Amendment: Chapter 210 inserted (2)(b) relating to payment of a machine transfer processing fee following a change in ownership; in (3), in first sentence, inserted reference to 100% of machine transfer processing fee and in second sentence inserted reference to fee

collected under subsection (2)(a); and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: Near end of (1), before "permit", inserted "annual"; in (2) inserted second sentence concerning proration of fee and third sentence prohibiting refunds; in (3), in first sentence, substituted "50%" for "$100" and after "collected" inserted "under subsection (2)" and at beginning of second sentence substituted "The balance" for "The remaining $100"; deleted former (3) and (4) that read: "(3) The permit expires on June 30 of each year, and the fee may not be prorated.

(4) A used keno machine may be licensed under subsection (1) without meeting the requirements of 23-5-609 [as that section read on September 30, 1989] if the applicant for licensure can establish to the satisfaction of the department that, on the date of application, he owns or possesses a machine that was owned or operated in the state prior to June 30, 1987. A license issued under this subsection expires for all purposes no later than June 30, 1989"; and made minor change in style. Amendment effective July 1, 1991.

1989 Amendments: Chapter 496 inserted (4)(a) of temporary version relating to meeting requirements of 23-5-607 and 23-5-608; inserted (4)(b) of temporary version relating to meters; and in (4)(c) of temporary version substituted "was licensed by the department prior to January 1, 1989" for "was owned or operated in the state prior to June 30, 1987" and deleted last sentence that read: "A license issued under this subsection expires for all purposes no later than June 30, 1989." Amendment effective July 1, 1989, and terminates June 30, 1990. Section 73, Ch. 642, L. 1989, in (4)(b) of temporary version inserted "as that section read on September 30, 1989". Amendment effective May 5, 1989.

Chapter 642 throughout section substituted "permit" for "license" and "gambling machine" for references to draw poker machine or keno machine; in (2) increased fee from $100 to $200 and provided that the $100 increase is statutorily appropriated to the local government; in (3) inserted "and the fee may not be prorated"; corrected internal references; and made minor changes in phraseology.

Proration of 1989 Fee: Chapter 642, L. 1989, transferred administration of parts 1 through 6 of this chapter to the Department of Justice and amended various fee provisions. Section 69 provided: "A fee imposed under 23-5-321, 23-5-421, 23-5-612, 23-5-625, or 23-5-631 between [the effective date of this section] [May 5, 1989] and October 1, 1989, must be prorated to cover only the period between the date the permit or license takes effect and October 1, 1989."

1987 Amendments: Chapter 154 in (1)(a) changed "department of revenue" to "department"; and in (1)(b), near middle of second sentence after "collected", deleted "in fiscal years 1986 and 1987 and shall retain 3% thereafter", but see Ch. 603 amendment.

Chapter 603 near end of (1)(a), after "poker", inserted "or keno"; in (1)(b) reduced fee to $100 from $1,500 for each video draw poker machine, inserted $100 license fee for each keno machine, and substituted last two sentences permitting Department to retain $100 of total license fee for administrative purposes and establishing June 30 of each year as date for expiration of license for former language that read: "The department shall retain 5% of the total license fee collected in fiscal years 1986 and 1987 and shall retain 3% thereafter for purposes of administering this part, except 23-5-615. The department shall deposit one-third of the remaining fee in the state general fund and forward two-thirds of the remaining fee to the treasurer of the county or the clerk, finance officer, or treasurer of the city or town in which the licensed machine is located, for deposit to the county or municipal treasury. Counties are not entitled to proceeds from fees on licensed machines located in cities and towns. The license expires on June 30 of each year, and the fee is prorated. The two-thirds portion of the annual fee is statutorily appropriated to the department as provided in 17-7-502 for deposit to the county or municipal treasury"; and inserted (2) authorizing the licensing of used keno machine not meeting required specifications if license applicant establishes that machine was owned or operated in state prior to June 30, 1987.

Administrative Rules

ARM 23.16.1803 Application for permit, fee, and permit requirements.
ARM 23.16.1805 Refund of permit fee.
ARM 23.16.1807 Issuance of permit decal.
ARM 23.16.1822 Permit not transferable.
ARM 23.16.1823 Expiration — renewal of permit.

Case Notes

No Clear Legal Duty to Issue Gambling Licenses and Permits — Activity Unlawful Under Federal Law — Writ of Mandamus Properly Denied: The Department of Justice, Gambling Control Division, denied gambling licenses and permits to the plaintiffs, business owners who

operate within the boundaries of the Flathead Indian Reservation. The denial of licenses was based on the determination of the U.S. Attorney that the operation of video gambling machines would no longer be lawful on Indian lands absent a tribal-state compact. The plaintiffs filed a petition for a writ of mandamus ordering the state to issue the licenses and permits. The writ was denied. The plaintiffs appealed on the grounds that the state had a clear legal duty under state law to issue the licenses and permits. On appeal, the Supreme Court rejected the state's contention that state gambling laws specifically authorize it to refuse to process the plaintiffs' applications. However, because the plaintiffs seek to conduct gambling operations on the Flathead Indian Reservation, federal statutes must be considered in conjunction with state law. State law that conflicts with the purpose and operation of a federal statute, regulation, or policy is preempted by the federal law. State licensure of Class III gaming under the facts of this case would frustrate the federal policy underlying the Indian Gaming Regulatory Act (IGRA). The Supreme Court concluded that absent a ruling of a federal court as to the applicability of IGRA to non-Indians, such as the plaintiffs in this case, and given the apparent conflict between Montana licensing statutes and federal statutes regulating gambling on Indian lands, there is no clear legal duty requiring the state to issue gambling licenses and permits to the plaintiffs. The District Court did not err in denying the petition for a writ of mandamus. Larson v. St., 275 M 314, 912 P2d 783, 53 St. Rep. 158 (1996).

23-5-613. Violations.

Compiler's Comments

1989 Amendment: Substituted "Unless otherwise provided in this part, a person who purposely or knowingly violates or procures, aids, or abets a violation of this part or an ordinance, resolution, or rule adopted under this part is guilty of a misdemeanor punishable under 23-5-161" for "A violation of this part, except 23-5-615, or a rule promulgated under 23-5-605 is a criminal offense, and a fine not to exceed $10,000 for the first violation and $15,000 for a subsequent violation must be imposed"; and deleted former (1) and (3) through (6) relating to investigation of violations of this part, suspensions and revocations, hearings, seizures, personal background investigations, reports of suspected violations to law enforcement agencies, reports of convictions to the Department, and arrests (see 1987 MCA for former text).

1987 Amendment: Near beginning of (1) and (4), after "department", inserted "or duly authorized department representatives"; inserted (5)(b) requiring court clerk to report to Department licensee's conviction of local gambling ordinance; and inserted (5)(c) authorizing Department to commence proceeding to revoke or suspend video draw poker license upon receiving report of gambling ordinance violation conviction.

Administrative Rules

ARM 23.16.1924 Prohibited machines.
ARM 23.16.1931 Inspection and seizure of machines.
ARM 23.16.1932 Investigation of licensee.

23-5-614. Sale of video gambling machines.

Compiler's Comments

1997 Amendment: Chapter 354 inserted (3) regarding conditions under which video gambling machines may be sold outside the state. Amendment effective July 1, 1997.

23-5-616. Removal of machine from public access.

Compiler's Comments

1989 Amendment: Substituted "this part or any rule of the department which specification or requirement existed at the time the machine was approved" for "23-5-606, 23-5-607, or 23-5-608"; after "initial" substituted "permit has been issued, the operator" for "licensure, the licensee"; and made minor change in phraseology.

Administrative Rules

ARM 23.16.1925 Possession of unlicensed machines by manufacturer, distributor, owner, or repair service.
ARM 23.16.1929 Repairing machines — approval.

23-5-621. Rules.

Compiler's Comments

2005 Amendments — Composite Section: Chapter 134 in (1)(b) at end inserted text relating to screen image and area. Amendment effective July 1, 2005.

Chapter 319 in (1)(d) near beginning after "gambling machine" deleted "approved for connection to the department's automated accounting and reporting system", near middle after "machine cabinet if" deleted "after October 1, 2002" substituted "to report video gambling machine information utilizing an approved automated accounting and reporting system" for "of an application for connection of the machine to the automated accounting and reporting system", and at end substituted "to utilize an approved automated accounting and reporting system" for "for connection of the machine to the system"; deleted former (1)(d)(ii) that read: "(ii) after October 1, 2003, the owner of the video gambling machine has received approval of an application for connection of the machine to the automated accounting and reporting system or has entered into an agreement with the department for connection of the machine to the system, but the system is unavailable for connection"; in (1)(e) near middle substituted "that utilize an approved" for "connected to the department's"; in (1)(e)(i) near middle after "data collected" deleted "by the department" and near end substituted "an approved" for "the department's"; deleted former (1)(f) that read: "(f) provide that, for video gambling machines connected to the department's automated accounting and reporting system, machine paper audit and accounting rolls need not be retained for more than 4 consecutive quarters"; in (1)(f) near middle substituted "utilize an approved" for "are connected to the department's"; in (2) near beginning inserted "approved"; in (2)(a) and (2)(b) near middle inserted "approved"; in (2)(c) at end deleted "based on the requirement that electronic permitting and transfer of funds may be done only when the department has a request in writing from the owner of the electronic funds transfer account"; deleted former (2)(d) and (2)(e) that read: "(d) limit and prescribe the circumstances under which machines may be disabled for malfunctions or violations detected by use of the automated accounting and reporting system or for other violations of this chapter. Under no circumstances may machines connected to the automated system be disabled for violations except upon clear and convincing evidence supporting a determination made after notice and an opportunity for hearing and with the right of judicial review under the Montana Administrative Procedure Act.

(e) provide for training by the department of technicians who install, maintain, and repair video gambling machines and components connected to the automated accounting and reporting system and for a department list of technicians who have completed department training"; inserted (2)(d) relating to specifications and testing for automated accounting and reporting systems; inserted (2)(e) relating to frequency of reporting from automated accounting and reporting systems; and made minor changes in style. Amendment effective July 1, 2005.

2003 Amendment: Chapter 210 in (1)(d) near beginning after "machine" substituted "approved for connection" for "connected"; inserted (1)(d)(i) and (1)(d)(ii) allowing combination poker, keno, and bingo games after October 1, 2002, under certain conditions; inserted (2)(e) requiring that rules provide for training and listing of technicians; and made minor changes in style. Amendment effective April 3, 2003.

1999 Amendment: Chapter 424 inserted (1)(a) relating to implementation of 23-5-637; at end of (1)(b) deleted "The specifications in the rules must substantially follow the specifications contained in 23-5-606 and 23-5-609 as those sections read on September 30, 1989"; inserted (1)(d) through (1)(g) relating to rules for video gambling machines connected to the automated accounting and reporting system; inserted (2) relating to rules governing the operation of the automated accounting and reporting system; and made minor changes in style. Amendment effective April 22, 1999.

Administrative Rules

ARM 23.16.1901 General specifications of video gambling machines.
ARM 23.16.1905 Safety specifications.
ARM 23.16.1906 General video gaming machine software specifications.
ARM 23.16.1907 Video draw poker software.
ARM 23.16.1908 Software specifications for video keno machines.
ARM 23.16.1909 Software specifications for video bingo machines.
ARM 23.16.1909A Software specifications for video multigame machines.
ARM 23.16.1910 Restrictions on optional game format or features.
ARM 23.16.1911 Software information to be provided to the department.
ARM 23.16.1920 Automated accounting and reporting system, video gambling machine, and hardware and software specifications.
ARM 23.16.1936 Transportation of machines into state.
ARM 23.16.1940 Video gambling machines — trade shows.
ARM 23.16.2101 Combination of poker, keno, and bingo.
ARM 23.16.2803 Application for authorization to conduct a Calcutta pool.

23-5-625. Video gambling machine manufacturer — license — fees — restrictions.

Compiler's Comments

2005 Amendment: Chapter 134 in (1) in first sentence near beginning after "produce" inserted "test". Amendment effective July 1, 2005.

1993 Amendment: Chapter 626 throughout section substituted "manufacturer" for "manufacturer-distributor" and substituted "manufacturer's" for "manufacturer-distributor's"; in (1), at beginning, deleted "(a) Except as provided in subsections (2) and (3)", after "manufacture" deleted "or supply", and near end, after "licensed", inserted "distributor, route operator, or"; in (2), at beginning, inserted exception clause; in (3), at beginning, substituted "Except as provided in subsection (6)" for "In addition to other license fees"; deleted former (2) specifying conditions under which licensed operator who is not a manufacturer-distributor may sell video gambling machines (see 1993 Session Law for text); deleted former (3) authorizing foreclosing lienholder to sell video gambling machines (see 1993 Session Law for text); inserted (6) authorizing Department to waive license fee; and made minor changes in style.

1991 Amendment: At beginning of (1)(a) inserted exception clause and inserted last sentence limiting supply of machine to another licensee; inserted (2) limiting sale by licensed operator not licensed as a manufacturer-distributor; inserted (3) authorizing sale by a lienholder; and made minor changes in style. Amendment effective July 1, 1991.

1989 Amendment: Throughout section inserted references to video gambling machine; in (1), after "person to", substituted "assemble, produce, manufacture, or supply" for "manufacture, sell, or distribute"; in (5) substituted "unless otherwise provided" for "except 23-5-615"; and made minor changes in phraseology.

Proration of 1989 Fee: Chapter 642, L. 1989, transferred administration of parts 1 through 6 of this chapter to the Department of Justice and amended various fee provisions. Section 69 provided: "A fee imposed under 23-5-321, 23-5-421, 23-5-612, 23-5-625, or 23-5-631 between [the effective date of this section] [May 5, 1989] and October 1, 1989, must be prorated to cover only the period between the date the permit or license takes effect and October 1, 1989."

Administrative Rules

ARM 23.16.1828 General requirements of operators, manufacturers, and distributors of video gambling machines or producers of associated equipment.

ARM 23.16.1916 Manufacturers/distributors and producers of associated equipment of video gambling machines.

23-5-628. Inspection of premises, records, and devices.

Compiler's Comments

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this section is effective July 1, 1991.

23-5-631. Examination and approval of new video gambling machines and associated equipment — fee.

Compiler's Comments

2005 Amendment: Chapter 327 in (5) substituted provision that the payments under subsection (4) must be deposited in an account in the state special revenue fund and used to administer this part and for other purposes provided by law for "are statutorily appropriated to the department, as provided in 17-7-502, to defray the costs of examining and approving video gambling machines and associated equipment and modifications to approved machines and associated equipment and to issue refunds for overpayments". Amendment effective July 1, 2005.

2003 Amendment: Chapter 190 near middle of (3) substituted "state" for "department of commerce". Amendment effective April 1, 2003.

1997 Amendment: Chapter 354 in (1) inserted second sentence establishing conditions regarding importation of a video gambling machine for research and development. Amendment effective July 1, 1997.

1993 Amendments: Chapter 398 in (6) inserted second sentence prohibiting manufacturer, distributor, or route operator from supplying gambling machine or equipment to another manufacturer, distributor, route operator, or operator without approval.

Section 19, Ch. 398, L. 1993, a coordination instruction, in (6) deleted a sentence prohibiting manufacturer-distributor from supplying gambling machine or equipment to another licensed manufacturer-distributor or licensed operator without Department approval, contingent on passage and approval of House Bill No. 411. House Bill No. 411 was passed and approved as Ch. 626, L. 1993.

Chapter 626 in three places inserted "or a modification to an approved machine or associated equipment"; in two places substituted "manufacturer" for "manufacturer- distributor"; in (1), near beginning after "gambling machine", substituted "or" for "and"; in (3), after "machines", inserted "or associated equipment"; in (5), after "equipment", inserted "and modifications to approved machines and associated equipment"; in (6), in first sentence after "equipment", inserted "or associated equipment or a modification to an approved machine or associated equipment"; and made minor changes in style.

1991 Amendment: Inserted (5) statutorily appropriating payments to Department. Amendment effective July 1, 1991.

1989 Amendment: Throughout section substituted "gambling machine" for references to draw poker machine; inserted (3) mandating that machines approved before October 1, 1989, must be considered approved for purposes of this part; inserted (5) allowing machine inspection and approval and placing conditions on machine placement for play; and made minor changes in phraseology.

Machines Approved Prior to October 1, 1989: Section 48, Ch. 642, L. 1989, inserted subsection (3) providing that "machines approved by the department of commerce prior to [the effective date of this act] must be considered approved under this part". October 1, 1989, was substituted for "[the effective date of this act]" by the Code Commissioner, though the "act", Ch. 642, contained three different effective dates for various sections. The effective date section was amended into the bill. Prior to the amendment, the whole act was effective October 1, 1989. Under the amendment, sec. 48 is effective October 1, 1989, and it is clear that "[the effective date of this act]" in sec. 48 refers to October 1, 1989.

Proration of 1989 Fee: Chapter 642, L. 1989, transferred administration of parts 1 through 6 of this chapter to the Department of Justice and amended various fee provisions. Section 69 provided: "A fee imposed under 23-5-321, 23-5-421, 23-5-612, 23-5-625, or 23-5-631 between [the effective date of this section] [May 5, 1989] and October 1, 1989, must be prorated to cover only the period between the date the permit or license takes effect and October 1, 1989."

Administrative Rules

ARM 23.16.1918 Video gambling machine testing fees.

ARM 23.16.1927 Approval of video gambling machines by department.

ARM 23.16.1929 Repairing machines — approval.

23-5-637. Approved automated accounting and reporting systems.

Compiler's Comments

2005 Amendment: Chapter 319 in (1) near end substituted "approve" for "operate and maintain, subject to the restrictions contained in subsections (3) and (4)"; in (2) near middle substituted "or as provided in an agreement for multiple-game software, utilization of an approved" for "connection of video gambling machines to the department's" and at end deleted "prior to the available connection date"; deleted former (3) that read: "(3) (a) The department shall issue a request for proposals for the automated accounting and reporting system. The department may not sign a final contract for the purpose of acquiring an automated system unless it has obtained written confirmation from licensed machine owners who volunteer to participate in the automated system and whose commitment to participate covers 70% of the total number of video gambling machines that are capable of being connected to the automated system.

(b) The 70% calculation must be based on video gambling machines that had permits on July 15 prior to the contract date and on an analysis by the department of the feasibility of upgrading specific video gambling machine models based on the age of the video gambling machines, technologies employed, numbers of video gambling machines in a model series, and existence or nonexistence of a licensed manufacturer to support upgraded conversions.

(c) A request for proposals for the system must require that the proposal:

(i) provide that communication protocols between connected video gambling machines and the central system and between connected video gambling machines and on-premises site controllers do not favor any one central system vendor or component manufacturer; and

(ii) provide for computer backup and contingency planning to ensure that there will be no video gambling machine operation interruptions because of central system failures"; inserted (3) relating to requirements for an approved automated accounting and reporting system; in (4) at beginning deleted "After the available connection date" and at end substituted "July 1, 2005, that is not manufactured in a manner specifically designed to comply with communications standards adopted by department rules" for "the available connection date that is not manufactured in a manner specifically designed to allow the video gambling machine to be

connected to the department's automated accounting and reporting system"; in (5) near beginning substituted "utilizes an approved" for "connects one or more video gambling machines at a premises to the department's", near middle inserted "for one or more video gambling machines at a premises", after "premises, all" deleted "connected", after "on the premises" inserted "that utilize the approved system", after "replacing" deleted "connected", and near end substituted "that utilize the approved system, must continue to use the approved system" for "must remain connected to the automated system"; deleted former (4)(c) that read: "(c) if there is a change in the majority ownership interests of a licensed gambling business, all video gambling machines located on the premises must be connected to the department's automated accounting and reporting system within 5 years after the date on which the majority ownership change is approved by the department, unless there are five or fewer video gambling machines on the premises and:

(i) they are owned by the licensed operator; or

(ii) the premises are located in a city, town, or county with a population of 3,000 or less, according to the last official decennial census"; and made minor changes in style. Amendment effective July 1, 2005.

2003 Amendment: Chapter 210 in (2) at end substituted "prior to the available connection date" for "on December 31, 2000"; in (3)(a) at end of first sentence after "system" deleted "on or before September 1, 1999"; in (3)(b) near beginning after "July 15" substituted "prior to the contract date" for "1999"; in (4) at beginning of introductory clause after "After" substituted "the available connection date" for "December 31, 2000"; in (4)(a) near beginning after "manufactured after" substituted "the available connection date" for "December 31, 2000"; and made minor changes in style. Amendment effective April 3, 2003.

Effective Date: Section 9(1), Ch. 424, L. 1999, provided that this section is effective on passage and approval. Approved April 22, 1999.

Administrative Rules

ARM 23.16.1920 Automated accounting and reporting system, video gambling machine, and hardware and software specifications.

Part 7
Casino Nights

Part Compiler's Comments

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this part is effective July 1, 1991.

Part Administrative Rules

Title 23, chapter 16, subchapter 31, ARM Definitions, permit applications, casino night requirements, and reports.

23-5-710. Requirements for conducting casino nights.

Compiler's Comments

1999 Amendment: Chapter 171 in (1)(a) at beginning inserted exception clause; inserted (1)(b) allowing a casino night to be split into separate sessions; in (3) after "merchandise" inserted "or cash"; inserted (5) allowing cash prizes at a casino night; and made minor changes in style. Amendment effective October 1, 1999.

23-5-715. Rules.

Compiler's Comments

1991 Statement of Intent: The statement of intent attached to Ch. 647, L. 1991, provided: "A statement of intent is required for this bill because [sections 13, 20, and 44] [23-5-426, 23-5-512, and 23-5-715] grant rulemaking authority to the department of justice.

[Section 13] [23-5-426] requires the department to adopt rules describing electronic live bingo and keno equipment that may be approved for use in Montana. The rules must ensure that the electronic equipment use a random selection process to determine the outcome of each bingo or keno game.

[Section 20] [23-5-715] requires the department to adopt rules to administer the laws governing casino nights. The rules must address but are not limited to:

(1) procedures for applying for a casino night permit;

(2) the type of documentation to be submitted as part of the application to establish an organization's nonprofit status; and

(3) the conduct of games operated during a casino night to ensure that illegal gambling activities are not offered.

[Section 44] [23-5-512] requires the department to adopt rules describing the types of sports pools authorized under 23-5-501, 23-5-503, and [section 44] [23-5-512]."

Part 8
Fantasy Sports Leagues

Part Compiler's Comments

Effective Date: Section 58(2), Ch. 647, L. 1991, provided that this part is effective July 1, 1991.

Part Administrative Rules

Title 23, chapter 16, subchapter 32, ARM Definitions, play restrictions, prizes, and records.

CHAPTER 6
AMUSEMENT GAMES

Chapter Administrative Rules

Title 23, chapter 16, subchapter 38, ARM Carnival games.

Chapter Law Review Articles

Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns, Saunders, 2003 L. Rev. Mich. St. U. - Det. C.L. 51 (2003).

Chapter Collateral References

Liability for injury to customer or patron from amusement device maintained by store or shopping center for use by customers. 40 ALR 5th 807.

Part 1
General

Part Compiler's Comments

Effective Date: Section 9, Ch. 523, L. 1991, provided that this part is effective April 22, 1991.

Part Collateral References

Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death of patron. 54 ALR 5th 513.

Recovery in tort for wrongful interference with chance to win game, sporting event, or contest. 85 ALR 4th 1048.

23-6-101. Definitions.

Compiler's Comments

1993 Amendment: Chapter 327 in definition of prize, at end of (a) and (b), deleted "with a wholesale value of $50 or less" and in (b), after "tickets", deleted "coupons"; and made minor changes in style.

23-6-102. Requirements for games.

Compiler's Comments

1993 Amendment: Chapter 327 substituted (4) concerning display of prizes and prohibition on repurchase for former text that read: "A cash prize is not awarded, and only a prize is awarded. Prizes must be displayed and may not be repurchased"; and inserted (5) stating that a tangible personal property prize may not exceed $50 in wholesale value, the value of a token or ticket for redemption purposes may not exceed 5 cents, the maximum value of tokens or tickets awarded after a single play may not exceed the value of 10 times the total amount paid by all participants to play the game, and tangible personal property for which tokens or tickets are redeemed may exceed $50 in wholesale value.

23-6-104. Amusement games allowed.

Compiler's Comments

1993 Amendments: Chapter 327 inserted (2)(h)(xiv) relating to "Other coin- or token-operated games of skill"; and made minor changes in style.

Chapter 353 inserted (3) allowing adoption by rule of additional fair or carnival games and the setting and collection of fees to offset costs; and made minor changes in style.

Chapter 626 in (2)(h)(i)(A), at beginning of first sentence, inserted "The games in each of the following sentences require the" and after "(bulldozer)" inserted "operating on a playing field containing additional coins, tokens, or merchandise", in second sentence, at beginning after "A coin", deleted "or token", after "(bulldozer)" inserted "operating on a playing field containing additional coins to", after "push" substituted "coins" for "additional tokens or prizes", and at end inserted phrase describing counting mechanism, and inserted most of third sentence and all of fourth sentence describing result of correctly aimed token; in (2)(h)(i)(B), at beginning, substituted "There may not be a" for "Tokens are exchanged for prizes. If there is a hidden", after "passage of" inserted "coins", after "tokens, or" substituted "merchandise" for "prizes", after "into the" inserted "counting mechanism", and after "or chute" deleted "that sends them to the player, the operator shall post a sign to advise the players"; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 353, L. 1993, provided: "A statement of intent is required for this bill because the bill gives the department of justice authority to adopt administrative rules. It is intended that rules be adopted, or at least considered, on a cyclical basis that takes the state's fair and carnival season into account. Unless the department, in conjunction with the fair and carnival industry and others offering amusement games for play, works out a better arrangement and timetable for proposing and adopting rules, the department should accept, research, and consider rule requests during the first 9 months of each year and, after the fair and carnival season has ended, propose to adopt by rule new amusement games and file an adoption notice in approximately mid-December."

CHAPTER 7
STATE LOTTERY

Chapter Compiler's Comments

Initial Appointment and Terms of Commissioners: Section 22, Ch. 669, L. 1985, provided: "Initial appointments to the commission must be made within 30 days after [the effective date of sections 1 through 25] [January 1, 1987]. Two of the initial appointees shall serve for 2 years, two shall serve for 3 years, and one shall serve for 4 years."

Initial Duties of Commission — Lottery Study — First Game: Section 23, Ch. 669, L. 1985, provided: "(1) The commission shall immediately conduct an initial study of other state lotteries.

(2) The commission shall begin the operation of state lottery games at the earliest practicable time and in any event no later than July 1, 1987."

Submission to Electorate: Section 27, Ch. 669, L. 1985, provided: "The question whether sections 1 through 25 of this act will become effective shall be submitted to the electors of the State of Montana at the general election to be held in November 1986 by printing on the ballot the full title of this act and the following:

[ ] FOR establishing a state lottery.

[ ] AGAINST establishing a state lottery."

Temporary State Treasury Line of Credit for Expense of Starting State Lottery: Section 24, Ch. 669, L. 1985, provided: "There is a temporary line of credit that may be drawn by the director of the state lottery from the state general fund and deposited in the state lottery fund, in the amount of $1,500,000. This temporary line of credit may be drawn upon only during the first 12 months after the effective date of [sections 1 through 20] [Title 23, ch. 5, part 10 (renumbered Title 23, ch. 7)] and only for the purpose of financing the initial expenses of starting the state lottery. The director may draw upon all or part of this temporary line of credit. Any funds advanced under the temporary line of credit must be repaid out of the lottery's net revenue to the general fund within 1 year of the advance, and no net revenue may be paid out under [section 13(3)] [23-5-1027(4) (renumbered 23-7-402)] until all advanced funds are repaid. Interest must be paid at an annual simple interest rate of 10% on funds advanced, commencing on the day funds are advanced and until the funds are repaid." This section was amended by sec. 7, Ch. 161, L. 1987, which, after the third sentence, inserted "This temporary line of credit must be available for expenditure regardless of fiscal or biennium yearend."

Chapter Administrative Rules

Title 2, chapter 63, subchapter 1, ARM Organizational rule.
Title 2, chapter 63, subchapter 2, ARM Procedural rules.
Title 2, chapter 63, subchapter 4, ARM Retailer rules.
Title 2, chapter 63, subchapter 6, ARM Licensing rules.
Title 2, chapter 63, subchapter 8, ARM Electronic funds transfer.

Title 2, chapter 63, subchapter 10, ARM Instant ticket rules.
Title 2, chapter 63, subchapter 12, ARM Prizes.

Chapter Law Review Articles

Are All Lotteries Regressive? Evidence From the Powerball, Oster, 57 Nat'l Tax J. 179 (2004).
Lottery Winnings Probably Not Assignable, Emory, 73 J. Tax'n 115 (1990).

Chapter Collateral References

38 Am. Jur. 2d Gambling §57.
Recovery in tort for wrongful interference with chance to win game, sporting event, or contest. 85 ALR 4th 1048.
Private contests and lotteries: entrant's rights and remedies. 64 ALR 4th 1021.
State lotteries: actions by ticketholders against state or contractor for state. 40 ALR 4th 662.

Part 1
General

23-7-103. Definitions.

Compiler's Comments

1997 Amendment: Chapter 42 in (4)(b) substituted "Calcutta pools governed by Title 23, chapter 5, part 2" for "lotteries prohibited by Title 23, chapter 5, part 2"; and made minor changes in style. Amendment effective March 12, 1997.

Part 2
Administration

23-7-201. State lottery commission — allocation — composition — compensation — quorum.

Compiler's Comments

2001 Amendment: Chapter 483 in (9) after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

23-7-202. Powers and duties of commission.

Compiler's Comments

2003 Amendment: Chapter 211 in (8)(a) after "states" inserted "and countries"; inserted (8)(b) allowing the commission to enter into agreements with an association for the purpose of participating in multistate lottery games or games offered in other states and other countries; and made minor changes in style. Amendment effective April 3, 2003.

1995 Amendment: Chapter 509 in (3) substituted "state" for "superintendent of public instruction and to the board of crime control"; and made minor changes in style. Amendment effective July 1, 1995.

1991 Amendment: In (3) inserted "and to the board of crime control". Amendment effective July 1, 1991.

1989 Amendments: Chapter 248 in (8), before "lottery games", deleted "regional".

Chapter 408 inserted (3) requiring Commission to maximize net revenue paid Superintendent of Public Instruction under 23-5-1027 (renumbered 23-7-402) and to ensure that policies and rules further revenue maximization; inserted (4) requiring Commission to determine percentage paid for tickets or for chances to be paid as prizes; in (8), before "lottery games", deleted "regional"; in (10) inserted reference to staff sales incentives or bonuses and sales agents' commissions; and made changes in form. Amendment effective April 3, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 408, L. 1989, provided: "This bill requires a statement of intent because [sections 2 and 4] [23-5-1007 and 23-5-1016 (renumbered 23-7-202 and 23-7-301)] grant rulemaking authority to the lottery commission. The overall intent and purpose of this bill is to enable the lottery to be run as a business.

The legislature finds that the lottery is a complex business driven by market forces and must be given flexibility in order to maximize profits.

The legislature also finds that the people of Montana overwhelmingly approved the creation of a lottery and that the intent of the people was also to maximize profits to the state.

The legislature finds that an operational budget based on a percentage of revenue has hampered the lottery commission in its attempt to operate as a business. The lottery must be able to plan for market expansion, improvement of the product line, cost reduction, and organizational development as would a private business. These plans cannot be made or carried

out unless the operational budget is a fixed amount. It is the intent of the legislature that the lottery's operating budget be set by the legislature as are the budgets of all other state agencies.

In [section 2] [23-5-1007 (renumbered 23-7-202)], the legislature grants additional rulemaking authority to the lottery commission to adopt rules providing for staff incentives or bonuses for increased sales only if these rules can be shown to significantly increase sales. It is the further intent that the rules for sales incentives and bonuses be based on incentive and bonus plans that have proven successful in private business or other lotteries.

The legislature intends to give the commission flexibility to change the prize payout in instant ticket games in order to increase profits. If increased prize payout does not result in increased net revenue, the decision of the commission then should be to roll back the prize payout percentage to comply with the legislative intent of maximizing profits.

In [section 4] [23-5-1016 (renumbered 23-7-301)], the legislature allows the lottery commission to adopt rules providing for increased commissions to retailers if retailers increase their sales of lottery products. The legislature intends that the bonus commission plans be based on successful plans in other lotteries, such as Colorado's, whereby total sales are projected for each retailer based on average sales over a period of time, such as 1 year. Whenever future sales for an established period of time exceed forecasted sales, a bonus may be paid. For example, if a retailer maintains average sales, the commission is the regular 5%; if a retailer sells a certain percentage above average, 6%; an even higher percentage of increase in sales may provide 7%, etc. The purpose of bonus commissions is to increase net revenue to the state."

1987 Amendment: In (6), after "study", deleted "the possibility of working" and inserted "and may enter into agreements".

23-7-210. Director — appointment — compensation — qualifications.

Compiler's Comments

2001 Amendment: Chapter 483 at end of (3) after "department of" substituted "administration" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

23-7-211. Powers and duties of director.

Compiler's Comments

1997 Amendment: Chapter 42 in (2)(b), at end, substituted "18-4-312(3)" for "18-4-312(4)". Amendment effective March 12, 1997.

1995 Amendment: Chapter 359 in (2)(a), at end of first sentence, inserted "for the sale of tickets and chances, and for other services" and substituted second sentence requiring the state to provide management, security, and audit control for former second and third sentences that read: "All contracts must be made in accordance with state law. A contract is not legal or enforceable that provides for the management of the state lottery or for the entire operation of its games by any private person or firm"; and made minor changes in style. Amendment effective April 11, 1995.

1993 Amendment: Chapter 24 in (2)(b), near beginning of first sentence after "satisfactory to", inserted "and in an amount determined by", near end, after "satisfactory to the commission", deleted "in an amount equal to the price of the contract", and inserted second sentence regarding bond requirements; and made minor changes in style. Amendment effective February 9, 1993.

23-7-212. Assistant director for security — qualifications — duties — compensation.

Compiler's Comments

1987 Amendment: In (1), at end, inserted "who serves at the pleasure of the director"; and inserted (4) establishing salary of assistant Director for security as equal to 90% of lottery Director's salary.

Part 3
Sales and Regulation

23-7-301. Ticket or chance sales agents — licenses.

Compiler's Comments

2001 Amendment: Chapter 483 in (11) near end after "department of" substituted "administration" for "commerce". Amendment effective July 1, 2001.

1997 Amendment: Chapter 42 in (10) substituted "paid to the general fund" for "paid to the superintendent of public instruction"; and made minor changes in style. Amendment effective March 12, 1997.

1989 Amendments: Chapter 342 in (10) increased from 5% to 10% the commission allowable to a sales agent and inserted third sentence that read: "Commissions may not come from that part of all gross revenue that is net revenue and is paid to the superintendent of public instruction"; and made minor changes in phraseology. Amendment effective July 1, 1989.

Chapter 408 in (10) substituted language clarifying that sales agents' commissions are based on a percentage of the face value of tickets, allowing Commission to adopt rules providing for additional commissions, and statutorily appropriating commissions for language that read: "Sales agents are entitled to no more than a 5% commission on tickets and chances sold." Amendment effective April 3, 1989.

1989 Statement of Intent: The statement of intent attached to Ch. 408, L. 1989, provided: "This bill requires a statement of intent because [sections 2 and 4] [23-5-1007 and 23-5-1016 (renumbered 23-7-202 and 23-7-301)] grant rulemaking authority to the lottery commission. The overall intent and purpose of this bill is to enable the lottery to be run as a business.

The legislature finds that the lottery is a complex business driven by market forces and must be given flexibility in order to maximize profits.

The legislature also finds that the people of Montana overwhelmingly approved the creation of a lottery and that the intent of the people was also to maximize profits to the state.

The legislature finds that an operational budget based on a percentage of revenue has hampered the lottery commission in its attempt to operate as a business. The lottery must be able to plan for market expansion, improvement of the product line, cost reduction, and organizational development as would a private business. These plans cannot be made or carried out unless the operational budget is a fixed amount. It is the intent of the legislature that the lottery's operating budget be set by the legislature as are the budgets of all other state agencies.

In [section 2] [23-5-1007 (renumbered 23-7-202)], the legislature grants additional rulemaking authority to the lottery commission to adopt rules providing for staff incentives or bonuses for increased sales only if these rules can be shown to significantly increase sales. It is the further intent that the rules for sales incentives and bonuses be based on incentive and bonus plans that have proven successful in private business or other lotteries.

The legislature intends to give the commission flexibility to change the prize payout in instant ticket games in order to increase profits. If increased prize payout does not result in increased net revenue, the decision of the commission then should be to roll back the prize payout percentage to comply with the legislative intent of maximizing profits.

In [section 4] [23-5-1016 (renumbered 23-7-301)], the legislature allows the lottery commission to adopt rules providing for increased commissions to retailers if retailers increase their sales of lottery products. The legislature intends that the bonus commission plans be based on successful plans in other lotteries, such as Colorado's, whereby total sales are projected for each retailer based on average sales over a period of time, such as 1 year. Whenever future sales for an established period of time exceed forecasted sales, a bonus may be paid. For example, if a retailer maintains average sales, the commission is the regular 5%; if a retailer sells a certain percentage above average, 6%; an even higher percentage of increase in sales may provide 7%, etc. The purpose of bonus commissions is to increase net revenue to the state."

23-7-302. Sales restrictions.

Compiler's Comments

1993 Amendment: Chapter 398 in (3), after "may", inserted "be purchased only with cash or a check and may".

1989 Amendment: In (3) substituted "may not be purchased on credit" for "must be paid for in cash"; and in (4), at end, substituted "households" for "families living with them". Amendment effective April 3, 1989.

1987 Amendment: In (4) substituted "employees of any firm auditing or investigating the state lottery, governmental employees" for "employees of any firm or governmental agency".

23-7-306. Felony and gambling-related convictions — ineligibility for lottery positions.

Compiler's Comments

2003 Amendment: Chapter 107 deleted former second and third sentences that read: "Prior to appointment as a commissioner, director, assistant director, or employee, a person shall submit to the commission a full set of fingerprints made at a law enforcement agency by an agent or officer of such agency on forms supplied by the agency. The assistant director for security may require a ticket or chance sales agent to submit fingerprints prior to licensing" and inserted second and third sentences requiring a person to submit fingerprints to the department of justice

to determine a person's suitability for the position of commissioner, director, assistant director, or employee of the state lottery and requiring the department of justice to examine fingerprints and, if a disqualifying record is not found, to forward the fingerprints to the federal bureau of investigation for a national criminal history check; and made minor changes in style. Amendment effective March 24, 2003.

1989 Amendment: Near beginning of second sentence substituted references to Commissioner, Director, Assistant Director, or employee for "to any such position"; and inserted third sentence providing that Assistant Director for Security may require agent to submit fingerprints prior to licensing. Amendment effective April 3, 1989.

23-7-307. Conflict of interest.

Compiler's Comments

1989 Amendment: Near middle substituted "household" for "family living with him". Amendment effective April 3, 1989.

23-7-310. Disclosures by gaming suppliers.

Compiler's Comments

2003 Amendment: Chapter 107 at end of (1)(d) deleted "and shall submit to the commission a full set of fingerprints of such person made at a law enforcement agency by an agent or officer of such agency on forms supplied by the agency"; and made minor changes in style. Amendment effective March 24, 2003.

1987 Amendment: In (2), near end after "financial interest", substituted "in" for "or connection with".

23-7-311. Drawings for and payment of prizes — unclaimed prizes.

Compiler's Comments

1995 Amendment: Chapter 19 near beginning of first sentence of (2), after "commission may", inserted "by rule", before "payment" deleted "immediate", and near middle, after "sales", substituted "agents, whether or not the paying agent" for "agent who"; and made minor changes in style.

1993 Amendment: Chapter 25 in (3)(a), at beginning, inserted exception clause and at end substituted "and in yearly installment payments of not less than $20,000" for "except that each installment payment must be at least $20,000"; inserted (3)(b) allowing the Commission to adopt installment amounts and time periods for payment of lottery prizes in excess of $100,000; and made minor changes in style.

1987 Amendment: In (3), near end, increased installment period from 10 years to 20 years.

23-7-312. Lien on lottery winnings for debt collected by IV-D agency — notice to agency — payment to agency — procedure.

Compiler's Comments

1995 Amendment: Chapter 325 in (4)(b) substituted "state treasurer" for "state auditor". Amendment effective July 1, 1995.

Severability: Section 5, Ch. 429, L. 1993, was a severability clause.

Part 4
Finances and Audits

23-7-402. Disposition of revenue.

Compiler's Comments

1997 Amendment: Chapter 494 in (3), in second sentence at beginning, inserted "Except as provided in subsection (5)"; inserted (5) concerning appropriation from enterprise fund; and made minor changes in style. Amendment effective July 1, 1997, and terminates June 30, 1999.

Preamble — Study Committee Created: The preamble attached to Ch. 494, L. 1997, provided: "WHEREAS, The Constitution of the State of Montana provides for the legalization of gambling through a vote of the people or the action of the Legislature; and

WHEREAS, there is a public policy statement in state law concerning gambling activities that includes the creation and maintenance of a regulatory climate; and

WHEREAS, state and local governments receive tax revenues generated by gambling; and

WHEREAS, there are citizens who are adversely affected by legalized gambling, including compulsive gamblers and their families; and

WHEREAS, there is no recent reliable data in Montana that substantiates the economic or social impacts of gambling; and

WHEREAS, the results of gambling studies conducted in other states and on a national basis are not specifically relevant to conditions in Montana."

Chapter 494, L. 1997, provided: "Section 1. Gaming study commission — composition — vacancies. (1) There is an interim gambling study commission.

(2) The commission is composed of the following five members:

(a) one member, to be appointed by the governor, who holds a doctorate in a social science that is pertinent to socioeconomic analysis;

(b) two members from the Montana university system, one from the bureau of business and economic research or the sociology department of the university of Montana, the other from the school of business or the sociology department of Montana state university. The president of the university of Montana and the president of Montana state university shall each nominate three candidates for commission membership. The governor shall select and appoint one member from each list of nominees.

(c) one member, to be appointed by the governor, who is a mental health professional and who holds a doctorate degree or a master's degree with relevant subsequent certification and who has experience in the treatment of mental disorders that manifest in addictive behavior that includes gambling but who has no significant financial interest in the treatment of gambling addiction;

(d) one member, to be appointed by the governor, who is a business owner who does not have an economic interest in and is not related to a person who has an economic interest in the gambling industry.

(3) The members of the commission shall elect a presiding officer from among the members.

(4) Any vacancy occurring on the commission must be filled in the same manner as the original appointment.

Section 2. Meetings. The presiding officer shall schedule meetings of the commission as considered necessary and shall give notice of the time and place of each meeting to the members of the commission.

Section 3. Reimbursement of expenses — compensation. Each member of the commission is entitled to reimbursement for expenses as provided in 2-18-501 through 2-18-503.

Section 4. Powers and duties — staff support — recommendations — report. (1) The commission shall request, fund, and subsequently evaluate and publicize a detailed study of the socioeconomic effects of gambling in Montana. The study may include but is not limited to:

(a) a demographic profile of the people who participate in gambling in Montana, including both residents and nonresidents;

(b) the number of private sector jobs and the amount of personal and business income directly or indirectly attributable to gambling;

(c) the impact of gambling on employment and income in other sectors of the economy outside of the gambling industry;

(d) the amount of tax revenue collected by the state and by local governments that is directly or indirectly attributable to gambling;

(e) the amount of expenditures by the state and by local governments, including law enforcement agencies, that is directly or indirectly attributable to gambling;

(f) demographic data on pathological and problem gamblers that is derived in a way to allow longitudinal comparisons with earlier studies in Montana;

(g) the impact of gambling on state and federal government transfer payments;

(h) data on the effects of gambling on the family, such as statistics related to divorce, spousal abuse, child abuse and neglect, and other familial dysfunction as well as general health and economic statistics that are pertinent to family stability and well-being; and

(i) the relationship of gambling to the numbers of Montana citizens who file for bankruptcy, who bring cases to small claims court, and who are subject to real property foreclosures.

(2) The commission shall establish goals and a budget for an unbiased and scientifically credible study as well as minimum qualifications and selection criteria for persons who submit proposals to conduct the study.

(3) The commission is responsible for determining the most cost-effective allocation of the funds appropriated in [section 5] [not codified].

(4) The legislative services division shall provide staff support to the commission for administrative purposes and for the purpose of drafting and issuing of a detailed request for proposals in order to recruit qualified persons to conduct the study or studies. The legislative services division may expend funds from the appropriation provided in [section 5] [not codified] for staff services provided by the legislative services division to the commission.

(5) State and local agencies shall cooperate with the commission in the conduct of the study.

(6) On or before September 1, 1998, the commission shall submit to the legislature and the governor a comprehensive written report of its findings, conclusions, and recommendations. If legislation is recommended, the report must include a draft of the legislation.

(7) On or before October 1, 1998, the commission may use any available means, including informational public meetings, to disseminate the results of the study to the citizens of Montana.

Section 5. Appropriation. (1) There is appropriated to the legislative services division for the purposes of funding and administering the study described in [section 4] [not codified] and supporting the commission described in [section 1] [not codified] $100,000 from the state lottery fund established in 23-7-401.

(2) The appropriation in subsection (1) is a biennial appropriation."

Effective Date: Section 7, Ch. 494, L. 1997, provided: "[This act] is effective July 1, 1997."

Termination: Section 8, Ch. 494, L. 1997, provided: "[Section 6] [amending 23-7-402] terminates June 30, 1999."

1995 Amendment: Chapter 509 in (3), at beginning of second sentence, deleted "Except for the amount required to be paid under subsection (5)", after "be" substituted "transferred" for "paid", and after "the" substituted "state general fund" for "superintendent of public instruction for distribution as state equalization aid to the public schools of Montana as provided in 20-9-343. The net revenue is statutorily appropriated, as provided in 17-7-502, to the superintendent of public instruction"; deleted (5) that read: "(5)(a) An amount equal to 9.1% of the net revenue derived under subsection (3), but not to exceed $1 million in any fiscal year, must be paid to the board of crime control.

(b) All money paid to the board of crime control under this subsection (5) must be used to fund state grants to counties for youth detention services and to cover the costs of administering the grant program as authorized in 41-5-1002. The grants are statutorily appropriated, as provided in 17-7-502, to the board of crime control. The costs of administering the grant program must be paid pursuant to a legislative appropriation"; and made minor changes in style. Amendment effective July 1, 1995.

1993 Amendment: Chapter 461 deleted former (5)(a) that read: "For the fiscal year beginning July 1, 1991, 1.6% of the net revenue derived under subsection (3) must be paid quarterly to the board of crime control"; at beginning of present (5)(a) substituted "An amount equal to" for "For the fiscal year beginning July 1, 1992, and thereafter"; and in first sentence of (5)(b), after "services", inserted "and to cover the costs of administering the grant program", in second sentence, before "statutorily", substituted "grants are" for "revenue is", and inserted third sentence requiring administrative costs to be paid by legislative appropriation. Amendment effective July 1, 1993.

1991 Amendment: In (3), at beginning of second sentence, inserted exception clause; inserted (5) requiring 1.6% of net revenue for fiscal year beginning July 1, 1991, to be paid quarterly to Board of Crime Control, requiring for fiscal year beginning July 1, 1992, and thereafter, 9.1% of net revenue, but not exceeding $1 million in any fiscal year, to be paid to Board of Crime Control, and requiring money paid to Board of Crime Control to be used to fund state grants to counties and establishing statutory appropriation to Board; and made minor changes in style. Amendment effective July 1, 1991.

1989 Special Session Amendment: At end of first sentence of (3) substituted "state equalization aid to the public schools of Montana as provided in 20-9-343" for "equalization aid to the retirement fund obligations of elementary and high school districts in the manner provided in 20-9-532". Amendment effective July 1, 1990.

1989 Amendments: Chapter 206 in (3) inserted "together with the interest earned on the gross revenue while the gross revenue is in the enterprise fund"; and made minor change in form.

Chapter 408 in (1), in first sentence, substituted language requiring minimum of 45% to be paid as prize money for "As near as possible to 45% of the money paid for tickets or chances must be paid out as prize money, except as provided in subsection (b)" and inserted second sentence providing that prize money is statutorily appropriated; deleted (1)(b) that read: "(b) In the case of a regional lottery game, a maximum of 50% of the money paid for tickets or chances may be paid out as prize money"; in (2) deleted former first sentence that allowed Director to use up to 15% of gross revenue for operating costs; deleted former (3) that statutorily appropriated funds to pay operating expenses; in (3) inserted second sentence statutorily appropriating net revenue to Superintendent of Public Instruction; inserted (4) allowing spending authority to be increased upon review and approval of Budget Office; and made minor changes in form. Amendment effective April 3, 1989.

Chapter 628 deleted former (3) that statutorily appropriated funds to pay operating expenses; and inserted (4) statutorily appropriating lottery revenue allocated under subsections

(1) and (3) for the purposes specified in subsections (1) and (3). Amendment effective July 1, 1989.

1989 Composite: In preparing the composite for this section, the Code Commissioner has not codified subsection (4) inserted by Ch. 628 that statutorily appropriated the money allocated in subsections (1) and (3). The Code Commissioner did not codify this subsection because it is redundant with the statutory appropriations made in those subsections by Ch. 408. The statutory appropriations made by Ch. 408 are also more specific.

1987 Amendments: Chapter 161 in (1)(a), near middle after "tickets or chances", deleted "in each separate state lottery game" and at end deleted "for the game" and inserted "except as provided in subsection (b)"; inserted (1)(b) authorizing a maximum of 50% of money paid for tickets to be paid out as prize money in regional lottery; inserted (3) establishing that funds to pay lottery operating expenses are statutorily appropriated; and in (4), near beginning of first sentence, inserted "commissions" and near middle of last sentence of temporary version substituted "net lottery revenue available that has been deposited in the superintendent of public instruction lottery account" for "retirement fund equalization aid".

Chapter 635 in version effective July 1, 1988, in (4), in first sentence after "retirement", deleted "funds required by 20-9-501", deleted former second through fifth sentences distributing lottery proceeds for teacher retirement on an ANB basis, and inserted current distribution method based on 20-9-532.

Coordination Instruction: Section 7, Ch. 635, L. 1987, a coordination instruction, deleted last sentence of (4), as amended by sec. 4, Ch. 161, L. 1987, that read: "The superintendent of public instruction shall then distribute by state warrant the total amount of net lottery revenue available that has been deposited in the superintendent of public instruction lottery account for each county by October 1 of the school fiscal year."

23-7-410. Annual audit.

Compiler's Comments

1989 Amendment: Near beginning of first sentence inserted "or have conducted". Amendment effective April 3, 1989.

TITLE 24
RESERVED

TITLE 25
CIVIL PROCEDURE

CHAPTER 1
GENERAL PROVISIONS

Chapter Compiler's Comments

Sections Applicable to All Courts: The provisions of this chapter are general in nature and, with the exception of 25-1-201, by their language would apply to all other courts in addition to District Courts. Chapters 2 through 15 apply to District Courts.

Part 1
Civil Actions — Form and Commencement

25-1-101. One form of civil action.

Case Notes

General 105
Forms of Action Abolished 105
Law and Equity Distinction 105

GENERAL

Quo Warranto Not Abolished: A statute which provides that there shall be "but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs", does not apply to informations in the nature of quo warranto, which are solely employed to enforce or protect public rights, and redress or prevent public wrongs. Territory ex rel. Blake v. Virginia Rd Co., 2 M 96 (1875).

FORMS OF ACTION ABOLISHED

Distinctions in Causes of Action Still Apply: Though the Code has abolished all other forms of action, and provides that there shall be but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs, yet the distinctions between the different causes of action still obtain—the reasons underlying them are still the same—and the plaintiff may not recover beyond the case stated by him in his complaint. State ex rel. Barron v. District Court, 119 M 344, 174 P2d 809 (1946); Kramlich v. Tullock, 84 M 601, 277 P 411 (1929); Butala v. Union Elec. Co., 70 M 580, 226 P 899 (1924), distinguished in Francis v. Sun Oil Co., 135 M 307, 340 P2d 824 (1959); Glass v. Basin & Bay St. Min. Co., 31 M 21, 77 P 302 (1904).

Form of Action Immaterial: The form in which an action is brought is immaterial, for if upon any view of the case made the plaintiff is entitled to relief, the pleading will be sustained and the character of the action determined from the nature of the grievance rather than from the form of the declaration. Samuell v. Moore Mercantile Co., 62 M 232, 204 P 376 (1921).

Reference to Common-Law Forms Helpful: While the common-law forms of action have been abolished so far as name and form of action but not substance are concerned, reference to the forms and principles of the common law are of aid in determining the rights of litigants. Samuell v. Moore Mercantile Co., 62 M 232, 204 P 376 (1921).

Distinct Forms of Action Not Recognized: While the Courts of this state recognize the principles applicable to the different actions, particular forms of which are required in common-law jurisdictions, they do not recognize those distinct forms since the statute has abolished them. This rule was recognized and applied in the following cases: Maronen v. Anaconda Copper Min. Co., 48 M 249, 136 P 968 (1913); Logan v. Billings & N. R.R., 40 M 467, 107 P 415 (1910); Raymond v. Blancgrass, 36 M 449, 93 P 648 (1908); Donovan v. McDevitt, 36 M 61, 92 P 49 (1907); W. Plumbing Co. v. Fried, 33 M 7, 81 P 394 (1905); Glass v. Basin & Bay St. Min. Co., 31 M 21, 77 P 302 (1904); Aldritt v. Panton, 17 M 187, 42 P 767 (1895); Goodrich Lumber Co. v. Davie, 13 M 76, 32 P 282 (1893).

LAW AND EQUITY DISTINCTION

Court May Accept Jurisdiction in Equity Only When No Legal Remedy Available: The Billings VFW ceased operations in 1974 and allowed its pre-1947 liquor license to lapse based on

the belief that the license was nontransferable. In 1979, the VFW reopened and was issued a new nontransferable all-beverages license. In 1991, the Supreme Court held that pre-1947 liquor licenses held by fraternal and veterans' organizations were not subject to quota restrictions passed in 1949 and therefore were freely transferable. (See Helena Aerie No. 16 v. Dept. of Revenue, 251 M 77, 822 P2d 1057 (1991).) After the 1991 court decision, the VFW received an offer to purchase its pre-1947 license for $165,000. The Department of Revenue refused to reissue the lapsed license or to declare that the current license held by the VFW was freely transferable. The VFW sought a declaratory judgment that its license be characterized as freely transferable on the basis that the Department was estopped from arguing that the license was nontransferable because the VFW had let the pre-1947 license expire based on the Department's misrepresentation that under the 1949 law, the license was nontransferable. The Supreme Court held that the doctrine of equitable estoppel did not apply because the misrepresentation had to be of fact and not a misrepresentation of law. The Supreme Court further ruled that a legal remedy had been available at all times to the VFW in that it could have challenged the Department's interpretation of the 1949 law prior to letting its license lapse and that therefore the lower court was correct in refusing to accept equity jurisdiction when a legal remedy was available. Billings Post No. 1634 v. Dept. of Revenue, 284 M 84, 943 P2d 517, 54 St. Rep. 786 (1997).

Legal Distinctions Not Abolished: The provision of this section that there is but one form of civil action for the enforcing of private rights or redressing private wrongs refers only to form and not to substance and does not abolish the distinction between causes of action at law and those in equity. Frisbee v. Coburn, 101 M 58, 52 P2d 882 (1935); State ex rel. Lewis & Clark County v. District Court, 90 M 213, 300 P 544 (1931).

One Form of Action: Under this section there is but one form of civil action for the enforcement or protection of private rights or the redress or prevention of private wrongs, and upon a cause of action or defense stated, the court will proceed to try the cause as one at law or in equity, upon the issues presented, and grant such relief as the circumstances demand. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 27 M 536, 71 P 1005 (1903); 27 M 288, 70 P 1114 (1902).

Distinctions Abolished: The old distinctions between actions at law and suits in equity have been abolished, and the court, having jurisdiction of the parties, can afford such relief as the facts of the case may justify. Merchants' Nat'l Bank v. Great Falls Opera House Co., 23 M 33, 57 P 445 (1899).

Collateral References

Action *key* 32.

1A C.J.S. Actions §122.

25-1-102. Limitations on commencing actions.

Compiler's Comments

1981 Amendment: In (1) substituted "Title 27, chapter 2" for "[93-2501 to 93-2720]".

Section Not Codified: Section 93-2718, R.C.M. 1947, has not been codified as that section was of a temporary nature. This section provided that section 93-2720, R.C.M. 1947 (now codified as 25-1-102(2)), did not apply to existing actions already commenced.

Case Notes

Application to Uniform Parentage Act: The tolling statute, by its terms, has not been made applicable to Uniform Parentage Act cases. St. v. Wilson, 193 M 318, 631 P2d 1273, 38 St. Rep. 1299 (1981).

Writ of Review: A proceeding in District Court for Writ of Review to set aside a judgment of a Justice's Court is an "action" and the Statute of Limitations expressed by 27-2-215 (renumbered 27-2-231) applies thereto. Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), overruled in Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102 because pursuant to Rule 5, M.R.App.P. (Title 25, ch. 21), a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding.

Writ of Mandate as Special Proceeding: An application for a Writ of Mandate to compel the reinstatement of a discharged policeman is a special proceeding of a civil nature. State ex rel. Bennetts v. Duncan, 47 M 447, 133 P 109 (1913).

Surety's Right to Contribution: The right of a surety who has paid a judgment against his principal, himself, and other sureties to enforce contribution from a cosurety exists so long as the judgment is alive. Such a proceeding is not an ordinary action within the meaning of this section. NW. Nat'l Bank v. Great Falls Opera House Co., 23 M 1, 57 P 440 (1899).

Collateral References

Action *key* 20.

1A C.J.S. Actions §115.

Estoppel to rely on Statute of Limitations. 24 ALR 2d 1413.

Inclusion or exclusion of first and last day for purposes of Statute of Limitations. 20 ALR 2d 1249.

25-1-103. When action considered pending.

Case Notes

Improvements Pending Appeal: Where company went upon land 6 days after entry of District Court judgment quieting title and expended large sums of money drilling well, it acted at its peril where case was thereafter appealed and reversed. Rieckhoff v. Consol. Gas Co., 123 M 555, 217 P2d 1076 (1950).

Pleading of Finality Not Required: Plaintiff in an action to quiet title procured under foreclosure proceeding is not required to allege in his complaint that the decree has become final within the meaning of this section. If it has not become final, it is the duty of defendant to so allege in the answer. Thomson v. Nygaard, 98 M 529, 41 P2d 1 (1935).

Judgment Roll as Evidence: It was error to admit in evidence a judgment roll in a companion case which was then pending on appeal, but nonprejudicial where, independent of the judgment roll, the proof was sufficient to show that defendant Sheriff's attempted justification in seizing personal property under a mortgage was without merit. Noe v. Matlock, 64 M 35, 208 P 591 (1922).

Appeal Time Unexpired: The court erred in striking the defense of another action pending between the same parties upon the same cause, where defendant alleged that the judgment in that action in his favor had not been satisfied, and it appeared from the record that the time for appealing had not passed. McCormick v. Shields, 63 M 9, 205 P 831 (1922).

Judgment as Final Determination: Though a judgment is defined as the final determination of the rights of the parties, the action must be regarded as still pending, within the meaning of this section, until the happening of one or more of the events enumerated therein. Peterson v. Butte, 44 M 129, 120 P 231 (1911).

Application to Successor Parties: Where a complaint shows that a former action between the same parties and for the same cause is before the Supreme Court undetermined on appeal, the first action is considered to be pending, and a demurrer to the complaint is properly sustained. The action is between the same parties where it appears from the complaint that the defendant in the action is the successor in interest of the defendant in the former action. Wetzstein v. Boston & Mont. Consol. Copper & Silver Min. Co., 28 M 451, 72 P 865 (1903).

Collateral References

Abatement and Revival *key* 7, et seq.; Action *key* 71.

1 C.J.S. Abatement and Revival §§1 through 3; 1A C.J.S Actions §§344, 345.

Part 2
Fees

25-1-201. Fees of clerk of district court.

Compiler's Comments

2005 Amendments — Composite Section — Coordination: Chapter 408 in (1)(a) near middle increased fee for filing a petition for dissolution of marriage from $160 to $170; in (2) near beginning after "must" deleted "(a) prior to July 1, 2003, be forwarded to the department of revenue for deposit in the state general fund; and

(b) after June 30, 2003"; in (3)(a) near middle increased the amount to be deposited in the children's trust fund account from $9 to $19; deleted former (5) that read: "(5) Through June 30, 2003, the clerk of district court shall remit to the credit of the special revenue account established in 42-2-105 $70 of the filing fee required in subsection (1)(q)"; and made minor changes in style. Amendment effective October 1, 2005.

Section 9, Ch. 493, L. 2005, a coordination section, amended this section as follows: in (1)(l) and (1)(o) increased fee from $30 to $53; deleted former (2)(a) and part of former (2)(b) that read:

"(a) prior to July 1, 2003, be forwarded to the department of revenue for deposit in the state general fund; and

(b) after June 30, 2003"; deleted former (5) that read: "(5) Through June 30, 2003, the clerk of district court shall remit to the credit of the special revenue account established in 42-2-105 $70 of the filing fee required in subsection (1)(q)"; inserted (7) regarding deposit of certain fees; and made minor changes in style. Amendment effective July 1, 2005.

The amendments made to this section by sec. 3, Ch. 114, L. 2005, and sec. 5, Ch. 493, L. 2005, were rendered void by sec. 9, Ch. 493, L. 2005, a coordination section.

2003 Amendment: Chapter 100 in (1)(d)(i) at beginning inserted exception clause, near middle after "office" increased fee from 50 cents to $1, after "first" increased five pages to 10 pages, and near end increased fee from 25 cents to 50 cents; inserted (1)(d)(ii) providing a $5 fee for copies of marriage licenses and a $10 fee for copies of dissolution decrees; and in (1)(g) near middle after "records" substituted "$2 for each name for each year searched, for a period of up to 7 years, and an additional $1 for each name for any additional year searched" for "50 cents for each year searched, not to exceed a total of $25". Amendment effective July 1, 2003.

2002 Amendment: Chapter 13 in (2)(a) at beginning inserted "prior to July 1, 2003"; inserted (2)(b) relating to deposit as specified by the supreme court administrator; in (5) at beginning inserted "Through June 30, 2003"; inserted (8) relating to deposit of unallocated collections; and made minor changes in style. Amendment effective August 16, 2002.

Retroactive Applicability: Section 36(3), Ch. 13, Sp. L. August 2002, provided: "(3) [Sections 1, 2, 5, 8, 12, 17, 19, 22, 23, and 25 through 30] apply retroactively, within the meaning of 1-2-109, to July 1, 2002."

2001 Amendment: Chapter 585 in (2) substituted "Except as provided in subsections (3) and (5) through (7), fees collected by the clerk of district court must be forwarded to the state treasurer for deposit in the state general fund" for "Except as provided in subsections (3) through (11), 32% of all fees collected by the clerk of the district court must be deposited in and credited to the district court fund. If no district court fund exists, that portion of the fees must be deposited in the general fund for district court operations. The remaining portion of the fees must be remitted to the state general fund"; deleted former (3) that read: "(3) In the case of a fee collected for issuing a marriage license or filing a declaration of marriage without solemnization, $23.60 must be deposited in and credited to the state general fund and $6.40 must be deposited in and credited to the county general fund"; in (3)(a) near beginning after "petition for dissolution of marriage" deleted "$75 must be deposited in the state general fund" and at end after "40-15-110" deleted "and $21 must be deposited in and credited to the district court fund. If no district court fund exists, the $21 must be deposited in the general fund for district court operations"; in (3)(b) near beginning after "petition for legal separation" deleted "$75 must be deposited in the state general fund" and at end after "40-15-110" deleted "and $20 must be deposited in and credited to the district court fund. If no district court fund exists, the $20 must be deposited in the general fund for district court operations"; deleted former (5) through (9)(a) that read: "(5) (a) Before the percentages contained in subsection (2) are applied and the fees deposited in the district court fund or the county general fund or remitted to the state, the clerk of the district court shall deduct from the following fees the amounts indicated:

(i) at the commencement of each action or proceeding and for filing a complaint in intervention, as provided in subsection (1)(a), $35;

(ii) from each defendant or respondent, on appearance, as provided in subsection (1)(b), $25;

(iii) on the entry of judgment, as provided in subsection (1)(c), $15; and

(iv) from the applicant or petitioner, on the filing of an application for probate or for the appointment of a personal representative or on the filing of a petition for appointment of a guardian or conservator, as provided in subsection (1)(m), $15.

(b) The clerk of the district court shall deposit the money deducted in subsection (5)(a) in the county general fund for district court operations unless the county has a district court fund. If the county has a district court fund, the money must be deposited in that fund.

(6) The fee for filing a motion for substitution of a judge, as provided in subsection (1)(p), must be remitted to the state general fund.

(7) Fees collected under subsections (1)(d) through (1)(i) must be deposited in the district court fund. If no district court fund exists, fees must be deposited in the general fund for district court operations.

(8) The clerk of the district court shall remit to the credit of the state general fund $20 of each fee collected under the provisions of subsections (1)(a) through (1)(c), (1)(m), and (1)(n) to fund a portion of judicial salaries.

(9) (a) The fee for filing a petition for a contested amendment of a parenting plan must be remitted by the clerk of the district court to the credit of the district court to defray the costs of the court-sanctioned educational program concerning the effects of dissolution of marriage on children, as required in 40-4-226, and to defray the expense of education when ordered for the investigation and preparation of a report concerning parenting arrangements, as provided in 40-4-215(2)(a)"; at end of (5) after "subsection (1)(q)" deleted "and $5 of the filing fee must be deposited in the district court fund. If no district court fund exists, fees must be deposited in the general fund for district court operations"; at end of (6) after "3-2-714" deleted "and $1 must be deposited in and credited to the district court fund for mitigation of administrative costs incurred by the court in the collection of the fee. If a district court fund does not exist, the $1 must be deposited in the county general fund for district court operations"; inserted (7) directing deposit of fees collected under subsections (1)(d), (1)(g), and (1)(j); and made minor changes in style. Amendment effective July 1, 2002.

The amendments to this section in sec. 144, Ch. 574, L. 2001, were rendered void by sec. 255(3), Ch. 574, L. 2001, a coordination section.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in (2) in version effective July 1, 2002, the code commissioner changed "state treasurer" to "department of revenue".

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1999 Amendments — Composite Section: Chapter 386 in (1)(a) near beginning after "petitioner" increased fee from $80 to $90 and near middle after "marriage" increased fee from $150 to $160; in (4)(a) near beginning after "marriage" deleted "or legal separation", near middle inserted "$9 must be deposited in the civil legal assistance for indigent victims of domestic violence account established in 3-2-714", and in two places increased amount deposited from $20 to $21; inserted (4)(b) designating various accounts in which portions of filing fee for legal separation petition must be deposited; inserted (11) providing for the deposit into certain accounts of a portion of filing fees for actions or proceedings other than petitions for dissolution of marriage; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 545 inserted (9)(b) prohibiting clerk of court from collecting fee for filing petition if moving party files statement signed by nonmoving party agreeing not to contest final parenting plan amendment; and made minor changes in style. Amendment effective July 1, 1999.

Termination Provision Repealed: Section 3, Ch. 311, L. 1999, repealed sec. 14, Ch. 484, L. 1997, which terminated this section June 30, 1999.

1997 Amendments: Chapter 287 at end of third sentence in (2) and in (6), after "remitted", substituted "to the state general fund" for "to the state to be deposited as provided in 19-5-404"; in (3) increased fee for marriage license or declaration of marriage without solemnization from "$14" to "$23.60" and near end, after "county general fund", deleted "and $9.60 must be remitted to the state to be deposited as provided in 19-5-404"; in (4) increased fee for dissolution of marriage or legal separation from "$40" to "$75" and after "state general fund" deleted "$35 must be remitted to the state to be deposited as provided in 19-5-404"; and made minor changes in style. Amendment effective July 1, 1997.

Chapter 343 in (1)(a), at end, added $120 filing fee for petition for a contested amendment of a final parenting plan; inserted (9) providing for the disbursement of the filing fee for a petition for a contested amendment of a parenting plan; adjusted subsection references; and made minor changes in style.

Chapter 480 inserted (1)(q) establishing $75 fee for filing adoption petition; and inserted (10) requiring deposit of $70 of fee for adoption petition in special revenue account and $5 of fee in District Court fund or general fund.

Chapter 484 in (1)(a) increased fee for petition for dissolution of marriage and petition for legal separation from $120 to $150; and in (4), after "41-3-702", inserted language requiring $30 to be deposited in partner and family member assault intervention and treatment fund. Amendment effective July 1, 1997, and terminates June 30, 1999.

Saving Clause: Section 41, Ch. 343, L. 1997, was a saving clause.

Severability: Section 42, Ch. 343, L. 1997, was a severability clause.

Section 172, Ch. 480, L. 1997, was a severability clause.

Section 11, Ch. 484, L. 1997, was a severability clause.

Applicability: Section 43, Ch. 343, L. 1997, provided: "[This act] applies to proceedings begun after October 1, 1997, including proceedings regarding modification of orders or decrees existing on October 1, 1997."

Section 173, Ch. 480, L. 1997 provided: "(1) [Sections 1 through 156] [Title 42, chapters 1 through 7, Title 52, chapter 8, part 1] apply to proceedings commenced on or after October 1, 1997.

(2) A petition for adoption filed prior to October 1, 1997, is governed by the law in effect at the time the petition was filed.

(3) The putative father registry requirements apply to children born on or after October 1, 1997."

Termination: Section 14, Ch. 484, L. 1997, provided: "[Sections 1 [25-1-201] and 9] terminate June 30, 1999."

1993 Amendment: Chapter 570 in (1)(h), before "from", substituted "transcript of the docket" for "abstract of judgment" and at end substituted "the fee for entry of judgment provided for in subsection (1)(c)" for "$25"; deleted former (5)(a)(iv) and (5)(a)(v) that read: "(iv) on the entry of judgment as provided in subsection (1)(h), $20;

(v) for issuing an execution or order of sale as provided in subsection (1)(i), $3"; and made minor changes in style. Amendment effective July 1, 1993.

1991 Amendment: (Temporary version) In (1)(a), (1)(b), (1)(c), (1)(m), and (1)(n) increased fees by $10; in (2) expanded subsection reference to include subsection (8); and inserted (8) relating to use of $10 of certain fees. Amendment effective July 1, 1991, and terminates June 30, 1992.

(Version effective July 1, 1992) In (1)(a), (1)(b), (1)(c), (1)(m), and (1)(n) increased fees by $20; in (2) expanded subsection reference to include subsection (8); and inserted (8) relating to use of $20 of certain fees. Amendment effective July 1, 1992.

1989 Amendments: Chapter 221 in (1)(a) inserted fee for filing petition for legal separation; in (1)(h) increased fee for filing and docketing transcript of judgment or abstract of judgment from $5 to $25; in (1)(i) increased fee relating to foreclosure of a lien from $2 to $5; in (2) substituted "subsections (3) through (7)" for "subsections (3) through (6)", at end of first sentence substituted "district court fund" for "general fund of the county", and inserted second sentence relating to the general fund for District Court operations; in (4), after "marriage", inserted "or legal separation", substituted "district court fund" for "general fund of the county", and inserted second sentence relating to the general fund for District Court operations; in (5)(a), before "county general fund", inserted "district court fund or the"; inserted (5)(a)(iv) relating to entry of judgment; inserted (5)(a)(v) relating to an execution or order of sale; and inserted (7) relating to deposit of fees in the District Court fund or general fund for District Court operations. Amendment effective July 1, 1989.

Chapter 664 in middle of (4) substituted "$40" for "$75" and inserted "$35 must be remitted to the state to be deposited as provided in 19-5-404"; and at end of (6) substituted "remitted to the state to be deposited as provided in 19-5-404" for "deposited in the state general fund". Amendment effective July 1, 1989.

Review of Actuarial Valuation: Section 5, Ch. 664, L. 1989, provided: "The public employees retirement board shall provide to the 52nd legislature, by January 10, 1991, a copy of the most current actuarial valuation of the judges' retirement system. The legislature shall review the actuarial soundness of the judges' retirement system, and the 52nd legislature may eliminate or modify the effect of [this act]."

1987 Amendments: Chapter 271 in (1)(d), after "office", substituted "50 cents per page for the first five pages of each file, per request, and 25 cents per page thereafter" for "25 cents per page"; in (1)(e) increased fee to $2 from 50 cents; in (1)(f) increased fee to $1 from 50 cents; in (1)(g) substituted "search of court records, 50 cents for each year searched, not to exceed a total of $25" for "administering oath, 25 cents"; and deleted former (1)(h) that read: "(h) for taking depositions, per folio, 20 cents".

Chapter 318 inserted (1)(p) that read: "for filing a motion for substitution of a judge, $100"; near beginning of (2) inserted reference to subsection (6); and inserted (6) specifying disposition of fee for filing motion for substitution of judge.

Chapter 642 in (1)(a), in two places, increased fee for filing complaint from $25 to $60; in (1)(b) increased appearance fee from $15 to $40; in (1)(c) increased fee for entry of judgment from $10 to $25; in (1)(m) increased fee in estate proceedings from $35 to $50; in (2) changed reference to subsections (3) and (4) to reference to subsections (3) through (6); and inserted (5) (see 1987 Session Law for language addressing allocation of a portion of certain fees for District Court operations).

Chapter 645 near beginning of (1)(a) inserted "except a petition for dissolution of marriage" and at end substituted "a fee of $100" for "an additional fee of $30"; and in (4) at beginning deleted "additional" before "fee", increased from $25 to $75 the amount deposited in state general

fund, inserted "and $20 must be deposited in and credited to the general fund of the county", and made minor change in phraseology.

Termination Provision Repealed: Section 2, Ch. 645, L. 1987, repealed sec. 13, Ch. 610, L. 1985, which terminated the amendment of this section by sec. 7, Ch. 610, L. 1985.

1985 Amendment: In (1)(a) at end raised fee for petition for dissolution of marriage from $25 to $30; in (2) inserted reference to subsection (4); and in (4), at beginning substituted "Of the" for "The", near middle after "marriage", inserted "$25", and after "general fund", inserted requirement that $5 be deposited in children's trust fund account. Amendment terminates January 1, 1990 (sec. 13, Ch. 610, L. 1985).

1983 Amendments: Chapter 10 inserted (1)(o) requiring $35 fee for items required in 72-4-303.

Chapter 12, in (1)(p) and (3), inserted the language relating to declaration of marriage without solemnization.

Chapter 524, in (1)(a), increased fees for plaintiffs and intervenors from $20 to $25; in (1)(b) increased fee for defendants from $10 to $15; in (2) decreased percentage of fees going to county general fund from 40% to 32%.

Chapter 709, inserted at end of (1)(a), "and for filing a petition for dissolution of marriage, an additional fee of $25"; in (2) substituted "must" for "shall" in two places; and inserted (4) requiring additional fee for dissolution of marriage to be deposited in state general fund.

1981 Amendments — Composite Section: Chapter 493, in (1)(e), deleted "or oath and jurat"; increased marriage license fee from $15 to $30; at beginning of (2) inserted exception; and added subsection (3) regarding disposition of marriage license fee.

Chapter 575 amended this section in the same manner as Ch. 493 except that the fee was increased to $25 and, in (3), $9 was to be deposited to general fund. Because Ch. 575 was a Code Commissioner bill intended to make nonsubstantive clarifications and because the dollar figures of Ch. 575 are included in the higher figures of Ch. 493, the dollar figures of Ch. 493 were chosen by the Code Commissioner in preparing the composite section.

Coordination With Other Bill: Section 81, Ch. 575, L. 1981, provided: "If Senate Bill No. 121 which bill would generally amend the fees of the clerk of district court, including those fees specified in section 80, is passed and approved, the amendments in subsections (1) through (3) of section 80 are void and of no effect." Senate Bill 121 was not passed and approved.

Case Notes

Perfection of Appeal From Small Claims Court — No Requirement to File Undertaking or Pay Transfer Fee: Petersen cited 25-33-201 and 25-35-807 in arguing that the appeal from Small Claims Court filed by Aladdin Steel Products, Inc. (Aladdin), was deficient for failing to file an undertaking. However, 25-33-201 applies to appeals from Justice's Court and City Court, and 25-35-807 concerns proceedings to enforce or collect a judgment and is not relevant to perfecting an appeal from Small Claims Court. There is in fact no statutory requirement to file an undertaking on appeal from Small Claims Court, and Aladdin's appeal was not deficient for failing to do so. Further, although the transfer fee required under subsection (1)(k) of this section does apply to appeals from Small Claims Court, payment of the fee is not a prerequisite to perfecting an appeal. It is the duty of the Clerk of the District Court to collect the fee, and that duty is unrelated to the duty of the appealing party to perfect an appeal under 25-35-804. Thus, an appeal from Small Claims Court to District Court is properly perfected upon filing a notice of appeal under 25-35-804 and requesting that the Small Claims Court transmit the record to the District Court. Petersen v. Aladdin Steel Prod., Inc., 1999 MT 262, 296 M 394, 989 P2d 385, 56 St. Rep. 1061 (1999).

Clerk's Refusal to File Until Fee Paid: It was proper for the Clerk of the District Court to hold proffered answer in suspense and not file it until the officially required filing fee had been paid. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Transcript in Special Proceedings Exempted: As this section makes no provision for the collection of a fee for making a transcript in special proceedings, such a fee is not a necessary disbursement, and the clerk is not authorized to collect the same. State ex rel. Healy v. District Court, 26 M 224, 67 P 114 (1902), 26 M 224, 68 P 470 (1902); State ex rel. Baker v. District Court, 24 M 425, 62 P 688 (1900), distinguished in King v. District Court, 25 M 1, 63 P 402 (1901). But see State ex rel. Hall v. District Court, 111 M 619, 115 P2d 92 (1941).

Preparation and Authentication of Transcripts on Appeal: Transcripts on appeal may be prepared by the parties or their counsel, but the authentication must be made by the clerk, after comparison of them with the original files, by his certificate under the seal of the District Court. Shadville v. Barker, 26 M 45, 66 P 496 (1901), 26 M 45, 66 P 761 (1901).

Attorney General's Opinions

Fee for Filing Petition for Contested Amendment of Parenting Plan Not Applicable to Petition to Modify Child Support: Modification of child support pursuant to 40-4-208 is a separate procedure that does not necessarily entail amendment of a parenting plan pursuant to 40-4-219. Therefore, for filing purposes, a petition to modify child support is not considered a petition for amendment of a parenting plan, and it is inappropriate for a Clerk of Court to collect the $120 statutory fee for filing a petition for a contested amendment of a parenting plan under subsection (1)(a) of this section upon the filing of a petition to modify child support in an existing cause. 47 A.G. Op. 14 (1998).

District Court Clerk Not Authorized to Charge Nonparty State Agency for Copies and Certification of Public Records: Access to and fees for copying public court records are not absolute and are controlled by state law. Fees allowed by law are enumerated in this section, and the collection of those fees is mandatory. Fees for preparing copies and for certification of documents are also specified in this section. Section 25-10-405 clarifies that fees are collectible from state agencies that are a party to an action but has no effect in cases in which the agency is not a litigant. In those cases, the rule in 7-4-2516 applies, exempting agencies of state and county government from paying official fees. Therefore, a Clerk of District Court may not charge a nonparty state agency for copies and certification of public District Court records. 47 A.G. Op. 3 (1997).

Distribution of Foreign Judgment Filing Fee: The $60 fee collected by the Clerk of Court at the time of filing a foreign judgment must be distributed in accordance with the provisions of subsection (2) of this section. 44 A.G. Op. 38 (1992).

Fees Collectible Upon Filing of Foreign Judgment: Once a foreign judgment has been properly filed pursuant to 25-9-503, the Clerk of Court is required to treat the foreign judgment as a domestic judgment. The $60 fee paid at the time of filing replaces the filing fee paid at the commencement of an action or appearance of a defendant under 25-1-201(1)(a), the fee collected on the entry of judgment from the prevailing party under 25-1-201(1)(c), and the fee for filing and docketing a transcript of judgment or abstract of judgment from another court under 25-1-201(1)(h). The Clerk should therefore collect the $60 fee required in this section, the $5 fee for issuing an execution or order of sale on a foreclosure of a lien under 25-1-201(1)(i), and any other fees for services requested by the judgment creditor in the enforcement of the judgment. 44 A.G. Op. 38 (1992).

Disposition of Money Received by County Officers for Preparation of Abstracts: Preparation of abstracts by a Clerk of District Court, a County Clerk, or their respective deputies is an official service of the office. Therefore, compensation paid to them by title companies, credit bureaus, banks, realtors, and others for preparation on a regular basis of abstracts of instruments recorded in their respective offices may not be retained for their personal use, but rather must be paid to the county general fund, District Court fund, or state, as provided by law. 43 A.G. Op. 75 (1990).

Commencement Filing Fee Not Chargeable for Certain Postdissolution Proceedings: The Attorney General relied on the holding in In re Marriage of Billings, 189 M 520, 616 P2d 1104 (1980), in finding that a District Court Clerk may not charge a commencement filing fee for postdissolution of marriage action that is brought under the same cause number as the marital dissolution proceeding and that remains under the continuing jurisdiction of the District Court. 43 A.G. Op. 72 (1990).

Appearance Fee Required of URESA Respondent — Affidavit Excusing Payment: The respondent in a URESA action is required to pay a $40 appearance fee. However, the respondent may be excused from payment upon filing an affidavit in accordance with 25-10-404. 43 A.G. Op. 3 (1989).

Fee for Substitution of Judge Applicable Only to Civil Actions: The fee imposed by this section for filing a motion for substitution of a District Court Judge applies only in civil actions, and no such fee is imposed in criminal actions. 42 A.G. Op. 77 (1988).

Dissolution Fee Not Chargeable Under Motion to Convert: A District Court Clerk may not charge a fee for filing a petition for dissolution under 25-1-201(1)(a) when a motion is made under 40-4-108(2) to convert a decree of legal separation to a decree of dissolution because the motion to convert is a continuation of the initial separation action and does not entail commencement of a new action. 42 A.G. Op. 56 (1988).

Disposition of District Court Fees: Fees collected by Clerks of the District Courts do not accrue as a revenue item to the District Court Fund in those counties adopting a 6-mill District Court levy. The Board of County Commissioners, however, may supplement the 6-mill levy with

General Fund revenues in financing the District Court Fund. (See 38 A.G. Op. 31.) 38 A.G. Op. 52 (1979).

Domiciliary Foreign Personal Representative: Prior to the 1983 amendment, 25-1-201 did not authorize the Clerk of the District Court to charge a domiciliary foreign personal representative for filing authenticated copies of his appointment, any official bond, and an inventory and appraisal of the property of the nonresident decedent located in the state under 72-4-306. 37 A.G. Op. 111 (1978).

Petition for Dissolution of Marriage — Filing Fees: The Clerk of the District Court cannot require a $20 (increased to $60 in 1987) filing fee from each petitioner when one petition for dissolution of marriage is filed listing a petitioner and copetitioner. 37 A.G. Op. 128 (1978).

Filing Fees — Defendant or Respondent: The Clerk of the District Court must collect from each defendant or respondent a $10 (increased to $40 in 1987) fee on his initial appearance. 37 A.G. Op. 136 (1978).

Who Exempted From Fee Payments: The Department of Natural Resources and Conservation is not required to pay the statutory fees of the County Clerk for recording water use permits or of the Clerk of District Court for furnishing copies of decrees affecting water rights. However, cities and counties are required to pay the fees prescribed by the Board of Natural Resources and Conservation (now Department of Natural Resources and Conservation) for filing water right applications. 37 A.G. Op. 146 (1978).

Declaration of Marriage Without Solemnization: A marriage license is not a requirement for a valid marriage by written declaration. Prior to the 1983 amendment, no fee could be charged for filing the declaration of marriage without solemnization. 37 A.G. Op. 12 (1977).

Multiple Parties — Filing Fees: This section permits the Clerk of the District Court to collect only one filing fee when multiple plaintiffs or defendants file a single complaint or answer or motion to dismiss respectively. 35 A.G. Op. 94 (1974).

Collateral References

Clerks of Courts *key* 11, et seq.

21 C.J.S. Courts §§242 through 248.

Liability of clerk of court or his bond for money paid into his hands by virtue of his office. 59 ALR 60.

25-1-202. Additional filing fee.

Compiler's Comments

2001 Amendment: Chapter 585 in second sentence substituted "must be forwarded by the clerk to the state treasurer for deposit in the state general fund" for "must be paid by the clerk into the treasury of the county where the action is filed, to be applied to the payment of the salary of the reporter"; and made minor changes in style. Amendment effective July 1, 2002.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in version effective July 1, 2002, the code commissioner changed "state treasurer" to "department of revenue".

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1997 Amendment: Chapter 384 near beginning of first sentence increased the required fee from $10 to $20; and made minor changes in style.

1989 Amendment: Substituted first sentence relating to $10 filing fee for former language that read: "In every issue of fact in civil actions tried before the court or jury, before the trial commences, there must be paid into the hands of the clerk of the court by each party to the suit the sum of $3"; near middle of second sentence substituted "where the action is filed" for "where the cause is tried"; and made minor changes in phraseology. Amendment effective July 1, 1989.

Case Notes

Stenographer's Per Diem: The fees paid stenographers for per diem refer to the sum required by this section to be paid by each party at the beginning of the trial. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 33 M 400, 84 P 706 (1905).

Court-Appointed Stenographers — Payment of Fees: The fees for stenographers must be paid to official stenographers appointed by the court under authority of 3-5-601. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 27 M 288, 70 P 1114 (1902).

Attorney General's Opinions

Court Reporter Filing Fee — Clerk of District Court to Collect Fee in Appeal From Justice's Court or City Court — Appeal Is "Civil Action" Under Statutes: The Attorney General was asked whether a Clerk of District Court must collect the $20 filing fee, required by this section and used to help pay the salary of the court reporter, in appeals filed in District Court from judgments of a Justice's or City Court. The Attorney General concluded that: (1) a private legal action in a

Justice's or City Court is a civil action; (2) an appeal from a Justice's or City Court may include appeal of a civil action; (3) an appeal from either of those courts results in most cases in a new trial in District Court and that the need for a court reporter in that instance is obvious; and (4) the payment of the additional $20 filing fee required by this section is mandatory. 48 A.G. Op. 1 (1999).

Collateral References

Costs *key* 157, 189; Courts *key* 57(2).

20 C.J.S. Costs §118; 82 C.J.S Stenographers §12.

Witness's and stenographer's fees, service of subpoenas, and depositions, as allowable items of costs in suit by beneficiary respecting trust. 9 ALR 2d 1280.

Attorney's liability for fees of court reporter. 100 ALR 546, superseded in part by 15 ALR 3d 541.

Part 3
Time

25-1-301. Extension of time.

Compiler's Comments

1981 Amendment: Substituted "Subject to Rule 6(b), M.R.Civ.P., whenever this code requires or allows an act to be done at or within a specified time, which act" for "When an act to be done, as provided in this code"; deleted "or bills of exceptions" after "statements".

Case Notes

Death of Attorney as Reason for Extension: There was no merit to an appellant's argument in opposition to a motion to strike a bill of exceptions that because an extension of time could not exceed 90 days without consent of the adverse party, pursuant to 25-1-301, and because he could not get an extension until a new attorney for the adverse party was appointed, pursuant to 37-61-405, he was prevented from making a timely filing of his bill. Even though appellee's attorney may have died, 37-61-405 is not designed to enable a prospective appellant to disregard the time limitation on filing a bill by delaying notice to the adverse party to appoint a new attorney. Berg v. Fraser, 136 M 525, 349 P2d 317 (1960).

Notice of Appeal Excluded: This section makes it clear that the time prescribed by law for the serving of notices of appeal may not be extended thereunder, for notices of appeal are specifically excluded from the operation of the statute. Thus the courts are denied the authority to extend the maximum time prescribed by statute for the service or filing of a notice of appeal. State ex rel. Reid v. District Court, 126 M 489, 255 P2d 693 (1953).

Unauthorized Extensions — Loss of Jurisdiction: Where the District Court granted extensions of time for the preparation of a bill of exceptions upon motion for new trial, amounting in all to 94 days, without the consent of the adverse party, contrary to the express provision of this section which limits such extensions to 90 days, it lost jurisdiction to determine the motion. Evans v. Oreg. Short Line R.R., 51 M 107, 149 P 715 (1915).

Constitutionality Not Considered: The constitutionality of a statute that attempts to give a court power to extend time will not be considered by the Supreme Court on appeal unless the necessity of passing upon that question is urgent and imperative. Sanden v. N. Pac. Ry., 39 M 209, 102 P 145 (1909).

Additional Extensions Following Stipulation: Where, by stipulation of counsel, the time for the preparation and service of a statement on motion for a new trial had been extended for 90 days, the District Court had power to grant a further extension, without the consent of the adverse party, and upon good cause shown, within the limit of 90 days prescribed by this section, and service made during the time so granted by the court was timely. Nord v. Boston & Mont. Consol. Copper & Silver Min. Co., 33 M 464, 84 P 1116 (1905).

Part 4
Undertakings for Security

25-1-402. Governmental entities not required to give security.

Case Notes

Governmental Entities — Undertaking for Costs on Appeal: The Division of Motor Vehicles, being a governmental entity, is not required to file an undertaking for costs on appeal of the denial of its motion for rehearing. In re Petition of Burnham, 217 M 513, 705 P2d 603, 42 St. Rep. 1342 (1985).

Application to County Treasurer: Under this section a County Treasurer is not required to furnish an undertaking on attachment in an action brought in his official capacity for the benefit of the county to recover on an indemnity bond against loss of county funds in a bank. Jenkins v. First Nat'l Bank, 73 M 110, 236 P 1085 (1925).

Application to Examining Board: Under this section, the Board of Examiners for Nurses (now Board of Nursing), being a public office and its members public officers, is relieved from filing a bond on appeal from a judgment compelling it, by Writ of Mandate, to recommend to the Governor an applicant for certification as a registered nurse. State ex rel. Scollard v. Bd. of Examiners, 52 M 91, 156 P 124 (1916).

Application to Mayor of City: On appeal from an adverse judgment in an action against the Mayor of a city in his official capacity, he is not under this section required to furnish an undertaking. State ex rel. Dwyer v. Duncan, 49 M 54, 140 P 95 (1914).

Part 5
Notice to Attorney General

25-1-502. Notice of appeal to be served on attorney general when state is party to judicial review.

Compiler's Comments

2001 Amendment: Chapter 535 substituted language in (1) and (2) expanding the requirements for notice to the attorney general when a state agency is party to a proceeding for which judicial review is sought for former language that read: "When a department or board of this state appeals from a judgment or order entered in any court of this state, a copy of the notice of appeal must be served on the attorney general." Amendment effective May 1, 2001.

Applicability: Section 3, Ch. 535, L. 2001, provided: "[This act] applies to any action or other proceeding for which the time for an appeal has not yet begun to run on [the effective date of this act]." Effective May 1, 2001.

Case Notes

Standing of Attorney General to Appeal P.S.C. Order — P.S.C. Appeal Untimely: The Montana Power Company (M.P.C.) applied to the Public Service Commission (P.S.C.) for a rate increase of over $96.3 million. The P.S.C. granted only $4.1 million and denied in toto M.P.C.'s request to recover costs associated with Colstrip Unit 3. The M.P.C. appealed to District Court for review under 2-4-701. The judge reversed the P.S.C. order. The Attorney General filed notice of appeal. More than 60 days after the judge's order was entered, the P.S.C. also filed notice of appeal. The M.P.C. filed a motion to dismiss the appeal of the Attorney General for lack of standing and the appeal of the P.S.C. as untimely. The Supreme Court granted the motion, holding that the Attorney General had no standing to represent the state on appeal since it was not an aggrieved party or a party to the proceedings before the District Court and because, in his official capacity, the Attorney General may not appeal a decision that is within the discretion of the P.S.C. as a party to the action. The appeal of the P.S.C. was untimely, although within 7 days of the notice of appeal filed by the Attorney General. The latter appeal being invalid, the P.S.C. appeal would have to fall within the 60-day rule. Mont. Power Co. v. Dept. of Public Service Regulation, 218 M 471, 709 P2d 995, 42 St. Rep. 1750 (1985).

Part 11
Registration of Process Servers — Levying Officers

Part Compiler's Comments

Source: Sections 25-1-1101 through 25-1-1103, 25-1-1105 through 25-1-1107, 25-1-1111, and 25-1-1112 are based on sections 22350 through 22360 of the California Business and Professional Code.

25-1-1101. Registered process server — levying officer.

Compiler's Comments

2005 Amendment: Chapter 392 in (1) inserted second sentence authorizing registered process server to make service of process in any county in the state; and made minor changes in style. Amendment effective October 1, 2005.

25-1-1103. Fee — duration of certificate.

Compiler's Comments

2001 Amendment: Chapter 585 in second sentence substituted "The fee must be forwarded by the clerk of district court to the state treasurer for deposit in the state general fund" for "The fee

must be deposited in the county general fund for district court operations, unless the county has a district court fund. If the county has a district court fund, the fee must be deposited in that fund." Amendment effective July 1, 2002.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in (1) in version effective July 1, 2002, the code commissioner changed "state treasurer" to "department of revenue".

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

25-1-1104. Handbook for process servers.

Compiler's Comments

2001 Amendment: Chapter 483 in (1) and (3) after "department of" substituted "labor and industry" for "commerce"; and made minor changes in style. Amendment effective July 1, 2001.

1989 Amendment: In (2) changed "patrolmen" to "patrol officers".

Administrative Rules

ARM 8.50.437 Registration fee schedules.

CHAPTER 2
VENUE

Chapter Case Notes

Forum Non Conveniens and Right to Change of Venue Inapplicable to FELA Actions: In Federal Employers Liability Act cases, neither the doctrine of forum non conveniens nor the right to change of place of trial is available. (However, see the 1995 and 1997 amendments to 25-2-122, which restricted this decision.) Haug v. Burlington N. RR Co., 236 M 368, 770 P2d 517, 46 St. Rep. 432 (1989).

Part 1
Proper Place of Trial — Venue

Part Compiler's Comments

Recommendations for Revisions in Venue Statutes Prepared by the Montana Supreme Court Commission on the Rules of Evidence: Chapter 432, L. 1985, was enacted based on recommendations to the Legislature as indicated in the following preface to the report that accompanied the introduced bill (Senate Bill 91):

"This report and the accompanying draft bill are submitted to partially fulfill the request of Senate Joint Resolution 24 of the 48th Legislature that the Supreme Court Commission on the Rules of Evidence prepare draft legislation for submission to the 49th Legislature to provide that "statutory provisions on venue . . . accurately reflect the current usages and interpretations of those laws . . . ."

The Resolution recognized that the existing statutes "no longer reflect on their face the present state of the law," and expressed a desire that new draft statutes be prepared incorporating the "logical, useful, and consistent" rules and practices which have evolved by judicial construction of the present laws.

The current venue statutes were adopted in 1864 at Bannack and are substantially the same today as when they were enacted. Throughout the 120 years of their existence these venue statutes have been the subject of dozens, perhaps hundreds, of appeals to the Montana Supreme Court. Many of the appeals were caused by the silence of the statutes on principles necessary to their operation; other appeals resulted from the ambiguity of certain fundamental language. The commands of various venue sections that particular kinds of cases "shall," "may," or "must" be tried in specified counties resulted in seemingly unending litigation. Concerning one of these sections, Justice Sheehy, writing for a unanimous court, complained in 1978:

Possibly no statute has spawned more litigation in this state than section 93-2904 relating to the proper place of trial. Year after year we are called upon to interpret anew what are seemingly simple code provisions and to explain again the impact of our decisions under the statute. (Clark Fork Paving, Inc. v. Atlas Concrete, 178 Mont. 8, 582 P.2d 779.)

Justice Sheehy went on to extract, from what he termed "the mountain of cases which have arisen," the long-standing rules that decided the issue, and restated them for the thirtieth or fortieth time.

The Clark Fork case illustrates the fundamental problem: basic rules exist but many cannot be found in the statutes. They must be located in, and sifted from, a "mountain of cases." When

attorneys have not found the applicable Supreme Court opinion in the 190-odd volumes of Montana Reports (or hope that their opponents have not), the same legal questions are hauled before the Court again and again and again.

The new statutes proposed in this draft have three objectives:

(1) to include in the Montana Code Annotated those rules which have been declared and are settled by the Supreme Court but are not now stated in the Code;

(2) to change the language, without changing the meaning, of the sections that have caused the most litigation (primarily by substituting the designation "proper place of trial" for the ambiguous command that cases "shall," "may," or "must" be tried in particular counties);

(3) to settle the few matters where there is still a seeming ambiguity, following general principles along the lines that the Court seems to feel would be best derived from what the Court has held in other situations."

Part Law Review Articles

Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 317 (1983).

Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 347 (1981).

25-2-111. Scope of part.

Evidence Commission Recommendations for Revisions

Explanation: The only purpose of this section is clarity. It is simply an expression of the fundamental principle incorporated but unstated in the present Code and its predecessors.

Compiler's Comments

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Collateral References

92A C.J.S. Venue §§1 through 6.

77 Am. Jur. 2d Venue §§3, 4.

25-2-112. Designation of proper place of trial not jurisdictional.

Evidence Commission Recommendations for Revisions

Explanation: This new section is intended to codify the results of a series of cases dealing with recurrent problems caused by the form and language of the current statutes. Although intended only to set rules of venue, the phrasing of the present statutes has caused many litigants to believe they prescribe jurisdictional requirements. The Supreme Court has had to rule repeatedly that these statutes do not in any way affect the jurisdiction of District Courts to try cases brought before them. All District Courts have equal power to try any action of which the district courts, as a group, have jurisdiction (Miller v. Miller, 189 Mont. 356, 616 P.2d 313 (1980); State ex rel. Foster v. Mountjoy, 83 Mont. 162, 271 P. 446 (1928)). Even if a court is not the proper one as designated by the venue statutes, it can try a case if there is no objection from a party through a motion for a change of venue (Miller v. Miller, supra; Bullard v. Zimmerman, 82 Mont. 434, 268 P. 512 (1928)). Unless there is a demand by one of the parties, a court is not authorized to order the case transferred to another county or to refuse to try the case (State ex rel. Gnose v. District Court, 30 Mont. 188, 75 P. 1109 (1904); Danielson v. Danielson, 62 Mont. 83, 203 P. 506 (1921)).

Since these questions have arisen repeatedly over a long period of time, it seems sensible to include this or a similar provision to prevent endless recurrences in the future.

Compiler's Comments

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Case Notes

Venue Versus Jurisdiction — Failure to Move for Change of Venue at Initial Appearance Constituting Waiver of Right to Later Object to Venue: A mother filed in District Court in Judith Basin County for review of a child support modification consent order by the Department of Public Health and Human Services Child Support Enforcement Division (CSED) reducing the father's child support obligation. CSED moved for dismissal, claiming that the mother had failed to exhaust her administrative remedies. The District Court granted the motion based on lack of jurisdiction, concluding that the petition should have been filed in a different county. The mother appealed, contending that the court confused the concepts of venue and jurisdiction and contending that dismissal of the petition for lack of jurisdiction was erroneous as a matter of law.

The Supreme Court agreed and reversed. The District Court's interpretation of 2-4-702 as a requirement that a petition for judicial review must be filed in the correct venue for the court to obtain jurisdiction was incorrect as a matter of law. Jurisdiction is a court's authority to hear and determine a case that goes to the power of the court and cannot be waived or conferred by consent of the parties when there is no basis for jurisdiction under the law, while venue refers to the place where a case is to be heard or where the power of the court is to be exercised and is a personal privilege of defendant that may be waived and that is considered waived pursuant to Rule 12(b), M.R.Civ.P. (Title 25, ch. 20), unless a motion to change venue is made at defendant's initial appearance. Thus, the mother's petition for judicial review vested the Judith Basin County District Court with jurisdiction under 2-4-702. Whether venue was proper in the county where the petition was filed was an entirely different issue. Section 2-4-702 also sets forth the proper place where a contested administrative decision can be heard, providing that the petition must be filed in the District Court for the county where the petitioner resides or has a principal place of business or where the agency maintains its principal office. Upon proper motion, the matter should have been transferred to the proper county, but CSED failed to move for a change of venue at the initial appearance, thereby waiving its right to later object to venue, opting instead to move to dismiss for lack of jurisdiction. Therefore, Judith Basin County was a proper place for trial absent agreement by the parties to transfer venue. In re Support Obligation of McGurran, 2002 MT 144, 310 M 268, 49 P3d 626 (2002).

Collateral References

92A C.J.S. Venue §§1 through 6.
77 Am. Jur. 2d Venue §1.

25-2-113. Power of court to change place of trial.

Evidence Commission Recommendations for Revisions

Explanation: This section is simply a consolidation into a single section a principle now expressed separately and not very clearly in each statute. Every venue statute now, after designating the proper county or counties for particular purposes, includes a provision that it is "subject, however, to the power of the court to change the place of trial as provided in this code." The Supreme Court has had to state on many occasions that the clause is intended only to preserve the trial courts' discretionary power of granting changes of venue to secure impartial trials or to promote convenience of witnesses or the ends of justice. The proposed section incorporates these declarations and should make the meaning clear.

Compiler's Comments

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Collateral References

92A C.J.S. Venue §§127 through 130.
77 Am. Jur. 2d Venue §§9, 50, et seq., 55.

25-2-114. Right of defendant to move for change of place of trial.

Evidence Commission Recommendations for Revisions

Explanation: This section and section 5 [25-2-115] specify that the right to move for a change of place of trial on the ground that the action is brought in the wrong county belongs exclusively to a defendant. It might be argued that this right should extend to some other classes of litigants, such as involuntary plaintiffs under Rule 19(a), M.R.Civ.P. or some intervenors (Rule 24, M.R.Civ.P.). The courts have always held that such parties must accept the status of the ongoing action as they find it at the time of their entry. Further, Rule 12(b)(ii), M.R.Civ.P. provides that only defendants can move for a change of venue on this ground, which is consistent with all of the Supreme Court holdings.

Compiler's Comments

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Case Notes

Change of Venue on Multiple Claims to Defendants' County of Residence While Allowing Plaintiff to Pursue Venue Established by Contract Proper: The franchise agreement between one plaintiff and defendants provided that plaintiff could elect to initiate an action concerning breach of the agreement in Yellowstone County. Franchise agreements with other plaintiffs

provided that Missoula County would be the place of venue. All plaintiffs joined in a suit against defendants, which was filed in Yellowstone County. Defendants moved for a change of venue to Missoula County where the company headquarters were located, and the motion was granted. Plaintiff whose agreement allowed for a Yellowstone County venue was allowed to sever its claims and keep its action in that county if desired. Plaintiffs appealed the venue change, but the Supreme Court affirmed. The determination of whether a county is the proper place for trial is a question of law involving application of the venue statutes to pleaded facts. The general rule in 25-2-118 provides that the proper place for trial in civil actions is the defendant's county of residence. Additionally, in a case involving multiple claims, 25-2-116 provides that a party that is entitled to a change of venue on any claim is entitled to a change of venue on the entire action, subject to the power of the trial court to separate claims or issues for trial. Therefore, the District Court did not err in moving the venue to Missoula County where defendants resided and in allowing the plaintiff with a contractual provision for trial in Yellowstone County to pursue its action there. DML, Inc. v. Fulbright, 2005 MT 204, 328 M 212, 119 P3d 93 (2005), distinguishing Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996), and Liang v. Lai, 2004 MT 188, 322 M 199, 94 P3d 759 (2004).

Location of Resident Agent of Foreign Corporation Proper Venue in Tort Action: Nelson worked for a Minnesota corporation at a refinery in Yellowstone County. Nelson brought a tort action based on exposure to asbestos during employment, naming as defendants three Minnesota corporations that operated the refinery and two individuals from Yellowstone County who worked as plant managers. Nelson resided in Missoula County, and the corporations' resident agent was located in Lewis and Clark County. Nelson brought the action in Lewis and Clark County. The corporations moved for a change of venue to Yellowstone County, but the motion was denied. On appeal, the Supreme Court affirmed. A defendant may move for a change of venue when an action is not brought in a county that is statutorily designated as a proper place for trial, and the motion must be granted if the county in which the action is filed is not a proper place for trial. If more than one county is proper, the action may be brought in any of those counties and a motion for change of venue may not be granted. The general rule for determining venue is 25-2-118, but there are statutory exceptions to the general rule for specific types of actions. Venue rules for tort actions are in 25-2-122, including venue for tort actions against a foreign corporation, one of which is the county in which the corporation's resident agent is located. Thus, Lewis and Clark County was a proper venue for trial, and the District Court did not err in denying the motion for change of venue. Nelson v. Cenex, Inc., 2004 MT 170, 322 M 54, 97 P3d 1073 (2004), distinguishing Platt v. Sears, 222 M 184, 721 P2d 336 (1986).

Action Filed in Proper County — Motion to Remove to Another Proper County Properly Denied: Once an action has been filed in a proper county, the District Court cannot grant a motion to have it removed to another county of proper venue. Petersen v. Tucker, 228 M 393, 742 P2d 483, 44 St. Rep. 1625 (1987).

Collateral References

92A C.J.S. Venue §§128, 142 through 147.

77 Am. Jur. 2d Venue §44, et seq.

25-2-115. Multiple proper counties.

Evidence Commission Recommendations for Revisions

Explanation: Present statutes do not deal with this situation. This section codifies a number of Supreme Court holdings that do. In many cases (particularly tort and contract actions) alternative venues are authorized, but the manner of choosing between them is not stated. A sizeable amount of litigation has resulted. All of the cases have held that the plaintiff has the initial choice and, if he selects a county that is proper, the issue is closed, but that if the plaintiff files the action in a county that is not one of those designated, he has waived the right to choose, which passes to the defendant. Defendant can then decide to which of the proper counties he wants the case transferred. Of the many cases dealing with the problem, Seifert v. Gehle, 133 Mont. 320, 323 P.2d 269 (1958), a tort action, gives the clearest statement:

In this case the statute means that either the county of defendant's residence or the county where the tort was committed is a proper county for the trial of the action, and had the plaintiff chosen either of those counties, the defendant could not have had it removed.

In this case plaintiff waived his right to have it tried in one of the proper counties. Therefore, the defendant has the right upon proper demand to have the place of trial changed either to the county where he resides or to the county where the tort was committed, whichever he elects.

This proposed section will preserve the rule of Seifert and other cases. It allows the plaintiff first choice among the proper venues and provides that a correct choice by him cannot be

changed. If the plaintiff's selection is not one of the designated counties, the initiative passes to the defendant. He can move for a change to the proper county of his choice, and section 25-2-201 MCA requires that the trial court grant the motion.

Compiler's Comments

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Case Notes

Change of Venue on Multiple Claims to Defendants' County of Residence While Allowing Plaintiff to Pursue Venue Established by Contract Proper: The franchise agreement between one plaintiff and defendants provided that plaintiff could elect to initiate an action concerning breach of the agreement in Yellowstone County. Franchise agreements with other plaintiffs provided that Missoula County would be the place of venue. All plaintiffs joined in a suit against defendants, which was filed in Yellowstone County. Defendants moved for a change of venue to Missoula County where the company headquarters were located, and the motion was granted. Plaintiff whose agreement allowed for a Yellowstone County venue was allowed to sever its claims and keep its action in that county if desired. Plaintiffs appealed the venue change, but the Supreme Court affirmed. The determination of whether a county is the proper place for trial is a question of law involving application of the venue statutes to pleaded facts. The general rule in 25-2-118 provides that the proper place for trial in civil actions is the defendant's county of residence. Additionally, in a case involving multiple claims, 25-2-116 provides that a party that is entitled to a change of venue on any claim is entitled to a change of venue on the entire action, subject to the power of the trial court to separate claims or issues for trial. Therefore, the District Court did not err in moving the venue to Missoula County where defendants resided and in allowing the plaintiff with a contractual provision for trial in Yellowstone County to pursue its action there. DML, Inc. v. Fulbright, 2005 MT 204, 328 M 212, 119 P3d 93 (2005), distinguishing Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996), and Liang v. Lai, 2004 MT 188, 322 M 199, 94 P3d 759 (2004).

Erroneous Change of Venue for Defendants When Proper Venue Chosen by Plaintiff: Plaintiff filed a tort action in Flathead County where a slip and fall accident occurred. Defendants moved for and were granted a change of venue to Sanders County where one defendant resided. Plaintiff appealed the venue change, and the Supreme Court reversed, noting that a defendant must be granted a change of venue if an action is brought in a county that is not statutorily designated as a proper place for trial, but because Flathead County was the location of the premises where the allegedly tortious act occurred, it was a proper venue, so no motion to change the place of trial on the entire action could be granted. Because plaintiff chose a proper venue, the District Court erred when it granted defendants' venue change. Liang v. Lai, 2004 MT 188, 322 M 199, 94 P3d 759 (2004), following Nelson v. Cenex, Inc., 2004 MT 170, 322 M 54, 97 P3d 1073 (2004). See also Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996).

Contract Agreement for Sale of Goods and Performance of Services — Venue Proper in Place of Principle Activity: A dispute arose between the parties to a contract regarding the proper county of venue. Plaintiff maintained that because the dispute arose out of a contract, proper venue should be determined under 25-2-121 and that because the contract was for the sale of goods only, 25-2-121(2)(a) should apply to establish venue in Yellowstone County where possession of the goods was to be delivered. Although defendant agreed that 25-2-121 applied, defendant contended that because the contract was for both the sale of goods and the performance of services, 25-2-121(1)(b)(ii) should apply, establishing appropriate venue in the county where the principle activity was to take place, which was Valley County. Defendant also argued that under 25-2-118, venue was proper in Valley County, defendant's county of residence. The District Court examined all the obligations required of the parties at the time of the agreement and applied Missouri-Stone Co. v. Barber Seed Serv., Inc., 256 M 66, 844 P2d 112 (1992), concluding that because the contract was for both the sale of goods and the performance of services, 25-2-121(1)(b)(ii) was the appropriate subsection under which to establish venue—in Valley County where the principle activity was to take place. The Supreme Court concurred. Venue was proper in either the county of defendant's residence or where the principle place of activity occurred, which in both cases was Valley County, so the District Court did not err in changing venue to Valley County. Tractor & Equip. Co. v. Zerbe Bros., 2001 MT 162, 306 M 111, 32 P3d 721 (2001).

Suit Filed in Proper County — Defendant May Not Change Venue to Other Proper County: When a suit may properly be commenced in more than one county and plaintiff files in one of the

permissible counties, defendant may not change the venue of the action to a different county even if the county preferred by defendant is also a proper place for trial. Melroe v. Doyle, 239 M 524, 781 P2d 1134, 46 St. Rep. 1884 (1989).

Collateral References

92A C.J.S. Venue §§62 through 68.

77 Am. Jur. 2d Venue §2.

25-2-116. Multiple claims.

Evidence Commission Recommendations for Revisions

Explanation: The present statutes do not cover this situation. This section codifies the holdings of the Supreme Court in cases that have raised the question. Our statutes have no provision for the multiple claim situation in which the county where the plaintiff files is correct on one claim but not for one or more of the others. It is possible, at least since the adoption of Rule 42(b), for a court to split the action and grant a change on one or more claims, but this causes multiple trials and may be a cure worse than the disease. For a great many years our Court has ruled consistently that a defendant entitled to a change of venue on one claim should have it on the entire action. The Court feels the rule is necessary to prevent a plaintiff from controlling venue by adding spurious claims that have little or no validity, but are triable in the forum the plaintiff chooses rather than at the normal situs which would be the defendant's residence or another location more favorable to the defendant.

This new provision codifies the result of this unbroken line of opinions: Yore v. Murphy, 10 Mont. 304, 25 P. 1039 (1891); Heinecke v. Scott, 95 Mont. 200, 26 P.2d 167 (1933); Beavers v. Rankin, 142 Mont. 570, 385 P.2d 640 (1963). It makes no change in existing law, but simply enacts it into the Code where it is available.

Compiler's Comments

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Case Notes

Change of Venue on Multiple Claims to Defendants' County of Residence While Allowing Plaintiff to Pursue Venue Established by Contract Proper: The franchise agreement between one plaintiff and defendants provided that plaintiff could elect to initiate an action concerning breach of the agreement in Yellowstone County. Franchise agreements with other plaintiffs provided that Missoula County would be the place of venue. All plaintiffs joined in a suit against defendants, which was filed in Yellowstone County. Defendants moved for a change of venue to Missoula County where the company headquarters were located, and the motion was granted. Plaintiff whose agreement allowed for a Yellowstone County venue was allowed to sever its claims and keep its action in that county if desired. Plaintiffs appealed the venue change, but the Supreme Court affirmed. The determination of whether a county is the proper place for trial is a question of law involving application of the venue statutes to pleaded facts. The general rule in 25-2-118 provides that the proper place for trial in civil actions is the defendant's county of residence. Additionally, in a case involving multiple claims, this section provides that a party that is entitled to a change of venue on any claim is entitled to a change of venue on the entire action, subject to the power of the trial court to separate claims or issues for trial. Therefore, the District Court did not err in moving the venue to Missoula County where defendants resided and in allowing the plaintiff with a contractual provision for trial in Yellowstone County to pursue its action there. DML, Inc. v. Fulbright, 2005 MT 204, 328 M 212, 119 P3d 93 (2005), distinguishing Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996), and Liang v. Lai, 2004 MT 188, 322 M 199, 94 P3d 759 (2004).

Wrongful Death and Survivor Action — Change of Venue Properly Denied: The District Court did not err in refusing to apply this section to a case in which survivorship action arose in one county and the wrongful death action arose in another. Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237, 53 St. Rep. 1277 (1996).

Collateral References

92A C.J.S. Venue §68.

77 Am. Jur. 2d Venue §16.

25-2-117. Multiple defendants.

Evidence Commission Recommendations for Revisions

Explanation: On a few occasions, the Supreme Court has had to deal with the problem posed by multiple defendants with conflicting venue rights. Most situations involve defendants who

live in different counties, but this presents no difficulty since the statutes (Section 25-2-108 MCA [renumbered 25-2-118]; amended in section 7 of this draft [section 8 of Ch. 432]) have always allowed the plaintiff to file at the residence of any of them. Tort, contract, and real property actions, however, which present choices other than residence, have been troublesome. Heinecke v. Scott, 95 Mont. 200, 26 P.2d 167 (1933) raised but did not give a definitive answer to the question of possible priorities between defendants whose venue rights arise under different statutory provisions. That case involved contract, tort, and real property claims, and was brought at the plaintiff's residence where none of the defendants lived. The Court held that the action was basically one for recovery of real property, to which the tort and contract claims were subsidiary. Since all of the defendants were residents of the county where the land was situated, a change of venue to that county was awarded. The court noted that small differences in the facts might have presented much more complex questions. These questions are what this proposed section attempts to meet. The section would simply extend the same "good as to one, good as to all" principle that has always governed venue based on residence to all situations. Rule 42(b), which was not available at the time of the Heinecke case, could be used to alleviate the difficulties of a defendant placed at a real disadvantage.

This proposed section does not change existing law or establish any new principle. Like the other new provisions it simply tries to codify existing case law (although, in this instance, cases are neither plentiful nor clear-cut) so that all the fundamental principles will be gathered together in one place and stated as plainly as possible.

Compiler's Comments

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Case Notes

Venue in Matter Involving Multiple Defendants — Plaintiff's Venue Alternatives Properly Exercised: Plaintiff's husband was killed in an accident at the city bus barn in Lewis and Clark County in Helena. Plaintiff filed a survivorship/wrongful death action in Silver Bow County against defendant city in Lewis and Clark County and against defendant gas company with its principal place of business in Silver Bow County. The city moved for a change of venue to Lewis and Clark County, but the motion was denied. On appeal, the city argued that because Gabriel v. School District No. 4, 264 M 177, 870 P2d 1351 (1994), and Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996), established that the proper venue for trial of a combined survivorship/wrongful death action is either the county where the survivorship action arose or the county where the wrongful death claim arose and that neither claim in this case arose in Silver Bow County, Silver Bow County was not a proper venue. Plaintiff contended that under this section, when there are multiple defendants, a proper place for trial of any defendant is proper for all defendants. The Supreme Court agreed with plaintiff. Although Gabriel and Wentz approved counties where survivorship or wrongful death actions arose as proper venues, neither case established those counties as exclusive venues for survivorship/wrongful death actions. In cases with multiple defendants pursuant to this section, including defendants that are both political subdivisions and private entities, 25-2-126, which provides venue for actions against political subdivisions, does not prevail over 25-2-122, which provides venue for tort actions, but rather provides alternative venue options to a plaintiff. The plaintiff properly exercised a venue option here, and denial of the change of venue motion was affirmed. Meyer v. Mont. Power Co., LLC, 2005 MT 66, 326 M 283, 109 P3d 269 (2005), distinguishing Whalen v. Mont. Right to Life Ass'n, 2002 MT 328, 313 M 204, 60 P3d 972 (2002).

Location of Resident Agent of Foreign Corporation Proper Venue in Tort Action: Nelson worked for a Minnesota corporation at a refinery in Yellowstone County. Nelson brought a tort action based on exposure to asbestos during employment, naming as defendants three Minnesota corporations that operated the refinery and two individuals from Yellowstone County who worked as plant managers. Nelson resided in Missoula County, and the corporations' resident agent was located in Lewis and Clark County. Nelson brought the action in Lewis and Clark County. The corporations moved for a change of venue to Yellowstone County, but the motion was denied. On appeal, the Supreme Court affirmed. A defendant may move for a change of venue when an action is not brought in a county that is statutorily designated as a proper place for trial, and the motion must be granted if the county in which the action is filed is not a proper place for trial. If more than one county is proper, the action may be brought in any of those counties and a motion for change of venue may not be granted. The general rule for determining venue is 25-2-118, but there are statutory exceptions to the general rule for specific types of

actions. Venue rules for tort actions are in 25-2-122, including venue for tort actions against a foreign corporation, one of which is the county in which the corporation's resident agent is located. Thus, Lewis and Clark County was a proper venue for trial, and the District Court did not err in denying the motion for change of venue. Nelson v. Cenex, Inc., 2004 MT 170, 322 M 54, 97 P3d 1073 (2004), distinguishing Platt v. Sears, 222 M 184, 721 P2d 336 (1986).

Venue Properly Based Solely Upon Allegations in Complaint — Affidavits Not Considered — Venue Found Proper for Both Defendants: The Department of Health and Environmental Sciences (now Department of Environmental Quality) brought an action in Lewis and Clark County against Pegasus Gold Corporation (Pegasus) and Zortman Mining, Inc. (ZMI), for numerous violations of the Montana water quality laws at the Zortman and Landusky mines located in Phillips County. The complaint alleged that Pegasus owned or controlled the mines and that both Pegasus and ZMI did business in Lewis and Clark County, making that county a proper place for venue. ZMI moved to change venue to Phillips County, alleging that Pegasus did not own or control ZMI, and attached affidavits of Fletcher and Erickson to support its motion. Citing Petersen v. Tucker, 228 M 393, 742 P2d 483 (1987), the Supreme Court held that the District Court properly relied upon the allegations in the complaint without considering the two affidavits. The Supreme Court held that inasmuch as Pegasus was a named defendant at the time of the complaint and did business in Lewis and Clark County, that county was proper for venue. The Supreme Court noted that because the motion for change of venue did not refer to or rely upon the Fletcher affidavit, it was properly not considered by the District Court. The Supreme Court also noted that because the Erickson affidavit did not contradict the allegations in the complaint that Pegasus owned or controlled ZMI, the District Court was correct in focusing on the allegations in the complaint. The Supreme Court held that venue was properly found in Lewis and Clark County for both defendants because under the provisions of this section, a county that is proper venue for one defendant is proper for both. State ex rel. Dept. of Health and Environmental Sciences v. Pegasus Gold Corp., 270 M 32, 889 P2d 1197, 52 St. Rep. 64 (1995).

Status of Parties and Pleadings at Time of Complaint or Time Moving Party Appears as Determining Venue: A complaint was filed in Missoula County against several defendants, including a Kalispell doctor, who moved for a change of venue to Flathead County. The motion was initially denied, but upon dismissal of the other defendants, the doctor again moved for a change of venue, which was granted. The District Court erred in granting the change because in Montana, venue will be determined by the status of the parties and pleadings at the time of the complaint or at the time that the moving party appears in the action. Otherwise, courts would be required to reexamine the question of venue whenever the composition of the parties is altered. Emery v. Federated Foods, Inc., 262 M 83, 863 P2d 426, 50 St. Rep. 1454 (1993), following Boucher v. Steffes, 160 M 482, 503 P2d 659 (1972).

Motion by One Cross-Defendant for Change of Venue Not Affected by Waiver of Right by Other Cross-Defendants: Where one of four cross-defendants timely filed a proper motion to move for a change of venue, denial of the motion based on the fact that the other three cross-defendants had waived their similar right by failing to make a proper motion upon initial appearance was error and was reversed. St. Bank of Townsend v. Worline, 227 M 315, 738 P2d 1295, 44 St. Rep. 1112 (1987).

Foreign Corporation and Montana Resident as Defendants: The rule set out in 25-2-118 that a foreign corporation may be sued in any county in the state does not apply when Montana residents are also named as defendants. In that case, venue is determined by Montana's other venue statutes. Platt v. Sears, 222 M 184, 721 P2d 336, 43 St. Rep. 1160 (1986).

Venue for Insurer Bad Faith Tort — County Where Investigation and Negotiation Transpired: In action for bad faith against insurer and its claims representative under 33-18-201, defendants moved for change of venue from Flathead County to Cascade County. Defendants contended that Cascade County was proper venue since the claims representative maintained an office and accomplished all work and decisions there. The Supreme Court affirmed the trial court's denial of the motion, finding that the defendant's duty to investigate and negotiate could have been realistically performed only in Flathead County where the plaintiff's farm and the provider of defective potting soil were located. Since venue in Flathead County was proper for the insurer, it was also proper for the claims representative who resided in Cascade County. Streich & Associates, Inc. v. St. Paul Mercury Ins. Co., 221 M 209, 717 P2d 1101, 43 St. Rep. 752 (1986).

No Change of Venue — County and Public Officials: Plaintiff Weiss was severely injured in a one-car accident in Glacier County. A complaint was filed in Gallatin County, Weiss' place of residence. Codefendants, Glacier County and Glacier County Commissioners, filed a motion for a change of venue from Gallatin to Glacier County, asserting that 25-2-125 and 25-2-126 require

an action against a county or its Commissioners to be brought in the county of the alleged tort. The District Judge denied the motion, reasoning that venue was proper as to the state defendants, therefore venue was proper as to all defendants. On appeal, the Supreme Court agreed with the plaintiffs' assertion that 25-2-117, enacted in 1985, rather than 25-2-125 and 25-2-126, was controlling. The court held that 25-2-117 was intended to apply to all venue provisions, including the provisions relating to suits against counties and public officials, and that denial of a change of venue was consistent with the provision of 25-2-117 which states that an action may be brought in any county where venue is proper and other defendants joined, though venue otherwise would not lie against those defendants. Weiss v. St., 219 M 447, 712 P2d 1315, 43 St. Rep. 82 (1986).

Collateral References

92A C.J.S. Venue §§116 through 118.

77 Am. Jur. 2d Venue §58.

25-2-118. Residence of defendant.

Evidence Commission Recommendations for Revisions

Explanation: This revised section changes the location and arrangement of the most basic rules but does not alter their content significantly. Currently, section 25-2-108 [renumbered 25-2-118], which states the most fundamental of all venue rules—that the defendant has the right to have the trial in his county of residence—is the last section in Part 1, Chapter 2, Title 25, preceded by a long list of exceptions to it. The sequence is confusing and has caused much needless litigation. This revision tries to put first things first, beginning with the most fundamental proposition, and following it with the exceptions.

Subsection (1). This subsection extracts from the confusing welter of statutes what the Supreme Court has repeatedly called the "principal rule" of venue (see Hardenburgh v. Hardenburgh, 115 Mont. 46, 146 P.2d 151 (1944); Love v. Mon-O-Co Oil Corp., 133 Mont. 56, 319 P.2d 1056 (1957); Clark Fork Paving v. Atlas Concrete, 178 Mont. 8, 582 P.2d 779 (1978)) and places it at the beginning, rather than the end, of the related group of rules. The proper relationship between this principle and others that are subordinate to it has generated most of what Justice Sheehy, in Clark Fork Paving, called the "mountain of cases" that the present statutes have spawned. This new order and placement is intended to emphasize the pre-eminence of this rule and the Court's repeated insistence upon it.

The stricken material "or where the plaintiff resides and the defendants or any of them may be found" at the end of subsection (1) is part of the current rule, but, in the judgment of the Commission, should be eliminated entirely. This deletion constitutes a substantive change in current law, the only such change in the draft bill. Unlike the fundamental principle to which it is attached, this separate method of fixing venue is legally questionable and almost never used except in domestic relations actions. As a built-in exception to the rule that a defendant is entitled to trial in his own county, it is an open invitation to subterfuge and sharp practice by plaintiffs' attorneys, and was so characterized in the single case construing it that has reached the Supreme Court. By a 3-2 decision in Shields v. Shields, 115 Mont. 146, 139 P.2d 528 (1943) the Court held that this portion of the statute permitted a plaintiff to keep a divorce case in his own home county rather than that of the defendant by serving her when she had to leave her home county and come to the plaintiff's in connection with other litigation between them. The two dissenting judges called the plaintiff's action fraudulent. They argued that the provision was intended to be used only when the defendant had no residence in Montana, or had one but could not be found there. The dissenters' contention, though it did not prevail, apparently cast so much doubt on the practice that it has never again, in over 40 years, come before the Supreme Court. The Commission recognizes that this deleted language is often used in domestic relations cases; to preserve this existing use, similar language could be incorporated into 40-4-105(3), MCA. The situation for child custody is covered in 40-4-211, MCA.

The legitimate uses of the deleted language—to set venue in the cases of non-residents or residents whose whereabouts cannot be ascertained—are substantially covered by subsection (2) of the current draft.

Subsection (2). This provision clarifies the portion of section 25-2-108 [renumbered 25-2-118] dealing with nonresident defendants. Since, by definition, a nonresident of the state is not resident in any county, the basic rule of subsection (1) cannot apply. In this situation the statute has always given the right of choosing venue to the plaintiff, and this draft contemplates no change.

Most of the litigation under this provision has dealt with nonresident corporations. An unbroken chain of decisions holds that a foreign corporation has no Montana residence for venue

purposes, can be sued in any county selected by the plaintiff, and has no right to a change of venue for improper county (Pue v. Northern Pacific Ry. Co., 78 Mont. 40, 252 P. 313 (1926); Hanlon v. Great Northern Ry. Co., 83 Mont. 15, 268 P. 547 (1928); Truck Insurance Exchange v. NFU Property and Casualty, 149 Mont. 387, 427 P.2d 50 (1967); Foley v. General Motors Corp., 159 Mont. 469, 499 P.2d 774 (1972)). Since, under this statute, any county selected by the plaintiff is a proper place of trial, a nonresident is not entitled to a change even in those instances, like tort and contract actions, where alternative venues are authorized (Morgan and Oswood v. U. S. F. & G., 167 Mont. 64, 535 P.2d 170 (1975)). [However, see the 1995 amendment to 25-2-122, which restricted these decisions.]

All of the existing case holdings would be undisturbed by subsection (2). The law will remain just as it is.

It should be noted that subsection (2) applies only to the nonresident and does not affect the rights of a resident who may be joined as co-defendant with the nonresident. The resident retains whatever rights he may have to a venue change (Foley v. General Motors Corp., supra).

The stricken language providing for designation of a proper county by a plaintiff was deleted as redundant with section 4 [25-2-114]. A plaintiff, whether he knows the residence of the defendant or not, may file in any county subject to defendant's right to move the trial.

Compiler's Comments

2003 Amendment: Chapter 314 in (3) in middle inserted "or the respondent" and near end substituted "filing" for "commencement". Amendment effective October 1, 2003.

1997 Amendment: Chapter 352 deleted former introductory clause that read: "Unless otherwise specified in this part"; in (2), near middle after "trial", substituted "for a contract action is as provided in 25-2-121(1)(b) or (2) and the proper place of trial for a tort action is as provided in 25-2-122(2) or (3)" for "is any county the plaintiff designates in the complaint"; and made minor changes in style.

1985 Amendment: In lead-in to section substituted "Unless otherwise specified in this part" for "In all other cases, the action shall be tried in"; at beginning of (1) inserted exception clause and reference to proper place of trial before "the county", and deleted from end of (1) "or where the plaintiff resides and the defendants or any of them may be found"; in (2) after "reside in the state", substituted language allowing plaintiff to designate county if none of defendants reside in state for "or, if residing in the state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint, subject, however, to the power of the court to change the place of trial as provided in this code"; and inserted (3) regarding venue of action brought pursuant to Title 40, chapter 4.

Legislative Modification of Recommendations: Pursuant to the above recommendation that modifications be made to preserve current venue provisions for domestic relations cases, the Legislature added subsection (3) to the language of the introduced bill recommended by the Commission.

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

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GENERAL

FELA Action Not Dismissible on Grounds of Inconvenience — Number of Out-of-State Filings Irrelevant: A District Court may not dismiss a FELA action because it considers itself to be an inconvenient forum and may not change the place of a FELA trial based on the doctrine of forum non conveniens, whether based on common law or as codified in 25-2-201. This issue will not henceforth be reexamined on the basis of the number of out-of-state FELA cases filed in Montana. (However, see the 1995 and 1997 amendments to 25-2-122, which restricted this decision.) State ex rel. Burlington N. RR Co. v. District Court, 270 M 146, 891 P2d 493, 52 St. Rep. 118 (1995).

Status of Parties and Pleadings at Time of Complaint or Time Moving Party Appears as Determining Venue: A complaint was filed in Missoula County against several defendants, including a Kalispell doctor, who moved for a change of venue to Flathead County. The motion

was initially denied, but upon dismissal of the other defendants, the doctor again moved for a change of venue, which was granted. The District Court erred in granting the change because in Montana, venue will be determined by the status of the parties and pleadings at the time of the complaint or at the time that the moving party appears in the action. Otherwise, courts would be required to reexamine the question of venue whenever the composition of the parties is altered. Emery v. Federated Foods, Inc., 262 M 83, 863 P2d 426, 50 St. Rep. 1454 (1993), following Boucher v. Steffes, 160 M 482, 503 P2d 659 (1972).

Temporary Absences From Residence — No Change in Place of Residence: After Rosemary petitioned for a dissolution of her marriage, her husband Timothy discovered that she had been away from her home in Billings for a 6-week period to attend classes at MSU. During that time, she had lived in Pray in Park County. Upon discovery of these facts, Timothy asked for reconsideration of an earlier motion to change venue to Park County. Citing School District No. 12 v. Simonsen, 210 M 100, 683 P2d 471 (1984), the Supreme Court held that the District Court properly denied the motion for a change of venue because temporary absences from one's residence do not change an individual's place of residence. In re Marriage of Bernethy, 260 M 402, 860 P2d 157, 50 St. Rep. 1144 (1993).

Foreign Corporate Defendant — Venue Statute Not Unconstitutional: This statute, allowing plaintiff to sue a Montana corporation only in the county of its principal place of business and allowing suit against a foreign corporation in any county, does not violate the equal protection provision of the United States Constitution. (However, see the 1995 and 1997 amendments to 25-2-122, which restricted this decision.) Burlington N. RR Co. v. Ford, 504 US 648, 119 L Ed 2d 432, 112 S Ct 2184 (1992).

Foreign Corporations — State Venue Statute No Violation of Equal Protection: Montana's venue rule, which allows a foreign corporation to be sued in any county, does not violate equal protection guaranties of the U.S. Constitution. The statute rationally furthers a legitimate state interest. (However, see the 1995 and 1997 amendments to 25-2-122, which restricted this decision.) Burlington N. RR Co. v. Ford, 504 US 648, 119 L Ed 2d 432, 112 S Ct 2184 (1992).

Right to Sue Nonresident FELA Defendant in Any County — No Equal Protection Violation: This section's provision that if none of the defendants reside in the state, venue is proper in any county designated by the complaint has been interpreted by this court to allow a plaintiff in a Federal Employers' Liability Act suit to sue a nonresident, such as Burlington Northern, in any county in the state. The provision, as interpreted, does not violate equal protection by treating, without any rational basis, nonresidents differently than residents for venue purposes. Since 1910, it has been national policy to allow a railroad worker to sue his employer at any location where the employer does business, and this policy constitutes a justification for disparate treatment. In this case, Sheridan, Wyoming, residents injured in Sheridan sued in Yellowstone County in which the railroad does business, not Hill County in which the railroad's Montana headquarters are located. The court distinguished this case from Power Mfg. Co. v. Saunders, 274 US 490, 47 S Ct 678 (1927), cited by the railroad, in which the defendant did no business in the county in which it was sued. The court also cited several U.S. Supreme Court cases, finding that it should not make much difference what county a nonresident defendant defends in and finding that it is not necessarily important that all persons in the same classification be made equal as to the place in which they may sue, but it is important that the law applied to the facts and issues of the case be the same and be equally applied in whatever county the suit is brought. (However, see the 1995 and 1997 amendments to 25-2-122, which restricted this decision.) Ford v. Burlington N. RR Co., 250 M 188, 819 P2d 169, 48 St. Rep. 740 (1991). This decision was affirmed by the U.S. Supreme Court in Burlington N. RR Co. v. Ford, 504 US 648, 119 L Ed 2d 432, 112 S Ct 2184 (1992).

Importance of Contractual Venue Stipulation — Court Discretion: When faced with a contractual stipulation to venue, the court must place venue in the stipulated county when requested by the parties. A stipulation does not remove the court's discretion to change venue when the convenience of witnesses and the ends of justice require it; however, an agreement to place venue in a particular county is a most important factor for the court to consider. Given the court's wide discretion under 25-2-201(3), the court's decision will not be disturbed in the absence of clear evidence of abuse of that discretion. Mont. Wholesale Accounts Serv. v. Penington, 233 M 72, 758 P2d 759, 45 St. Rep. 1302 (1988).

Civil and Tort Actions — Venue: In all civil actions, the proper place of trial is in the county of defendant's residence; but in tort actions, the proper place may be the county of defendant's residence or the county where the tort was committed. Brown v. Hartwell, 226 M 130, 734 P2d 204, 44 St. Rep. 527 (1987).

Venue for Dissolution Proceedings: In construing the apparently conflicting venue provisions of 25-2-118(2) and 25-2-118(3), the Supreme Court held that, as related to dissolution proceedings, the specific provisions in subsection (3) outweigh the general provisions of subsection (2). Therefore, the proper place for trial for an action for dissolution of marriage is the county where the petitioner has resided during the 90 days preceding commencement of the action. In re Marriage of Jones, 226 M 14, 736 P2d 350, 44 St. Rep. 422 (1987).

Foreign Corporation and Montana Resident as Defendants: The rule set out in 25-2-118 that a foreign corporation may be sued in any county in the state does not apply when Montana residents are also named as defendants. In that case, venue is determined by Montana's other venue statutes. (See the 1995 and 1997 amendments to 25-2-122, which limits the place of trial against a foreign corporation.) Platt v. Sears, 222 M 184, 721 P2d 336, 43 St. Rep. 1160 (1986).

Choice of Venue in Tort Action — 1985 Law Codifying Longstanding Rule: A 1985 amendment to 25-2-102 (renumbered 25-2-122) codified the longstanding interpretation of the tort venue exception to the basic venue rule in 25-2-108 (renumbered 25-2-118). Under that longstanding rule, plaintiff in this case could sue either in the county in which the tort occurred or in a county in which one of the five defendants resided. Bradley v. Valmont Indus., Inc., 216 M 429, 701 P2d 997, 42 St. Rep. 925 (1985).

Fraudulent Misrepresentations Preceding Contract Formation: When purchasing a bull, plaintiff relied on defendant's alleged intentionally, falsely, and fraudulently made representations and brought an action in Cascade County for compensatory and punitive damages. As plaintiff chose to affirm the contract and sue for the misrepresentations preceding the contract, the action was in tort. However, venue was properly changed to Stillwater County where the auction, sale, and payment, and therefore the tort, if any, took place. Further, under the general rule, an action is to be brought where the defendant resides (Stillwater County), and plaintiff did not show a clear reason for applying an exception. Woolcock v. Beartooth Ranch, 196 M 65, 637 P2d 520, 38 St. Rep. 2130 (1981).

Venue for Tort Class Action Against Counties: Plaintiffs brought a class action suit against Dow Chemical Co., Lake County, and Missoula County. The complaint did not allege that either Missoula County or Lake County was the exclusive cause of one injury. Rather, the pleadings indicated that the plaintiffs could have been damaged by the actions of either or both counties acting separately. In such a situation both counties are not necessary parties to one action, and the counties should be sued where they are located. The suit would be properly filed in Lake County for the tort allegedly committed against the Lake County plaintiffs. Dow Chemical Co. is entitled to a change of venue as to the claims filed by the Lake County plaintiffs. State ex rel. Kesterson v. District Court, 189 M 20, 614 P2d 1050 (1980).

Place of Performance in Contract Action: In an action to recover a commission for the sale of real estate in which the residence of plaintiff, the place of deposit of earnest money, and the place of escrow were undisputedly in Cascade County, the District Court did not abuse its discretion by finding that by necessary implication the parties intended Cascade County to be the place of performance. Therefore, proper venue was determined by 25-2-101 (renumbered 25-2-121) and not 25-2-108 (renumbered 25-2-118). Deimler v. Ostler, 183 M 480, 600 P2d 814 (1979).

County of Alleged Tort and Where Contract to Be Performed — Same County: The plaintiffs' allegation of defendants' tortious conduct in the county of plaintiffs' residence, when considered with the allegations that performance of the contract was to be in that county, was sufficient to uphold the determination of the District Court that proper venue for the action was in the county of plaintiffs' residence. Hopkins v. Scottie Homes, Inc., 180 M 498, 591 P2d 230 (1979).

Jurisdiction and Venue — Child Custody: The court had jurisdiction to modify the child's custody because Montana was the home state of the child at the time the action was commenced and venue of the case because defendant was a resident of the county when the action was commenced. Ronchetto v. Ronchetto, 173 M 285, 567 P2d 456 (1977).

Foreign Corporate Surety: Action brought against foreign corporate surety without joinder of principal was properly venued in county where plaintiff resided, even though the bond assured a subcontract which was to be performed in another county and the residence of the subcontractor was in another county. Morgen & Oswood Constr. v. USF&G Co., 164 M 64, 535 P2d 170 (1975).

Foreign Corporation — Resident Agent in County: A foreign corporation does not acquire residence for venue purposes in a particular county by appointing a resident of that county as its agent for service of process, and it may be sued in any county. Foley v. Gen. Motors Corp., 159 M 469, 499 P2d 774 (1972).

General Rule Inapplicable to Municipal Defendant: The rule that where a contract for payment of money is entered into between persons residing at different places and place of payment is not agreed upon, creditor's residence becomes place of performance and therefore

place of trial does not apply to municipal corporations. Lillis v. Big Timber, 103 M 206, 62 P2d 219 (1936).

Venue as Location of Debtor City: The place of trial is in the county in which the debtor city is located in the absence of an agreement as to the place of payment, and not in the county of plaintiff creditor's residence, in action by nonresident civil engineer to recover for services rendered city in and about water system. Lillis v. Big Timber, 103 M 206, 62 P2d 219 (1936).

Foreign Corporation — Venue in Plaintiff's County: Whether an action against a railway company, a foreign corporation and therefore a nonresident of the state, to recover damages to a shipment of livestock from a point in this state to another state, due to unreasonable delays and negligence occurring outside the state, be treated as one ex contractu or ex delicto, the cause of action accrued at point of destination. Under this section the action was properly triable in the county of plaintiff's residence, in which an agent of defendant was served with summons, though in the act of transportation no part of such county was traversed, and a motion for change of venue to a county through which defendant company's track ran and transportation of the livestock was had was properly denied. Hanlon v. Great N. Ry., 83 M 15, 268 P 547 (1928), distinguished in Thomas v. Cloyd, 110 M 343, 100 P2d 938 (1940).

Nonresident Defendants: This section expressly provides that if none of the defendants reside in this state an action may be tried in any county which the plaintiff may designate in his complaint. As to what are styled local actions—such, for example, as those relating to interests in lands—usually the venue or place of trial is the district or the county where the subject matter lies. But in general, transitory actions may be tried wherever personal service can be made on the defendant. (However, see the 1995 and 1997 amendments to 25-2-122, which restricted this decision.) State ex rel. Mackey v. District Court, 40 M 359, 106 P 1098 (1910).

Waiver of Improper Venue: Although an action to redeem from a mortgage on real property should have been brought in the county in which the mortgagee resided, yet where it was instituted in the county in which the mortgagor had his residence, but defendant failed to ask for a change of venue to his home county, as he could have done under section 93-2905, R.C.M. 1947 (since repealed), the court in which the suit was commenced had jurisdiction to try it. State ex rel. Schatz v. District Court, 40 M 173, 105 P 554 (1909).

Account Versus Contract: Where two of the three causes of action alleged in a complaint were actions on an open account for medical services rendered in B County, and not on express contracts to render such services, plaintiff was not entitled to sue thereon in B County. Bond v. Hurd, 31 M 314, 78 P 579 (1904), overruled in State ex rel. Interstate Lumber Co. v. District Court, 54 M 602, 172 P 1030 (1918), but reinstated in Fraser v. Clark, 128 M 160, 273 P2d 105 (1954).

Action on Account: Actions on an account must be brought in the county in which the defendants, or some of them, reside or in the county in which plaintiff resides and in which defendants, or any of them, may be found. McDonnell v. Collins, 19 M 372, 48 P 549 (1897), overruled in State ex rel. Interstate Lumber Co. v. District Court, 54 M 602, 172 P 1030 (1918), but reinstated in Fraser v. Clark, 128 M 160, 273 P2d 105 (1954).

RELATIONSHIP OF RESIDENCY TO OTHER VENUE STATUTES

Contract Agreement for Sale of Goods and Performance of Services — Venue Proper in Place of Principle Activity: A dispute arose between the parties to a contract regarding the proper county of venue. Plaintiff maintained that because the dispute arose out of a contract, proper venue should be determined under 25-2-121 and that because the contract was for the sale of goods only, 25-2-121(2)(a) should apply to establish venue in Yellowstone County where possession of the goods was to be delivered. Although defendant agreed that 25-2-121 applied, defendant contended that because the contract was for both the sale of goods and the performance of services, 25-2-121(1)(b)(ii) should apply, establishing appropriate venue in the county where the principle activity was to take place, which was Valley County. Defendant also argued that under this section, venue was proper in Valley County, defendant's county of residence. The District Court examined all the obligations required of the parties at the time of the agreement and applied Missouri-Stone Co. v. Barber Seed Serv., Inc., 256 M 66, 844 P2d 112 (1992), concluding that because the contract was for both the sale of goods and the performance of services, 25-2-121(1)(b)(ii) was the appropriate subsection under which to establish venue—in Valley County where the principle activity was to take place. The Supreme Court concurred. Venue was proper in either the county of defendant's residence or where the principle place of activity occurred, which in both cases was Valley County, so the District Court did not err in changing venue to Valley County. Tractor & Equip. Co. v. Zerbe Bros., 2001 MT 162, 306 M 111, 32 P3d 721 (2001).

Breach of Property Warranty — Venue Where Property Located: Defendants, residents of Missoula County, sold property located in Granite County to plaintiffs. The deal was closed in Missoula County, and payments were made under the contract for deed into an escrow account in Missoula County. Plaintiffs discovered defects with the fireplace and sewer system of the house. The parties reached an agreement to offset $3,000 from the purchase price for fireplace repairs. Plaintiffs alleged it cost $12,000 more to repair the fireplace and sewer system and filed suit. At the time of filing, all payments under the contract had been made. Defendants moved to have venue changed to Missoula County, contending that under 25-2-108 (renumbered 25-2-118), they were entitled to be sued in the county where they reside. However, the court found that 25-2-101 (renumbered 25-2-121) provides a specific exception regarding venue on contract suits. Section 25-2-101 (renumbered 25-2-121) gives a plaintiff the choice of bringing an action on a contract in the county where the contract was to be performed, regardless of the defendant's residence. The court held that the gravamen of the issue presented is whether sellers performed by delivering the property in Granite County defect free. The issue did not concern the payments in Missoula. Letford v. Kraus, 206 M 493, 672 P2d 265, 40 St. Rep. 1802 (1983).

Place of Performance Specified in Contract: In a suit on a contract of sale for nonpayment of the balance of the purchase price of furniture purchased in one county and delivered to another county, the District Court properly denied defendant/buyer's claim that venue should be set where defendant lives and where the goods were delivered. If by the express terms of a contract, place of performance is established, 25-2-101 (renumbered 25-2-121) applies and venue exists where the performance is to occur, Deimler v. Ostler, 183 M 480, 600 P2d 814 (1979); Hopkins v. Scottie Homes, Inc., 180 M 498, 591 P2d 230 (1979), rather than where defendant resides as is normally the case under 25-2-108 (renumbered 25-2-118). Here, since the contract specifies that the remaining performance (payment by the buyer) should occur in the county where the goods were purchased, this county is the county of proper venue. Peenstra v. Berek, 188 M 489, 614 P2d 520 (1980).

Failure to File Tax Return — Change of Venue Denied: Venue of a criminal action charging intentional failure to file a properly completed Montana individual income tax return would lie in either Lewis and Clark County or the county in which defendants reside. But, since the complaint was filed in the former and no legal justification or prejudice was shown to support transfer, the Supreme Court reversed the District Court's change of venue from Lewis and Clark County. Dept. of Revenue v. Lane, 187 M 230, 609 P2d 300 (1980), following St. v. Bretz, 169 M 505, 548 P2d 949 (1976). (The determination of venue in Bretz was reversed in St. v. Bretz, 180 M 307, 590 P2d 614 (1979), because the conviction was reversed on another issue and the court corrected what was viewed then as manifest error on the prior venue decision.)

Change of Venue From One Proper County to Another Based on Residence Denied: Under 17-4-103, Lewis and Clark County was a proper venue for an action to recover funds paid to the defendant by the state and defendant's motion for a change of venue to the county in which the defendant resided was properly denied. The courts are powerless to transfer a cause to another venue, based on the residence of the parties, even though the other venue may also have been proper. The power to change the place of trial based on residence exists only when the county designated in the complaint is not the proper county. St. v. Sec. St. Bank, 184 M 461, 603 P2d 681 (1979).

Place of Performance in Contract Action Same as Plaintiff's Residence: In an action to recover a commission for the sale of real estate in which the residence of plaintiff, the place of deposit of earnest money, and the place of escrow were undisputedly in Cascade County, the District Court did not abuse its discretion by finding that by necessary implication the parties intended Cascade County to be the place of performance. Therefore proper venue was determined by 25-2-101 (renumbered 25-2-121) and not 25-2-108 (renumbered 25-2-118). Deimler v. Ostler, 183 M 480, 600 P2d 814 (1979).

Intent of Parties as to Performance: Where intent of parties was that a contract would be performed in either Cascade or Chouteau County and contract was performed in Cascade County until breach, venue of action on contract was in Cascade County rather than county of defendant's residence. Armon v. Stewart, 162 M 262, 511 P2d 8 (1973).

Exceptions to Be Shown on Face of Complaint: To maintain suit in county other than that of defendant's residence, plaintiff must show clearly the facts relied on to bring the case within one of the venue statutes other than 25-2-108 (renumbered 25-2-118). A contract must state clearly that it is to be performed in county other than that of defendant's residence so that no other fair construction can be placed upon it. Rapp v. Graham, 145 M 371, 401 P2d 579 (1965).

Suit on Contract in County of Defendant's Residence: In bringing suit where contract is to be performed, rather than place of defendant's residence, a mere direction by the seller as to the

place of payment is not sufficient to maintain venue within exception to this section, nor can a promise to remit to cover the purchase price be sued upon by the seller in the county of the point to which the remittance is to be made. Rapp v. Graham, 145 M 371, 401 P2d 579 (1965).

Action on Contract Where Defendant Does Not Reside: In order for plaintiff to maintain action on contract in a county where defendant does not reside, the place of performance must be evident either by express terms of contract, or by necessary implication that a county other than that of defendant's residence is intended to be the county of performance. Brown v. First Fed. S & L Ass'n of Great Falls, 144 M 149, 394 P2d 1017 (1964).

Performance of Contract — Choice of Plaintiff: If contract is to be performed in a county other than the county of defendant's residence, then the plaintiff has his choice of the two counties in which to sue. He may sue in the county where defendant resides or in the county where the contract is to be performed. Brown v. First Fed. S & L Ass'n of Great Falls, 144 M 149, 394 P2d 1017 (1964).

Tort Action Against Nonresidents: Although either the county of residence of defendant or county where tort was committed was proper county in which to bring action for personal injury arising from accident, where none of the defendants were residents of Montana, the action was triable in any county designated by plaintiff in his complaint. (However, see the 1995 and 1997 amendments to 25-2-122, which restricted this decision.) Tassie v. Cont. Oil Co., 228 F. Supp. 807 (D.C. Mont. 1964).

Oral Lease: In an action for breach of an oral agreement to lease farm land, venue was in the county where the estate of one of the defendants was being probated, in which the other defendants resided, in which the land was located, and in which service was made and the creditor's claim filed. Erickson v. Toy, 142 M 121, 385 P2d 268 (1963).

PLAINTIFF'S RESIDENCE AND SERVICE ON DEFENDANT

Venue in Action in Which State Is Defendant: Although the general rule, as stated in this section, is that the proper place for trial of a civil action is the county in which the defendant resides, an exception in 25-2-126 applies to situations in which the state is a defendant. Under the plain meaning of the exception, the county of plaintiff's residence is a proper venue in a civil suit naming the state as defendant. As noted in Petersen v. Tucker, 228 M 393, 742 P2d 483, 44 St. Rep. 1625 (1987), the purpose of 25-2-126 is to afford citizens a practical and inexpensive forum for suits against the state, and the section is to be liberally construed in favor of private litigants. Kendall v. St., 231 M 316, 752 P2d 1091, 45 St. Rep. 646 (1988).

Construction of Statute: Under the rule that where two clauses or phrases in a statute are expressed in the disjunctive as in this section, they are coordinate and either is applicable to any situation to which its terms relate. An action may be tried either in the county in which defendant resides or in the county in which plaintiff resides and defendant may be found. The word "found" means found for legal service of summons in contradistinction to the word "reside", and is not to be understood in any sense other than as frequently used in statutes relative to service of process, to wit: "to come upon by seeking or by effort". Shields v. Shields, 115 M 146, 139 P2d 528 (1943).

"Found" Defined: Defendant is properly said to be "found" where served only if he is at the place where served voluntarily, and not by reason of plaintiff's fraud, artifice, or trick for the purpose of obtaining service. Shields v. Shields, 115 M 146, 139 P2d 528 (1943).

Wife "Found" in Divorce Action: Under the rule that if the county in which an action is brought and the one to which it is sought to have it transferred are both proper counties, the action must stay where the complaint was filed. Where plaintiff husband in a divorce action resided in the county where the action was commenced, and the wife residing in an adjoining county was "found" and served in the county of the husband's residence, venue was proper in both counties and change to the county of her residence was error. Shields v. Shields, 115 M 146, 139 P2d 528 (1943).

Action on Contract for Benefit of Third Person: An action brought by a merchant against a state highway contractor and his bondsman under this section, 18-2-204, and 28-2-206 to recover for supplies furnished the former's subcontractor, was one upon a contract between the contractor and the state for the benefit of a third person and was triable in the county in which the person entitled to payment resided or had his place of business. H. Earl Clack Co. v. Staunton, 100 M 26, 44 P2d 1069 (1935).

SUITS IN EQUITY

Injury by Motor Vehicle for Hire: Though, generally speaking, all equitable suits are properly triable under this section in the county in which defendants, or any of them, reside, 69-12-209

specifically provides that a party injured by the illegal operation of a motor vehicle for hire may by Writ of Injunction seek enforcement of the act in any county in which the motor carrier is engaged in business. Hence, where injunctive relief was sought against such a carrier in a county between the county seat in which defendant was doing business and that of his home county, the court erred in granting a change of venue to the latter county. Great N. Ry. v. Hatch, 98 M 269, 38 P2d 976 (1934).

Suit to Establish Trust: A suit seeking to establish a trust in corporate stock, asking for an accounting and an injunction against the transfer of any shares of stock pending suit, in which proof of the contract out of which it arose was but incidental to the establishment of the trust, was purely equitable and transitory and governed as to venue by this section. McKinney v. Mires, 95 M 191, 26 P2d 169 (1933).

CHANGE OF VENUE

Change of Venue on Multiple Claims to Defendants' County of Residence While Allowing Plaintiff to Pursue Venue Established by Contract Proper: The franchise agreement between one plaintiff and defendants provided that plaintiff could elect to initiate an action concerning breach of the agreement in Yellowstone County. Franchise agreements with other plaintiffs provided that Missoula County would be the place of venue. All plaintiffs joined in a suit against defendants, which was filed in Yellowstone County. Defendants moved for a change of venue to Missoula County where the company headquarters were located, and the motion was granted. Plaintiff whose agreement allowed for a Yellowstone County venue was allowed to sever its claims and keep its action in that county if desired. Plaintiffs appealed the venue change, but the Supreme Court affirmed. The determination of whether a county is the proper place for trial is a question of law involving application of the venue statutes to pleaded facts. The general rule in this section provides that the proper place for trial in civil actions is the defendant's county of residence. Additionally, in a case involving multiple claims, 25-2-116 provides that a party that is entitled to a change of venue on any claim is entitled to a change of venue on the entire action, subject to the power of the trial court to separate claims or issues for trial. Therefore, the District Court did not err in moving the venue to Missoula County where defendants resided and in allowing the plaintiff with a contractual provision for trial in Yellowstone County to pursue its action there. DML, Inc. v. Fulbright, 2005 MT 204, 328 M 212, 119 P3d 93 (2005), distinguishing Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996), and Liang v. Lai, 2004 MT 188, 322 M 199, 94 P3d 759 (2004).

Erroneous Change of Venue for Defendants When Proper Venue Chosen by Plaintiff: Plaintiff filed a tort action in Flathead County where a slip and fall accident occurred. Defendants moved for and were granted a change of venue to Sanders County where one defendant resided. Plaintiff appealed the venue change, and the Supreme Court reversed, noting that a defendant must be granted a change of venue if an action is brought in a county that is not statutorily designated as a proper place for trial, but because Flathead County was the location of the premises where the allegedly tortious act occurred, it was a proper venue, so no motion to change the place of trial on the entire action could be granted. Because plaintiff chose a proper venue, the District Court erred when it granted defendants' venue change. Liang v. Lai, 2004 MT 188, 322 M 199, 94 P3d 759 (2004), following Nelson v. Cenex, Inc., 2004 MT 170, 322 M 54, 97 P3d 1073 (2004). See also Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996).

Location of Resident Agent of Foreign Corporation Proper Venue in Tort Action: Nelson worked for a Minnesota corporation at a refinery in Yellowstone County. Nelson brought a tort action based on exposure to asbestos during employment, naming as defendants three Minnesota corporations that operated the refinery and two individuals from Yellowstone County who worked as plant managers. Nelson resided in Missoula County, and the corporations' resident agent was located in Lewis and Clark County. Nelson brought the action in Lewis and Clark County. The corporations moved for a change of venue to Yellowstone County, but the motion was denied. On appeal, the Supreme Court affirmed. A defendant may move for a change of venue when an action is not brought in a county that is statutorily designated as a proper place for trial, and the motion must be granted if the county in which the action is filed is not a proper place for trial. If more than one county is proper, the action may be brought in any of those counties and a motion for change of venue may not be granted. The general rule for determining venue is this section, but there are statutory exceptions to the general rule for specific types of actions. Venue rules for tort actions are in 25-2-122, including venue for tort actions against a foreign corporation, one of which is the county in which the corporation's resident agent is located. Thus, Lewis and Clark County was a proper venue for trial, and the District Court did

not err in denying the motion for change of venue. Nelson v. Cenex, Inc., 2004 MT 170, 322 M 54, 97 P3d 1073 (2004), distinguishing Platt v. Sears, 222 M 184, 721 P2d 336 (1986).

Specific Statute Governing Venue in Contract Cases Controlling Over General Civil Venue Statute — Remand for Determination of Place Where Services to Be Performed Under Terms of Contract: Defendant hired plaintiff to perform legal services. About 1 month later, plaintiff was terminated, but defendant refused to pay for plaintiff's work. The District Court determined that under this section, proper venue was the place where defendant resided. The court also examined 25-2-121 and held that because the action was a contract action, 25-2-121(1)(a) dictated that the action be held at the place of defendant's residence. Because the action was based on a contract, the specific provisions of 25-2-121 prevailed over the general venue provisions for civil actions in this section. The District Court neglected to consider 25-2-121(1)(b), which provides that a proper venue for contract actions may also be the county in which the contract was to be performed. Here, the record contained no written contracts for legal services, so the Supreme Court was unable to determine whether specific performance provisions had been included in the contract. The case was remanded so that the District Court could determine whether a specific place of performance was named in the contract, in which case the proper venue would be the named county or the county of residence of defendant. However, if there were no written contracts or if no specific place of performance was named, then proper venue would be the place where the services were performed or the county of residence of defendant. Whalen v. Mont. Right to Life Ass'n, 2002 MT 328, 313 M 204, 60 P3d 972 (2002).

No Defendant Residing in State — Plaintiff May File in Any County, Not Just County Where Alleged Injury Occurred: Norwest Bank argued that the lower court erred in refusing to change venue to Yellowstone County, which was the county where its registered agent was located and where the alleged injury occurred. The Supreme Court held that the statute requiring that a suit be brought in the county where the resident agent resides did not apply to Norwest because the statute referred to corporations incorporated in a state other than Montana and Norwest as a federally chartered bank did not qualify as a corporation. The Supreme Court also held that although one statute allowed the filing of a suit in the county where the alleged injury occurred, another allowed a plaintiff to file in any county when none of the defendants were a resident of the state. Therefore, the plaintiff had properly filed in Cascade County. The bank was not entitled to a change of venue. Spoonheim v. Norwest Bank Mont., 277 M 417, 922 P2d 528, 53 St. Rep. 764 (1996).

Status of Parties and Pleadings at Time of Complaint or Time Moving Party Appears as Determining Venue: A complaint was filed in Missoula County against several defendants, including a Kalispell doctor, who moved for a change of venue to Flathead County. The motion was initially denied, but upon dismissal of the other defendants, the doctor again moved for a change of venue, which was granted. The District Court erred in granting the change because in Montana, venue will be determined by the status of the parties and pleadings at the time of the complaint or at the time that the moving party appears in the action. Otherwise, courts would be required to reexamine the question of venue whenever the composition of the parties is altered. Emery v. Federated Foods, Inc., 262 M 83, 863 P2d 426, 50 St. Rep. 1454 (1993), following Boucher v. Steffes, 160 M 482, 503 P2d 659 (1972).

Temporary Absences From Residence — No Change in Place of Residence: After Rosemary petitioned for a dissolution of her marriage, her husband Timothy discovered that she had been away from her home in Billings for a 6-week period to attend classes at MSU. During that time, she had lived in Pray in Park County. Upon discovery of these facts, Timothy asked for reconsideration of an earlier motion to change venue to Park County. Citing School District No. 12 v. Simonsen, 210 M 100, 683 P2d 471 (1984), the Supreme Court held that the District Court properly denied the motion for a change of venue because temporary absences from one's residence do not change an individual's place of residence. In re Marriage of Bernethy, 260 M 402, 860 P2d 157, 50 St. Rep. 1144 (1993).

Choice of County in Tort Action Against Nonresident Defendant: In a tort action against a nonresident defendant, the plaintiff may choose either the county where the tort was committed or any county in Montana. (However, see the 1995 and 1997 amendments to 25-2-122, which restricted this decision.) Haug v. Burlington N. RR Co., 236 M 368, 770 P2d 517, 46 St. Rep. 432 (1989), overruling McAlear v. Kasak, 225 M 113, 731 P2d 908, 44 St. Rep. 81 (1987).

Filing Proper in County Where Tort Occurred: Parties met in Dawson County and orally agreed that defendant would find, evaluate, and appraise potential mineral investment opportunities for plaintiffs, but there was no agreement on a place of performance of the oral contract. Parties later met in Flathead County, and defendant apprised plaintiffs of the value of

mineral interests in eastern Montana and western North Dakota. Plaintiffs purchased the interests for $175,000 but subsequently determined the interests were nearly worthless. Plaintiffs filed a breach of contract and related tort suit in Flathead County. Defendant sought change of venue to Dawson County, his place of residence. Absent a written contract with express terms or an agreement on where the oral contract was to be performed, the District Court correctly determined that any tort resulting from defendant's alleged misrepresentation would have had to occur in Flathead County; therefore, the motion for change of venue was properly denied. Berlin v. Boedecker, 235 M 443, 767 P2d 349, 46 St. Rep. 125 (1989).

Tort Action — Change of Venue for Nonresident Defendant Proper: Following an allegation of sexual harassment, lawyer filed defamation suit. The District Court granted nonresident defendant's motion for a change of venue, moving the tort action to the county in which the lawyer's office was located and where the tort allegedly arose. Upon appeal, the Supreme Court upheld the District Court, ruling that in a tort action, proper venue for suing a nonresident defendant is in either the county of defendant's residence or the county where the tort occurred. McAlear v. Kasak, 225 M 113, 731 P2d 908, 44 St. Rep. 81 (1987), overruled in Haug v. Burlington N. RR Co., 236 M 368, 770 P2d 517, 46 St. Rep. 432 (1989). (However, see the 1995 and 1997 amendments to 25-2-122, which limits the place of trial against a foreign corporation.)

Venue Properly Removed: In an action sounding in contract and tort, venue properly was removed from the county where business was done by the first defendant, a foreign corporation having no residence for venue purposes, to the county where the plaintiffs and other defendant resided and where the accident occurred. The venue statutes for actions in contract (25-2-121) and in tort (25-2-122) contain exceptions to the basic venue rule; these two statutes control the issue of proper venue. Platt v. Sears, 222 M 184, 721 P2d 336, 43 St. Rep. 1160 (1986).

Venue for Tort Class Action Against Counties: Plaintiffs brought a class action suit against Dow Chemical Co., Lake County, and Missoula County. The complaint did not allege that either Missoula County or Lake County was the exclusive cause of one injury. Rather, the pleadings indicated that the plaintiffs could have been damaged by the actions of either or both counties acting separately. In such a situation both counties are not necessary parties to one action, and the counties should be sued where they are located. The suit would be properly filed in Lake County for the tort allegedly committed against the Lake County plaintiffs. Dow Chemical Co. is entitled to a change of venue as to the claims filed by the Lake County plaintiffs. State ex rel. Kesterson v. District Court, 189 M 200, 614 P2d 1050 (1980).

Failure to File Tax Return — Change of Venue Denied: Venue of a criminal action charging intentional failure to file a properly completed Montana individual income tax return would lie in either Lewis and Clark County or the county in which defendants reside. But, since the complaint was filed in the former and no legal justification or prejudice was shown to support transfer, the Supreme Court reversed the District Court's change of venue from Lewis and Clark County. Dept. of Revenue v. Lane, 187 M 230, 609 P2d 300 (1980), following St. v. Bretz, 169 M 505, 548 P2d 949 (1976). (The determination of venue in Bretz was reversed in St. v. Bretz, 180 M 307, 590 P2d 614 (1979), because the conviction was reversed on another issue and the court corrected what was then viewed as manifest error on the prior venue decision.)

Change of Venue From One Proper County to Another Based on Residence Denied: Under 17-4-103, Lewis and Clark County was a proper venue for an action to recover funds paid to the defendant by the state and defendant's motion for a change of venue to the county in which the defendant resided was properly denied. The courts are powerless to transfer a cause to another venue, based on the residence of the parties, even though the other venue may also have been proper. The power to change the place of trial based on residence exists only when the county designated in the complaint is not the proper county. St. v. Sec. St. Bank, 184 M 461, 603 P2d 681 (1979).

Change of Venue Proper — Particular Facts: Under statute providing that on proper motion court must change place of trial when convenience of witnesses and ends of justice would be promoted and under further statute requiring action to be tried in county in which defendants reside at commencement of action, defendants were entitled to have action moved to county upon which all agreed, which was residence of one defendant, which was place insurance contract was entered into, which was where tort occurred, and which was most convenient for defendants and their witnesses. Truck Ins. Exch. v. Nat'l Farmers Union Property & Cas. Co., 149 M 387, 427 P2d 50 (1967).

Venue Not Shown — Change of Venue Proper: Denial of defendant's motion for change of venue to place where he resided was improper since, where plaintiff-relator did not plead the commission agreement itself or include it as an exhibit, there was no way of considering the

venue matter except on the residence of the defendant. Rapp v. Graham, 145 M 371, 401 P2d 579 (1965), distinguished in Boucher v. Steffes, 160 M 482, 503 P2d 659 (1972).

No Removal From Proper County: Either the county of defendant's residence or the county where the contract was to be performed is the proper county for the trial of the action, and if the plaintiff chooses either of these counties, defendant may not have it removed, except as stated in the last part of this section, but it is still subject to the power of the court to change place of trial as provided in 25-2-201. Love v. Mon-O-Co Oil Corp., 133 M 56, 319 P2d 1056 (1958).

Equity Action — Change of Venue Improper: Though, generally speaking, all equitable suits are properly triable under this section in the county in which defendants, or any of them, reside, 69-12-209 specifically provides that a party injured by the illegal operation of a motor vehicle for hire may by Writ of Injunction seek enforcement of the act in any county in which the motor carrier is engaged in business. Hence, where injunctive relief was sought against such a carrier in a county between the county seat in which defendant was doing business and that of his home county, the court erred in granting a change of venue to the latter county. Great N. Ry. v. Hatch, 98 M 269, 38 P2d 976 (1934).

Law Review Articles

A Primer on the Developing Doctrine of Constructive Fraud in Montana, Monhart, 52 Mont. L. Rev. 153 (1991). See footnote 168 on p. 172.

Collateral References

Venue *key* 18, et seq.

92A C.J.S. Venue §80.

77 Am. Jur. 2d Venue §11, et seq.

Venue of wrongful-death action. 58 ALR 5th 535.

Venue as affected by intervention of other stockholders in stockholder's derivative action. 69 ALR 2d 583.

Venue of action for unauthorized geophysical or seismograph exploration or survey. 67 ALR 2d 450.

Venue of action for specific performance of contract pertaining to real estate. 63 ALR 2d 456.

Proper county for bringing replevin, or similar possessory action. 60 ALR 2d 487.

Venue of divorce action in particular county as dependent on residence or domicile for a specific length of time. 54 ALR 2d 898.

Venue of action for partnership dissolution, settlement, or accounting. 33 ALR 2d 914.

Applicability, to annulment actions, of statutory residence requirements relating to venue in divorce actions. 32 ALR 2d 735.

25-2-121. Contracts.

Evidence Commission Recommendations for Revisions

Explanation: Present section 25-2-101 [renumbered 25-2-121] was, until the recodification of 1979, part of section 93-2904, RCM 1947, which lumped together in a single paragraph the basic rule of venue and all its major exceptions. This was the provision about which Justice Sheehy said, in Clark Fork Paving v. Atlas Concrete, 178 Mont. 8, 582 P.2d 779 (1978), "Possibly no statute has spawned more litigation in this state . . . ." The portion that has become section 25-2-101 [renumbered 25-2-121] was the focus of a major portion of that litigation.

The original intent of the "contract exception" to the general rule placing venue at the residence of the defendant was to permit an alternative place of trial. The plaintiff could, if he chose, elect to file his action in the county where the contract was to be performed rather than at defendant's residence. The Supreme Court, however, in Interstate Lumber Co. v. District Court, 54 Mont. 602, 172 P. 1030 (1918), held that the word "may" in the statute meant "must" and construed the provision to mean that contract actions were properly triable only in the county of performance. This decision, in conjunction with the earlier case of State ex rel. Coburn v. District Court, 41 Mont. 84, 108 P. 144 (1910), which had ruled that the place of performance of all contracts calling for payment of money was at the place of the payment, effectively established the venue of practically all contract actions at the plaintiff's, rather than the defendant's, residence. The Coburn and Interstate Lumber cases were overruled in Hardenburgh v. Hardenburgh, 115 Mont. 469, 146 P.2d 151 (1944) which decided that "may" means "may" rather than "must" and set out rules for determining the place of performance of various types of contracts that have been followed down to the present.

The last sentence of subsection (1)(b) and subsection (2) through the end of the section is an attempt to codify the results of an extensive line of cases dealing with the problems created by

section 25-2-101 [renumbered 25-2-121], MCA, and its predecessor, particularly those cases struggling with the meaning of the "place of performance" language of the statutes.

The contract venue statutes since their beginning have clearly intended to allow alternative venues when a contract is to be performed in a county other than the one where the defendant lives, but they have not proven easy to apply. Although the Hardenburgh case got rid of an obviously erroneous interpretation that had robbed the alternative provision of much of its benefit, the decision did not settle all the problems. Determining the place where a contract is to be performed is frequently not an easy task. Most contracts call for a monetary payment of some sort, and when, under the Coburn and Interstate Lumber cases, this was made the single determinative factor, the location was normally clear. After those decisions were changed, that certainty disappeared. The Hardenburgh court, anticipating the difficulties that could result, laid down a succession of interpretive rules which have generally been followed and developed in later cases.

This portion of the section seeks to state the case rules in a form as brief and complete as possible although, in dealing with a series of court opinions that are lengthy and diverse, and extend over a period of 40 years, the rules are not always simple and clear.

The Hardenburgh rules establish a basic framework. If a contract specifies a place of performance, the matter is settled; the courts will accept the designation. Where the contract is not specific, the court will look to see whether the contract allows performance to occur only at a particular site. If so, that is the location "by necessary implication." Some of these determinations are reasonably simple, others complex. In the uncomplicated category are such cases as Colbert Drug v. Electrical Products, 106 Mont. 11, 74 P.2d 437 (1937) where the contract, although it did not specify any county as the place of performance, was to maintain neon signs in Butte; Thomas v. Cloyd, 110 Mont. 343, 100 P.2d 938 (1940) in which the defendant contracted to secure employment for the plaintiff in Butte; and Love v. Mon-O-Co Oil, 133 Mont. 56, 319 P.2d 1056 (1958), an action on a contract to drill an oil well on a described tract of land which lay in Fallon county. In each case the Court found a county of performance specified by necessary implication.

Where both parties have duties and obligations which must be carried out at different locations, fixing the place of performance becomes more difficult. Before Hardenburgh, place of payment was the sole determining factor in most cases. After Hardenburgh, the court, in a search for a similar touchstone, experimented with a number of factors; place of negotiation, place of execution, place of payment, or some combination of them. Ultimately, it settled on the "county of activity," that is, the county where the primary purpose of the contract was to be accomplished.

Determining "county of activity" as outlined in the series of cases which fixed this as the test, involves several steps. It begins with a consideration of all the duties and obligations of all the parties (Hardenburgh); then the court seeks to determine the ultimate purpose to be achieved and decide which of the various acts are primary and which subsidiary to that purpose. The county where the primary actions are to be performed is the county of activity. The process was most clearly demonstrated in Brown v. First Federal Savings and Loan, 144 Mont. 149, 394 P.2d 1017 (1964), which also contains the clearest expression of the principle. The plaintiffs, residents of Lewis and Clark County, received a loan from the defendant loan association to build a house in Helena. The association's office was in Great Falls; the loan was made there, payments were to be received there, the contractors and subcontractors were to be supervised and paid from there, and all the financial activities performed there. The actual construction, however, was all in Lewis and Clark County. The plaintiffs' action was for breach of defendant's obligations to supervise and pay the contractors properly. Defendants claimed venue was in Cascade County because the suit concerned duties to be performed there. Plaintiffs maintained that the contract existed primarily to build a house in Lewis and Clark County, and that was the proper county of performance. The Supreme Court held for the plaintiffs, saying, in part, "The theatre of performance, by necessary implication of what the parties intended as evidenced by the terms of the contract, is Helena."

Brown is one of a number of cases holding that it is the overall purpose of the contract, not the particular provision that is in contest in the action, which governs venue. It is also one of a series, again beginning with Hardenburgh, which have decided what is "necessarily implied" about performance of particular kinds of contracts. It is these rules that are set out in subsections (2)(a) through (2)(d) of the draft bill.

The lead-in to subsection (2) recognizes that the contracts named in the subsection are not an exclusive list of contracts, but merely those in which a rule has evolved. The Commission does not intend to require that all contracts somehow be pigeon-holed into one of the categories to

establish venue. Contracts not within the list are subject to analysis under subsection (1)(b)(ii) to establish venue.

Subsection (2)(a) incorporates the holding of the Hardenburgh case, which involved the sale of a business and included real and personal, tangible and intangible property; McNussen v. Graybeal, 141 Mont. 571, 380 P.2d 575 (1963) dealing with the sale of milk produced and gathered in Lake county but sold in Missoula (venue was held to be in Missoula county where delivery and sale was made); and Hopkins v. Scottie Homes, 180 Mont. 498, 591 P.2d 230 (1979) where a mobile home was financed and sold in Valley county for delivery and erection in Musselshell county (venue lay in Musselshell county where delivery was to be made and the home set up).

Subsection (2)(b) adopts the rule declared in Hardenburgh for employment contracts. The Hardenburgh decision specifically overruled the portion of State ex rel. Coburn v. District Court, 41 Mont. 84, 108 P. 145 (1910) which had held that the venue of any contract calling for payment of money was at the residence of the creditor, but adopted the holding of Coburn that the place of performance of a labor contract was the place where the labor or services were to be performed. No subsequent cases have dealt with the question, so the basic rule of Coburn and Hardenburgh is clearly in force and is expressed in this subsection.

Subsection (2)(c) sets out the "insurance and indemnity" rule expressed in Hardenburgh, Hartford Accident and Indemnity Co. v. Viken, 157 Mont. 93, 483 P.2d 266 (1971), and General Insurance Co. v. Town Pump, 196 Mont. 531, 640 P.2d 463 (1982). Hardenburgh did not deal with insurance, so its discussion of the subject is technically dictum, but the Court was trying to deal with all the implications of the basic change it had made by overruling the *Coburn* and *Interstate Lumber* cases. The later Hartford and General Insurance opinions adopted Hardenburgh's rationale and applied it to the insurance contracts at issue in those cases. Using the "principal activity" test of Brown v. First Federal, supra, the Court in Hartford ruled that the performance called for in an insurance or indemnity contract is payment by the insurer on the happening of the named contingency. General Insurance made this doctrine more specific by holding that the place of performance of an insurance contract covering property in a number of different locations was in the county where the particular property involved in the claim at issue was situated.

The language of subsection (2)(c) is taken from the opinions in the Hardenburgh and Hartford cases.

Subsection (2)(d) is the rule of Brown v. First Federal, supra. Brown dealt with a contract for the original construction of a building, but the conclusion seems inescapable that its rationale is equally applicable to repair contracts, so they are included.

Note: Not all of the cases construing the contract exception to the basic venue rule, even those beginning with Hardenburgh, are totally reconcilable. Considering their numbers, it would be a miracle if they were. This proposed section is based on the large majority of the cases, which includes all of those that are most detailed and thoroughly considered, holding that contract venue lies in the county where the principal activity is to take place. A few opinions seem to state that a contract can have more than one place of performance, depending on the part of the contract sought to be enforced or the purpose of the specific litigation. These cases ignore the statutory language referring to the county in which the contract was to be performed, and are an open invitation to continue the endless round of litigation that the contract exception has spawned in the past. The proposed section therefore presumes a single place of performance of any contract, located in the county of its principal activity.

This proposal would follow and reaffirm Hardenburgh, Brown, McNussen v. Graybeal, and Hopkins v. Scottie Homes, but reject the rule of Peenstra v. Berek, 188 Mont. 489, 614 P.2d [520], which held that a contract for sale of goods was divisible into separate performances by buyer and seller. Each was to occur in a different county—the seller was to deliver the goods in the buyer's county, and the buyer was to make payments in the seller's county. Since the seller's performance was complete and he had brought the action for payment, the Court said, venue lay in the county where the buyer was to perform by making payment. Peenstra casts doubt on the entire sequence of decisions since Hardenburgh and throws the law back into uncertainty. The proposed section rejects it and any other decisions based on a "multiple performance" concept.

Compiler's Comments

1985 Amendment: In lead-in of (1) substituted "The proper place of trial for actions upon contracts is either" for "Actions upon contracts may be tried in"; inserted (1)(a) relating to venue in county where defendant resides; at end of first sentence of (1)(b) deleted "subject, however, to the power of the court to change the place of trial as provided in this code" and inserted language

on determining in which county a contract is to be performed; and inserted (2) setting forth a partial list of classes of contracts and the appropriate venue (see Ch. 432, sec. 9, L. 1985).

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

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GENERAL

Proper Venue for Contract Action: At the option of the plaintiff in a contract action, venue is proper in either the county where the defendant resides or the county where the contract is to be performed. The contract in this case was for the sale of goods and provision of services but made no provision for place of performance. The District Court correctly determined that the county where the principal activity of the contract occurred was a proper venue for the action. Missouri-Stone Co. v. Barber Seed Serv., Inc., 256 M 66, 844 P2d 112, 49 St. Rep. 1139 (1992), followed in Tractor & Equip. Co. v. Zerbe Bros., 2001 MT 162, 306 M 111, 32 P3d 721 (2001).

Foreign Corporation and Montana Resident as Defendants: The rule set out in 25-2-118 that a foreign corporation may be sued in any county in the state does not apply when Montana residents are also named as defendants. In that case, venue is determined by Montana's other venue statutes. Platt v. Sears, 222 M 184, 721 P2d 336, 43 St. Rep. 1160 (1986).

Liability Insurance — Where Losses Suffered: A corporation residing in Silver Bow County purchased a liability insurance policy covering its various gasoline stations located throughout the state. In an action under the policy involving a gasoline station located in Gallatin County, venue was properly in that county, that being where the losses being paid for were suffered. Gen. Ins. Co. of America v. Town Pump, Inc., 196 M 531, 640 P2d 463, 39 St. Rep. 303 (1982).

Fraudulent Misrepresentations Preceding Contract Formation — Tort Action: When purchasing a bull, plaintiff relied on the defendant's alleged intentionally false and fraudulently made representations and brought an action for compensatory and punitive damages. As plaintiff chose to affirm the contract and sue for the misrepresentations preceding the contract, the action was in tort and not in contract. Woolcock v. Beartooth Ranch, 196 M 65, 637 P2d 520, 38 St. Rep. 2130 (1981).

County of Alleged Tort and Where Contract to Be Performed — Same County: The plaintiffs' allegation of defendants' tortious conduct in the county of plaintiffs' residence, when considered with the allegations that performance of the contract was to be in that county, was sufficient to uphold the determination of the District Court that proper venue for the action was in the county of plaintiffs' residence. Hopkins v. Scottie Homes, Inc., 180 M 498, 591 P2d 230 (1979).

Application to Foreign Corporate Surety: Action brought against foreign corporate surety without joinder of principal was properly venued in county where plaintiff resided, even though the bond assured a subcontract which was to be performed in another county and the residence of the subcontractor was in another county. Morgen & Oswood Constr. v. USF&G Co., 167 M 64, 535 P2d 170 (1975).

Action on Contract and in Tort: In action in which complaint stated a claim for breach of contract and an interrelated and dependent claim in tort, the county of performance of the contract was the county in which any tort was committed for purpose of determining venue. Slovak v. Kentucky Fried Chicken, 164 M 1, 518 P2d 791 (1974).

Burden of Proof: In contract action, once defendant showed that his place of residence was other than where suit was brought, the burden of proof was on the plaintiff to meet the motion for change of venue. Rapp v. Graham, 145 M 371, 401 P2d 579 (1965).

Stipulation of Venue in Contract: Defendant in action to recover monthly rental for electric signs was not entitled to change of venue where stipulation in contract established venue of any future suit or action instituted for enforcement of contract. Elec. Prod. Consol. v. Bodell, 132 M 243, 316 P2d 788 (1957).

Highway Contract — Residence of Purchaser: An action brought by a merchant against a state highway contractor and his bondsman under this section, 18-2-203, and 18-2-206 to recover for supplies furnished the former's subcontractor, was one upon a contract between the contractor and the state for the benefit of a third person and was triable in the county in which the person entitled to payment resided or had his place of business. H. Earl Clack Co. v. Staunton, 100 M 26, 44 P2d 1069 (1935).

Implied Contract Included: The term "contract", as used in this section, not being limited in meaning either by the context or by any qualifying word, must be accepted in its broadest signification, and as including every kind of contract, whether express or implied. State ex rel. Interstate Lumber Co. v. District Court, 54 M 602, 172 P 1030 (1918); but see Fraser v. Clark, 128 M 160, 273 P2d 105 (1954).

PERFORMANCE OF CONTRACT

Specific Statute Governing Venue in Contract Cases Controlling Over General Civil Venue Statute — Remand for Determination of Place Where Services to Be Performed Under Terms of Contract: Defendant hired plaintiff to perform legal services. About 1 month later, plaintiff was terminated, but defendant refused to pay for plaintiff's work. The District Court determined that under 25-2-118, proper venue was the place where defendant resided. The court also examined this section and held that because the action was a contract action, subsection (1)(a) of this section dictated that the action be held at the place of defendant's residence. Because the action was based on a contract, the specific provisions of this section prevailed over the general venue provisions for civil actions in 25-2-118. The District Court neglected to consider subsection (1)(b) of this section, which provides that a proper venue for contract actions may also be the county in which the contract was to be performed. Here, the record contained no written contracts for legal services, so the Supreme Court was unable to determine whether specific performance provisions had been included in the contract. The case was remanded so that the District Court could determine whether a specific place of performance was named in the contract, in which case the proper venue would be the named county or the county of residence of defendant. However, if there were no written contracts or if no specific place of performance was named, then proper venue would be the place where the services were performed or the county of residence of defendant. Whalen v. Mont. Right to Life Ass'n, 2002 MT 328, 313 M 204, 60 P3d 972 (2002).

Contract Agreement for Sale of Goods and Performance of Services — Venue Proper in Place of Principle Activity: A dispute arose between the parties to a contract regarding the proper county of venue. Plaintiff maintained that because the dispute arose out of a contract, proper venue should be determined under this section and that because the contract was for the sale of goods only, subsection (2)(a) of this section should apply to establish venue in Yellowstone County where possession of the goods was to be delivered. Although defendant agreed that this section applied, defendant contended that because the contract was for both the sale of goods and the performance of services, subsection (1)(b)(ii) of this section should apply, establishing appropriate venue in the county where the principle activity was to take place, which was Valley County. Defendant also argued that under 25-2-118, venue was proper in Valley County, defendant's county of residence. The District Court examined all the obligations required of the parties at the time of the agreement and applied Missouri-Stone Co. v. Barber Seed Serv., Inc., 256 M 66, 844 P2d 112 (1992), concluding that because the contract was for both the sale of goods and the performance of services, subsection (1)(b)(ii) of this section was the appropriate subsection under which to establish venue—in Valley County where the principle activity was to take place. The Supreme Court concurred. Venue was proper in either the county of defendant's residence or where the principle place of activity occurred, which in both cases was Valley County, so the District Court did not err in changing venue to Valley County. Tractor & Equip. Co. v. Zerbe Bros., 2001 MT 162, 306 M 111, 32 P3d 721 (2001).

Proper Venue for Architectural Services Contract: The proper venue for employment and service contracts is the place where the labor or services are to be performed, regardless of the place of payment for the services. Schutz Foss Architects v. Campbell, 243 M 194, 793 P2d 821, 47 St. Rep. 1129 (1990), distinguishing Whalen v. Snell, 205 M 299, 667 P2d 436 (1983).

Venue — Second Suit Abuse of Process: Venue was proper in Lewis and Clark County, the location clearly indicated in the contract as the place where the contract was to be performed. It was an abuse of process for the defendant in a suit filed in District Court in Lewis and Clark County to file an action against the plaintiff in Justice's Court in Granite County. This was an attempt to thwart the plain provisions of the written contract and a use of the court system to accomplish that goal. The Supreme Court affirmed the order of the Lewis and Clark County District Court requiring defendant to dismiss its action filed in Justice's Court in Granite County. Leasing, Inc. v. Discovery Ski Corp., 235 M 133, 765 P2d 176, 45 St. Rep. 2250 (1988).

Action to Recover Fees for Negotiating Services: Plaintiff alleged breach of contract in a suit to recover fees for negotiating services he rendered for defendants. The court held that under this section, the appropriate venue was in the county where the contract was to be performed and that under 25-2-201, the District Court must make the initial factual determination as to where

the contract was performed. The court distinguished Whalen v. Snell, 205 M 299, 667 P2d 436 (1983) (an action to recover attorney fees), as being a bad faith tort claim (rather than a breach of contract claim) for which venue was properly determined under 25-2-102 (since renumbered 25-2-122). Hurly v. Studer, 234 M 100, 761 P2d 821, 45 St. Rep. 1761 (1988).

Importance of Contractual Venue Stipulation — Court Discretion: When faced with a contractual stipulation to venue, the court must place venue in the stipulated county when requested by the parties. A stipulation does not remove the court's discretion to change venue when the convenience of witnesses and the ends of justice require it; however, an agreement to place venue in a particular county is a most important factor for the court to consider. Given the court's wide discretion under 25-2-201(3), the court's decision will not be disturbed in the absence of clear evidence of abuse of that discretion. Mont. Wholesale Accounts Serv. v. Penington, 233 M 72, 758 P2d 759, 45 St. Rep. 1302 (1988).

Breach of Property Warranty — Venue Where Property Located: Defendants, residents of Missoula County, sold property located in Granite County to plaintiffs. The deal was closed in Missoula County, and payments were made under the contract for deed into an escrow account in Missoula County. Plaintiffs discovered defects with the fireplace and sewer system of the house. The parties reached an agreement to offset $3,000 from the purchase price for fireplace repairs. Plaintiffs alleged it cost $12,000 more to repair the fireplace and sewer system and filed suit. At the time of filing, all payments under the contract had been made. Defendants moved to have venue changed to Missoula County, contending that under 25-2-108 (now 25-2-118), they were entitled to be sued in the county where they reside. However, the court found that 25-2-101 (now 25-2-121) provides a specific exception regarding venue on contract suits. Section 25-2-101 (now 25-2-121) gives a plaintiff the choice of bringing an action on a contract in the county where the contract was to be performed, regardless of the defendant's residence. The court held that the gravamen of the issue presented is whether sellers performed by delivering the property in Granite County defect free. The issue did not concern the payments in Missoula. Letford v. Kraus, 206 M 493, 672 P2d 265, 40 St. Rep. 1802 (1983).

Contract for Legal Services — Venue in County Where Payments Made: Plaintiff, an attorney, sued defendant, his former client, alleging that defendant had failed to pay legal fees incurred in a divorce and further that defendant had repudiated his obligation to pay for the legal services, thus committing the tort of bad faith. Plaintiff filed the action in the county in which his law office was located. Defendant moved for a change of venue to the county of his residence. The District Court granted defendant's motion. Plaintiff appealed. The Supreme Court reversed the District Court, ruling that the tort, if committed at all, was committed where payment was to be made. The court further stated that even if the plaintiff had alleged breach of contract rather than or in addition to the tort claim, venue would have been properly laid in the county in which plaintiff's law office was located. The court reasoned that the place where the divorce action was tried was not relevant to the venue issue; what was relevant was the place at which defendant was to have performed his obligation to pay the legal fees. Whalen v. Snell, 205 M 299, 667 P2d 436, 40 St. Rep. 1283 (1983).

Liability Insurance — Where Losses Suffered: A corporation residing in Silver Bow County purchased a liability insurance policy covering its various gasoline stations located throughout the state. In an action under the policy involving a gasoline station located in Gallatin County, venue was properly in that county, that being where the losses being paid for were suffered. Gen. Ins. Co. of America v. Town Pump, Inc., 196 M 531, 640 P2d 463, 39 St. Rep. 303 (1982).

Venue — Contract as Specifying Place of Performance: In a suit on a contract of sale for nonpayment of the balance of the purchase price of furniture purchased in one county and delivered to another county, the District Court properly denied defendant/buyer's claim that venue should be set where defendant lives and where the goods were delivered. If by the express terms of a contract, place of performance is established, 25-2-101 (now 25-2-121) applies and venue exists where the performance is to occur, Deimler v. Ostler, 183 M 480, 600 P2d 814 (1979); Hopkins v. Scottie Homes, Inc., 180 M 498, 591 P2d 230 (1979), rather than where defendant resides as is normally the case under 25-2-108 (now 25-2-118). Here, since the contract specifies that the remaining performance (payment by the buyer) should occur in the county where the goods were purchased, this county is the county of proper venue. Peenstra v. Berek, 188 M 489, 614 P2d 520 (1980). (Annotator's note: Chapter 432, L. 1985, amended this section to reject the holding in Peenstra and any other decisions based on a "multiple performance" concept. See Evidence Commission Recommendations for Revisions located in annotations to 25-2-121.)

Determination of Intended Place of Performance — Contract for Sale of Real Estate: In an action to recover a commission for the sale of real estate in which the residence of plaintiff, the

place of deposit of earnest money, and the place of escrow were undisputedly in Cascade County, the District Court did not abuse its discretion by finding that by necessary implication the parties intended Cascade County to be the place of performance. Therefore, proper venue was determined by 25-2-101 (now 25-2-121) and not 25-2-108 (now 25-2-118). Deimler v. Ostler, 183 M 480, 600 P2d 814 (1979).

Oral Agreement for Procurement of Insurance: When party failed to procure insurance orally agreed upon, proper venue rests at the place of performance because the agreement implied that insurance would be arranged at defendant's place of business. Laforest v. Leland, 171 M 518, 559 P2d 1177 (1977).

Intent of Parties: Where intent of parties was that contract would be performed in either Cascade or Chouteau County and contract was performed in Cascade County until breach, venue of action on contract was in Cascade County rather than county of defendant's residence. Armon v. Stewart, 162 M 262, 511 P2d 8 (1973).

Basis for Venue Insufficient: In bringing suit where contract is to be performed, rather than place of defendant's residence, a mere direction by the seller as to the place of payment is not sufficient to maintain venue within exception to this section, nor can a promise to remit to cover the purchase price be sued upon by the seller in the county of the point to which the remittance is to be made. Rapp v. Graham, 145 M 371, 401 P2d 579 (1972).

Facts Relied on to Be Shown: To maintain suit in county other than that of defendant's residence, plaintiff must show clearly the facts relied on to bring the case within one of the exceptions to the rule. The contract must state clearly that it is to be performed in county other than that of defendant's residence so that no other fair construction can be placed upon it. Rapp v. Graham, 145 M 371, 401 P2d 579 (1972).

Inapplicable to Implied Contract: "Place of performance" rule regarding venue in contract actions was inapplicable in action based on implied contract that did not specify place of payment; change of venue to county where defendants resided was proper. Bick v. Haidle, 156 M 350, 480 P2d 818 (1971).

Action on Account: In action on account for grazing rentals on lands owned or controlled by plaintiff, trial court erred in granting motion for change of venue where action was predicated upon contract to be performed in county where action was brought. Cormier Bros., Inc. v. Willcutt, 154 M 297, 462 P2d 889 (1969).

Clause in Contract: Contract clause expressly requiring defendant to perform by making payments in county other than defendant's county of residence came within the operation of this section thereby entitling plaintiff to institute action on contract in county in which payments were to be made. McGregor v. Svare, 151 M 520, 445 P2d 571 (1968).

Delivery of Cattle: In suit against seller for breach of express warranty against diseased cattle, buyer properly exercised option in initiating suit in county where cattle were delivered as county where contract was to be performed. Neely v. Steinbach, 149 M 119, 423 P2d 584 (1967).

Choice of Plaintiff: If contract is to be performed in a county other than the county of defendant's residence, then the plaintiff has his choice of the two counties in which to sue. He may sue in the county where defendant resides or in the county where the contract is to be performed. The provisions of this section are permissive. Brown v. First Fed. S & L Ass'n of Great Falls, 144 M 149, 394 P2d 1017 (1964).

Place of Performance to Be Shown: In order for plaintiff to maintain action on contract in a county where defendant does not reside, the place of performance must be evident either by express terms of contract or by necessary implication that a county other than that of defendant's residence is intended to be the county of performance. Brown v. First Fed. S & L Ass'n of Great Falls, 144 M 149, 394 P2d 1017 (1964).

Oral Lease: In an action for breach of an oral agreement to lease farm land, venue was in the county where the estate of one of the defendants was being probated, in which the other defendants resided, in which the land was located, and in which service was made and the creditor's claim filed. Erickson v. Toy, 142 M 121, 385 P2d 268 (1963).

Pleading Unclear — Change of Venue Proper: Defendants had a right to a change of venue to the county of their residence where the plaintiffs' pleadings did not clearly establish that the contract forming the basis for the action was to be performed in the county where action was brought. McNussen v. Graybeal, 141 M 571, 380 P2d 575 (1963).

Actions to Which Section Applies: This section applies only to such actions as are based upon contracts which plainly show, either by their express terms or by necessary implication therefrom, that the contracting parties at the time of contracting did mutually agree upon a particular county other than that of defendant's residence wherein they intended that their contract was to be performed. Love v. Mon-O-Co Oil Corp., 133 M 56, 319 P2d 1056 (1958).

Use of "May": The word "may" in this section should not be given the force of "must". Love v. Mon-O-Co Oil Corp., 133 M 56, 319 P2d 1056 (1958).

History of Exception to Rule: Early decisions uniformly held that in actions upon contracts this section applied only to actions upon express contracts wherein the contract sued upon discloses on its face that it was to be performed in a particular county other than that of defendant's residence. Later cases departed from the earlier decisions and held that the performance exception applies to a contract which failed to state or provide for any place where such contract was to be performed. The case of State ex rel. Interstate Lumber Co. v. District Court, 54 M 602, 172 P 1030 (1918), went further and expressly overruled the earlier cases. The construction given in the Interstate Lumber Co. case and the overruling of the earlier decisions by the case are expressly disapproved. Fraser v. Clark, 128 M 160, 273 P2d 105 (1954).

Application of Statute: Where plaintiffs, operating an outdoor advertising business in the city of Missoula and surrounding territory with defendant (all residents of said city), sold their interest to defendant and 2 years later brought suit on the contract in Richland County, then plaintiffs' residence, although the parties intended the contract to be performed in Missoula County, venue in the instant case is regulated by the rule (defendant's residence) rather than by the performance exception. Hardenburgh v. Hardenburgh, 115 M 469, 146 P2d 151 (1944).

Contract of Indemnity: The place of performance of a contract of indemnity, as regards the venue of an action thereon, is the county wherein the loss or injury occurs or wherein a judgment is obtained against the assured or indemnitee (differentiating between venue of actions on contracts of indemnity and insurance, and contracts of sale). Hardenburgh v. Hardenburgh, 115 M 469, 146 P2d 151 (1944).

Exception to General Rule: The general rule governing venue in civil actions is that the action shall be tried in the county in which the defendant resides at the commencement of the action. The phrase in the last sentence of this section "in which the contract was to be performed" permits the parties, in exception to the general rule, to agree on the county of performance, but applies only to actions based upon contracts which plainly show either by express terms or necessary implication that when contracting the parties mutually agreed upon a particular county other than defendant's residence for performance or payment. Hardenburgh v. Hardenburgh, 115 M 469, 146 P2d 151 (1944).

"Performance" Defined: Performance of a contract is the doing of the things promised to be done, and while the obligation may be for the delivery of money only, in which event performance is called "payment", where the contract calls for the doing of various things (as did the contract in the instant case, payment being only one of them), payment alone would not constitute performance. Hardenburgh v. Hardenburgh, 115 M 469, 146 P2d 151 (1944).

Stipulation as to Place of Performance: A contract is performable at the place stipulated by the parties or in the absence of a stipulation at the place where the parties supposedly understood at the time of the contract that it was to be performed. In the absence of an express stipulation or of facts and circumstances showing that the parties intended performance to be elsewhere, the place of performance is considered to be the place where the contract was made. Hardenburgh v. Hardenburgh, 115 M 469, 146 P2d 151 (1944).

Tender Rule Overruled: On review of a number of prior decisions of the court involving the venue statutes, either applying the old English rule relating to tender in the matter of performance (i.e., that where the place of payment is not specified the debtor must seek his creditor and make tender wherever he may be found) or construing the word "may" as "must", such decisions were expressly overruled; held, that the tender rule is wholly inconsistent with, and the antithesis of the general venue rule, and that "may" as used in this section is a permissive word. (Cases which held "may" construed as "must" are State ex rel. Interstate Lumber Co. v. District Court, 54 M 602, 172 P 1030 (1918); Colbert Drug Co. v. Elec. Prod. Consol., 106 M 11, 74 P2d 437 (1937); and Thomas v. Cloyd, 110 M 343, 100 P2d 938 (1940).) Hardenburgh v. Hardenburgh, 115 M 469, 146 P2d 151 (1944).

Place of Performance in Alternative: Where the place of performance of a contract is in the alternative, ordinarily the promisor may elect place of performance, but if he allows the given date of performance to elapse without performing either his right of election is lost, and if he is sued for breach of contract, the right to select the place of trial passes to the promisee, irrespective of the contention of promisor that, the place of performance having been in his county, the cause should be tried there. Thomas v. Cloyd, 110 M 343, 100 P2d 938 (1940).

Loan of Money: The proper county in which to commence an action for money loaned is where performance was to be made, i.e., where payment was to be made, defendant's residence not being a material consideration. Kroehnke v. Gold Creek Min. Co., 102 M 21, 55 P2d 678 (1936).

No Place of Performance Designated: Where a contract does not designate the place of payment of a money obligation, the law makes it payable where the creditor resides or where he may be found, if within the state, and upon failure of the debtor to seek the creditor for the purpose of making payment, the latter may sue in the county of his residence. Elec. Prod. Consol. v. Goldstein, 97 M 581, 36 P2d 1033 (1934); Silver v. Morin, 74 M 398, 240 P 825 (1925); but see Hardenburgh v. Hardenburgh, 115 M 469, 146 P2d 151 (1944).

Full Performance: The provision of this section that actions upon contracts must be tried in the county in which the contract is to be performed means full not part performance. Hanlon v. Great N. Ry., 83 M 15, 268 P 547 (1928), distinguished in Thomas v. Cloyd, 110 M 343, 100 P2d 938 (1940).

Presumption as to Place of Payment: Where a contract of sale of personal property provides that payment shall be made in a county other than the one in which action is commenced, the defendant is entitled to a change of venue to that county, but where it does not so provide, the presumption is that payment is to be made at the creditor's residence or place of business, and the action is triable in his county. Courtney v. Gordon, 74 M 408, 241 P 233 (1925), distinguished in State ex rel. Gen. Oil Corp. v. Kelly, 94 M 445, 23 P2d 555 (1933).

Refusal to Change Venue as Error: Under this section refusal to change the place of trial of an action on a contract from the county of plaintiff's residence to the county in which the contract was to be performed was error. Feldman v. Sec. St. Bank, 62 M 330, 206 P 425 (1922).

Place of Payment as Place of Performance: Where men are employed to work at a mine, and no place of payment is mentioned, an action for wages may be tried in the county where the mine is situated, that being the place of performance. State ex rel. Coburn v. District Court, 41 M 84, 108 P 144 (1910).

CHANGE OF VENUE

Agreements Involving Purchase and Financing of Mobile Home: Plaintiffs, mobile home purchasers and their bank, sued a Butte bank in Ravalli County for wrongful conversion, breach of agreement, breach of statutory duty to file a satisfaction of a chattel mortgage, wrongful repossession, breach of an obligation of good faith, and fraud. The case revolved around the purchasers' agreement with a realtor to buy the mobile home, on the condition that the purchasers' bank approve the financing, and the Butte bank's agreement with the purchasers' bank that the Butte bank would release its lien on the mobile home, which the Butte bank had financed to the realtor, when the realtor was paid for the mobile home. The purchasers' bank paid the realtor, who then went out of business. The Butte bank did not relinquish the lien and attempted to repossess the mobile home. The trial court properly held that venue in Ravalli County was proper as to both agreements and properly denied the Butte bank's motion for a change of venue to Butte-Silver Bow County. Depee v. First Citizen's Bank of Butte, 258 M 217, 852 P2d 592, 50 St. Rep. 505 (1993).

Principal Place of Business Proper Venue: The plaintiff brought suit against the defendant bank to enforce a letter of credit established on its behalf by an insurance company that subsequently went into liquidation. The bank moved for a change of venue, relying on state insurance laws. The Supreme Court held that a letter of credit, as opposed to an instrument of guaranty, created a primary obligation on the part of the bank that is independent from any obligations of the party that established the letter of credit. In light of the nature of a letter of credit, the bankrupt company and its status had nothing to do with the dispute between the parties; proper venue was the county where the defendant had its principal place of business. Gerling Global Reinsurance Corp. v. First Interstate Bank, 242 M 216, 789 P2d 1237, 47 St. Rep. 726 (1990).

Suit Filed in Proper County — Defendant May Not Change Venue to Other Proper County: When a suit may properly be commenced in more than one county and plaintiff files in one of the permissible counties, defendant may not change the venue of the action to a different county even if the county preferred by defendant is also a proper place for trial. Melroe v. Doyle, 239 M 524, 781 P2d 1134, 46 St. Rep. 1884 (1989).

Filing Proper in County Where Tort Occurred: Parties met in Dawson County and orally agreed that defendant would find, evaluate, and appraise potential mineral investment opportunities for plaintiffs, but there was no agreement on a place of performance of the oral contract. Parties later met in Flathead County, and defendant apprised plaintiffs of the value of mineral interests in eastern Montana and western North Dakota. Plaintiffs purchased the interests for $175,000 but subsequently determined the interests were nearly worthless. Plaintiffs filed a breach of contract and related tort suit in Flathead County. Defendant sought change of venue to Dawson County, his place of residence. Absent a written contract with

express terms or an agreement on where the oral contract was to be performed, the District Court correctly determined that any tort resulting from defendant's alleged misrepresentation would have had to occur in Flathead County; therefore, the motion for change of venue was properly denied. Berlin v. Boedecker, 235 M 443, 767 P2d 349, 46 St. Rep. 125 (1989).

Proper Venue for Interpleader Complaint and Cross-Claim in Real Property Transaction: The proper venue for an interpleader complaint requesting the resolution of conflicting demands made upon an escrow agent holding documents for a contract for deed as well as for an action seeking to affect repossession, foreclosure, or forfeiture of an interest in real property when the escrow documents were held in a county different from that in which the property was located was determined under 25-2-123 to be the county in which the property is located. St. Bank of Townsend v. Worline, 227 M 315, 738 P2d 1295, 44 St. Rep. 1112 (1987).

Venue Properly Removed: In an action sounding in contract and tort, venue properly was removed from the county where business was done by the first defendant, a foreign corporation having no residence for venue purposes, to the county where the plaintiffs and other defendant resided and where the accident occurred. The venue statutes for actions in contract (25-2-121) and in tort (25-2-122) contain exceptions to the basic venue rule; these two statutes control the issue of proper venue. Platt v. Sears, 222 M 184, 721 P2d 336, 43 St. Rep. 1160 (1986).

Reconsideration of Previous Venue Ruling: The employer filed an action in Lewis and Clark County against the employee and the Department of Labor and Industry. The employee moved for a change of venue to Yellowstone County, which was denied. A hearing was held and the matter sent back to the Department for further proceedings, which continued without conclusion. The employee then brought an action against the employer in Yellowstone County. The employer's request for a change of venue to Lewis and Clark County was properly denied. The Department is not a party to the present action, and therefore the court is not bound by 25-2-105 (renumbered 25-2-125), which requires that a cause against the Department be tried in the county in which it arose or in Lewis and Clark County. Although the two actions arose out of the same act, occurrence, or transaction, the merits of the case were not reached in the Lewis and Clark County action. The mere fact that the cases are the same does not preclude one court from reconsidering a ruling of a court of coordinate jurisdiction. The Yellowstone County District Court did not err by reconsidering the venue ruling of the Lewis and Clark County court as Yellowstone County is the proper venue. Mereness v. Frito-Lay, Inc., 216 M 154, 700 P2d 182, 42 St. Rep. 716 (1985).

Proper County for Trial on Contract: When it is clear from the status of the pleadings and the uncontroverted facts that a contract was entered into and to be performed in one county, it was proper for the District Court to deny a motion for a change of place of trial to the county where defendants reside. Clark Fork Paving, Inc. v. Atlas Concrete & Paving, 178 M 8, 582 P2d 779 (1978).

Commission Agreement — Denial of Change Improper: Denial of defendant's motion for change of venue to place where he resided was improper since where plaintiff-relator did not plead the commission agreement itself or include it as an exhibit, there was no way of considering the venue matter except on the residence of the defendant. Rapp v. Graham, 145 M 371, 401 P2d 579 (1965), distinguished in Boucher v. Steffes, 160 M 482, 503 P2d 659 (1972).

Change Properly Denied: Although express terms of construction loan agreement between borrowers residing in Lewis and Clark County and lender in Cascade County did not designate place of performance of the contract, District Court of Lewis and Clark County properly denied motion of lender for change of venue of action for breach of the contract, where borrowers' affidavit in opposition to the motion showed that the contract was to be performed in Lewis and Clark County, the loan agreement, note and mortgage being executed in Lewis and Clark County for home to be built in that county, and inspection, supervision, and completion of the home were to take place in Lewis and Clark County where all bills were to be paid. Brown v. First Fed. S & L Ass'n of Great Falls, 144 M 149, 394 P2d 1017 (1964).

Personal Injury Under Contract — Change Denied: In an action for personal injuries sustained by an employee of a railroad company, a change of venue will not be granted to the county of defendant's residence, where the complaint averred that the railroad upon which plaintiff was employed was lying within a particular county and at the time of the injury, the plaintiff was in the service of the defendant upon said railroad, as such averments sufficiently state the county in which the contract of employment was to be performed. Oels v. Helena & Livingston Smelting & Reduction Co., 10 M 524, 26 P 1000 (1891).

Law Review Articles

A Primer on the Developing Doctrine of Constructive Fraud in Montana, Monhart, 52 Mont. L. Rev. 153 (1991). See footnote 166 on p. 172.

Venue of Contract Actions: This note compares a Montana case (Love v. Mon-O-Co Oil Corp., 133 M 56, 319 P2d 1056 (1958)) with previous decisions interpreting section 93-2904, R.C.M. 1947 (now codified as 25-2-101 (renumbered 25-2-121), 25-2-102 (renumbered 25-2-122), 25-2-107 (repealed), and 25-2-108 (renumbered 25-2-118), MCA). 20 Mont. L. Rev. 120 (1958).

Venue of Contract Actions in Montana, McNamer, 16 Mont. L. Rev. 68 (1955).

The Place of Trial of Contract and Tort Actions Under the Montana Venue Statutes, Horkan, 10 Mont. L. Rev. 83 (1949).

Collateral References

Venue *key* 18, et seq.

92A C.J.S. Venue §§10 through 18.

77 Am. Jur. 2d Venue §§30, 31.

Venue of action for rescission or cancellation of contract relating to interests in land. 77 ALR 2d 1014.

Venue of action for specific performance of contract pertaining to real estate. 63 ALR 2d 456.

25-2-122. Torts.

Evidence Commission Recommendations for Revisions

Explanation: This section changes the form but not the substance of the tort exception to the basic venue rule, and adds, in the last sentence of subsection (2) [now (1)(b)], the essence of the Supreme Court's holding in Slovak v. Kentucky Fried Chicken, 164 Mont. 1, 518 P.2d 791 (1974).

The present language of section 25-2-102 [renumbered 25-2-122], like the identical wording of the contract exception, that the action "may be tried" in the county where the tort was committed, has contributed to the "mountain of cases" that Justice Sheehy complained of in the Clark Fork Paving case. The principal case, Seifert v. Gehle, 133 Mont. 320, 323 P.2d 269 (1958) followed the Hardenburgh interpretation—that the language was permissive and created an alternative to the basic rule that venue lies at the defendant's residence. This holding has not been seriously questioned since it was handed down. It accords with the contract cases and makes the interpretation uniform.

The problems that arose after Seifert were in fixing the situs of torts that involved no physical injury. Three times in 10 years the Supreme Court had to determine the county where torts would be held to be committed if they arose from a business relationship (Brown v. First Federal, supra; Foley v. General Motors, 159 Mont. 469, 499 P.2d 774 (1972); Slovak v. Kentucky Fried Chicken, 164 Mont. 1, 518 P.2d 791 (1974)). The common factor in all the cases was the existence of a contract between the parties, out of which the tort was claimed to have sprung.

In Brown and Foley the question was not reached because other considerations were decisive, but the issue was central and squarely presented in Slovak. The Court decided that in tort actions arising from contractual relationships, the tort has the same situs, for venue purposes, as the contract.

This proposed section codifies the rules of Seifert and Slovak.

Compiler's Comments

2005 Amendment: Chapter 217 in (1) at beginning inserted reference to the exception in subsection (4); in (2) and (3) at beginning inserted exception clause; inserted (4) stating the proper place of trial of a federal Employers' Liability Act claim if the defendant is a railroad and the plaintiff is a Montana resident; and made minor changes in style. Amendment effective April 13, 2005.

Applicability: Section 3, Ch. 217, L. 2005, provided: "[This act] applies to causes of action occurring on or after [the effective date of this act]." Effective April 13, 2005.

1997 Amendment: Chapter 352 in (1), in introductory clause, inserted reference to subsection (3); in (2)(c), at end, deleted "or in the first judicial district"; inserted (3) regarding venue for a tort action if the defendant is a nonresident; and made minor changes in style.

1995 Amendment: Chapter 332 at beginning of (1) inserted exception clause; and inserted (2) establishing place of trial for tort action when defendant is out-of-state corporation.

1985 Amendment: In lead-in to section substituted "The proper place of trial for a tort action is" for "Actions for torts may be tried in"; inserted (1) specifying county where defendant resides; at end of first sentence of (2) deleted "subject, however, to the power of the court to change the place of trial as provided in this code" and inserted second sentence specifying county where contract to be performed if tort is interrelated with breach of contract.

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

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GENERAL

Provision Treating Victims of Nonresident Corporate Tortfeasors Differently From Victims of Other Nonresident Tortfeasors — Unconstitutional Violation of Equal Protection: The provisions of subsection (2) of this section provide different venues for tort suits brought against nonresident corporate defendants and other nonresident defendants. Applying the rational basis test, the Supreme Court found no question that tort victims are not treated equally under the statutory venue limitations and that the subsection discriminates against a tort victim injured by a corporate nonresident, whose choice of venue is limited to only four options according to the corporate status of the defendant, as opposed to a tort victim injured by a noncorporate nonresident whose choice of venue may be any Montana county. By limiting the choice of venue, plaintiffs are unconstitutionally deprived of the equal protection guaranteed by Art. II, sec. 4, Mont. Const. (See 1997 amendment.) Davis v. Union Pac. RR Co., 282 M 233, 937 P2d 27, 54 St. Rep. 328 (1997), distinguishing Ford v. Burlington N. RR, 250 M 188, 819 P2d 169 (1991), and followed in Isakson v. Burlington N. RR Co., 282 M 296, 937 P2d 472, 54 St. Rep. 389 (1997). See also State ex rel. Burlington N. RR Co. v. District Court, 270 M 146, 891 P2d 493 (1995).

FELA Action Not Dismissible on Grounds of Inconvenience — Number of Out-of-State Filings Irrelevant: A District Court may not dismiss a FELA action because it considers itself to be an inconvenient forum and may not change the place of a FELA trial based on the doctrine of forum non conveniens, whether based on common law or as codified in 25-2-201. This issue will not henceforth be reexamined on the basis of the number of out-of-state FELA cases filed in Montana. (However, see the 1995 and 1997 amendments to this section, which restricted this decision.) State ex rel. Burlington N. RR Co. v. District Court, 270 M 146, 891 P2d 493, 52 St. Rep. 118 (1995).

Attorney Malpractice — Venue in County Where Breach of Contract Occurs: The plaintiffs brought a malpractice suit against an attorney, alleging that he had failed to renegotiate certain loans on their behalf. The defendant moved for a change of venue to the county where his office was located. The Supreme Court affirmed the lower court's denial of the motion on the grounds that venue in a tort action is proper in the county where there is a concurrence of the breach of the obligation and the occasion of damages. BHC Holding Co. v. Hurley, 242 M 4, 788 P2d 322, 47 St. Rep. 490 (1990).

Civil and Tort Actions — Venue: In all civil actions, the proper place of trial is in the county of defendant's residence; but in tort actions, the proper place may be the county of defendant's residence or the county where the tort was committed. Brown v. Hartwell, 226 M 130, 734 P2d 204, 44 St. Rep. 527 (1987).

Foreign Corporation and Montana Resident as Defendants: The rule set out in 25-2-118 that a foreign corporation may be sued in any county in the state does not apply when Montana residents are also named as defendants. In that case, venue is determined by Montana's other venue statutes. (See the 1995 and 1997 amendments to this section, which limits the place of trial against a foreign corporation.) Platt v. Sears, 222 M 184, 721 P2d 336, 43 St. Rep. 1160 (1986).

Venue for Insurer Bad Faith Tort — County Where Investigation and Negotiation Transpired: In action for bad faith against insurer and its claims representative under 33-18-201, defendants moved for change of venue from Flathead County to Cascade County. Defendants contended that Cascade County was proper venue since the claims representative maintained an office and accomplished all work and decisions there. The Supreme Court affirmed the trial court's denial of the motion, finding that the defendant's duty to investigate and negotiate could have been realistically performed only in Flathead County where the plaintiff's farm and the provider of defective potting soil were located. Since venue in Flathead County was proper for the insurer, it was also proper for the claims representative who resided in Cascade County. Streich & Associates, Inc. v. St. Paul Mercury Ins. Co., 221 M 209, 717 P2d 1101, 43 St. Rep. 752 (1986).

Choice of Venue in Tort Action — 1985 Law Codifying Longstanding Rule: A 1985 amendment to 25-2-102 (renumbered 25-2-122) codified the longstanding interpretation of the tort venue exception to the basic venue rule in 25-2-108 (renumbered 25-2-118). Under that longstanding rule, plaintiff in this case could sue either in the county in which the tort occurred or in a county in which one of the five defendants resided. Bradley v. Valmont Indus., Inc., 216 M 429, 701 P2d 997, 42 St. Rep. 925 (1985), cited in Carter v. Nye, 266 M 226, 879 P2d 729, 51 St. Rep. 781 (1994).

Malpractice in Prescribing Medication — Where Tort Is Committed: A Fergus County resident traveled to Yellowstone County, where a Billings doctor prescribed medicine that allegedly caused seizures and other injuries. She sued the doctor for malpractice. Any malpractice occurred in Yellowstone County, where the diagnosis and prescription were made. That is where the tort was committed, not in Fergus County where the medicine was taken and the injury occurred. Therefore, proper venue was in Yellowstone County. The mere allegation that the doctor failed to monitor the patient's use of the medication did not on its face allege that a tort was committed in Fergus County. Howard v. Dooner Laboratories, Inc., 211 M 312, 688 P2d 279, 41 St. Rep 1381 (1984), distinguished in Carter v. Nye, 266 M 226, 879 P2d 729, 51 St. Rep. 781 (1994).

Venue for Action for Tortious Failure to Pay Legal Fees: Plaintiff, an attorney, sued defendant, his former client, alleging that defendant had failed to pay legal fees incurred in a divorce and further that defendant had repudiated his obligation to pay for the legal services, thus committing the tort of bad faith. Plaintiff filed the action in the county in which his law office was located. Defendant moved for a change of venue to the county of his residence. The District Court granted defendant's motion. Plaintiff appealed. The Supreme Court reversed the District Court, ruling that the tort, if committed at all, was committed where payment was to be made. The court further stated that even if the plaintiff had alleged breach of contract rather than or in addition to the tort claim, venue would have been properly laid in the county in which plaintiff's law office was located. The court reasoned that the place where the divorce action was tried was not relevant to the venue issue; what was relevant was the place at which defendant was to have performed his obligation to pay the legal fees. Whalen v. Snell, 205 M 299, 667 P2d 436, 40 St. Rep. 1283 (1983).

Venue for Tort Action Against Two Counties: Plaintiffs brought a class action suit against Dow Chemical Co., Lake County, and Missoula County. The complaint did not allege that either Missoula County or Lake County was the exclusive cause of one injury. Rather, the pleadings indicated that the plaintiffs could have been damaged by the actions of either or both counties acting separately. In such a situation both counties are not necessary parties to one action, and the counties should be sued where they are located. The suit would be properly filed in Lake County for the tort allegedly committed against the Lake County plaintiffs. Dow Chemical Co. is entitled to a change of venue as to the claims filed by the Lake County plaintiffs. State ex rel. Kesterson v. District Court, 189 M 20, 614 P2d 1050 (1980).

FELA Actions — Application of Forum Non Conveniens: With the plaintiff, the scene of the injury, and most of the witnesses in Idaho, a suit for personal injuries filed in Montana was dismissed by the District Court under the doctrine of forum non conveniens. The Supreme Court reversed stating that the doctrine must be tempered by an open-door policy and that the doctrine should not presently be applied to FELA actions. (However, see the 1995 and 1997 amendments to this section, which restricted this decision.) Bevacqua v. Burlington N., Inc., 183 M 237, 598 P2d 1124 (1979).

Forum Non Conveniens Not Applicable in FELA Suits: The doctrine of forum non conveniens is not applicable to a FELA suit filed in a Montana District Court. There is a strong policy favoring plaintiff's forum selection in FELA cases, and the Montana Constitution states that the courts of justice must be open to all persons. (However, see the 1995 and 1997 amendments to this section, which restricted this decision.) Bevacqua v. Burlington N., Inc., 183 M 237, 598 P2d 1124 (1979); Labella v. Burlington N., Inc., 182 M 202, 595 P2d 1184 (1979). See also Great N. Ry. v. District Court, 139 M 453, 365 P2d 512 (1961).

County of Alleged Tort and Where Contract to Be Performed — Same County: The plaintiffs' allegation of defendants' tortious conduct in the county of plaintiffs' residence, when considered with the allegations that performance of the contract was to be in that county, was sufficient to uphold the determination of the District Court that proper venue for the action was in the county of plaintiffs' residence. Hopkins v. Scottie Homes, Inc., 180 M 498, 591 P2d 230 (1979).

Action on Contract and in Tort: In action in which complaint stated a claim for breach of contract and an interrelated and dependent claim in tort, the county of performance of the contract was the county in which any tort was committed for purpose of determining venue. Slovak v. Kentucky Fried Chicken, 164 M 1, 518 P2d 791 (1974).

No Montana Residents: Although either the county of residence of defendant or county where tort was committed was proper county in which to bring action for personal injury arising from accident, where none of the defendants were residents of Montana, the action was triable in any county designated by plaintiff in his complaint. (However, see the 1995 and 1997 amendments to this section, which restricted this decision.) Tassie v. Cont. Oil Co., 228 F. Supp. 807 (D.C. Mont. 1964).

Advice Not Unethical: Attorney's advice to a client that a personal injury action had to be filed in the county where the cause arose was not improper or unethical. Petition of Wasson, 143 M 323, 389 P2d 406 (1963).

Action for Conversion: Lincoln County was the proper county for trial of action where complaint by which plaintiff commenced suit alleged plaintiff's ownership and right of possession of the timber in Lincoln County, conversion by the defendants, and resulting damage. Johnson v. Clark, 131 M 454, 311 P2d 772 (1957).

False Representation: Action brought 2 years after dissolution of partnership for damages resulting from false representations, a paragraph of the complaint alleging that defendant purchased a house with part of the partnership funds and that plaintiff was entitled to one-half the profits received on its sale, was for damages and at law and the proper venue was in the county where the tort was committed. Brownback v. Nelson, 122 M 525, 206 P2d 1017 (1949).

False Representations — No Judicial Estoppel by Complaint: Where plaintiff in first complaint for damages alleged that false representations were made in one county, he was not precluded from alleging that the false representations were made in another county in a subsequent complaint since the representation may have been made in both places. Brownback v. Nelson, 122 M 525, 206 P2d 1017 (1949).

Action Proper Where Tort Was Committed: An action for tort is properly triable in the county where the tort was committed. Stewart v. First Nat'l Bank & Trust Co., 93 M 390, 18 P2d 801 (1933); Enos v. Am. Sur. Co. of New York, 95 M 588, 28 P2d 197 (1933), distinguished in Bergin v. Temple, 111 M 539, 111 P2d 286 (1941).

Action in Claim and Delivery: The action in claim and delivery is founded upon a tort and must be tried in the county where the tort was committed. Kalberg v. Greiner, 91 M 509, 8 P2d 799 (1932).

Personal Injuries to Railroad Employee: Under this section an action for tort must be tried in the county in which it was committed. An action by a railroad employee for personal injuries sustained in a county other than that of his residence was properly triable in the county where the accident occurred subject to the power of the court to change the place of trial. (However, see the 1995 amendment to this section, which restricted this decision.) Dryer v. Director-General of Railroads, 66 M 298, 213 P 210 (1923).

CHANGE OF VENUE

Change of Venue on Multiple Claims to Defendants' County of Residence While Allowing Plaintiff to Pursue Venue Established by Contract Proper: The franchise agreement between one plaintiff and defendants provided that plaintiff could elect to initiate an action concerning breach of the agreement in Yellowstone County. Franchise agreements with other plaintiffs provided that Missoula County would be the place of venue. All plaintiffs joined in a suit against defendants, which was filed in Yellowstone County. Defendants moved for a change of venue to Missoula County where the company headquarters were located, and the motion was granted. Plaintiff whose agreement allowed for a Yellowstone County venue was allowed to sever its claims and keep its action in that county if desired. Plaintiffs appealed the venue change, but the Supreme Court affirmed. The determination of whether a county is the proper place for trial is a question of law involving application of the venue statutes to pleaded facts. The general rule in 25-2-118 provides that the proper place for trial in civil actions is the defendant's county of residence. Additionally, in a case involving multiple claims, 25-2-116 provides that a party that is entitled to a change of venue on any claim is entitled to a change of venue on the entire action, subject to the power of the trial court to separate claims or issues for trial. Therefore, the District Court did not err in moving the venue to Missoula County where defendants resided and in allowing the plaintiff with a contractual provision for trial in Yellowstone County to pursue its action there. DML, Inc. v. Fulbright, 2005 MT 204, 328 M 212, 119 P3d 93 (2005), distinguishing Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996), and Liang v. Lai, 2004 MT 188, 322 M 199, 94 P3d 759 (2004).

Venue in Matter Involving Multiple Defendants — Plaintiff's Venue Alternatives Properly Exercised: Plaintiff's husband was killed in an accident at the city bus barn in Lewis and Clark County in Helena. Plaintiff filed a survivorship/wrongful death action in Silver Bow County against defendant city in Lewis and Clark County and against defendant gas company with its principal place of business in Silver Bow County. The city moved for a change of venue to Lewis and Clark County, but the motion was denied. On appeal, the city argued that because Gabriel v. School District No. 4, 264 M 177, 870 P2d 1351 (1994), and Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996), established that the proper venue for trial of a combined survivorship/wrongful death action is either the county where the survivorship action arose or

the county where the wrongful death claim arose and that neither claim in this case arose in Silver Bow County, Silver Bow County was not a proper venue. Plaintiff contended that under 25-2-117, when there are multiple defendants, a proper place for trial of any defendant is proper for all defendants. The Supreme Court agreed with plaintiff. Although Gabriel and Wentz approved counties where survivorship or wrongful death actions arose as proper venues, neither case established those counties as exclusive venues for survivorship/wrongful death actions. In cases with multiple defendants pursuant to 25-2-117, including defendants that are both political subdivisions and private entities, 25-2-126, which provides venue for actions against political subdivisions, does not prevail over this section, which provides venue for tort actions, but rather provides alternative venue options to a plaintiff. The plaintiff properly exercised a venue option here, and denial of the change of venue motion was affirmed. Meyer v. Mont. Power Co., LLC, 2005 MT 66, 326 M 283, 109 P3d 269 (2005), distinguishing Whalen v. Mont. Right to Life Ass'n, 2002 MT 328, 313 M 204, 60 P3d 972 (2002).

Venue Rights of FELA Plaintiff With Tort Claim Against Out-of-State Corporate Defendant: Rule filed an action in Cascade County seeking damages for personal injury arising from Rule's railroad employment in Dawson County, Rule's county of residence. Defendant moved for a change of venue to Dawson County or Yellowstone County, the location of defendant's resident agent. The District Court granted the motion and ordered the case moved to either county, at Rule's option. Rule appealed the change of venue, contending that the District Court erred in applying Montana tort venue statutes to Rule's Federal Employers' Liability Act (FELA) claim and that subsection (2) of this section constituted an unconstitutional arbitrary and capricious limitation on FELA venue practice in Montana. The Supreme Court disagreed. In enacting subsection (2) of this section the Legislature did not create an exception for FELA claims. The venue options in subsection (2) of this section are sufficient for FELA plaintiffs to meet the concerns in both the federal law and under Montana cases. Because federal law allows states to enact venue laws applicable to FELA actions, there is no legal impediment to treating FELA plaintiffs the same as other plaintiffs with tort claims against out-of-state corporate defendants. Rule failed to establish why application of subsection (2) of this section to FELA cases exceeded legislative discretion in enacting venue statutes and thus failed to meet the burden of proving that the statute is unconstitutional. The change of venue was affirmed. Rule v. Burlington N. & Santa Fe Ry. Co, 2005 MT 6, 325 M 329, 106 P3d 533 (2005), following Miles v. Ill. Cent. RR Co., 315 US 698 (1942). See also Davis v. Union Pac. RR Co., 282 M 233, 937 P2d 27 (1997).

Erroneous Change of Venue for Defendants When Proper Venue Chosen by Plaintiff: Plaintiff filed a tort action in Flathead County where a slip and fall accident occurred. Defendants moved for and were granted a change of venue to Sanders County where one defendant resided. Plaintiff appealed the venue change, and the Supreme Court reversed, noting that a defendant must be granted a change of venue if an action is brought in a county that is not statutorily designated as a proper place for trial, but because Flathead County was the location of the premises where the allegedly tortious act occurred, it was a proper venue, so no motion to change the place of trial on the entire action could be granted. Because plaintiff chose a proper venue, the District Court erred when it granted defendants' venue change. Liang v. Lai, 2004 MT 188, 322 M 199, 94 P3d 759 (2004), following Nelson v. Cenex, Inc., 2004 MT 170, 322 M 54, 97 P3d 1073 (2004). See also Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996).

Location of Resident Agent of Foreign Corporation Proper Venue in Tort Action: Nelson worked for a Minnesota corporation at a refinery in Yellowstone County. Nelson brought a tort action based on exposure to asbestos during employment, naming as defendants three Minnesota corporations that operated the refinery and two individuals from Yellowstone County who worked as plant managers. Nelson resided in Missoula County, and the corporations' resident agent was located in Lewis and Clark County. Nelson brought the action in Lewis and Clark County. The corporations moved for a change of venue to Yellowstone County, but the motion was denied. On appeal, the Supreme Court affirmed. A defendant may move for a change of venue when an action is not brought in a county that is statutorily designated as a proper place for trial, and the motion must be granted if the county in which the action is filed is not a proper place for trial. If more than one county is proper, the action may be brought in any of those counties and a motion for change of venue may not be granted. The general rule for determining venue is 25-2-118, but there are statutory exceptions to the general rule for specific types of actions. Venue rules for tort actions are in this section, including venue for tort actions against a foreign corporation, one of which is the county in which the corporation's resident agent is located. Thus, Lewis and Clark County was a proper venue for trial, and the District Court did not err in denying the motion for change of venue. Nelson v. Cenex, Inc., 2004 MT 170, 322 M 54, 97 P3d 1073 (2004), distinguishing Platt v. Sears, 222 M 184, 721 P2d 336 (1986).

Burden of Proof on Moving Party Seeking Change of Venue — Error in Shifting Burden of Proof Regarding Residency to Nonmoving Party: Lockhead and Weinstein were involved in an altercation in Missoula. Lockhead subsequently filed a motion in Silver Bow County seeking damages from Weinstein for defamation, negligent and intentional infliction of emotional distress, and malicious prosecution. In the complaint, Lockhead alleged that he resided in Butte. Weinstein then moved for a change of venue to Missoula, contending that Lockhead was actually a resident of Missoula rather than Silver Bow County and that the trial should be moved for the convenience of witnesses and the promotion of justice. At a hearing on the motion, Weinstein submitted an affidavit stating that Silver Bow County homeless shelters, the police department, and the post office had been searched for proof of Lockhead's residency, and none could be found. Lockhead also filed an affidavit stating that he resided in Butte at the time that the complaint was filed and that he had no intention of moving. The District Court concluded that Lockhead had failed to establish that he was a resident of Butte and granted Weinstein's motion for a change of venue. Although a District Court may consider affidavits related to a motion to change venue, the averments of a complaint will be taken as true in considering the motion. As movant, Weinstein bore the burden of proof in support of the motion, but failed to carry the burden of proving that Lockhead did not reside in Butte at the time that the complaint was filed or that Lockhead actually resided elsewhere. Thus, the District Court erred by shifting the burden of proving residency to Lockhead, and the change of venue motion was reversed. Lockhead v. Weinstein, 2001 MT 132, 305 M 438, 28 P3d 1081 (2001).

No Defendant Residing in State — Plaintiff May File in Any County, Not Just County Where Alleged Injury Occurred: Norwest Bank argued that the lower court erred in refusing to change venue to Yellowstone County, which was the county where its registered agent was located and where the alleged injury occurred. The Supreme Court held that the statute requiring that a suit be brought in the county where the resident agent resides did not apply to Norwest because the statute referred to corporations incorporated in a state other than Montana and Norwest as a federally chartered bank did not qualify as a corporation. The Supreme Court also held that although one statute allowed the filing of a suit in the county where the alleged injury occurred, another allowed a plaintiff to file in any county when none of the defendants were a resident of the state. Therefore, the plaintiff had properly filed in Cascade County. The bank was not entitled to a change of venue. Spoonheim v. Norwest Bank Mont., 277 M 417, 922 P2d 528, 53 St. Rep. 764 (1996).

Venue for Case Involving Tort Claim Against One Defendant and Contract Claim Against Another: As part of an insurance policy coverage dispute, plaintiff brought a tort claim against one defendant who resided in Lewis and Clark County and a breach of contract claim against another defendant who resided in Powell County. The District Court granted a change of venue to Powell County. Under this section, the proper venue for tort claims is the county where the contract was to be performed. Nothing in this section suggests an intention to limit its application to cases in which the tort and contract claim are made against the same defendant. Because both counties were proper venues for the tort claim, no change of venue motion could be granted on the grounds that the action was not brought in a proper county. The District Court was reversed. Standley v. Travelers Indem. Co., 259 M 269, 855 P2d 1020, 50 St. Rep. 788 (1993).

Agreements Involving Purchase and Financing of Mobile Home: Plaintiffs, mobile home purchasers and their bank, sued a Butte bank in Ravalli County for wrongful conversion, breach of agreement, breach of statutory duty to file a satisfaction of a chattel mortgage, wrongful repossession, breach of an obligation of good faith, and fraud. The case revolved around the purchasers' agreement with a realtor to buy the mobile home, on the condition that the purchasers' bank approve the financing, and the Butte bank's agreement with the purchasers' bank that the Butte bank would release its lien on the mobile home, which the Butte bank had financed to the realtor, when the realtor was paid for the mobile home. The purchasers' bank paid the realtor, who then went out of business. The Butte bank did not relinquish the lien and attempted to repossess the mobile home. The trial court properly held that venue in Ravalli County was proper as to both agreements and properly denied the Butte bank's motion for a change of venue to Butte-Silver Bow County. Depee v. First Citizen's Bank of Butte, 258 M 217, 852 P2d 592, 50 St. Rep. 505 (1993).

Choice of County in Tort Action Against Nonresident Defendant: In a tort action against a nonresident defendant, the plaintiff may choose either the county where the tort was committed or any county in Montana. (However, see the 1995 and 1997 amendments to this section, which restricted this decision.) Haug v. Burlington N. RR Co., 236 M 368, 770 P2d 517, 46 St. Rep. 432 (1989), overruling McAlear v. Kasak, 225 M 113, 731 P2d 908, 44 St. Rep. 81 (1987).

Filing Proper in County Where Tort Occurred: Parties met in Dawson County and orally agreed that defendant would find, evaluate, and appraise potential mineral investment opportunities for plaintiffs, but there was no agreement on a place of performance of the oral contract. Parties later met in Flathead County, and defendant apprised plaintiffs of the value of mineral interests in eastern Montana and western North Dakota. Plaintiffs purchased the interests for $175,000 but subsequently determined the interests were nearly worthless. Plaintiffs filed a breach of contract and related tort suit in Flathead County. Defendant sought change of venue to Dawson County, his place of residence. Absent a written contract with express terms or an agreement on where the oral contract was to be performed, the District Court correctly determined that any tort resulting from defendant's alleged misrepresentation would have had to occur in Flathead County; therefore, the motion for change of venue was properly denied. Berlin v. Boedecker, 235 M 443, 767 P2d 349, 46 St. Rep. 125 (1989).

Action Filed in Proper County — Motion to Remove to Another Proper County Properly Denied: Once an action has been filed in a proper county, the District Court cannot grant a motion to have it removed to another county of proper venue. Petersen v. Tucker, 228 M 393, 742 P2d 483, 44 St. Rep. 1625 (1987).

Venue When Student Lives in One County but Attends School by Bus in Another: A student lived in Missoula County but was bused to school in Lake County where an accident occurred during a school-sponsored event and where the supervisor lived. The District Court properly determined venue to be in Lake County since limited contact with Missoula County for a bus route did not make it a county in which a school district, primarily located and operated in Lake County, could be sued. The Supreme Court declined to address whether a school district is properly labeled a "political subdivision" and therefore did not apply 25-2-126 to the question of venue. Mapston v. Joint School District, 227 M 521, 740 P2d 676, 44 St. Rep. 1281 (1987).

Tort Action — Change of Venue for Nonresident Defendant Proper: Following an allegation of sexual harassment, lawyer filed defamation suit. The District Court granted nonresident defendant's motion for a change of venue, moving the tort action to the county in which the lawyer's office was located and where the tort allegedly arose. Upon appeal, the Supreme Court upheld the District Court, ruling that in a tort action, proper venue for suing a nonresident defendant is in either the county of defendant's residence or the county where the tort occurred. McAlear v. Kasak, 225 M 113, 731 P2d 908, 44 St. Rep. 81 (1987), overruled in Haug v. Burlington N. RR Co., 236 M 368, 770 P2d 517, 46 St. Rep. 432 (1989). (However, see the 1995 and 1997 amendments to this section, which restricted this decision.)

Venue Properly Removed: In an action sounding in contract and tort, venue properly was removed from the county where business was done by the first defendant, a foreign corporation having no residence for venue purposes, to the county where the plaintiffs and other defendant resided and where the accident occurred. The venue statutes for actions in contract (25-2-121) and in tort (25-2-122) contain exceptions to the basic venue rule; these two statutes control the issue of proper venue. Platt v. Sears, 222 M 184, 721 P2d 336, 43 St. Rep. 1160 (1986).

Change of Venue in Tort Action — Attorney Inaction: A Billings attorney, sued by his Missoula client for legal malpractice moved for a change of venue to Yellowstone County, the location of his law office. The motion was granted by the District Judge, who relied on Whalen v. Snell, 205 M 299, 667 P2d 436, 40 St. Rep. 1283 (1983), in granting the change of venue. On appeal, the Supreme Court affirmed, holding that although the attorney may arguably have been negligent in pursuing the civil action in Missoula, there was no harm until the Statute of Limitations ran on filing a claim in Helena, Lewis and Clark County, where the claim should have been filed. A tort, if one occurred at all, would have resulted from the attorney's inaction in Yellowstone County, the site of his law office. Vehrs v. Moses, 220 M 473, 716 P2d 207, 43 St. Rep. 537 (1986).

Reconsideration of Previous Venue Ruling: The employer filed an action in Lewis and Clark County against the employee and the Department of Labor and Industry. The employee moved for a change of venue to Yellowstone County, which was denied. A hearing was held and the matter sent back to the Department for further proceedings, which continued without conclusion. The employee then brought an action against the employer in Yellowstone County. The employer's request for a change of venue to Lewis and Clark County was properly denied. The Department is not a party to the present action, and therefore the court is not bound by 25-2-105 (renumbered 25-2-125), which requires that a cause against the Department be tried in the county in which it arose or in Lewis and Clark County. Although the two actions arose out of the same act, occurrence, or transaction, the merits of the case were not reached in the Lewis and Clark County action. The mere fact that the cases are the same does not preclude one court from reconsidering a ruling of a court of coordinate jurisdiction. The Yellowstone County District

Court did not err by reconsidering the venue ruling of the Lewis and Clark County court as Yellowstone County is the proper venue. Mereness v. Frito-Lay, Inc., 216 M 154, 700 P2d 182, 42 St. Rep. 716 (1985).

Timeliness of Brief in Support of Motion for Change of Venue: In an action for strict liability in tort for personal injuries, defendant filed a motion for change of venue on November 17, 1982, and a brief in support of the motion on November 24, 1982. The motion was denied by the District Court for failure to file a supporting brief within 5 days, the time limit allowed by Rule II of the Uniform Rules for District Courts of Montana. The Supreme Court reversed and remanded the case to District Court, ruling that under Rule 6(a), M.R.Civ.P., three of the days intervening between the time of filing of the motion and the time of filing of the brief are excluded from the calculation of the maximum permissible time, so the filing of the brief was timely. Tanniehill v. Remington Arms Co., 207 M 501, 675 P2d 948, 41 St. Rep. 103 (1984).

Fraudulent Misrepresentations Preceding Contract Formation: When purchasing a bull, plaintiff relied on defendant's alleged intentionally false and fraudulently made representations and brought an action in Cascade County for compensatory and punitive damages. As plaintiff chose to affirm the contract and sue for the misrepresentations preceding the contract, the action was in tort. However, venue was properly changed to Stillwater County where the auction, sale, and payment, and therefore the tort, if any, took place. Further, under the general rule, an action is to be brought where the defendant resides (Stillwater County), and plaintiff did not show a clear reason for applying an exception. Woolcock v. Beartooth Ranch, 196 M 65, 637 P2d 520, 38 St. Rep. 2130 (1981).

Estate Joined — No Right to Change of Venue: Where the driver of one vehicle and the estate of the driver of the other vehicle had been joined as defendants in tort action, the one driver had no right to change of venue after the dismissal of the estate since the plaintiff in joining the resident estate as a defendant had reasonable grounds to believe that he had a cause of action against the resident estate. Boucher v. Steffes, 160 M 482, 503 P2d 659 (1972).

Section as Permissive: The provisions of this section are permissive only and where five separate actions were brought in four widely separated counties against the same defendant involving the same accident, court did not abuse its discretion in granting change of venue under 25-2-201 to the place where the tort occurred, for the convenience of the witnesses. Putro v. Mannix Elec., Inc., 147 M 314, 412 P2d 410 (1966).

Defendant Not Entitled to Change From Proper County: Defendant is not entitled to a change of venue in personal injury action where plaintiff filed the action in the proper county. Tassie v. Cont. Oil Co., 228 F. Supp. 807 (D.C. Mont. 1964).

No Reason for Change Shown: Where personal injury action arising from accident occurring in Fallon County, Montana, was commenced in Silver Bow County, Montana, by nonresident plaintiff, and nonresident defendants in removing action to federal District Court designated Billings Division, but stated no statutory grounds for change of venue and did not show good cause for assignment to Billings Division, plaintiff was entitled to change of venue to Butte Division in which Silver Bow County was located. Tassie v. Cont. Oil Co., 228 F. Supp. 807 (D.C. Mont. 1964).

Waiver of Improper Venue: Plaintiff by instituting his action in a county other than where the accident occurred or the defendant resided, waived his right to have the action tried in either of these counties, and defendant had the right to have the place of trial changed to either of the latter counties. Seifert v. Gehle, 133 M 320, 323 P2d 269 (1958).

Error to Refuse Motion for Change: It was error for the District Court of M County to overrule defendants' motion for change of venue to L County where an accident occurred, under the power of the court to change the place of trial made compulsory by 25-2-201, even though the District Court of L County could, in its discretion, retransfer the cause to M County to subserve the convenience of witnesses—the ground upon which the court based its order refusing to change the place of trial. Maio v. Greene, 114 M 481, 137 P2d 670 (1943).

False Imprisonment Denial as Abuse of Discretion: In an action for false imprisonment commenced in a county other than the one in which the tort was alleged to have been committed, the District Court abused its discretion in denying defendant's motion for change of venue asked for on the ground of the convenience of witnesses and the promotion of justice, on affidavits showing, among other things, that a large number of its witnesses residing in Idaho a short distance from the county seat of the county to which it was proposed to have the cause removed, would attend the trial but would decline to attend if held in the county in which the action was brought some 340 miles distant, etc., no affidavits being filed in opposition; irrespective of company's showing in support of the motion as made, it was entitled to the change of place of

trial, under this section, to the county where the alleged tort was committed. Atkinson v. Bonners Ferry Lumber Co., 74 M 393, 240 P 823 (1925).

Separate Causes of Action: Where the complaint contained two causes of action in tort, in the first of which the county in which the tort was committed was stated, while in the second it was not, a change of venue was properly granted to the county of defendant's residence on the second cause of action, and the defendant's right to such change could not be abridged by reason of the fact that the first cause of action was properly triable in the county where the action was commenced. Yore v. Murphy, 10 M 304, 25 P 1039 (1890).

Law Review Articles

Venue of Tort Actions: This note compares a Montana case (Love v. Mon-O-Co Oil Corp., 133 M 56, 319 P2d 1056 (1958)) with previous decisions interpreting section 93-2904, R.C.M. 1947 (now codified as 25-2-101 (renumbered 25-2-121), 25-2-102 (renumbered 25-2-122), 25-2-107 (repealed), and 25-2-108 (renumbered 25-2-118), MCA). 20 Mont. L. Rev. 120 (1958).

The Place of Trial of Contract and Tort Actions Under the Montana Statutes, Horkan, 10 Mont. L. Rev. 83 (1949).

Collateral References

Venue *key* 18, et seq.

92A C.J.S. Venue §§19 through 23.

77 Am. Jur. 2d Venue §§25 through 29.

Venue of wrongful-death action. 58 ALR 5th 535.

Place where corporation is doing business for purposes of state venue statute. 42 ALR 5th 221.

Venue of action for slander. 70 ALR 2d 1340.

Venue of action for cutting, destruction, or damage of standing timber or trees. 65 ALR 2d 1268.

Venue of action against nonresident motorist served constructively under statute in that regard. 38 ALR 2d 1198.

Venue of suit to enjoin nuisance. 7 ALR 2d 481.

25-2-123. Real property.

Evidence Commission Recommendations for Revisions

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft [25-2-111 through 25-2-118, 25-2-121, and 25-2-122].

Compiler's Comments

1985 Amendment: At beginning of (1) before "the county", substituted "The proper place of trial for the following actions is" for "Actions for the following causes must be tried in"; at end of lead-in of (1) deleted "subject to the power of the court to change the place of trial as provided in this code"; at beginning of (3) inserted "The proper place of trial for"; and made minor changes in phraseology.

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Case Notes

One-Action Rule Not Violated by Separate Foreclosure Suits:

The District Court order granting summary judgment in Flathead County on a promissory note after the bank had already obtained judgment in Gallatin County on the same promissory note was not an additional judgment but an integrated proceeding allowing foreclosure of the Flathead property. Jones v. First Sec. Bank of Bozeman, 249 M 221, 814 P2d 988, 48 St. Rep. 653 (1991).

The bank brought two separate actions in two different counties to foreclose on separate parcels of property, both of which secured the defendant's promissory note which was in default. The Supreme Court ruled that the bank was not violating the one-action rule because the two actions were filed simultaneously, incorporating each other by reference, and therefore were not an attempt to circumvent the one-action rule. First Sec. Bank v. Jones, 243 M 301, 794 P2d 679, 47 St. Rep. 1238 (1990).

Determining Venue for Ancillary Claims: The lower court allowed a third party, seeking to foreclose on real property, to intervene in an action between the plaintiff and the defendant. The plaintiff moved for a change of venue to the county in which the property was located. The Supreme Court affirmed the lower court's refusal to change venue on the basis that the intervenor's claims were only ancillary to the original suit and therefore were not determinative

as to venue. Whitefish Credit Union Ass'n, Inc. v. Glacier Wilderness Ranch, Inc., 242 M 471, 791 P2d 1363, 47 St. Rep. 892 (1990).

Proper Venue for Interpleader Complaint and Cross-Claim in Real Property Transaction: The proper venue for an interpleader complaint requesting the resolution of conflicting demands made upon an escrow agent holding documents for a contract for deed as well as for an action seeking to affect repossession, foreclosure, or forfeiture of an interest in real property when the escrow documents were held in a county different from that in which the property was located was determined under 25-2-123 to be the county in which the property is located. St. Bank of Townsend v. Worline, 227 M 315, 738 P2d 1295, 44 St. Rep. 1112 (1987).

Real Property Partition — Change of Venue — Jurisdiction: Appellants contention that 25-2-103 (renumbered 25-2-123) requires that a hearing on partition of property be had only in the county where the property is located is without merit. This statute is a venue statute, not a statute establishing or restricting jurisdiction. Any District Court in the state has jurisdiction over a civil cause of action such as a property partition. Miller v. Miller, 189 M 356, 616 P2d 313, 37 St. Rep. 1523 (1980).

Real Property Partition — When Change of Venue Required: Sections 25-2-103 (renumbered 25-2-123) and 25-2-201 are in pari materia and must be read together, and under 25-2-201, in the absence of a motion for a change of venue, an action may be brought in any county of the state and may be tried where brought. Miller v. Miller, 189 M 356, 616 P2d 313, 37 St. Rep. 1523 (1980).

Change of Venue in Class Action for Property Damage — Multiple Causes of Action: In their complaint for a class action, all plaintiffs alleged real property damage. Section 25-2-103 (renumbered 25-2-123) sets venue for actions for injury to real property "in the county in which the subject of the action . . . is situated . . .". The "subject of the action" in this case would appear to be located in Lake County as to the Lake County plaintiffs and properly triable there. The Supreme Court has determined that if a complaint contains more than one cause of action and a defendant is entitled to a change of venue in one of those actions, the motion for a change of venue must be granted. This is so despite the fact that the other causes of action are properly triable where the action was commenced. Thus, where venue as to the real property damage claim against Dow Chemical Co. is properly in Lake County, venue as to all claims against Dow should be moved to Lake County. State ex rel. Kesterson v. District Court, 189 M 20, 614 P2d 1050 (1980).

"Subject of Action" Defined: The phrase "subject of the action" as used in subsection (1) is not synonymous with the term "cause of action" nor with the term "object of the action". Subject of the action denotes the plaintiff's principal primary right to enforce or maintain that for which the action is brought and does not denote the specific thing in regard to which the legal controversy is carried on. Fraser v. Clark, 128 M 160, 273 P2d 105 (1954).

Application to Equity Proceedings: While the code sections relating to venue and change of venue refer only to "actions" which technically speaking may be said to apply only to actions at law, the term includes "suits" embracing both law actions and suits in equity. McKinney v. Mires, 95 M 191, 26 P2d 169 (1933).

Application to Proceedings to Adjudicate Water Rights:

An action to ascertain, determine, and decree the extent and priority to the use of water partakes of the nature of an action to quiet title to real property. Whitcomb v. Murphy, 94 M 562, 23 P2d 980 (1933).

In an action to adjudicate water rights on a main river and its tributaries, the District Court of a county in which plaintiffs' lands lay and through which the main river flowed had jurisdiction to adjudicate the rights to waters of a tributary flowing entirely within another county, under Art. VIII, sec. 11, 1889 Mont. Const. (now Art. VIII, sec. 4, 1972 Mont. Const.), and this section, and the above rule. Whitcomb v. Murphy, 94 M 562, 23 P2d 980 (1933), distinguished in State ex rel. McKnight v. District Court, 111 M 520, 111 P2d 292 (1941).

Proceedings to condemn water appropriated for irrigation purposes may be brought and tried in the court in which the land is situated, though the water is to be taken in another county. Helena v. Rogan, 26 M 452, 68 P 798 (1902).

Application to Specific Performance Actions: This section has no application to an action to enforce the specific performance of a contract for the conveyance of real estate. Silver Camp Min. Co. v. Dickert, 31 M 488, 78 P 967 (1904).

Constitutionality: Part of this section (formerly section 93-2901, R.C.M. 1947) does not contravene Art. VIII, sec. 11, 1889 Mont. Const. Bookwalter v. Conrad, 15 M 464, 39 P 573 (1895).

Law Review Articles

A Primer on the Developing Doctrine of Constructive Fraud in Montana, Monhart, 52 Mont. L. Rev. 153 (1991). See footnote 167 on p. 172.

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).

Collateral References

Venue *key* 5, et seq.

92A C.J.S. Venue §§24 through 44.

77 Am. Jur. 2d Venue §§18 through 24.

Venue of action for rescission or cancellation of contract relating to interests in land. 77 ALR 2d 1014.

Venue of action for unauthorized geophysical or seismograph exploration or survey. 67 ALR 2d 450.

Venue of action for cutting, destruction, or damage of standing timber or trees. 65 ALR 2d 1268.

Venue of action to set aside as fraudulent conveyance of real property. 37 ALR 2d 568.

Lien as estate or interest in land within venue statute. 2 ALR 2d 1261.

25-2-124. Recovery of statutory penalty or forfeiture.

Evidence Commission Recommendations for Revisions

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft [25-2-111 through 25-2-118, 25-2-121, and 25-2-122].

Compiler's Comments

1985 Amendment: At beginning substituted "The proper place of trial" for "Actions"; near middle of section, after "some part thereof arose," deleted "subject to the power of the court to change the place of trial"; and made minor changes in phraseology.

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Case Notes

Penalty for Failure to Repair Partition Fence: Where defendant, a landowner on land adjoining plaintiff's, refused to help rebuild a partition fence between the parties' property when plaintiff requested him to do so under 70-16-209, plaintiff's action under that section and 25-2-104 (renumbered 25-2-124) to recover the costs of construction of the fence was an action to recover a "penalty" within the meaning of 25-2-104 (renumbered 25-2-124) and must therefore be tried in the county where the cause of action arose. Hidden Hollow Ranch v. Collins, 146 M 321, 406 P2d 365 (1965).

Collateral References

Venue *key* 9, 11.

92A C.J.S. Venue §§49, 50.

25-2-125. Against public officers or their agents.

Evidence Commission Recommendations for Revisions

Explanation: Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft [25-2-111 through 25-2-118, 25-2-121, and 25-2-122].

Compiler's Comments

1985 Amendment: At beginning substituted "The proper place of trial for an action" for "Actions"; at end deleted "subject to the power of the court to change the place of trial"; and made minor changes in phraseology.

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Case Notes

Place Where Effect of Decision to Award Contract Felt to Be Considered in Determining Where Cause of Action Arose: In determining proper venue in a contract case, it is not only the place where the decision to award the contract was made but also the place where the effect of the decision is felt that must be considered in determining where the cause of action arose. I.S.C. Distrib., Inc. v. Trevor, 259 M 460, 856 P2d 977, 50 St. Rep. 880 (1993).

Proper Venue in Dispute Between Counties: In a change of venue dispute between Missoula County and Lake County Commissioners regarding payment of District Court expenses by

Missoula County for transcripts and judicial decisions in cases filed in Lake County when both counties were part of the same judicial district: (1) Lake County argued that under 25-2-126, Missoula County was excluded as a proper place for trial; while (2) Missoula County argued that under 25-2-125, Missoula County was a proper place for trial and that therefore Lake County could not change venue. The Supreme Court found that 25-2-125 supported Lake County as the proper venue, but it further held that there were grounds for a reasonable person to believe that, considering the nature of the controversy and the parties involved, a fair trial could not be had in either county. Therefore, under 25-2-201, the District Court was directed to enter an order changing venue to Lewis and Clark County. Missoula County v. Hutchin, 223 M 55, 724 P2d 183, 43 St. Rep. 1527 (1986).

No Change of Venue — County and Public Officials: Plaintiff Weiss was severely injured in a one-car accident in Glacier County. A complaint was filed in Gallatin County, Weiss' place of residence. Codefendants, Glacier County and Glacier County Commissioners, filed a motion for a change of venue from Gallatin to Glacier County, asserting that 25-2-125 and 25-2-126 require an action against a county or its Commissioners to be brought in the county of the alleged tort. The District Judge denied the motion, reasoning that venue was proper as to the state defendants, therefore venue was proper as to all defendants. On appeal, the Supreme Court agreed with the plaintiffs' assertion that 25-2-117, enacted in 1985, rather than 25-2-125 and 25-2-126, was controlling. The court held that 25-2-117 was intended to apply to all venue provisions, including the provisions relating to suits against counties and public officials, and that denial of a change of venue was consistent with the provision of 25-2-117 which states that an action may be brought in any county where venue is proper and other defendants joined, though venue otherwise would not lie against those defendants. Weiss v. St., 219 M 447, 712 P2d 1315, 43 St. Rep. 82 (1986).

Venue — Nature of Action and Place Where It Arose: Plaintiff, a regional supervisor for defendant in Missoula, was notified that he was to be demoted. Plaintiff filed an application for an appropriate writ. Defendant moved to change venue to Helena, which was granted. The venue issue was appealed. In this action both the Department of Fish, Wildlife, and Parks and the director were named defendants. Both 2-9-312 (renumbered as part of 25-2-126) and 25-2-105 (renumbered 25-2-125) are applicable and must be harmonized, as both Missoula County and Lewis and Clark County were proper for venue. The court considered the nature of the action and the place where it arose. Because the challenged state action concerned and would affect a person and a position in Missoula, the court found that Missoula County was the proper county of venue. Ford v. Dept. of Fish, Wildlife, & Parks, 208 M 132, 676 P2d 207, 41 St. Rep. 220 (1984).

Mandamus — Venue: Plaintiffs brought an action seeking mandamus to compel the Department of State Lands (functions now transferred to Department of Natural Resources and Conservation) and Department of Health and Environmental Sciences (now Department of Environmental Quality) to review their granting of permits to ASARCO, Inc. for a mining operation in Lincoln County. ASARCO moved to change venue from Lewis and Clark to Lincoln County. The motion was denied and this appeal followed. ASARCO claims that venue lies in the county in which the alleged harm is threatened, the harm being caused by physical alteration of the land and not by actions of public agencies wherever they may be situated. Plaintiffs contend that when an action is one for the mandamus, proper venue lies in the county where the public official or agency resides. The Supreme Court concluded that the wrongful acts, issuance of an operating permit by the Department's refusal to require pollution discharge permits, occurred in Lewis and Clark County, and therefore venue was proper there. Cabinet Resource Group v. Dept. of St. Lands, 189 M 349, 616 P2d 310, 37 St. Rep. 1493 (1980).

Venue of Appeal of Decision of Board: Under 50-5-306 (now repealed), which provided for an appeal of a decision of the Board of Health and Environmental Sciences (now abolished) regarding a certificate of need for a health care facility, venue was determined by the Montana Administrative Procedure Act, and the District Court properly determined that venue should remain in Lewis and Clark County. Mont. Health Systems Agency, Inc. v. Bd. of Health & Environmental Sciences, 188 M 188, 612 P2d 1275 (1980).

Determining Venue in Action on P.S.C. Order: In an action on an order entered by the Montana Public Service Commission, it is not the mere making of the order but the place where it is put into operation that determines where the cause of action arises. St. v. Dept. of Public Service Regulation, 181 M 225, 593 P2d 34 (1979).

Action in Mandamus: Petitioner (a County Assessor) contended that an alleged wrong occurred in Silver Bow County where he began receiving paychecks for less than the claimed amount. However, respondent's (Director of Department of Revenue) motion for a change of venue was erroneously denied since the alleged neglectful or intentional failure to pay the full

amount of wages due petitioner occurred in Lewis and Clark County, the county where the public official officially resides. McGrath v. Dore, 177 M 179, 580 P2d 1385 (1978).

Action to Recover Taxes: In an action to recover taxes paid under protest, venue existed in the county where the taxpayer was located, audit conducted, additional tax assessment paid, and protest fund maintained. Roundup Nat'l Bank v. Dept. of Revenue, 175 M 133, 572 P2d 910 (1977).

Human Rights Commission: The cause of action for infringement of the right against self-incrimination by defendants' exercise of investigative powers under the antidiscrimination law arose in Gallatin County because the method of investigation there was at issue rather than the statutory power of the defendants to investigate. Thus, venue properly existed where the cause of action arose. School District v. Human Rights Comm'n, 173 M 113, 566 P2d 799 (1977).

Board of Plumbers: In a declaratory judgment action brought by private litigants in their county of residence against the Board of Plumbers, the operation or effect of the Board's action was challenged in the plaintiffs' county only, and the plaintiffs' county was held to be the proper place of trial. Billings Assoc. Plumbing v. Emerson, 172 M 369, 563 P2d 1123 (1977).

Injunctions — Venue — State Agency Involvement: Notwithstanding the fact that a state agency headquartered in Helena was involved as a defendant, when an injunction was aimed at stopping irreparable harm in another county, venue was proper in the latter county. Guthrie v. Dept. of Health & Environmental Sciences, 172 M 142, 561 P2d 913 (1977).

Mandamus — Failure to Set Hearing: A mandamus action to compel the Division of Workers' Compensation to set a hearing lies in Lewis and Clark County, the location of the Division's offices and the place where the official duty arises. Lunt v. Div. of Workers' Compensation, 167 M 251, 537 P2d 1080 (1975).

State Agency as Officer: The Division of Workers' Compensation is a "public officer" within the meaning of this section. Lunt v. Div. of Workers' Compensation, 167 M 251, 537 P2d 1080 (1975).

Governor: Complaint that Governor's executive order establishing multi-county planning districts was inconsistent with legislative resolution stated a cause of action arising in the county of the Governor's official residence, and venue should have been changed to Lewis and Clark County. Guildroy v. Anderson, 159 M 325, 497 P2d 688 (1972).

Tax Regulations: Proceeding for Writ of Prohibition to restrain Board of Equalization from enforcing amendments to regulations relating to corporation license tax allegedly due on patronage dividends of farm cooperatives should have been brought in the First Judicial District under this section and 15-31-505. State ex rel. Fulton v. District Court, 139 M 573, 366 P2d 435 (1961).

Cause of Action Defined: The word "cause" has a variety of meanings, but in connection with the case at bar for false imprisonment, it can mean only "cause of action". "Action" is defined by 27-1-102 as a proceeding for "redress or prevention of wrong", and "cause of action" has repeatedly been defined by this court as "the right which a party has to institute a judicial proceeding". Bergin v. Temple, 111 M 539, 111 P2d 286 (1941).

Sheriff:

Within the meaning of this section the word "cause" means cause of action, the latter term embracing the right which a party has to institute a judicial proceeding. A cause of action "arises" when it originates, comes into being or becomes operative when the act is done or not done; the time determines the place. In an action for false imprisonment against a Sheriff, based on unlawful arrest, the cause of action arose when and where the arrest was made, irrespective of the Sheriff's taking the party across the line of a neighboring county a short distance on their way to the county seat. Bergin v. Temple, 111 M 539, 111 P2d 286 (1941).

Where a Sheriff made an arrest in a county other than his own without a warrant, there placing plaintiff in jail several hours and thereafter transported him to his own county and detained him in jail there for some 12 days, at least a portion of several causes of action stated in the complaint against the officer and his sureties for false arrest and imprisonment arose in the county in which the plaintiff was arrested, and therefore his action was properly triable there. Enos v. Am. Sur. Co., 95 M 588, 28 P2d 197 (1933), distinguished in Bergin v. Temple, 111 M 539, 111 P2d 286 (1941).

Under this section, a Sheriff sued in his official capacity is entitled to have the case tried in the county of which he is such officer. State ex rel. Davis v. District Court, 72 M 56, 231 P 395 (1924), distinguished in Enos v. Am. Sur. Co., 95 M 588, 28 P2d 197 (1933).

Warden of Penitentiary: An action against the Warden of the state penitentiary, for tortious acts alleged to have been committed by him in the exercise of his authority as a public officer, is properly triable in the county where such acts were done. If the plaintiff selects another place of

trial, the defendant has no absolute right to have it changed to the county where such acts were committed. State ex rel. Stephens v. District Court, 43 M 571, 118 P 268 (1911).

Collateral References

Venue *key* 9, 11.

92A C.J.S. Venue §§51 through 55.

Venue of actions or proceedings against public officers. 48 ALR 2d 423.

25-2-126. Against state and political subdivisions.

Evidence Commission Recommendations for Revisions

Explanation: [Subsection (2)] Amended only to conform with terminology and principles set forth in sections 1 through 10 of the draft [25-2-111 through 25-2-118, 25-2-121, and 25-2-122].

[Subsections (1) and (3)] Amended to conform to the rest of the bill in terminology for inclusion into Title 25, chapter 2, part 1. Section was originally enacted relating to sovereign immunity actions, but the Commission believes it should properly be moved to general venue provisions.

Compiler's Comments

1999 Amendment: Chapter 128 deleted former (2) that read: "(2) The proper place of trial for an action against a county is that county unless such action is brought by a county, in which case any county not a party thereto is also a proper place of trial"; and made minor changes in style. Amendment effective October 1, 1999.

Preamble: The preamble attached to Ch. 128, L. 1999, provided: "WHEREAS, in Wentz v. Montana Power Co., 280 Mont. 14, 928 P.2d 237, 53 St. Rep. 1277 (1996), the Montana Supreme Court held that section 25-2-126(2), MCA, is superseded by section 25-2-126(3), MCA."

1985 Amendment: In (1), at beginning substituted "The proper place of trial for an action against the state is" for "Actions against the state shall be brought", near middle substituted "claim" for "cause of action", rearranged language of former last sentence that read "In addition, a resident of the state may bring an action in the county of his residence"; in (2), at beginning inserted "The proper place of trial for", substituted "is that county" for "may be commenced and tried in such county", after "in which case", deleted "it may be commenced and tried in", at end inserted "is also a proper place of trial"; at beginning of (3) substituted "The proper place of trial for an action" for "Actions" and substituted "claim" for "cause of action"; and made minor changes in phraseology.

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Case Notes

Venue in Matter Involving Multiple Defendants — Plaintiff's Venue Alternatives Properly Exercised: Plaintiff's husband was killed in an accident at the city bus barn in Lewis and Clark County in Helena. Plaintiff filed a survivorship/wrongful death action in Silver Bow County against defendant city in Lewis and Clark County and against defendant gas company with its principal place of business in Silver Bow County. The city moved for a change of venue to Lewis and Clark County, but the motion was denied. On appeal, the city argued that because Gabriel v. School District No. 4, 264 M 177, 870 P2d 1351 (1994), and Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996), established that the proper venue for trial of a combined survivorship/wrongful death action is either the county where the survivorship action arose or the county where the wrongful death claim arose and that neither claim in this case arose in Silver Bow County, Silver Bow County was not a proper venue. Plaintiff contended that under 25-2-117, when there are multiple defendants, a proper place for trial of any defendant is proper for all defendants. The Supreme Court agreed with plaintiff. Although Gabriel and Wentz approved counties where survivorship or wrongful death actions arose as proper venues, neither case established those counties as exclusive venues for survivorship/wrongful death actions. In cases with multiple defendants pursuant to 25-2-117, including defendants that are both political subdivisions and private entities, this section, which provides venue for actions against political subdivisions, does not prevail over 25-2-122, which provides venue for tort actions, but rather provides alternative venue options to a plaintiff. The plaintiff properly exercised a venue option here, and denial of the change of venue motion was affirmed. Meyer v. Mont. Power Co., LLC, 2005 MT 66, 326 M 283, 109 P3d 269 (2005), distinguishing Whalen v. Mont. Right to Life Ass'n, 2002 MT 328, 313 M 204, 60 P3d 972 (2002).

News Coverage of Trial Not Considered Inflammatory — Change of Venue Properly Denied: The first trial in this case resulted in a jury verdict for plaintiff, but the then-presiding judge

ordered a new trial after concluding that the initial verdict had been tainted by the jury's exposure to media publicity. The replacement judge denied plaintiff's motion for a change of venue on retrial, and plaintiff appealed. A party seeking a change of venue on grounds of prejudicial pretrial publicity must prove that the publicity was inflammatory and inflamed the prejudice of the community to the extent that a reasonable possibility existed that the party would not receive a fair trial. Here, plaintiff conceded that the media coverage had been balanced and factual, rather than biased or inflammatory. News accounts containing factual reports of court filings or events that are devoid of editorializing do not rise to the level of inflammatory publicity, even when the reports contain information unfavorable to the party seeking the change of venue. Plaintiff's speculative attempt to create the appearance of impropriety on the basis of balanced and factual publicity did not amount to a showing of prejudice, so denial of the motion for change of venue was not an abuse of discretion. LaTray v. Havre, 2000 MT 119, 299 M 449, 999 P2d 1010, 57 St. Rep. 497 (2000). See also St. v. Fuhrmann, 278 M 396, 925 P2d 1162 (1996).

Wrongful Death Action — County May Be Sued in Another County: Plaintiff's husband suffered a heart attack in Rosebud County and later died in Yellowstone County. Plaintiff sued in Yellowstone County. Rosebud County and other defendants moved to change venue. The District Court refused, and the Supreme Court affirmed. The location where death occurs is determinative for venue purposes of where the tort of wrongful death arises. Subsection (2) of this section (now deleted, see 1999 amendment) is superseded by subsection (3). Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237, 53 St. Rep. 1277 (1996).

Proper Venue for Wrongful Death Action: As set out in Carroll v. W.R. Grace & Co., 252 M 485, 830 P2d 1253 (1992), because death is a necessary element in a wrongful death action, a wrongful death action accrues at the time of the death rather than on the date of injury, for statute of limitations purposes. The corollary to Carroll is that for purposes of determining venue under this section, a wrongful death claim arises where the death occurs. Gabriel v. School District No. 4, 264 M 177, 870 P2d 1351, 51 St. Rep. 217 (1994), followed in Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237, 53 St. Rep. 1277 (1996). However, see Meyer v. Mont. Power Co., LLC, 2005 MT 66, 326 M 283, 109 P3d 269 (2005), in which it was held that in cases with multiple defendants, neither Gabriel nor Meyer establish those counties where survivorship or wrongful death actions arose as exclusive venues for survivorship/wrongful death actions.

University as "State" and Not "Political Subdivision" for Purposes of Venue: Minervino filed an action in Cascade County against the University of Montana (now University of Montana-Missoula), claiming that because the University is a political subdivision under subsection (3) of this section, the University campus in Great Falls established proper venue in Cascade County. The Supreme Court traced the legislative history of this section and concluded that because it was once codified as part of Title 2, ch. 9, the definition of "state" in 2-9-101 applied. Because the University is part of the state under subsection (1) of this section, venue was not proper in Cascade County because Minervino did not claim she was a resident there nor did the claim arise there. Minervino v. Univ. of Mont., 258 M 493, 853 P2d 1242, 50 St. Rep. 629 (1993).

Venue in Action in Which State Is Defendant: Although the general rule, as stated in 25-2-118, is that the proper place for trial of a civil action is the county in which the defendant resides, an exception in this section applies to situations in which the state is a defendant. Under the plain meaning of the exception, the county of plaintiff's residence is a proper venue in a civil suit naming the state as defendant. As noted in Petersen v. Tucker, 228 M 393, 742 P2d 483, 44 St. Rep. 1625 (1987), the purpose of this section is to afford citizens a practical and inexpensive forum for suits against the state, and this section is to be liberally construed in favor of private litigants. Kendall v. St., 231 M 316, 752 P2d 1091, 45 St. Rep. 646 (1988), followed in Topco, Inc. v. St., 275 M 352, 912 P2d 805, 53 St. Rep. 175 (1996).

Action Filed in Proper County — Motion to Remove to Another Proper County Properly Denied: Once an action has been filed in a proper county, the District Court cannot grant a motion to have it removed to another county of proper venue. Petersen v. Tucker, 228 M 393, 742 P2d 483, 44 St. Rep. 1625 (1987), followed in Gabriel v. School District No. 4, 264 M 177, 870 P2d 1351, 51 St. Rep. 217 (1994), and Topco, Inc. v. St., 275 M 352, 912 P2d 805, 53 St. Rep. 175 (1996).

Venue When Student Lives in One County but Attends School by Bus in Another: A student lived in Missoula County but was bused to school in Lake County where an accident occurred during a school-sponsored event and where the supervisor lived. The District Court properly determined venue to be in Lake County since limited contact with Missoula County for a bus route did not make it a county in which a school district, primarily located and operated in Lake County, could be sued. The Supreme Court declined to address whether a school district is

properly labeled a "political subdivision" and therefore did not apply 25-2-126 to the question of venue. Mapston v. Joint School District, 227 M 521, 740 P2d 676, 44 St. Rep. 1281 (1987).

Proper Venue in Dispute Between Counties: In a change of venue dispute between Missoula County and Lake County Commissioners regarding payment of District Court expenses by Missoula County for transcripts and judicial decisions in cases filed in Lake County when both counties were part of the same judicial district: (1) Lake County argued that under 25-2-126, Missoula County was excluded as a proper place for trial; while (2) Missoula County argued that under 25-2-125, Missoula County was a proper place for trial and that therefore Lake County could not change venue. The Supreme Court found that 25-2-125 supported Lake County as the proper venue, but it further held that there were grounds for a reasonable person to believe that, considering the nature of the controversy and the parties involved, a fair trial could not be had in either county. Therefore, under 25-2-201, the District Court was directed to enter an order changing venue to Lewis and Clark County. Missoula County v. Hutchin, 223 M 55, 724 P2d 183, 43 St. Rep. 1527 (1986).

No Change of Venue — County and Public Officials: Plaintiff Weiss was severely injured in a one-car accident in Glacier County. A complaint was filed in Gallatin County, Weiss' place of residence. Codefendants, Glacier County and Glacier County Commissioners, filed a motion for a change of venue from Gallatin to Glacier County, asserting that 25-2-125 and 25-2-126 require an action against a county or its Commissioners to be brought in the county of the alleged tort. The District Judge denied the motion, reasoning that venue was proper as to the state defendants, therefore venue was proper as to all defendants. On appeal, the Supreme Court agreed with the plaintiffs' assertion that 25-2-117, enacted in 1985, rather than 25-2-125 and 25-2-126, was controlling. The court held that 25-2-117 was intended to apply to all venue provisions, including the provisions relating to suits against counties and public officials, and that denial of a change of venue was consistent with the provision of 25-2-117 which states that an action may be brought in any county where venue is proper and other defendants joined, though venue otherwise would not lie against those defendants. Weiss v. St., 219 M 447, 712 P2d 1315, 43 St. Rep. 82 (1986).

Action Against County — Former Law: Plaintiff was mistakenly arrested in Lincoln County pursuant to a Flathead County arrest warrant. He brought an action for wrongful arrest in Lincoln County. The Supreme Court held, under former 2-9-312(2) (renumbered 25-2-126(3)), that venue was proper in either county and affirmed the District Court's order denying Flathead County's request for a change of venue. Spencer v. Flathead County, 212 M 399, 687 P2d 1390, 41 St. Rep. 1823 (1984), followed in Gabriel v. School District No. 4, 264 M 177, 870 P2d 1351, 51 St. Rep. 217 (1994). See also Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237, 53 St. Rep. 1277 (1996).

Venue — Action Against Multiple Counties: In 1981, Silver Bow County erroneously reissued the registration number of plaintiff's vehicle to another automobile. The automobile was subsequently reported stolen. The vehicle was recovered but not shown as such on county records. Defendant, a Jefferson County Deputy Sheriff, saw plaintiff's vehicle and requested status information. The vehicle was shown as stolen. Plaintiff was arrested and later released upon discovery of the error. Plaintiff brought suit against both Silver Bow and Jefferson Counties in Silver Bow District Court seeking damages on several grounds. Jefferson County moved for a change of venue, which was denied. The Supreme Court found that if the provisions of the venue statutes and the Rules of Civil Procedure were applied strictly, plaintiff would be placed in an impossible situation whereby both counties were indispensable parties and either could object to venue and be entitled to a change or dismissal. The court, relying on State ex rel. Mont. Deaconess Hosp. v. Park County, 142 M 26, 381 P2d 297 (1963), affirmed the refusal to grant a change of venue because both counties were necessary parties and because venue was proper at least as to Silver Bow County. Hutchinson v. Moran, 207 M 330, 673 P2d 818, 40 St. Rep. 2081 (1983).

Change of Venue for Tort Class Action — Multiple Defendants: Plaintiffs brought a class action suit against Dow Chemical Co., Lake County, and Missoula County. The complaint did not allege that either Missoula County or Lake County was the exclusive cause of one injury. Rather, the pleadings indicated that the plaintiffs could have been damaged by the actions of either or both counties acting separately. In such a situation both counties are not necessary parties to one action, and the counties should be sued where they are located. The suit would be properly filed in Lake County for the tort allegedly committed against the Lake County plaintiffs. Dow Chemical Co. is entitled to a change of venue as to the claims filed by the Lake County plaintiffs. State ex rel. Kesterson v. District Court, 189 M 20, 614 P2d 1050 (1980).

Judicial Review: Appeal for judicial review of an administrative decision of the County Welfare Board does not constitute an action against the county, and such appeal is properly brought in the county where the plaintiff resides. State ex rel. Hendrickson v. Gallatin County, 165 M 135, 526 P2d 354 (1974).

Action by County Against Nonresident: This section does not require a change of venue where a county brings action against a nonresident in the District Court of that county. Carter County v. Cambrian Corp., 143 M 193, 387 P2d 904 (1963).

Joinder of Counties as Defendants: Where two counties are necessary parties defendant, the action may be brought in either and an alternative writ will not issue. State ex rel. Mont. Deaconess Hosp. v. Park County, 142 M 26, 381 P2d 297 (1963).

Authority for Action: The provision that "an action against a county may be commenced" therein (by a litigant other than a county) constitutes a grant of authority to sue, otherwise lacking. The provision must be strictly construed, and if an action be brought in a county other than the one sued, the District Court thereof is without jurisdiction to try it. Good Roads Mach. Co. v. Broadwater Co., 94 M 68, 20 P2d 834 (1933). See Johnson v. Billings, 101 M 462, 54 P2d 579 (1936).

Collateral References

Counties *key* 215.

20 C.J.S. Counties §260.

Venue of wrongful-death action. 58 ALR 5th 535.

Change of venue as justified by fact that large number of inhabitants of local jurisdiction have interest adverse to party to state civil action. 10 ALR 4th 1046.

25-2-131. Specific statutes control.

Evidence Commission Recommendations for Revisions

Explanation: This section is to reaffirm that general venue statutes, even though they are later enactments, are not intended to disturb specific code sections establishing venue. In such cases the specific statute not within Title 25, chapter 2, part 1 is controlling.

Compiler's Comments

Purpose of Recommendations: For an explanation of the circumstances leading to the above Evidence Commission recommendations for revisions, see part compiler's comments under Title 25, ch. 2, part 1.

Part 2
Change of Venue

Part Case Notes

Action Filed in Proper County — Motion to Remove to Another Proper County Properly Denied: Once an action has been filed in a proper county, the District Court cannot grant a motion to have it removed to another county of proper venue. Petersen v. Tucker, 228 M 393, 742 P2d 483, 44 St. Rep. 1625 (1987).

Motion to Change Venue After Default Judgment Entered — Denied as Untimely — Proper Course Suggested: A motion for a change of venue may not be made after judgment has been entered. Thus, in this case defendant's motion to change venue was correctly denied as untimely because a default divorce judgment had been granted. Defendant's proper course of action should have been to move for relief from judgment under Rule 60(b), M.R.Civ.P.; then, if granted, she should attempt to withdraw her initial appearance and request a change of venue. Hoyt v. Hoyt, 208 M 83, 675 P2d 392, 41 St. Rep. 183 (1984).

25-2-201. When change of venue required.

Compiler's Comments

Statute Superseded by Rule: Subsection (4) of section 93-2906, R.C.M. 1947, relating to disqualification of judges, was superseded by Supreme Court rule. The rule is set forth in 3-1-801.

Case Notes

General 161
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GENERAL

Venue Rights of FELA Plaintiff With Tort Claim Against Out-of-State Corporate Defendant: Rule filed an action in Cascade County seeking damages for personal injury arising from Rule's railroad employment in Dawson County, Rule's county of residence. Defendant moved for a change of venue to Dawson County or Yellowstone County, the location of defendant's resident agent. The District Court granted the motion and ordered the case moved to either county, at Rule's option. Rule appealed the change of venue, contending that the District Court erred in applying Montana tort venue statutes to Rule's Federal Employers' Liability Act (FELA) claim and that 25-2-122(2) constituted an unconstitutional arbitrary and capricious limitation on FELA venue practice in Montana. The Supreme Court disagreed. In enacting 25-2-122, the Legislature did not create an exception for FELA claims. The venue options in 25-2-122(2) are sufficient for FELA plaintiffs to meet the concerns in both the federal law and under Montana cases. Because federal law allows states to enact venue laws applicable to FELA actions, there is no legal impediment to treating FELA plaintiffs the same as other plaintiffs with tort claims against out-of-state corporate defendants. Rule failed to establish why application of 25-2-122(2) to FELA cases exceeded legislative discretion in enacting venue statutes and thus failed to meet the burden of proving that the statute is unconstitutional. The change of venue was affirmed. Rule v. Burlington N. & Santa Fe Ry. Co, 2005 MT 6, 325 M 329, 106 P3d 533 (2005), following Miles v. Ill. Cent. RR Co., 315 US 698 (1942). See also Davis v. Union Pac. RR Co., 282 M 233, 937 P2d 27 (1997).

Erroneous Change of Venue for Defendants When Proper Venue Chosen by Plaintiff: Plaintiff filed a tort action in Flathead County where a slip and fall accident occurred. Defendants moved for and were granted a change of venue to Sanders County where one defendant resided. Plaintiff appealed the venue change, and the Supreme Court reversed, noting that a defendant must be granted a change of venue if an action is brought in a county that is not statutorily designated as a proper place for trial, but because Flathead County was the location of the premises where the allegedly tortious act occurred, it was a proper venue, so no motion to change the place of trial on the entire action could be granted. Because plaintiff chose a proper venue, the District Court erred when it granted defendants' venue change. Liang v. Lai, 2004 MT 188, 322 M 199, 94 P3d 759 (2004), following Nelson v. Cenex, Inc., 2004 MT 170, 322 M 54, 97 P3d 1073 (2004). See also Wentz v. Mont. Power Co., 280 M 14, 928 P2d 237 (1996).

Location of Resident Agent of Foreign Corporation Proper Venue in Tort Action: Nelson worked for a Minnesota corporation at a refinery in Yellowstone County. Nelson brought a tort action based on exposure to asbestos during employment, naming as defendants three Minnesota corporations that operated the refinery and two individuals from Yellowstone County who worked as plant managers. Nelson resided in Missoula County, and the corporations' resident agent was located in Lewis and Clark County. Nelson brought the action in Lewis and Clark County. The corporations moved for a change of venue to Yellowstone County, but the motion was denied. On appeal, the Supreme Court affirmed. A defendant may move for a change of venue when an action is not brought in a county that is statutorily designated as a proper place for trial, and the motion must be granted if the county in which the action is filed is not a proper place for trial. If more than one county is proper, the action may be brought in any of those counties and a motion for change of venue may not be granted. The general rule for determining venue is 25-2-118, but there are statutory exceptions to the general rule for specific types of actions. Venue rules for tort actions are in 25-2-122, including venue for tort actions against a foreign corporation, one of which is the county in which the corporation's resident agent is located. Thus, Lewis and Clark County was a proper venue for trial, and the District Court did not err in denying the motion for change of venue. Nelson v. Cenex, Inc., 2004 MT 170, 322 M 54, 97 P3d 1073 (2004), distinguishing Platt v. Sears, 222 M 184, 721 P2d 336 (1986).

Third-Party Defendant Related to District Court Judge — Denial of Motion for Change of Venue When Not Timely Filed: Over a 2 1/2-year period, one of plaintiff's employees forged signatures on more than 100 company checks and money orders, made them payable to herself, and deposited the proceeds in her personal account in a Missoula credit union. Plaintiff ultimately filed an action against the credit union and sought a change of venue from Missoula County on grounds that a fair trial could not be had in that county. The employee was related to one of the District Court judges in the county, although not the same judge that heard the case, but plaintiff nevertheless asserted a conflict of interest because both judges worked in the same courthouse in the same judicial district. The motion for change of venue was denied, and the Supreme Court affirmed. The motion for change of venue was not filed within 20 days of the credit union's answer, as required in Rule 12(b), M.R.Civ.P. (Title 25, ch. 20), so the untimely

motion was properly denied. Yarbro, Ltd. v. Missoula Fed. Credit Union, 2002 MT 152, 310 M 346, 50 P3d 158 (2002).

Burden of Proof on Moving Party Seeking Change of Venue — Error in Shifting Burden of Proof Regarding Residency to Nonmoving Party: Lockhead and Weinstein were involved in an altercation in Missoula. Lockhead subsequently filed a motion in Silver Bow County seeking damages from Weinstein for defamation, negligent and intentional infliction of emotional distress, and malicious prosecution. In the complaint, Lockhead alleged that he resided in Butte. Weinstein then moved for a change of venue to Missoula, contending that Lockhead was actually a resident of Missoula rather than Silver Bow County and that the trial should be moved for the convenience of witnesses and the promotion of justice. At a hearing on the motion, Weinstein submitted an affidavit stating that Silver Bow County homeless shelters, the police department, and the post office had been searched for proof of Lockhead's residency, and none could be found. Lockhead also filed an affidavit stating that he resided in Butte at the time that the complaint was filed and that he had no intention of moving. The District Court concluded that Lockhead had failed to establish that he was a resident of Butte and granted Weinstein's motion for a change of venue. Although a District Court may consider affidavits related to a motion to change venue, the averments of a complaint will be taken as true in considering the motion. As movant, Weinstein bore the burden of proof in support of the motion, but failed to carry the burden of proving that Lockhead did not reside in Butte at the time that the complaint was filed or that Lockhead actually resided elsewhere. Thus, the District Court erred by shifting the burden of proving residency to Lockhead, and the change of venue motion was reversed. Lockhead v. Weinstein, 2001 MT 132, 305 M 438, 28 P3d 1081 (2001).

Standard of Review of Motion for Change of Venue: Whether a county is a proper place for trial is a question of law involving the application of the venue statutes to pleaded facts. Thus, the Supreme Court's review of a District Court's grant or denial of a motion for change of venue is plenary, and the Supreme Court will simply determine whether the motion was legally correct. Lockhead v. Weinstein, 2001 MT 132, 305 M 438, 28 P3d 1081 (2001). See also Sprinkle v. Burton, 280 M 358, 935 P2d 1094 (1996).

FELA Action Not Dismissible on Grounds of Inconvenience — Number of Out-of-State Filings Irrelevant: A District Court may not dismiss a FELA action because it considers itself to be an inconvenient forum and may not change the place of a FELA trial based on the doctrine of forum non conveniens, whether based on common law or as codified in this section. This issue will not henceforth be reexamined on the basis of the number of out-of-state FELA cases filed in Montana. (However, see the 1995 and 1997 amendments to 25-2-122, which restricted this decision.) State ex rel. Burlington N. RR Co. v. District Court, 270 M 146, 891 P2d 493, 52 St. Rep. 118 (1995).

Failure to Transfer Venue for Convenience and Justice Not Subject to Interlocutory Appeal: The Department of Health and Environmental Sciences (now Department of Environmental Quality) brought an action in Lewis and Clark County against Pegasus Gold Corporation (Pegasus) and Zortman Mining, Inc. (ZMI), for numerous violations of the Montana water quality laws at the Zortman and Landusky mines located in Phillips County. Defendant ZMI moved for change of venue under both subsections (1) and (3) of this section. The District Court refused to transfer venue under subsection (1) without discussing the merits of ZMI's claim under subsection (3), and ZMI appealed. The Supreme Court refused to consider the merits of ZMI's claim under subsection (3), holding that the language of Rule 1(b)(2), M.R.App.P. (Title 25, ch. 21), is intended to allow interlocutory appeals only of a District Court's refusal to change venue under subsection (1) of this section. State ex rel. Dept. of Health and Environmental Sciences v. Pegasus Gold Corp., 270 M 32, 889 P2d 1197, 52 St. Rep. 64 (1995).

Venue Properly Based Solely Upon Allegations in Complaint — Affidavits Not Considered — Venue Found Proper for Both Defendants: The Department of Health and Environmental Sciences (now Department of Environmental Quality) brought an action in Lewis and Clark County against Pegasus Gold Corporation (Pegasus) and Zortman Mining, Inc. (ZMI), for numerous violations of the Montana water quality laws at the Zortman and Landusky mines located in Phillips County. The complaint alleged that Pegasus owned or controlled the mines and that both Pegasus and ZMI did business in Lewis and Clark County, making that county a proper place for venue. ZMI moved to change venue to Phillips County, alleging that Pegasus did not own or control ZMI, and attached affidavits of Fletcher and Erickson to support its motion. Citing Petersen v. Tucker, 228 M 393, 742 P2d 483 (1987), the Supreme Court held that the District Court properly relied upon the allegations in the complaint without considering the two affidavits. The Supreme Court held that inasmuch as Pegasus was a named defendant at the time of the complaint and did business in Lewis and Clark County, that county was proper for

venue. The Supreme Court noted that because the motion for change of venue did not refer to or rely upon the Fletcher affidavit, it was properly not considered by the District Court. The Supreme Court also noted that because the Erickson affidavit did not contradict the allegations in the complaint that Pegasus owned or controlled ZMI, the District Court was correct in focusing on the allegations in the complaint. The Supreme Court held that venue was properly found in Lewis and Clark County for both defendants because under the provisions of 25-2-117, a county that is proper venue for one defendant is proper for both. State ex rel. Dept. of Health and Environmental Sciences v. Pegasus Gold Corp., 270 M 32, 889 P2d 1197, 52 St. Rep. 64 (1995).

Venue for Action for Failure to Maintain Workers' Compensation Insurance: Under 39-71-516, an independent cause of action for failure to maintain workers' compensation insurance must be brought in the District Court in the district in which the claimant resides or in which the alleged violation occurs. As established in Melroe v. Doyle, 239 M 524, 781 P2d 1134 (1989), a defendant may not change venue to a different county when a suit may be commenced in more than one county and the plaintiff files in one of the permissible locations. Barthule v. Karman, 268 M 477, 886 P2d 971, 51 St. Rep. 1423 (1994).

Forum Non Conveniens and Right to Change of Venue Inapplicable to FELA Actions: In Federal Employers Liability Act cases, neither the doctrine of forum non conveniens nor the right to change of place of trial is available. (However, see the 1995 and 1997 amendments to 25-2-122, which restricted this decision.) Haug v. Burlington N. RR Co., 236 M 368, 770 P2d 517, 46 St. Rep. 432 (1989).

Filing Proper in County Where Tort Occurred: Parties met in Dawson County and orally agreed that defendant would find, evaluate, and appraise potential mineral investment opportunities for plaintiffs, but there was no agreement on a place of performance of the oral contract. Parties later met in Flathead County, and defendant apprised plaintiffs of the value of mineral interests in eastern Montana and western North Dakota. Plaintiffs purchased the interests for $175,000 but subsequently determined the interests were nearly worthless. Plaintiffs filed a breach of contract and related tort suit in Flathead County. Defendant sought change of venue to Dawson County, his place of residence. Absent a written contract with express terms or an agreement on where the oral contract was to be performed, the District Court correctly determined that any tort resulting from defendant's alleged misrepresentation would have had to occur in Flathead County; therefore, the motion for change of venue was properly denied. Berlin v. Boedecker, 235 M 443, 767 P2d 349, 46 St. Rep. 125 (1989).

Action to Recover Fees for Negotiating Services: Plaintiff alleged breach of contract in a suit to recover fees for negotiating services he rendered for defendants. The court held that under 25-2-121, the appropriate venue was in the county where the contract was to be performed and that under this section, the District Court must make the initial factual determination as to where the contract was performed. The court distinguished Whalen v. Snell, 205 M 299, 667 P2d 436 (1983) (an action to recover attorney fees), as being a bad faith tort claim (rather than a breach of contract claim) for which venue was properly determined under 25-2-102 (since renumbered 25-2-122). Hurly v. Studer, 234 M 100, 761 P2d 821, 45 St. Rep. 1761 (1988).

Importance of Contractual Venue Stipulation — Court Discretion: When faced with a contractual stipulation to venue, the court must place venue in the stipulated county when requested by the parties. A stipulation does not remove the court's discretion to change venue when the convenience of witnesses and the ends of justice require it; however, an agreement to place venue in a particular county is a most important factor for the court to consider. Given the court's wide discretion under subsection (3) of this section, the court's decision will not be disturbed in the absence of clear evidence of abuse of that discretion. Mont. Wholesale Accounts Serv. v. Penington, 233 M 72, 758 P2d 759, 45 St. Rep. 1302 (1988), followed in In re Marriage of Lockman, 266 M 194, 879 P2d 710, 51 St. Rep. 726 (1994).

Proper Venue in Dispute Between Counties: In a change of venue dispute between Missoula County and Lake County Commissioners regarding payment of District Court expenses by Missoula County for transcripts and judicial decisions in cases filed in Lake County when both counties were part of the same judicial district: (1) Lake County argued that under 25-2-126, Missoula County was excluded as a proper place for trial; while (2) Missoula County argued that under 25-2-125, Missoula County was a proper place for trial and that therefore Lake County could not change venue. The Supreme Court found that 25-2-125 supported Lake County as the proper venue, but it further held that there were grounds for a reasonable person to believe that, considering the nature of the controversy and the parties involved, a fair trial could not be had in either county. Therefore, under 25-2-201, the District Court was directed to enter an order changing venue to Lewis and Clark County. Missoula County v. Hutchin, 223 M 55, 724 P2d 183, 43 St. Rep. 1527 (1986).

Venue Properly Removed: In an action sounding in contract and tort, venue properly was removed from the county where business was done by the first defendant, a foreign corporation having no residence for venue purposes, to the county where the plaintiffs and other defendant resided and where the accident occurred. The venue statutes for actions in contract (25-2-121) and in tort (25-2-122) contain exceptions to the basic venue rule; these two statutes control the issue of proper venue. (However, see the 1995 and 1997 amendments to 25-2-122, which limits the place of trial against a foreign corporation.) Platt v. Sears, 222 M 184, 721 P2d 336, 43 St. Rep. 1160 (1986).

Venue — Nature of Action and Place Where It Arose: Plaintiff, a regional supervisor for defendant in Missoula, was notified that he was to be demoted. Plaintiff filed an application for an appropriate writ. Defendant moved to change venue to Helena, which was granted. The venue issue was appealed. In this action both the Department of Fish, Wildlife, and Parks and the director were named defendants. Both 2-9-312 (renumbered as part of 25-2-126) and 25-2-105 (renumbered 25-2-125) are applicable and must be harmonized, as both Missoula County and Lewis and Clark County were proper for venue. The court considered the nature of the action and the place where it arose. Because the challenged state action concerned and would affect a person and a position in Missoula, the court found that Missoula County was the proper county of venue. Ford v. Dept. of Fish, Wildlife, & Parks, 208 M 132, 676 P2d 207, 41 St. Rep. 220 (1984).

Timeliness of Brief in Support of Motion for Change of Venue: In an action for strict liability in tort for personal injuries, defendant filed a motion for change of venue on November 17, 1982, and a brief in support of the motion on November 24, 1982. The motion was denied by the District Court for failure to file a supporting brief within 5 days, the time limit allowed by Rule II of the Uniform Rules for District Courts of Montana. The Supreme Court reversed and remanded the case to District Court, ruling that under Rule 6(a), M.R.Civ.P., three of the days intervening between the time of filing of the motion and the time of filing of the brief are excluded from the calculation of the maximum permissible time, so the filing of the brief was timely. Tanniehill v. Remington Arms Co., 207 M 501, 675 P2d 948, 41 St. Rep. 103 (1984).

Change of Venue — Defendant's Personal Privilege in Main Action: Plaintiff (Novco) brought an action against the Graingers (defendants) on two counts, for payment for automobile parts delivered to Sunset Carburetor and Electric, Inc., and against Harold Grainger individually to collect on a bad check drawn on the account of Sunset Automotive, Inc., upon which Novco alleged Grainger was personally liable. The Graingers defaulted, which default was subsequently set aside, and they filed an answer, a counterclaim, and a third-party complaint. The third-party complaint alleged that Sunset Carburetor and Electric, Inc., was the real party in interest and liable to Novco. Sunset moved for a change of venue, which the District Court denied. The Montana Rules of Civil Procedure do not permit a third-party plaintiff to implead as a third-party defendant a party who is not a party to the original action and who is or may be liable to the original plaintiff. Rule 14(a), M.R.Civ.P., only permits impleader of a party who "is or may be liable" to the third-party plaintiff. The Supreme Court followed the federal court rule and held that the privilege of objecting to venue in the main action is a personal privilege belonging to the defendant in the main action alone and not to a third-party defendant. Novco v. Grainger, 199 M 291, 649 P2d 445, 39 St. Rep. 1367 (1982).

Real Property Partition — When Change of Venue Required: Sections 25-2-103 (renumbered 25-2-123) and 25-2-201 are in pari materia and must be read together, and under 25-2-201, in the absence of a motion for a change of venue, an action may be brought in any county of the state and may be tried where brought. Miller v. Miller, 189 M 356, 616 P2d 313, 37 St. Rep. 1523 (1980).

Venue for Tort Class Action Against Counties: Plaintiffs brought a class action suit against Dow Chemical Co., Lake County, and Missoula County. The complaint did not allege that either Missoula County or Lake County was the exclusive cause of one injury. Rather, the pleadings indicated that the plaintiffs could have been damaged by the actions of either or both counties acting separately. In such a situation both counties are not necessary parties to one action, and the counties should be sued where they are located. The suit would be properly filed in Lake County for the tort allegedly committed against the Lake County plaintiffs. Dow Chemical Co. is entitled to a change of venue as to the claims filed by the Lake County plaintiffs. State ex rel. Kesterson v. District Court, 189 M 20, 614 P2d 1050 (1980).

Venue of Appeal of Decision of Board: Under 50-5-306 (now repealed), which provided for an appeal of a decision of the Board of Health and Environmental Sciences (now abolished) regarding a certificate of need for a health care facility, venue was determined by the Montana Administrative Procedure Act, and the District Court properly determined that venue should

remain in Lewis and Clark County. Mont. Health Systems Agency, Inc. v. Bd. of Health & Environmental Sciences, 188 M 188, 612 P2d 1275 (1980).

Failure to File Tax Return — Change of Venue Denied: Venue of a criminal action charging intentional failure to file a properly completed Montana individual income tax return would lie in either Lewis and Clark County or the county in which defendants reside. But, since the complaint was filed in the former and no legal justification or prejudice was shown to support transfer, the Supreme Court reversed the District Court's change of venue from Lewis and Clark County. Dept. of Revenue v. Lane, 187 M 230, 609 P2d 300 (1980), following St. v. Bretz, 169 M 505, 548 P2d 949 (1976). (The determination of venue in Bretz was reversed in St. v. Bretz, 180 M 307, 590 P2d 614 (1979), because the conviction was reversed on another issue and the court corrected what was then viewed as manifest error on the prior venue decision.)

Change of Venue From One Proper County to Another Based on Residence Denied: Under 17-4-103, Lewis and Clark County was a proper venue for an action to recover funds paid to the defendant by the state and defendant's motion for a change of venue to the county in which the defendant resided was properly denied. The courts are powerless to transfer a cause to another venue, based on the residence of the parties, even though the other venue may also have been proper. The power to change the place of trial based on residence exists only when the county designated in the complaint is not the proper county. St. v. Sec. St. Bank, 184 M 461, 603 P2d 681 (1979).

Time for Motion to Change Venue for Interests of Justice and Witness Convenience: The District Court properly denied as premature a motion for a change of venue on the grounds that the interests of justice and the convenience of witnesses would be best served. Former case law required that the motion may be made only after an answer has been filed, and Rule 12(b)(iii), M.R.Civ.P., preserves that policy. St. v. Sec. St. Bank, 184 M 461, 603 P2d 681 (1979).

Change of Venue for Taxpayer Bias — Motion Not Timely Filed: A motion for a change of venue, based on the allegation that county taxpayers could not be unbiased jurors in a case in which that county was a party because the county taxpayers risked higher taxes if the county lost the case, was denied because the movant did not file the motion within 20 days after the answer or within 20 days after an event affording good cause to believe an impartial trial could not be had. Keith v. Liberty County Hosp. & Nursing Home, 183 M 39, 598 P2d 203 (1979).

County Taxpayers as Jurors — Motion Properly Denied: Where county brought an action for damages done to bridge struck by defendant's truck, it was not an abuse of discretion for the District Court to deny a motion for a change of venue even though the jury was made up, necessarily, of taxpayers of that county, each of whom had a pecuniary interest of $31. Carter County v. Cambrian Corp., 143 M 193, 387 P2d 904 (1963).

Action in Mandamus: Petitioner (a County Assessor) contended that an alleged wrong occurred in Silver Bow County where he began receiving paychecks for less than the claimed amount. However, respondent's (Director of Department of Revenue) motion for a change of venue was erroneously denied since the alleged neglectful or intentional failure to pay the full amount of wages due petitioner occurred in Lewis and Clark County, the county where the public official officially resides. McGrath v. Dore, 177 M 179, 580 P2d 1385 (1978).

Board of Plumbers: In a declaratory judgment action brought by private litigants in their county of residence against the Board of Plumbers, the operation or effect of the Board's action was challenged in the plaintiffs' county only and the plaintiffs' county was held to be the proper place of trial. Billings Assoc. Plumbing v. Emerson, 172 M 369, 563 P2d 1123 (1977).

Injunctions — Venue — State Agency Involvement: Notwithstanding the fact that a state agency headquartered in Helena was involved as a defendant, when an injunction was aimed at stopping irreparable harm in another county, venue is proper in the latter county. Guthrie v. Dept. of Health & Environmental Sciences, 172 M 142, 561 P2d 913 (1977).

Multiple Defendants — Good Faith Belief of Plaintiff as to Residency: Even after dismissal (from a tort action arising outside the state) of the only defendants residing in the county where the action was brought, the remaining defendants were not entitled to have the venue changed to the county of their residence so long as the plaintiff reasonably believed in good faith, when he brought the action, that he had a cause of action against the defendants resident in the county where brought. Boucher v. Steffes, 160 M 482, 503 P2d 659 (1972).

Change of Venue — Multiple Reasons: Under statute providing that on proper motion the court must change place of trial when convenience of witnesses and ends of justice would be promoted and under further statute requiring action to be tried in county in which defendants reside at commencement of action, defendants were entitled to have action moved to county upon which all agreed, which was residence of one defendant, which was place insurance contract was entered into, which was where tort occurred, and which was most convenient for defendants and

their witnesses. Truck Ins. Exch. v. Nat'l Farmers Union Property & Cas. Co., 149 M 387, 427 P2d 50 (1967).

Time for Motion: Court's discretion in granting change of venue under subsection (3) of this section cannot be exercised until after a defendant has answered, so that where action was brought under 25-2-108 (renumbered 25-2-118) in county where codefendant lived, denial of first motion before defendant had answered applied only to the residency requirement of the codefendant and did not bar determination of second motion made under this section after defendant had answered. Putro v. Mannix Elec., Inc., 147 M 314, 412 P2d 410 (1966).

Multiple Causes of Action — Motion Properly Granted: Where the defendant is entitled to a change of venue on one cause of action in a complaint containing more than one cause of action, the motion for change must be granted even though the other cause or causes would be triable where the plaintiff commenced the action. Beavers v. Rankin, 142 M 570, 385 P2d 640 (1963).

Discretion of Court — Motion Properly Denied: An order refusing an application for a change of venue will not be set aside in the absence of an abuse of judicial discretion. Little v. Strobel, 136 M 272, 346 P2d 971 (1959); McGraff v. McGillvray, 135 M 256, 339 P2d 478 (1959); St. v. Spotted Hawk, 22 M 33, 55 P 1026 (1899); In re Davis' Estate, 11 M 1, 27 P 342 (1891); Territory v. Manton, 8 M 95, 19 P 387 (1888); Kennon v. Gilmer, 5 M 257, 5 P 847 (1884), reversed on other grounds in 131 US 22 (1889); Territory v. Corbett, 3 M 50 (1877).

Change of Venue Not a Defense: A motion seeking a change of venue under this section is not a defense within the meaning of 27-1-501. McGraff v. McGillvray, 135 M 256, 342 P2d 736 (1959).

Discretion of Court — Language Not Mandatory: The word "must" as used in this section does not mandatorily require the trial judge to grant the motion as a matter of course. McGraff v. McGillvray, 135 M 256, 339 P2d 478 (1959).

Contract Action — Choice of Venue: Either the county of defendant's residence or the county where the contract was to be performed is the proper county for the trial of the action. If the plaintiff chooses either of those counties, defendant may not have it removed, except that it is still subject to the power of the court to change the place of trial as provided by subsections (2) and (3) of this section. Love v. Mon-O-Co Oil Corp., 133 M 56, 319 P2d 1056 (1958).

Discretion of Court — Language Mandatory:

The provisions of this section are mandatory in the cases covered by subsection (1) and on timely and proper application require the District Court to change the venue. Johnson v. Clark, 131 M 454, 311 P2d 772 (1957).

The provisions of this section are mandatory, and require the District Court to change the venue, but only after a motion has been filed and a showing made as required by the particular subsection of the section under which the change of venue is sought. The court cannot act of its own motion, for while a party may have an absolute right to a change of venue, it is a right that he may waive, and the court is without authority to invoke the statute in his behalf. State ex rel. Gnose v. District Court, 30 M 188, 75 P 1109 (1904).

Time of Determining Cause for Change — Venue Not Affected by Amended Complaint: Right of defendants to a change of place of trial to the proper county depends upon the state of plaintiff's original complaint at the time defendants made their first general appearance, and was not affected by the filing of an amended complaint changing the action from a tort action to one sounding in contract. Johnson v. Clark, 131 M 454, 311 P2d 772 (1957).

Motion Required: Since the District Court can only act upon motion in the matter of changing the place of trial, it is the duty of defendant desiring a change of venue on the ground that the county in which the action was brought was not the county of his residence, under this section, to make a motion to that effect, the demand for such change referred to in section 93-2905, R.C.M. 1947 (now repealed), not supplying the place of such motion. Danielson v. Danielson, 62 M 83, 203 P 506 (1921).

Notice of Motion Not Required: Notice of motion for change of place of trial is not required to be given to the adverse party. State ex rel. Lohman v. District Court, 49 M 247, 141 P 659 (1914); State ex rel. Jenkins v. District Court, 32 M 595, 81 P 351 (1905).

No Application to Contempt Cases: This section does not apply to contempt proceedings. State ex rel. Carleton v. District Court, 33 M 138, 82 P 789 (1905); State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. Harney, 30 M 193, 76 P 10 (1904), distinguished in State ex rel. Nissler v. Donlan, 32 M 256, 80 P 244 (1905).

"Place of Trial" Construed: In the expression "place of trial", as used in statutes of this character, the word "place" primarily means county, and not the immediate place where the trial court sits. In this connection it is equivalent to neighborhood or place of a crime, or a cause of action, or the political division within which a jury must be gathered for the trial, and is synonymous with the word "venue". State ex rel. Sackett v. Thomas, 25 M 226, 64 P 503 (1901).

Proof of Cause for Change Required: The power of courts to grant changes of venue is limited to the exercise of a judicial discretion, on good cause shown, which must consist of facts beyond the mere opinion and conclusions of the party making the affidavits. Kennon v. Gilmer, 5 M 257, 5 P 847 (1884), reversed on other grounds in 131 US 22 (1889). See Territory v. Manton, 8 M 95, 19 P 387 (1888).

CONVENIENCE OF WITNESSES

Failure to Transfer Venue for Convenience and Justice Not Subject to Interlocutory Appeal: The Department of Health and Environmental Sciences (now Department of Environmental Quality) brought an action in Lewis and Clark County against Pegasus Gold Corporation (Pegasus) and Zortman Mining, Inc. (ZMI), for numerous violations of the Montana water quality laws at the Zortman and Landusky mines located in Phillips County. Defendant ZMI moved for change of venue under both subsections (1) and (3) of this section. The District Court refused to transfer venue under subsection (1) without discussing the merits of ZMI's claim under subsection (3), and ZMI appealed. The Supreme Court refused to consider the merits of ZMI's claim under subsection (3), holding that the language of Rule 1(b)(2), M.R.App.P. (Title 25, ch. 21), is intended to allow interlocutory appeals only of a District Court's refusal to change venue under subsection (1) of this section. State ex rel. Dept. of Health and Environmental Sciences v. Pegasus Gold Corp., 270 M 32, 889 P2d 1197, 52 St. Rep. 64 (1995).

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Five Separate Actions Against Defendant: Where affidavit showed that five separate actions had been brought against defendant in four widely separated counties involving the same occurrence, trial court properly granted change of venue for the convenience of the witnesses to the county where accident occurred although affidavit omitted names of witnesses and nature of their testimony. Putro v. Mannix Elec., Inc., 147 M 314, 412 P2d 410 (1966).

Determination Prior to Answer: Until defendant has answered, any action of the court in determining a motion for a change of venue is premature. McNeill v. McNeill, 122 M 413, 205 P2d 510 (1949).

Divorce Action: Where divorce action was not brought in the county of the residence of the defendant and defendant appeared by general demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P. and 25-31-503, now repealed) and demanded that the action be transferred to the county of his residence, it was error for the court to refuse the transfer since the court could not be given such authority to retain jurisdiction in such county prior to the disposition of the demurrer and the answer of defendant. McNeill v. McNeill, 122 M 413, 205 P2d 510 (1949).

Rule Applicable to All Witnesses: Change of venue based upon convenience of witnesses relates to witnesses and the ends of justice generally, and not merely to the convenience of

plaintiff's witnesses and the ends of justice from his point of view. The matter of convenience of witnesses cannot be invoked until after the answer has been filed in the cause since the trial court cannot consider the materiality of the witnesses in question or determine the issues until then. Maio v. Greene, 114 M 481, 137 P2d 670 (1943).

Balanced Evidence: Where application for change of venue was made on the ground of convenience of witnesses, and affidavits on both sides showed the witnesses to be accommodated were about evenly balanced, refusal of the motion was not an abuse of discretion. Where testimony of physicians could be submitted by deposition, inability to leave their practice to testify was not a compelling reason for granting a change. Westergard v. Westergard, 108 M 54, 88 P2d 5 (1939).

Refusal to Change Venue — Testimony by Deposition: Where testimony of liquidating officer of defunct bank was sought for production and identification of documents in his possession, his residence was more than 30 miles distant and out of county and attendance was not then compellable by subpoena, refusal of change of venue was not error since his testimony was obtainable by deposition. Kroehnke v. Gold Creek Min. Co., 100 M 571, 51 P2d 640 (1935).

False Imprisonment — Location of Witnesses: In an action for false imprisonment commenced in a county other than the one in which the tort was alleged to have been committed, the District Court abused its discretion in denying defendant's motion for change of venue asked for on the ground of the convenience of witnesses and the promotion of justice under this section. The motion was made on affidavits showing, among other things, that a large number of its witnesses residing in Idaho a short distance from the county seat of the county to which it was proposed to have the cause removed, would attend the trial, but would decline to attend if held in the county in which the action was brought, some 340 miles distant, etc., no affidavits being filed in opposition. Irrespective of company's showing in support of the motion as made, it was entitled to the change of place of trial, under 25-2-102 (renumbered 25-2-122), to the county where the alleged tort was committed. Atkinson v. Bonners Ferry Lumber Co., 74 M 393, 240 P 823 (1925).

IMPARTIAL TRIAL

News Coverage of Trial Not Considered Inflammatory — Change of Venue Properly Denied: The first trial in this case resulted in a jury verdict for plaintiff, but the then-presiding judge ordered a new trial after concluding that the initial verdict had been tainted by the jury's exposure to media publicity. The replacement judge denied plaintiff's motion for a change of venue on retrial, and plaintiff appealed. A party seeking a change of venue on grounds of prejudicial pretrial publicity must prove that the publicity was inflammatory and inflamed the prejudice of the community to the extent that a reasonable possibility existed that the party would not receive a fair trial. Here, plaintiff conceded that the media coverage had been balanced and factual, rather than biased or inflammatory. News accounts containing factual reports of court filings or events that are devoid of editorializing do not rise to the level of inflammatory publicity, even when the reports contain information unfavorable to the party seeking the change of venue. Plaintiff's speculative attempt to create the appearance of impropriety on the basis of balanced and factual publicity did not amount to a showing of prejudice, so denial of the motion for change of venue was not an abuse of discretion. LaTray v. Havre, 2000 MT 119, 299 M 449, 999 P2d 1010, 57 St. Rep. 497 (2000). See also St. v. Fuhrmann, 278 M 396, 925 P2d 1162 (1996).

Change of Venue Sought on Allegations of Prejudicial Pretrial Publicity — Elements Required to Be Proved: As established in St. v. Moore, 268 M 20, 885 P2d 457 (1994), a defendant who seeks a change of venue on the basis of prejudicial pretrial publicity must prove that the news reports were inflammatory and that the news reports actually inflamed the prejudice of the community to an extent that a reasonable possibility existed that the defendant may not receive a fair trial. In the present case, defendant contended that two inflammatory news articles were prejudicial due to the small number of people in the community where the crime occurred and their close-knit relationships. However, the total circulation of the newspapers that contained the inflammatory publicity was about 109 households in a county of 3,626 people, and only 6 of 78 potential jurors knew about the facts of the case from word or mouth, not the media. Affirming the denial of the venue change, the Supreme Court concluded that even if the news articles were inflammatory, they were not widespread enough in the community to generate a general belief of defendant's guilt throughout the jury pool and that the community as a whole could not have been affected to the extent that a reasonable possibility existed that defendant would not get a fair trial. St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998).

Consideration by Court of Newspaper Articles Not Published Within Twenty Days of Motion to Change Venue: Mannix argued that the lower court erred in considering newspaper editorials

published more than 20 days before the defendants' motion for change of venue. The Supreme Court held that the lower court had not abused its discretion because many of the articles published were editorials rather than news articles as had been the case in its decision in St. v. Pease, 227 M 424, 740 P2d 659 (1987). Mannix v. Butte Water Co., 259 M 79, 854 P2d 834, 50 St. Rep. 691 (1993).

Fair Trial Possible Despite Pretrial Publicity: Defendant was not denied a fair trial by being denied a change of venue in spite of local publicity generated by his trial. The Supreme Court quoted the test set forth in St. v. Holmes, 207 M 176, 674 P2d 1071, 40 St. Rep. 1973 (1983), that when prejudicial pretrial publicity is alleged, the publicity must be inflammatory and create a reasonable apprehension that a fair trial is not possible before the motion will be granted. In this case, the newspaper articles were news reports and did not meet the two prongs of the Holmes test. St. v. Pease, 227 M 424, 740 P2d 659, 44 St. Rep. 1203 (1987), followed in St. v. Sullivan, 266 M 313, 880 P2d 829, 51 St. Rep. 827 (1994), and St. v. Abe, 1998 MT 206, 290 M 393, 965 P2d 882, 55 St. Rep. 876 (1998).

No Finding of Juror Prejudice Due to Pretrial Publicity: The District Court did not err in denying defendant's motion for a change of venue and a motion for an individually sequestered voir dire when the allegations given for the requested change of venue failed to establish any possibility of jury prejudice due to pretrial publicity. The two jurors who heard anything about the case in the newspaper or radio were eliminated by peremptory challenge. Further, an alternate juror who read the articles but was not prejudiced did not sit as a juror in the deliberations. St. v. Hansen, 194 M 197, 633 P2d 1202, 38 St. Rep. 1541 (1981), reversed on fifth amendment grounds in Hansen v. Risley, 40 St. Rep. 2100 (D.C. Mont. 1983) (apparently not reported in Federal Supplement).

Change of Venue for Taxpayer Bias — Timely Motion Not Filed: A motion for a change of venue, based on the allegation that county taxpayers could not be unbiased jurors in a case in which that county was a party because the county taxpayers risked higher taxes if the county lost the case, was denied. The movant did not file the motion within 20 days after the answer or within 20 days after an event affording good cause to believe an impartial trial could not be had. Keith v. Liberty County Hosp. & Nursing Home, 183 M 39, 598 P2d 203 (1979).

Action by School District: In an action by school district against fire insurers for loss of school building the court did not abuse its discretion in denying motion for change of venue on the ground that a fair and impartial trial could not be had in the county because most jurors, of any county jury, would be residents of the school district. School District v. Globe & Republic Ins. Co. of Am., 142 M 220, 383 P2d 482 (1963).

Motion by Executor: An executor, like any other defendant, may have a change of place of trial under this section upon a proper showing that "there is reason to believe that an impartial trial cannot be had". McGraff v. McGillvray, 135 M 256, 342 P2d 736 (1959).

Wrongful Death by Murder: In an action for wrongful death in behalf of the heirs of a deceased murder victim against the estate of the alleged killer, where the facts indicating prejudice on the part of the public were denied and there was no activity indicating any prejudice, the trial court did not abuse its discretion in denying executor's motion for a change of venue. McGraff v. McGillvray, 135 M 256, 342 P2d 736 (1959).

Motion Addressed to Discretion of Court: A motion for change of venue on the ground that the movant cannot have an impartial trial in the county in which the action was brought, is addressed to the sound legal discretion of the District Court and its denial of the motion, though based upon conflicting affidavits, will not be disturbed on appeal unless it clearly appears that the court abused its discretion. Torstenson v. Independent Publishing Co., 86 M 163, 282 P 861 (1929).

WAIVER OF RIGHT TO CHANGE

Waiver of Appeal: Where defendant, after the lower court's denial of his motion for change of venue, appears in court and proceeds to trial, he waives his right to raise the question of the correctness of the court's order on appeal from the judgment against him. Letz v. Lampen, 110 M 477, 104 P2d 4 (1941).

How Waived: A defendant may waive his right to the privilege of a change of venue by omitting to demand the right or by failing to observe the statutory requirements. O'Hanion v. Great N. Ry., 76 M 128, 245 P 518 (1926).

Disqualification of Judge — Suspension of Motion: In the event that a judge is disqualified under section 93-2906(4), R.C.M. 1947 (superseded by Supreme Court rule), a motion is made for a change of venue, and no qualified judge appears within 30 days to try the case, the motion is suspended for that length of time, at the expiration of which the transfer may be demanded, but

the moving party is not bound to demand it; and if he does not, but thereafter has the cause set for hearing, he must be conclusively presumed to have waived the right to have it transferred. Bean v. Missoula Lumber Co., 40 M 31, 104 P 869 (1909).

Motion Required — Court Not to Prevent Waiver: The provisions of this section are mandatory, and require the District Court to change the venue, but only after a motion has been filed and a showing made as required. The court cannot act of its own motion, for while a party may have an absolute right to a change of venue, it is a right that he may waive, and the court is without authority to invoke the statute in his behalf. State ex rel. Gnose v. District Court, 30 M 188, 75 P 1109 (1904).

Collateral References

Venue *key* 33, et seq.

92A C.J.S. Venue §§148 through 222.

77 Am. Jur. 2d Venue §61, et seq.

Waiver of objections to venue of action for rescission or cancellation of contract relating to interests in land. 77 ALR 2d 1035.

Construction and effect of statutory provision for change of venue for promotion of convenience of witnesses and ends of justice. 74 ALR 2d 16.

Waiver of venue of action for specific performance of contract pertaining to real property. 63 ALR 2d 490.

Change of venue of actions or proceedings against public officers. 48 ALR 2d 519.

Waiver of or estoppel as to venue of action to set aside as fraudulent conveyance of real property. 37 ALR 2d 583.

Right of defendant, upon motions made or renewed after plaintiff has closed his case without proving liability on part of codefendant, to change of venue to the county or district which would have been the proper venue but for the joinder of the codefendant. 140 ALR 1287.

Prejudice against officers, stockholders, or employees of corporations as ground for change of venue on application of corporation. 63 ALR 1015.

Power as to withdrawal or modification of order granting change of venue. 59 ALR 362.

25-2-202. Change of venue on agreement of parties.

Case Notes

No Motion to Change Venue for Convenience of Witnesses — No Court Discretion to Deny Stipulation for Change of Venue: This section does not require any additional statutory reason to exist before the trial court is bound to grant a stipulation for change of venue. When there is no motion to change venue based on convenience of witnesses, the court does not have the discretion to deny a stipulation for change of venue. Fjelstad v. St., 277 M 112, 918 P2d 674, 53 St. Rep. 565 (1996), following State ex rel. Bonners Ferry Lumber Co., Ltd. v. District Court, 74 M 338, 240 P 388 (1925), and distinguishing Mont. Wholesale Accounts v. Penington, 233 M 72, 758 P2d 759 (1988).

Stipulation in Contract Allowed: Parties have a right to stipulate in advance where any action arising under a contract may be tried. Elec. Prod. Consol. v. Bodell, 132 M 243, 316 P2d 788 (1957).

Stipulation in Contract — Assignee Bound: Assignee of contract is bound by stipulation as to venue. Elec. Prod. Consol. v. Bodell, 132 M 243, 316 P2d 788 (1957).

Confession of Motion for Change as Stipulation: Confession of a motion for change of venue is tantamount to a stipulation for a change, and under this section where the parties stipulate to that effect, the District Court must order the change to the county agreed upon. State ex rel. Bonners Ferry Lumber Co. v. District Court, 74 M 338, 240 P 388 (1925).

Collateral References

Venue *key* 44.

92A C.J.S. Venue §§150 through 152.

77 Am. Jur. 2d Venue §55.

25-2-203. Papers to be transmitted.

Collateral References

Venue *key* 79.

92A C.J.S. Venue §§290 through 292.

25-2-204. Jurisdiction preserved.

Collateral References

Venue *key* 79.

92A C.J.S. Venue §§284 through 289.

CHAPTER 3
SERVICE OF PROCESS AND OTHER PAPERS

Chapter Law Review Articles

Developing Theories of State Jurisdiction Over Indians: The Dominance of the Preemption Analysis, Lynaugh, 38 Mont. L. Rev. 63 (1977).

Personal Jurisdiction Over Non-Residents and Montana's New Rule 4B, Towe, 24 Mont. L. Rev. 3 (1962).

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Comment on the Case of Haggerty v. Sherburne Mercantile Co., 120 M 386, 186 P2d 884 (1947), Spanglo, 10 Mont. L. Rev. 95 (1949).

Substituted Service on Resident Motorists, McNamer, 1 Mont. L. Rev. 51 (1940).

Part 1
General Provisions

25-3-101. Definitions.

Case Notes

Writ of Supreme Court as Process of Enforcement: The decision of the Supreme Court, i.e., its opinion, on application for a writ under its original jurisdiction constitutes the judgment of the court and the writ itself which is thereafter issued is merely the court process issued for the enforcement thereof. State ex rel. Clark v. District Court, 103 M 145, 61 P2d 836 (1936).

Collateral References

Sheriffs and Constables *key* 87.

80 C.J.S. Sheriffs and Constables §44.

25-3-105. Person serving process — penalty for obstruction.

Compiler's Comments

Effective Date: Section 4, Ch. 69, L. 1997, provided: "[This act] is effective on passage and approval." Approved March 17, 1997.

Part 2
Service by an Officer

25-3-201. Delivery of papers to officer.

Compiler's Comments

1987 Amendment: In (1), near middle of first sentence, and in (3), near beginning, inserted "registered process server".

1981 Amendment: In (2) substituted "If the papers" for "Any writ, order, or other paper for service must be received at any place in the county where a sheriff or a deputy is found, but if papers".

Collateral References

Sheriffs and Constables *key* 28, et seq.

80 C.J.S. Sheriffs and Constables §§44, 56, 215, 218.

70 Am. Jur. 2d Sheriffs, Police, and Constables §§30, 31, 39, 153 through 157.

25-3-202. When officer's execution of process justified and required.

Compiler's Comments

1987 Amendment: Near beginning inserted "registered process server".

Case Notes

Sheriff Protected Against Loss — Process Regular on Face: Where a Sheriff seized oil well piping under a search warrant and subsequently released it by order of the same Justice of the Peace to the custody from which he seized it, incidentally enabling the person who procured the warrant to take it, under claim of ownership, claim and delivery does not lie against Sheriff on theory of wrongful and negligent loss of possession. Conversion does not lie where no facts are alleged that he instigated or assisted in the alleged wrongful taking. Trespass and trespass on the case do not lie unless the injury is "proximate result" of Sheriff's wrongful or negligent acts or defaults. Harri v. Isaac, 111 M 152, 107 P2d 137 (1940).

Protection of Sheriff — Valid Judgment Required: In an action against a Sheriff for the value of personal property sold under execution issued against the property of a third person, the

officer cannot justify under the execution, without proving the existence of a valid judgment. Palmer v. McMaster, 10 M 390, 25 P 1056 (1891); Marcum v. Coleman, 8 M 196, 19 P 394 (1891); Ford v. McMaster, 6 M 240, 11 P 669 (1886).

Collateral References

Sheriffs and Constables *key* 87.
80 C.J.S. Sheriffs and Constables §44.

25-3-203. Prepayment of cost of service.

Compiler's Comments

1987 Amendment: Near beginning and at end inserted "or registered process server".

Collateral References

Corporation *key* 507(12), 668(14); Costs *key* 176; Process *key* 84, et seq.

25-3-204. Officer to exhibit process.

Compiler's Comments

1987 Amendment: Near beginning inserted "or registered process server".

Collateral References

Process *key* 64.
72 C.J.S. Process §§42, 43.

25-3-205. Execution of process when sheriff a party.

Compiler's Comments

1987 Amendment: At end inserted "or a registered process server".

Collateral References

Sheriffs and Constables *key* 80.
80 C.J.S. Sheriffs and Constables §38.
70 Am. Jur. 2d Sheriffs, Police, and Constables §32.

Part 3
Return of Service

25-3-301. Time and manner of return.

Compiler's Comments

2005 Amendment: Chapter 392 in (1) in first sentence before "courts" deleted "district" and in second sentence near middle substituted "within 20 days" for "not more than 15 days"; inserted (3) authorizing sheriff or levying officer to enclose return of summons, process, or order in envelope, postage paid, and deposit it in post office addressed to officer, agent, or attorney sending it in lieu of returning summons, process, or order to clerk of court; and made minor changes in style. Amendment effective October 1, 2005.

1987 Amendment: In (2), near middle, inserted "or a registered process server".

1981 Amendment: In (2) substituted "a notice is" for "notices are", inserted "or was forwarded under 25-3-201" and "his return of"; deleted former subsection (3) relating to return by mail.

Case Notes

Delay in Filing Return — No Loss of Jurisdiction: The court does not lose jurisdiction over a defendant who has been properly served by the failure of the Sheriff to make the return within the time required by this section. Clinton v. Miller, 124 M 463, 226 P2d 487 (1951).

Failure to File Summons — No Loss of Jurisdiction: Mere failure or omission to file the original summons with the various returns thereon within the time specified in this section does not affect the District Court's jurisdiction. Clinton v. Miller, 124 M 463, 226 P2d 487 (1951).

Delay in Filing Return — Violation of Section: Where Sheriff served summons on defendant and mailed it with his official return to plaintiff's attorney who kept it for 18 days and then filed the summons and had defendant's default entered the first day defendant was in default, the return was irregular in two particulars, in that it was not returned and filed with the clerk by the officer serving it (see 2005 amendment) and it was not filed within 10 days after the service, both being required by this section. Madson v. Petrie Tractor & Equip. Co., 106 M 382, 77 P2d 1038 (1938).

Collateral References

Process *key* 127, et seq.; Sheriffs and Constables *key* 87.
72 C.J.S. Process §78; 80 C.J.S. Sheriffs and Constables §44.
62B Am. Jur. 2d Process §319; 70 Am. Jur. 2d Sheriffs, Police, and Constables §52, et seq.

Failure to make return as affecting validity of service or court's jurisdiction. 82 ALR 2d 668.

Defects or informalities as to appearance or return day in summons or notice of commencement of action. 97 ALR 746; 6 ALR 841.

25-3-302. Return prima facie evidence.

Compiler's Comments

1987 Amendment: Near beginning inserted "or registered process server".

Case Notes

Certainty of Proof Required to Overcome Return: Proof necessary to overcome the statements and recitals in a Sheriff's return must be clear, unequivocal, and convincing. Sewell v. Beatrice Foods Co., 145 M 337, 400 P2d 892 (1965).

Certainty of Proof Required to Overcome Return — Proof Found Sufficient: In reversing a default judgment obtained 7 years after an accident in which plaintiff was injured while riding in corporate defendant's truck, prima facie presumption of service was rebutted by plaintiff's long unexplained delay in asserting his claim, the testimony of defendant's district manager that there had been no service, and Sheriff's failure to make return within the required time. Sewell v. Beatrice Foods Co., 145 M 337, 400 P2d 892 (1965).

Certainty of Proof Required to Overcome Return — Proof Found Not Sufficient: A Sheriff's return stating that he offered land for sale in separate parcels, as required by the statute, is prima facie evidence of the facts stated therein and may be overcome only be clear, unequivocal, and convincing evidence. An affidavit later executed by the Sheriff and stating that he did not offer the land in separate parcels, but containing no excuse, explanation, or suggestion of mistake in the return, may be found not to be such clear, unequivocal, and convincing evidence. Husky Hi Power, Inc. v. Schmidt, 140 M 353, 372 P2d 142 (1962).

Execution Only Prima Facie Evidence: A Sheriff's return on execution is merely prima facie evidence of the facts therein stated and may be overcome by other evidence. Where his return in an action for the rescission of a land contract recited that he had delivered certain articles of personal property as directed, evidence regarding loss of or damage thereto was properly admissible. Silfvast v. Asplund, 99 M 152, 42 P2d 452 (1935).

Sheriff's Return of Execution — Prima Facie Evidence Only: The return of a Sheriff on execution sale is only prima facie evidence of the facts stated therein. It may be contradicted by other evidence, especially where the return is at variance with the officer's certificate of sale, by virtue of which latter instrument title to the property passes, subject to redemption. Sale cannot be affected by defects or informalities in the return. Commercial Bank & Trust Co. v. Jordan, 85 M 375, 278 P 832 (1929).

Sheriff's Return of Search Warrant — Prima Facie Evidence Only: The return of an officer upon a search warrant is prima facie evidence only of the facts stated therein and such facts stated in a warrant may be overcome by other evidence. State ex rel. Merrell v. District Court, 72 M 77, 231 P 1107 (1924).

Collateral References

Process *key* 141.

72 C.J.S. Process §85.

62B Am. Jur. 2d Process §335.

Part 4
Service of Papers After Defendant's Appearance

25-3-401. Notice requirements after appearance of defendant.

Case Notes

Required Notice of Withdrawal of Counsel: When counsel for a party withdraws, in order to properly protect the interests of the unrepresented party, the opposing party, by written notice, must require the unrepresented party to appoint another attorney or appear in person, as provided in 37-61-405. The written notice must include the date of the next action required in the case and notice that if the unrepresented party fails to appoint an attorney or appear in person within 20 days from the date of notice, the action or other proceeding will proceed and may result in a judgment or other order being entered against the unrepresented party. Once proper notice is given, any continued refusal by the unrepresented party to participate in the proceedings may justly result in default judgment or other final judgment against that party's interests. Quantum Elec., Inc. v. Schaeffer, 2003 MT 29, 314 M 193, 64 P3d 1026 (2003), following McPartlin v. Fransen, 178 M 178, 582 P2d 1255 (1978), and Stanley v. Holms, 281 M 329, 934 P2d 196 (1997), and overruling Sikorski & Sons, Inc. v. Sikorski, 162 M 442, 512 P2d 1147 (1973), and Audit

Serv., Inc. v. Kraus Constr., Inc., 189 M 94, 615 P2d 183 (1980), to the extent that Sikorski and Audit Serv. waived a failure of opposing counsel to comply with 37-61-405.

Withdrawal of Counsel — "Rule 10 Notice" Sent to Last-Known Address Held "Notice as Required by Law": In a dissolution proceeding between Christina and Laramie, Laramie's counsel withdrew after he had not been contacted by Laramie for approximately 18 months. In the notice of withdrawal, Laramie's counsel provided Christina's counsel with Laramie's last-known address. Christina's counsel then sent a "Rule 10 notice", pursuant to Rule 10, M.U.D.C.R. (Title 25, ch. 19), to Laramie at the address provided by his former counsel, informing Laramie that he must appoint another attorney, that trial was scheduled for a particular date, and that if he did not appoint an attorney or appear, a default judgment might be made against him. That notice was returned by the post office because Laramie was apparently no longer living at that address. After a decree of dissolution was entered, Christina's counsel obtained Laramie's address from his mother and sent Laramie a notice of entry of judgment. Fifty-six days later, Laramie moved pursuant to Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), to set aside the judgment, arguing that Christina's counsel did not exercise due diligence in obtaining his correct mailing address and that if Christina's counsel obtained his correct address through his mother after entry of judgment, Christina's counsel could have done so before entry of judgment. Citing McPartlin v. Fransen, 178 M 178, 582 P2d 1255 (1978), and Stanley v. Holms, 281 M 329, 934 P2d 196 (1997), the Supreme Court held that Christina's counsel, by mailing the Rule 10 notice to Laramie's last-known address, satisfied the requirement that he make a good faith effort to notify Laramie and that Christina's counsel had no obligation to "track down" Laramie through his mother. In re Marriage of Wallace, 284 M 360, 944 P2d 227, 54 St. Rep. 920 (1997).

Initial Appearance — Appearance General — Waiver of All Irregularities: Defendants' attorney made an initial appearance to vacate a default judgment without reserving the question of personal jurisdiction. As a result, defendants' appearance was general and waived all irregularities in the service of process. Spencer v. Ukra, 246 M 430, 804 P2d 380, 48 St. Rep. 25 (1991), followed in Spiker Communications, Inc. v. St., 1998 MT 32, 287 M 345, 954 P2d 1145, 55 St. Rep. 114 (1998), and distinguished in MacPheat v. Schauf, 1998 MT 250, 291 M 182, 969 P2d 265, 55 St. Rep. 1032 (1998).

Pretrial Stipulations as Vitiating Requirement: When a case is tried and submitted on agreed facts, the court is bound by the stipulation and will proceed accordingly. Big Sky Livestock v. Herzog, 171 M 409, 558 P2d 1107 (1976).

Motion to Strike as General Appearance: Defendants filing motion to strike portions of plaintiff's complaint made their general appearance in the case. Johnson v. Clark, 131 M 454, 311 P2d 772 (1957).

Entitlement to Appeal Notice: Attorneys appearing were entitled to notice of appeal. In re Malick's Estate, 124 M 585, 228 P2d 963 (1951).

Notice of Application for Leave to Present Evidence Unnecessary: Plaintiff, in a proceeding in which a temporary injunction was issued without notice, has the right under 27-19-402 (repealed in 1979) to present affidavits and oral testimony in opposition to a motion to dissolve the injunction, and since defendant knew the time of the hearing on the motion to dissolve and was advised by 27-19-402 (repealed in 1979) of plaintiff's right, service of notice upon defendant of the application for leave to exercise such right was unnecessary and would have been an idle gesture. State ex rel. Bottomly v. District Court, 115 M 400, 143 P2d 559 (1943).

Notice to Defendant or Attorney Required: Under this section and 25-3-402, the defendant in an action, or his attorney, if he has appeared by attorney, is entitled to notice of all subsequent proceedings. Barrick v. Porter, 56 M 247, 184 P 217 (1919).

Notice to Be Presumed: While defendants were entitled to notice and an opportunity to be heard on a motion for a new trial, it will be presumed in the absence of a showing of lack of notice that the proceedings were regular and that they had notice. Lish v. Martin, 55 M 582, 179 P 826 (1919).

Request for Extension of Time to Answer as General Appearance: Where defendants, after a denial of their motion to dismiss the action, asked for and were granted time in which to answer to the merits, their request for time constituted a general appearance, the effect and scope of which could not be limited by a statement of counsel that he desired the record to show that his appearance was special. State ex rel. Mackey v. District Court, 40 M 359, 106 P 1098 (1910). See also State ex rel. Lane v. District Court, 51 M 503, 154 P 200 (1915).

Entitlement to Entry of Judgment: The entry of judgment is one of the "subsequent proceedings" mentioned in this section, of which a defeated party or his attorney is entitled to notice. State ex rel. Cohn v. District Court, 38 M 119, 99 P 139 (1909).

Collateral References

Appearance *key* 8, et seq.

6 C.J.S. Appearances §§9, 18, et seq., 35, et seq.

Withdrawal or vacation of appearance. 64 ALR 2d 1424.

Filing bond to secure release or return of seized property as appearance. 57 ALR 2d 1109.

Motion to vacate order as constituting general appearance. 31 ALR 2d 262.

Objection before judgment to jurisdiction of court over subject matter as constituting general appearance. 25 ALR 2d 833.

25-3-402. Persons to be served.

Compiler's Comments

1981 Amendment: Substituted "Subject to the provisions of Rule 5(b), M.R.Civ.P., whenever" for "When"; inserted "of court" after "clerk"; inserted "unless the court orders otherwise"; made minor changes in grammar.

Case Notes

Custody Proceedings — Court-Appointed Attorney for Child — Service Required: While the appointment of an attorney to represent children in custody matters is discretionary with the court under 40-4-205, once an attorney has been appointed, it is required that he or she be served with all orders, pleadings, motions, notices, and other papers pertinent to the action. Further, the attorney must actively represent the children and be given an opportunity to present all evidence concerning the best interests of the children. In re Marriage of Hammill, 225 M 263, 732 P2d 403, 44 St. Rep. 220 (1987).

Constructive Service Not Allowed: In view of section 93-8507, R.C.M. 1947 (superseded by Rule 5, M.R.App.P.), this section will not permit the constructive service of an order to show cause on a motion to modify the custody provisions of a divorce decree. Hand v. Hand, 131 M 571, 312 P2d 990 (1957).

Guardianship Terminated: The matter of service of notice of appeal as provided by this section and section 93-8005, R.C.M. 1947 (superseded by Rules 1, 4 through 6, M.R.App.P.), is jurisdictional. Therefore, where guardianship of a minor had automatically ceased before trial by the minor's becoming of age, carrying with it the employment of the guardian's attorney, service of notice of appeal upon the guardian's attorney not shown to be reemployed by the former ward did not confer jurisdiction upon the Supreme Court to consider the appeal. Mitchell v. McDonald, 114 M 292, 136 P2d 536 (1943).

Part 5
Alternative Methods of Service

Part Law Review Articles

Substituted Service on a Non-Resident Vendor of Montana Land, Tingle, 13 Mont. L. Rev. 64 (1952).

25-3-501. Service of telephonic or telegraphic copy.

Case Notes

Faxed Return of Service of Summons Received on Evening of Final Day of Filing Considered Timely — Courts Always Open: White filed a complaint September 8, 1995, and summons was served on Klosterman September 8, 1998. The Sheriff's dispatcher faxed the return of service to the Clerk of Court at 8:23 p.m. the same day. The District Court held that the return of service was late because it was not filed with the Clerk of Court by 5 p.m. on the last day that filing was permitted. However, the Supreme Court found nothing in the plain language of the judicial rules of procedure or any Montana authority that provides those requirements. Rather, Rule 41(e), M.R.Civ.P. (Title 25, ch. 20), requires that return of service be filed within 3 years; Rule 5(e), M.R.Civ.P., allows filing by facsimile or other electronic means; this section gives faxed documents the same force and effect as an original; Rule 77(a), M.R.Civ.P., requires that District Courts always be open for filing; and 1-1-301 provides that each day ends at midnight. The District Court's decision was reversed on grounds that filing was timely. White v. Klosterman, 1999 MT 316, 297 M 259, 990 P2d 1249, 56 St. Rep. 1265 (1999).

Collateral References

Motions *key* 57, et seq.; Notice *key* 10, and other particular topics.

60 C.J.S. Motions and Orders §17; 66 C.J.S. Notice §§23 through 32.

58 Am. Jur. 2d Notice §28.

25-3-502. Publication to be once a week.

Case Notes

Number of Publications Required: The requirement for a 30-day notice of a sale by a county of property bought by it at delinquent tax sale, was not satisfied by one publication made 30 days prior to the day of sale in a newspaper published in the county, as this section prescribes that notices be published once a week for the period specified. Snidow v. Mont. Home for the Aged, 88 M 337, 292 P 722 (1930).

Collateral References

Newspapers *key* 3, and other particular topics.
66 C.J.S. Notice §§26 through 32.
Validity of legislation relating to publication of legal notices. 26 ALR 2d 655.

25-3-503. What suffices as once a week.

Collateral References

62B Am. Jur. 2d Process §§241, 242, 260.

25-3-504. Designating unknown persons as defendants.

Compiler's Comments

1981 Amendment: In (1) substituted "In the situations listed in Rule 4D(5)(a), M.R.Civ.P." for an enumeration of those situations; in (2)(a) deleted "including choses in action as aforesaid" after "mixed"; in (2)(b) inserted "or devisees" after "heirs" twice; deleted former subsection (2)(c) that read "When persons are made defendant by the style and description of unknown devisees, there shall be added to such designation the name of the deceased person of whom they shall be claimed or supposed to be devisees."

25-3-505. Effect of service by publication upon unknown persons.

Compiler's Comments

1981 Amendment: In lead-in to section substituted "the effect prescribed in Rule 4D(5)(b), M.R.Civ.P." for "the same effect in all respects as if such persons had been made parties by their own proper names and had been served by publication and mailing of summons according to the rules of civil procedure"; at beginning of second sentence substituted "such" for "in such action or proceeding"; in (3) substituted "persons with" for "all".

Part 6
Service on Secretary of State — Nonresident Motorists

Part Case Notes

Purpose: In the absence of a provision in this part that it is intended solely for the benefit of resident plaintiffs against nonresident defendants, it may not be so liberally construed; it being clear that the object of the law is to further safety of highway traffic within the state, and afford a practicable remedy for damage arising from negligence, and of providing service where otherwise it would be virtually impossible. State ex rel. Gallagher v. District Court, 112 M 253, 114 P2d 1047 (1941).

Constitutionality: This part is not so ambiguous and uncertain as to render it unconstitutional. Provision for mailing summons by plaintiff does not render it invalid. A failure to provide for delivery of copy of the complaint to defendant is immaterial and it is neither directly nor impliedly repealed by section 93-3007, R.C.M. 1947 (since repealed). The fact that it does not apply to operators of all vehicles as well as motor vehicles does not render it class legislation. The part conforms to Art. III, sec. 27, 1889 Mont. Const. (now Art. II, sec. 17, 1972 Mont. Const.) and federal due process of law clauses. State ex rel. Charette v. District Court, 107 M 489, 86 P2d 750 (1939).

25-3-601. Conditional granting of use of highways to nonresidents.

Collateral References

Automobiles *key* 52.
60 C.J.S. Motor Vehicles §120.

25-3-602. Operation of vehicle considered consent to service on secretary of state.

Collateral References

Automobiles *key* 235.
61 C.J.S. Motor Vehicles §502.
7A Am. Jur. 2d Automobiles and Highway Traffic §100.

25-3-603. Operation of vehicle by agent.

Case Notes

Roads to Which Section Applicable: A haul-road is a public way when it is being used in conjunction with highway construction project. State ex rel. Mohr v. District Court, 138 M 452, 357 P2d 891 (1960).

Operator of Truck as Agent: Owner of truck tractor, not a common carrier, and the driver thereof, were agents of common carrier authorized to transport freight in Canada and Montana, where at time of collision truck tractor was hauling freight accepted by common carrier as a carrier for hire under an arrangement whereby the owner of the truck tractor received a percentage of the freight charges collected by the common carrier. Thomas v. Warren, 162 F. Supp. 101 (D.C. Mont. 1958).

Ownership of Vehicle Immaterial — "Operation" by Agent Sufficient: For the purpose of motion to quash service, the question of ownership of the car is immaterial; if the car at the time of the accident was being "operated", i.e., if the physical act of working its mechanism was being performed by an agent (the driver), the act applies, the burden of proving that the driver was not defendant's agent being upon him. State ex rel. Gallagher v. District Court, 112 M 253, 114 P2d 1047 (1941).

Constitutionality: The prior ruling in State ex rel. Charette v. District Court, 107 M 489, 86 P2d 750, that this section is not unconstitutional as unwarranted class legislation nor in violation of the due process of law clauses of the federal and state constitutions, applies to a resident motorist who prior to suit arising out of a collision leaves the state either permanently or for an indefinite time, since in such a case he becomes in effect a nonresident who cannot with due diligence be found and served within the state. State ex rel. Thompson v. District Court, 108 M 362, 91 P2d 422 (1939).

Persons to Whom Applicable — Application to "Resident" Motorist: In view of the language used in the section and title thereof, it applies to "any person" operating a motor vehicle, whether a "nonresident", or a "resident" of the state at the time of the accident who removed therefrom prior to institution of suit against him and who therefore may not with due diligence be found and personally served within the state. State ex rel. Thompson v. District Court, 108 M 362, 91 P2d 422 (1939).

Collateral References

Automobiles *key* 235.

61 C.J.S. Motor Vehicles §502.

Place or type of motor vehicle accident as affecting applicability of statute providing for constructive or substituted service upon nonresident motorist. 73 ALR 2d 1351.

Who is subject to constructive or substituted service of process under statute providing for such service on nonresident motorist. 53 ALR 2d 1164.

What is "motor vehicle" or the like within statute providing for constructive or substituted service of process on nonresident motorists. 48 ALR 2d 1283.

Constitutionality and construction of statute authorizing constructive or substituted service of process on foreign representative of deceased nonresident driver of motor vehicle, arising out of accident occurring in state. 18 ALR 2d 544.

CHAPTER 4
PLEADINGS, MOTIONS, AND OTHER PAPERS

Chapter Case Notes

District Court Jurisdiction to Decide Constructive Fraud Based on Pleadings and Final Pretrial Order: Plaintiffs filed a claim for misrepresentation and failure to disclose concerning the sale of an irrigation system. Defendants contended that plaintiffs did not notify them by pleadings or evidence at trial that plaintiffs were claiming that a false impression was created regarding the condition of the field at pivot three, arguing that the complaint concerned defects and misrepresentations related to the irrigation system, not to the land, and that the District Court thus lacked jurisdiction to enter judgment on the issue of the land rather than the irrigation system. A District Court does not have jurisdiction to grant relief outside of the issues presented by the pleadings unless the parties stipulate that other questions be considered or the pleadings are amended to conform to the proof. However, in this case, the pleadings and the final pretrial order, which cited misrepresentation of or failure to disclose problems with both the deficient irrigation system and the erosion of the river bank near pivot three, gave defendants

sufficient notice of the disputed issues to vest the District Court with issue jurisdiction. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Primary Physical Custody Not Properly Before Court — No Implied Consent Found for Trial of Issue: Appellant filed a petition for custody of the parties' minor child, asking that she be given custody. Respondent counterpetitioned for split custody until the child was 5 years old, at which time respondent would be granted primary physical custody. During trial, respondent moved for an order granting immediate primary physical custody. Appellant moved for a stay or continuation to respond to the motion. The Supreme Court held that the issue of respondent's primary physical custody was not properly before the District Court because the issue had not been raised in the pleadings. Citing Trust Bank v. Darrah, 152 M 256, 448 P2d 734 (1968), the Supreme Court also held that there was no implied consent by appellant to try the issue raised by respondent's motion as appellant received no notice of the motion prior to trial. The issue was therefore not properly before the District Court. In re Custody of C.J.K., 258 M 525, 855 P2d 90, 50 St. Rep. 645 (1993).

Judgment on Matters Outside Pleadings Void: A judgment or final order adjudging matters outside the issues raised by the pleadings is void as to the matters outside the pleadings. In re Custody of C.S.F., 232 M 204, 755 P2d 578, 45 St. Rep. 992 (1988), following Welch v. All Persons, 78 M 370, 254 P 179 (1927).

No Jurisdiction Over Issues Not Presented in Pleadings: Where the plaintiff church was granted a tax exemption by the Department of Revenue for some but not all of the plaintiff's real property and brought a quiet title action to determine its ownership and the tax-exempt status of that portion of the property for which it had not been granted an exemption, the District Court erred in removing the exemption originally granted by the Department of Revenue. Under the rationale of Heller v. Osburnsen, 162 M 182, 510 P2d 13 (1973), and Nat'l Sur. Corp. v. Kruse, 121 M 202, 192 P2d 317 (1948), the District Court had jurisdiction only over those issues raised in the pleadings, and the exempt status of lots 10 through 16 was not at issue in the case. Consequently, the District Court had no jurisdiction to remove the tax-exempt status for those lots belonging to the plaintiff. Old Fashion Baptist Church v. Dept. of Revenue, 206 M 451, 671 P2d 625, 40 St. Rep. 1774 (1983).

Chapter Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Chapter Collateral References

Montana Pleading and Practice Form, Compiled with Commentary by Professor William F. Crowley, University of Montana School of Law (Copyright 1983 by University of Montana School of Law).

Part 1
General Provisions

25-4-101. Motions and orders — where made.

Compiler's Comments

1981 Amendment: In (1) substituted "unless" for "provided".

Case Notes

Disqualified Judge — Power of Substitute Judge: Where a substitute judge is appointed because of the disqualification of the original judge, the substituted judge is competent to make orders and rule on motions until there is a complete disposition of the case as far as the trial court is concerned. McLeod v. McLeod, 126 M 32, 243 P2d 321 (1952).

Adjoining District Judge — Cases Authorized to Be Heard: This section provides only for the presentation of such motions as the judge may entertain at chambers, and does not authorize a judge of an adjoining district to hear a motion which he could not hear at chambers if he were personally present in the district in which the parties reside. Eustance v. Francis, 52 M 295, 157 P 573 (1916).

Stipulation as to Judge's Power: If a judge is disqualified and another judge has been designated to try and determine the case, it seems to be proper practice for the parties, by stipulation, to submit to him for decision at chambers, in his own district, the issues of law arising therein. It is also proper to stipulate that the judge may make up his findings and decision in a cause, after returning to his own district, and transmit them to the clerk for filing and entry of judgment. Such a stipulation would doubtless estop the parties from questioning the validity of the result. Eustance v. Francis, 52 M 295, 157 P 573 (1916).

Collateral References

Motions *key* 7 through 9.

60 C.J.S. Motions and Orders §§5, 6.

25-4-102. Transfer when judge unable to hear motion or return of order.

Case Notes

Substitute for Disqualified Judge: Where a substitute judge is appointed because of the disqualification of the original judge, the substituted judge is competent to make orders and rule on motions until there is a complete disposition of the case as far as the trial court is concerned. McLeod v. McLeod, 126 M 32, 243 P2d 321 (1952).

Motions Out of Chambers — Adjoining District Judge: This section concerns only the presentation of such motions as the judge may entertain at chambers, and does not authorize a judge of an adjoining district to hear a motion which he could not hear at chambers if he were personally present in the district in which the parties reside. Eustance v. Francis, 52 M 295, 157 P 573 (1916).

Stipulation as to Judge's Power: If a judge is disqualified and another judge has been designated to try and determine the case, it seems to be proper practice for the parties, by stipulation, to submit to him for decision at chambers, in his own district, the issues of law arising therein. It is also to stipulate that the judge may make up his findings and decision in a cause, after returning to his own district, and transmit them to the clerk for filing and entry of judgment. Such a stipulation would doubtless estop the parties from questioning the validity of the result. Eustance v. Francis, 52 M 295, 157 P 573 (1916).

25-4-103. Vacating or modifying order made without notice.

Case Notes

Correction of Extension of Time Erroneously Made: If court erroneously made order extending the time to prepare, serve, and file bill of exceptions under section 93-5505, R.C.M. 1947 (since repealed), it had authority to correct such order under the provisions of this section. Barcus v. Portland Cattle Loan Co., 122 M 534, 207 P2d 565 (1949).

Correction of Order to Perpetuate Testimony: Where order of court on application to perpetuate testimony was complained of, the remedy was to apply to the court to vacate or modify the order and not by direct application for certiorari in the Supreme Court. State ex rel. Lichte v. District Court, 121 M 34, 189 P2d 1004 (1948); State ex rel. Woodard v. District Court, 120 M 585, 189 P2d 998 (1948).

Collateral References

Motions *key* 58, 59.

60 C.J.S. Motions and Orders §43.

25-4-111. Lost papers.

Case Notes

Carbon Copies Authorized: This section authorizes the trial judge to proceed with the trial on substituted carbon copies of the papers and pleadings rather than the original where the original papers and pleadings were missing. Mortenson v. Mortenson, 129 M 290, 285 P2d 834 (1955).

Collateral References

Pleading *key* 340, and other particular topics.

71 C.J.S. Pleading §§584, 585.

25-4-112. Papers with technical defects.

Case Notes

Application to Guardian's Account: Improperly designating a guardian's account as an administratrix's account did not render it inadmissible, where the account of the administratrix had been closed 2 years prior to rendition of her account as guardian and she certified to it as her guardian's account. McCauley v. Am. Sur. Co. of N.Y., 81 M 161, 263 P 90 (1927).

Application to Attachment Affidavit: If the affidavit for an attachment bears the title of the action and was filed as a part of the record at the time the complaint was filed, it is sufficiently identified as it intelligibly refers to the action or proceeding, within the meaning of this section; if the plaintiff had asked leave in the court below to amend it, the amendment would have been allowed as a matter of course. Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 181 P 332 (1919).

Application to Administrative Appeals: A notice of appeal from a decision of the Montana State Board of Medical Examiners, sufficient in other respects, is effectual, though entitled, "In

the matter of the application of (the appellant) for a certificate from the board of medical examiners to practice medicine and surgery". State ex rel. Riddell v. District Court, 27 M 103, 69 P 710 (1902).

Collateral References

Affidavits *key* 7, et seq.; Notice *key* 9, et seq; Pleading *key* 4, and other particular topics.

2A C.J.S. Affidavits §§26, 29, 47, 52 through 55; 66 C.J.S. Notice §§23 through 25; 71 C.J.S. Pleading §§1 through 8.

Part 2
Pleadings in General

Part Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

25-4-201. Description of real property in complaint.

Collateral References

Ejectment *key* 64.

25-4-203. Verification of pleadings.

Case Notes

Failure to Verify — Effect: When failure to verify was not raised as an issue until after trial and no claim was made that the failure was prejudicial, there was no error. The proper remedy was a motion to strike. Adams v. Davis, 142 M 587, 386 P2d 574 (1963).

Unverified Complaint Properly Dismissed: Where plaintiffs elected not to amend their unverified complaint, but to stand on it, and moreover there was nothing in the record to indicate that there was any set of circumstances which would admit of their stating a claim upon which relief could be granted under the complaint, the court properly sustained defendant's motion to dismiss the complaint. Rambur v. Diehl Lumber Co., 142 M 175, 382 P2d 552 (1963).

Failure to Verify Complaint as Negligence by Attorney: It is negligence for an attorney to file a complaint in a District Court which is not verified as required by this section. In re Hirst, 140 M 91, 368 P2d 157 (1962).

Amendment of Verification Allowed: Where verification by attorney was not in accordance with this section, court properly denied motion to strike and properly granted leave to file amended verification. Smith v. Armstrong, 118 M 290, 166 P2d 793 (1946).

Defective Verification — Waiver No Effect on Jurisdiction: Verification of pleadings is not necessary to vest jurisdiction in courts; therefore, since entire absence of it does not affect jurisdiction, a mere defect in verification which might have been taken advantage of by timely objection but was not, the objection being thus waived, cannot affect it, and the judgment roll in an action in which the verification to the complaint was defective was not rendered inadmissible in evidence by such defect. Chisholm v. Vocational School for Girls, 103 M 503, 64 P2d 838 (1936); Commercial Bank & Trust Co. v. Jordan, 85 M 375, 278 P 832 (1929).

Not Part of Pleadings: Verifications are not part of the pleadings. Chisholm v. Vocational School for Girls, 103 M 503, 64 P2d 838 (1936); Bryant v. Davis, 22 M 534, 57 P 143 (1903); Johnson v. Puritan Min. Co., 19 M 30, 47 P 337 (1896).

Defective Verification — Waiver: A verification is not part of a pleading, strictly speaking; its absence is such a defect as may be amended, and failure to object waives it. State ex rel. Jensen v. District Court, 103 M 461, 64 P2d 835 (1936).

Several Defendants — One Verification: Under this section, the verification to an answer in an action against several defendants may be made by one of them in behalf of all. State ex rel. Ingersoll v. Clapp, 81 M 200, 263 P 433 (1928).

Admissions in Verified Pleading Offered as Evidence: Admissions in a verified answer may properly be offered in evidence, and the plaintiff in doing so need not embrace in his offer the entire answer, nor is he estopped from denying or disproving statements contained in the pleading. Johnson v. Butte & Superior Copper Co., 41 M 158, 108 P 1057 (1910).

Alternative Defenses — Perjury Not Sanctioned: In permitting a defendant to set forth in his answer as many defenses as he has, it was never intended to sanction perjury. Johnson v. Butte & Superior Copper Co., 41 M 158, 108 P 1057 (1910).

Receivership Application — Unverified Complaint Insufficient: An ex parte order appointing a receiver cannot be based on the complaint alone, unless it satisfies the requirements of an evidential affidavit by a verification on affiant's own personal knowledge. A verification upon "knowledge, information, and belief" is insufficient. Benepe-Owenhouse Co. v. Scheidegger, 32 M 424, 80 P 1024 (1905), explained in Fisk Tire Co. v. Lanstrum, 96 M 279, 30 P2d 84 (1934).

Application to Certiorari Affidavits: No reason is apparent why the rule concerning affidavits in certiorari should be more strict regarding the proper affiant than is required by this section of the plaintiff in an action. An affidavit by the duly authorized agent or attorney of the party beneficially interested, in which the material averments are stated as true to the knowledge of the affiant, is sufficient. State ex rel. Allen v. Napton, 24 M 450, 62 P 686 (1900).

Defective Verification as Basis for Judgment on the Pleadings: Plaintiff is not entitled to judgment on the pleadings merely because the verification of the answer is defective. Bryant v. Davis, 22 M 534, 57 P 143 (1899).

Statements Upon Information and Belief — Corporate and Noncorporate Defendants: Where there are two defendants to an action, and one of them is absent from the county and the other is a corporation, answers verified on the best knowledge, information, and belief of the persons making them are correct. Bryant v. Davis, 22 M 534, 57 P 143 (1899).

Collateral References

Pleading *key* 289 through 304.
71 C.J.S. Pleading §§486 through 518.
61B Am. Jur. 2d Pleading §§888 through 898.

25-4-204. Time for amendment or reply after motion on pleading.

Compiler's Comments

1981 Amendment: Substituted "motion concerning a pleading" for "demurrer or motion to any pleading".

Case Notes

Motion for Change of Venue: Where a motion for a change of venue was timely served and filed in the action by defendant's attorney, defendant was not in default. McLeod v. McLeod, 124 M 590, 228 P2d 965 (1951).

Motion to Strike — Reply Required: A motion to strike a negligible portion of the answer in a personal injury action, which motion plaintiff claimed to have been in substance a demurrer to the answer, was insufficient to toll the time for reply to the affirmative defense of contributory negligence. Mihelich v. Butte Elec. Ry., 85 M 604, 281 P 540 (1929).

Notice Not Required — Attorney Present in Court: Where the minutes of the court showed that counsel, who asked the vacation of a default judgment entered upon his failure to answer within a given time after the overruling of a demurrer to the complaint, was present when the demurrer was overruled, notice to him of the decision of the court was not required. Pearce v. Butte Elec. Ry., 40 M 321, 106 P 563 (1910).

Collateral References

Pleading *key* 225, 360(5).
71 C.J.S. Pleading §§323 through 455.

Part 3
Pleading Special Matters

Part Law Review Articles

Comparative Negligence in Montana, Ellingson, 37 Mont. L. Rev. 152 (1976).
Defamation: The Montana Law, Kimball, 20 Mont. L. Rev. 1 (1958).

25-4-301. Pleading statute of limitations.

Case Notes

Reply to Pleading of Statute — When Required: Where new matter in the answer consists of a pleading of the Statute of Limitations, plaintiff need not reply thereto if matter in avoidance of the plea of the bar of the Statute be found in any of plaintiff's pleadings. Hence, where plaintiff's complaint in a mortgage foreclosure suit showed on its face that the action was barred by the Statute of Limitations, but plaintiff in addition alleged a payment of interest within the 8-year period, he relied in effect on the new promise, and was not required to reply to the limitation plea, nothing new having been brought in by the answer. Matteson v. Ackerson, 104 M 239, 66 P2d 797 (1937).

Facts Supporting Defense — No Allegation Required: In pleading the Statute of Limitations, it is not necessary to state the facts showing the defense, a statement that the cause of action is barred by the provisions of the section of the Code relied upon being sufficient. Bahn v. Estate of Fritz, 92 M 84, 10 P2d 1061 (1932).

Code Section to Be Specified: Where the answer alleges that a cause of action is barred by the Statute of Limitations, it must specifically point out the particular section under which the action is barred. Stewart v. Budd, 7 M 573, 19 P 221 (1888).

Collateral References

Limitation of Actions *key* 181, et seq.

54 C.J.S. Limitations of Actions §354, et seq.

51 Am. Jur. 2d Limitation of Actions §§402 through 422.

Plaintiff's diligence as affecting his right to have defendant estopped from pleading the statute of limitations. 44 ALR 3d 760.

Raising defense of Statute of Limitations by motion to dismiss. 61 ALR 2d 300.

Amendment of pleadings to assert Statute of Limitations. 59 ALR 2d 169.

25-4-302. Pleading an account.

Case Notes

Bill of Particulars — Extension of Time for Filing: The trial court may in its discretion permit the filing of a bill of particulars after expiration of the 5-day period. Long v. Byers, 142 M 46, 381 P2d 299 (1963).

Timber Purchase — Allegations of Fact Found Sufficient: An allegation that an indebtedness is owing from defendant to plaintiff for the balance due on "stumpage from timber purchased of and from the plaintiff" which upon demand the defendant has failed and still fails to pay, is sufficient to allege the ultimate facts required by the Code. Ballenger v. Tillman, 133 M 369, 324 P2d 1045 (1958).

Application to Foreclosure of Mechanics' Lien (Now Construction Lien): In an action to foreclose mechanics' lien (now construction lien) and recover a stated sum of money for labor and materials, a complaint which did not contain an itemized statement of the materials and labor furnished was not subject to demurrer; the defendant's remedy was under this section. Cole v. Hunt, 123 M 256, 211 P2d 417 (1949).

Section Not Applicable to Stated Account: The provision of this section regarding the duty to furnish a copy of the account has no application to an action on an account stated. Fowlis v. Heinecke, 87 M 117, 287 P 169 (1930).

Failure to Furnish Bill — Bar to Further Evidence: Failure to furnish a bill of particulars in a cause where a bill may properly be demanded bars the delinquent party from being heard at the trial. Munger v. Nelson, 61 M 104, 201 P 286 (1921).

Justice Court Pleadings — "Account" Distinguished: The term "account" in this section is not used in the same sense as it is in 25-31-504 (now repealed). Moran v. Ebey, 39 M 517, 104 P 522 (1909).

Section Applicable to Open Accounts: This section applies only to actions upon open, unsettled accounts, and not to actions upon accounts stated, and the court may order an additional statement, the penalty for refusal to furnish the same being punishment as for a contempt. Martin v. Heinze, 31 M 68, 77 P 427 (1904), distinguished in Moran v. Ebey, 39 M 517, 104 P 522 (1909). See also Cohen v. Clark, 44 M 151, 119 P 775 (1911).

Collateral References

Account, Action on *key* 6(3); Pleading *key* 313, et seq.

1 C.J.S. Account, Action on §§7 through 20; 71 C.J.S. Pleading §§531 through 537.

1 Am. Jur. 2d Accounts and Accounting §12.

25-4-303. True value of property — action for taking.

Collateral References

Detinue *key* 14, 32; Replevin *key* 30, 83, 130.

26A C.J.S. Detinue §§17, 24; 77 C.J.S. Replevin §47.

25-4-311. Damages for personal injury or wrongful death not to be stated.

Case Notes

Plaintiff Allowed to Amend Prayer in Complaint: Under Rule 15(a), M.R.Civ.P. (Title 25, ch. 20), the plaintiff is allowed to amend the prayer in her complaint regarding punitive and compensatory damages. Under the provisions of 25-4-311 through 25-4-313, the defendant is entitled to have the amendments to the prayer include the dollar amount of special and general damages sought, including punitive damages, or in lieu of the amounts, a statement of damages under 25-4-312. In any amendment the dollar amount sought may not be open-ended by reference to a proportion of the financial condition or net worth of the defendant. The amendment, in addition to stating the dollar amounts, may include such language as "other and

further relief to which the plaintiff may be entitled". State ex rel. Fitzgerald v. District Court, 217 M 106, 703 P2d 148, 42 St. Rep. 1061 (1985).

Complaint Including Prayer for Damages Not to Be Dismissed — Prayer to Be Stricken: Appellant filed a malpractice action and included a prayer for damages in violation of this section. The District Court granted respondent's motion to dismiss after the Statute of Limitations had run, so that appellant could not refile. On appeal, the Supreme Court reversed, ruling that there is nothing in this section that suggests that a complaint containing a prayer for damages is a nullity. The court held that dismissal of the complaint was an abuse of discretion on the part of the trial court and remanded the case to the trial court with directions to reinstate the complaint and order the specific amount of the prayer stricken. Franz v. Bednarek, 208 M 383, 678 P2d 217, 41 St. Rep. 418 (1984).

Effect of Statement of Damages on Amount Recoverable for Federal Jurisdiction Purposes: This case was removed to federal court but remanded to the Montana District Court. While discussing the options a plaintiff has with regard to the specification of damages for purposes of removal to federal court in light of the provisions of 25-4-311, 25-4-313, and 25-4-314, the federal District Court also discussed Rule 54(c), M.R.Civ.P. The court said it did not interpret the rule, which provides that the statement of claims is not a limitation on what the plaintiff ultimately may recover, as imposing on a plaintiff's option of avoiding federal jurisdiction by seeking less than the requisite amount for diversity jurisdiction. Rollwitz v. Burlington N., 507 F. Supp. 582, 38 St. Rep. 264 (D.C. Mont. 1981).

25-4-312. Request for statement of damages — response.

Case Notes

Plaintiff Allowed to Amend Prayer in Complaint: Under Rule 15(a), M.R.Civ.P. (Title 25, ch. 20), the plaintiff is allowed to amend the prayer in her complaint regarding punitive and compensatory damages. Under the provisions of 25-4-311 through 25-4-313, the defendant is entitled to have the amendments to the prayer include the dollar amount of special and general damages sought, including punitive damages, or in lieu of the amounts, a statement of damages under 25-4-312. In any amendment the dollar amount sought may not be open-ended by reference to a proportion of the financial condition or net worth of the defendant. The amendment, in addition to stating the dollar amounts, may include such language as "other and further relief to which the plaintiff may be entitled". State ex rel. Fitzgerald v. District Court, 217 M 106, 703 P2d 148, 42 St. Rep. 1061 (1985).

25-4-313. Notice to defendant when no request for statement.

Case Notes

Plaintiff Allowed to Amend Prayer in Complaint: Under Rule 15(a), M.R.Civ.P. (Title 25, ch. 20), the plaintiff is allowed to amend the prayer in her complaint regarding punitive and compensatory damages. Under the provisions of 25-4-311 through 25-4-313, the defendant is entitled to have the amendments to the prayer include the dollar amount of special and general damages sought, including punitive damages, or in lieu of the amounts, a statement of damages under 25-4-312. In any amendment the dollar amount sought may not be open-ended by reference to a proportion of the financial condition or net worth of the defendant. The amendment, in addition to stating the dollar amounts, may include such language as "other and further relief to which the plaintiff may be entitled". State ex rel. Fitzgerald v. District Court, 217 M 106, 703 P2d 148, 42 St. Rep. 1061 (1985).

Effect of Statement of Damages on Amount Recoverable for Federal Jurisdiction Purposes: This case was removed to federal court but remanded to the Montana District Court. While discussing the options a plaintiff has with regard to the specification of damages for purposes of removal to federal court in light of the provisions of 25-4-311, 25-4-313, and 25-4-314, the federal District Court also discussed Rule 54(c), M.R.Civ.P. The court said it did not interpret the rule, which provides that the statement of claims is not a limitation on what the plaintiff ultimately may recover, as imposing on a plaintiff's option of avoiding federal jurisdiction by seeking less than the requisite amount for diversity jurisdiction. Rollwitz v. Burlington N., 507 F. Supp. 582, 38 St. Rep. 264 (D.C. Mont. 1981).

25-4-314. Permissive delivery of statement with summons.

Case Notes

Effect of Statement of Damages on Amount Recoverable for Federal Jurisdiction Purposes: This case was removed to federal court but remanded to the Montana District Court. While discussing the options a plaintiff has with regard to the specification of damages for purposes of removal to federal court in light of the provisions of 25-4-311, 25-4-313, and 25-4-314, the federal

District Court also discussed Rule 54(c), M.R.Civ.P. The court said it did not interpret the rule, which provides that the statement of claims is not a limitation on what the plaintiff ultimately may recover, as imposing on a plaintiff's option of avoiding federal jurisdiction by seeking less than the requisite amount for diversity jurisdiction. Rollwitz v. Burlington N., 507 F. Supp. 582, 38 St. Rep. 264 (D.C. Mont. 1981).

Part 4
Counterclaim and Cross-Claim

25-4-401. Counterclaim by person sued in representative capacity.

Collateral References

Executors and Administrators *key* 434(1) through (7), and other specific topics.

34 C.J.S. Executors and Administrators §§733 through 738.

25-4-403. Counterclaim in action on contract.

Case Notes

Counterclaim Abandoned — Plaintiff Not Entitled to Costs: In a contract action when the defendant abandoned its counterclaim at the close of evidence, no instructions were given to the jury in relation to the counterclaim, the plaintiff made no objection to the lack of jury instructions on that issue, and the jury's verdict made no reference to the allegations in the counterclaim, the District Court did not abuse its discretion in denying the plaintiff's request for court costs. Smith v. Gen. Mills, Inc., 1998 MT 280, 291 M 426, 968 P2d 723, 55 St. Rep. 1151 (1998).

Counterclaim Premised on Malicious Prosecution or Abuse of Process as Suit in Tort — Necessary Elements: A counterclaim alleging damages for breach of fiduciary duty, constructive fraud, creditor overreaching, and wrongful attachment did not meet the conditions of a counterclaim and third-party complaint on an attachment bond as provided in 27-18-204. The counterclaim was then premised upon the common-law notions of malicious prosecution or abuse of process, which is a suit in tort. To recover on such a suit, the elements of malice and want of probable cause must be present and proved. Absent evidence of these elements, the counterclaim was properly dismissed. Montgomery v. Hunt, 227 M 279, 738 P2d 887, 44 St. Rep. 1081 (1987).

Breach of Covenant of Good Faith in Conducting Insurance Claim: In a foreclosure action, the insured, Britton, cross-claimed against Farmers Insurance Group (FIG) for the full amount of coverage provided by FIG's policy and for further compensatory and punitive damages by reason of "bad faith". FIG responded to the foreclosure action by setting up as a cross-claim against Britton its right under its partial assignment of mortgage and requesting foreclosure against Britton. FIG further defended against Britton's cross-claim by alleging that Britton had intentionally set the fire, had been guilty of fraud with respect to his interest in the property, and had not submitted a proper proof of loss. On appeal, the Supreme Court found that prior to filing its answer to Britton's cross-claim, FIG neither rejected Britton's proof of loss nor informed him in writing or otherwise of their contention of arson. Also, FIG's evidence regarding Britton's involvement in setting the fire was circumstantial, and there was no evidence of potential financial gain for Britton from the policy proceeds. The jury decision that FIG breached the implied covenant of good faith and fair dealing in conducting the claim was upheld. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Stipulation for Offset: Stipulation entered into between the parties in an action arising out of the drilling of a gas well under a lease, that the amount of a judgment which defendant might obtain on reversal of a judgment against a third person in a companion suit should be allowed as an offset or counterclaim to any judgment awarded the plaintiff, was binding. Nepstad v. E. Chicago Oil Ass'n, 91 M 366, 9 P2d 1074 (1932).

Collateral References

Assignments *key* 90, et seq.; Bills and Notes *key* 315, et seq.; Trusts *key* 253.

10 C.J.S. Bills and Notes §200; 80 C.J.S. Setoff and Counterclaim §§21, 49 through 55.

20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff §§39, 58, 60, et seq.

Setoff, counterclaim, and recoupment in replevin or other action for possession of personal property. 151 ALR 519.

Right of defendant in action by undisclosed principal to avail himself of defenses or setoffs that would have been available in an action by the agent in his own right on the contract. 53 ALR 414.

25-4-404. Cross-claim to be asserted in answer.

Case Notes

Res Judicata Inapplicable: The Supreme Court dismissed allegations by appellants that respondents should have asserted their cross-claim to property in a federal foreclosure action or be barred by the doctrine of res judicata. It is discretionary with the party whether to assert his claim as a cross-claim or to reserve it for later independent litigation. Whittaker v. Schreiner, 174 M 232, 570 P2d 299 (1977).

Demand for Relief Necessary: Fact that a court of equity, when once it acquires jurisdiction will grant all the relief necessary to the adjustment of the entire subject of the action, is subject to the qualification that when rights between defendants are involved it is not proper to make determination thereof unless demanded in the pleadings. Strack v. Fed. Land Bank, 124 M 19, 218 P2d 1052 (1950).

Equity Basis for Section — Complete Adjudication of Rights: This section is nothing more than a declaration, in statutory form, of the familiar rule that a court of equity, when all the parties to a controversy are before it, will adjust the rights of all and leave nothing open for future litigation, if it can be helped. Meredith v. Roman, 49 M 204, 141 P 643 (1914).

New Matter Not Allowed: This section does not permit the adjustment of defendants' rights in a case in which their claims are wholly independent of, and not in any way connected with, those of plaintiff, nor give the defendants the right to file new or amended pleadings. Meredith v. Roman, 49 M 204, 141 P 643 (1914).

Collateral References

Judgment *key* 208.

49 C.J.S Judgments §§32, 37, 67.

Part 5
Motion to Postpone Trial

Part Case Notes

Appellate Review — Issues Not Raised Below: In suit for damages arising out of railroad accident, issue regarding the admission of evidence of other accidents was not presented to the District Court upon application of one party for a Writ of Supervisory Control and a motion of the other party for a stay of proceedings, and thus the issue would not be addressed by Supreme Court in deciding the application and motion. Henry v. District Court, 198 M 8, 645 P2d 1350, 39 St. Rep. 430 (1982).

25-4-501. Motion to postpone trial for absence of testimony.

Case Notes

General 185
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GENERAL

No Assurance of Witness's Availability to Testify or Aid Defense — Motion for Continuance Properly Denied: After presenting his case at trial, Toulouse requested a continuance in order to allow his sister, who was sick with cancer, to testify the following day. The trial court granted a 15-minute recess to inquire whether the sister would be able to testify, but Toulouse could give no reasonable assurance that she would, so the continuance motion was denied. Following conviction, Toulouse appealed on grounds that he was denied a fair trial when the motion for continuance was denied, but the Supreme Court affirmed. A defendant moving for a continuance to secure an absent witness must demonstrate that a reasonable expectation or prospect of obtaining the presence of the witness exists, that the witness would testify, and that the witness's testimony would help the defense, and Toulouse did not meet this burden. Additionally, under this section, when a party moves to postpone a trial on the grounds of absence of evidence, such as an absent witness, the motion may be made only upon an affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to procure it. Toulouse failed to file an affidavit or to meet the other statutory criteria, so the District Court did not abuse its discretion in denying the motion for continuance. St. v. Toulouse, 2005 MT 166, 327 M 467, 115 P3d 197 (2005), following St. v. Fields, 2002 MT 84, 309 M 300, 46 P3d 612 (2002).

No Error in Failure to Grant Continuance of Parental Rights Trial Absent Affidavits or Showing of Good Cause: The father contended that the District Court erred in failing to grant his

motion for a continuance of the trial to terminate his parental rights because he had only 20 days to prepare for trial. Although true that only 20 days elapsed after the father received actual notice of the hearing, he was aware for more than 4 months of the state's intention to terminate his parental rights. Further, he offered no affidavits in support of his motion to continue, offered no evidence of what he would have presented had more time been available, and failed to show any good cause beyond the argument of fundamental unfairness. The District Court noted that this was not a new case and that the father had plenty of time to get witnesses to the hearing. The hearing did not spring upon the father unexpectedly, and denial of his motion to continue was not erroneous. In re R.F., 2001 MT 199, 306 M 270, 32 P3d 1257 (2001).

No Continuance for Failure to Obtain Counsel: Plaintiffs, who resided out of state, sought a continuance based on their alleged inability to obtain legal counsel. However, they had ample time to secure representation, and absent a showing of good cause, the District Court properly denied the motion for continuance. Fields v. Wells, 239 M 392, 780 P2d 1141, 46 St. Rep. 1775 (1989).

Not Error to Refuse to Grant Continuance to Subpoena Witness — Testimony Inadmissible Hearsay: Even if the motion to compel a subpoena had been made in a timely manner, the District Court did not err in refusing to grant a continuance to call the police chief as witness to testify as to what he reported to the Worker's Compensation Crime Compensation Unit because the police chief was not present during the assault and his testimony about the report would have been inadmissible hearsay. Sloan v. St., 236 M 100, 768 P2d 1365, 46 St. Rep. 214 (1989).

Failure of Petitioner to Appear — No Showing of Good Cause: Petitioner's motion for continuance was properly denied when she knew of the date and purpose of the trial, indicated no good reason for her voluntary absence, and made no showing of either absent material evidence or other grounds for continuance in the furtherance of justice. In re Custody of C.C., K.C., & B.C., 215 M 72, 695 P2d 816, 42 St. Rep. 190 (1985).

Failure of Attorney to Appear — Continuance Denied: A husband and wife and their respective attorneys had extended notice of the date of a property settlement hearing. However, without court approval for his absence, the husband's attorney failed to appear at the hearing. The husband made a motion for a continuance so that he might obtain another attorney to represent him. The District Court denied the motion and proceeded to ask many questions of the husband and wife, allowed the husband to cross-examine, and scrupulously protected the rights of the husband. Following the trial, the District Court waited several months to allow the husband and his attorney an opportunity to present additional evidence or file motions. Since the court found a complete absence of an abuse of discretion, the motion for continuance because of lack of evidence was properly denied. Bolich v. Bolich, 199 M 45, 647 P2d 844, 39 St. Rep. 1197 (1982).

Section Applied to Criminal Case — No Error in Denial of Motion: Court did not commit prejudicial error when it overruled criminal defendant's objection to County Attorney's motion for continuance even though motion was not supported by required affidavit where motion was made just prior to end of trial court's day and trial resumed promptly on the next morning. St. v. Crockett, 148 M 402, 421 P2d 722 (1966).

Mistake, Surprise, or Neglect — Cause for Relief From Judgment: A continuance ought to be granted whenever the facts shown upon the application therefor would authorize the court, under the appropriate provisions of law, to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, surprise, or excusable neglect. Westfall v. Motors Ins. Corp., 136 M 449, 348 P2d 784 (1960); Meredith v. Roman, 49 M 204, 141 P 643 (1914).

Bastardy Case — Diligence Not Shown: Where, in a bastardy case, no affidavit in support of a motion for continuance on the ground of two absent witnesses was presented, showing due diligence exercised to procure the absent evidence, and that should the motion be granted, the evidence could be procured at a subsequent time, and the character of evidence of one of them, still not subpoenaed, and absent in a neighboring state, would naturally make him reluctant to testify, and the other had been subpoenaed but not served, the trial court did not err in denying the motion. St. v. Kuilman, 111 M 459, 110 P2d 969 (1940).

Diligent Effort Required: It is indispensably necessary that the affidavit for a postponement, on the ground that witnesses are absent, contain a showing of diligent effort to secure their presence. Meredith v. Roman, 49 M 204, 141 P 643 (1914).

Section Applied to Criminal Case — Denial of Motion as Error: The denial of a continuance is error where, in a prosecution for murder, the defendant's affidavit for a continuance to secure the testimony of an absent witness, who was present at the killing, showed that: the utmost diligence was used to locate the witness and secure his testimony; he had been located in another state

about 18 days before the trial, and a commission was immediately issued to take his testimony, which was not secured in time for the trial; and his evidence was material, and the same facts could not be proved by any other witness. Moreover, the affidavit was corroborated as to the diligence used. St. v. Metcalf, 17 M 417, 43 P 182 (1896), distinguished in Bean v. Missoula Lumber Co., 40 M 31, 104 P 869 (1909).

Costs as a Condition to Continuance: This section, when construed with 25-10-203, confers jurisdiction upon the trial court to impose costs as a condition for a continuance, upon the ground of absence of evidence as well as other grounds. State ex rel. Congdon v. District Court, 10 M 456, 26 P 182 (1891).

DISCRETION OF COURT

Failure to File Affidavit or Show Prejudice From Denied Postponement, Coupled With Ample Chances to Discover: It was not an abuse of discretion to refuse to grant a continuance for discovery purposes when the requesting party failed to file the necessary affidavit in the lower court, did not assert on appeal how she was prejudiced by the failure, and had ample opportunity to pursue discovery of the matter at issue. In re Marriage of Caras, 263 M 377, 868 P2d 615, 51 St. Rep. 98 (1994).

Language Mandatory — Affidavit Required:

There was no abuse of discretion in denial of a motion for continuance where appellant failed to: (1) file an affidavit showing the materiality of a psychological evaluation and showing that he used due diligence in procuring a sexual offender psychological evaluation; and (2) show good cause to support a postponement pursuant to 25-4-503. Any bias as to the treatability of a sexual offender was harmless, and appellant's right to a fair trial was not denied. In re T.M.M., 234 M 273, 762 P2d 866, 45 St. Rep. 1909 (1988).

Defendant alleged error for failure to grant his motion for a continuance for the purpose of challenging the credibility of Paulus, the state's witness. Defendant never filed an affidavit demonstrating materiality or due diligence as required by statute. The District Court did not abuse its discretion in not granting the motion. The language of 25-4-501 is mandatory and must be construed as such. St. v. Harvey, 184 M 423, 603 P2d 661 (1979).

Minimal Diligence of Movant — Motion for Continuance Denied: Section 46-13-202 clearly allows the District Court to exercise discretion in granting or denying a motion for continuance after considering the diligence put forth by the movant. Where a trial date had already been rescheduled twice, the court properly denied a motion for continuance when defendant offered no evidence or argument that he exercised due diligence in pursuing a psychological evaluation and no formal affidavit was submitted as required by this section. St. v. French, 233 M 364, 760 P2d 86, 45 St. Rep. 1557 (1988).

Failure of Attorney to Appear — Continuance Denied: A husband and wife and their respective attorneys had extended notice of the date of a property settlement hearing. However, without court approval for his absence, the husband's attorney failed to appear at the hearing. The husband made a motion for a continuance so that he might obtain another attorney to represent him. The District Court denied the motion and proceeded to ask many questions of the husband and wife, allowed the husband to cross-examine, and scrupulously protected the rights of the husband. Following the trial, the District Court waited several months to allow the husband and his attorney an opportunity to present additional evidence or file motions. Since the court found a complete absence of an abuse of discretion, the motion for continuance because of lack of evidence was properly denied. Bolich v. Bolich, 199 M 45, 647 P2d 844, 39 St. Rep. 1197 (1982).

No Abuse of Discretion: In view of defendant's failure to comply with 25-4-501, it cannot be said that the court abused its discretion in denying a motion for continuance. St. v. Pascgo, 173 M 121, 566 P2d 802 (1977).

Condemnation — No Abuse Shown: Since this is a discretionary statute, denial of state's motion for continuance in condemnation action was not an abuse of discretion where landowner had made a full and complete admission as to testimony state's absent witness would have given. St. Highway Comm'n v. Cooper, 164 M 272, 521 P2d 190 (1974).

Refusal of Continuance as Abuse: Where plaintiff filed an affidavit for a continuance wherein it was shown that the affidavit was made in good faith, that the absent witness was a material witness, that due diligence was used to procure the witness, and that the defendant did not file any affidavits in opposition to the motion, it was an abuse of discretion for the trial court to refuse the continuance. Dean v. Carter, 131 M 304, 309 P2d 1032 (1957).

No Abuse Shown — Particular Facts: In denying a motion for a continuance on the ground of absent witnesses the court did not abuse its discretion where movant did not show that he had

used due diligence in procuring the desired evidence, nor set forth that if a continuance were granted he would be able to secure the personal attendance of the witnesses or their evidence at a subsequent time, and his assertion of what he "believed" the witnesses would testify to was fairly met by counteraffidavits. McCarthy v. Anaconda Copper Min. Co., 70 M 309, 225 P 391 (1924).

Order Not Reviewable Without Prejudice to Movant: A motion for a continuance on the ground of the absence of a witness is addressed to the discretion of the trial court, its action not being reviewable on appeal in the absence of an affirmative showing of prejudice to the movant. Hunt v. Van, 61 M 395, 202 P 573 (1921).

Order Not Reviewable Without Prejudice to Complainant: The power to grant or refuse a postponement on any ground is vested in the discretion of the court, and its exercise is not reviewable where no prejudice to the complaining party is shown. Downs v. Cassidy, 47 M 471, 133 P 106 (1913).

AFFIDAVIT AS TO ABSENT WITNESS

Language Mandatory — Affidavit Required:

The Supreme Court affirmed the District Court's denial of the husband's request for a continuance. No affidavit was presented showing the materiality of absent evidence and that due diligence had been used to procure it. The record did not disclose any other grounds warranting postponement under 25-4-503. The husband's contentions were unsubstantiated. In re Marriage of Concepcion, 212 M 191, 687 P2d 718, 41 St. Rep. 1675 (1984).

Defendant alleged error for failure to grant his motion for a continuance for the purpose of challenging the credibility of Paulus, the state's witness. Defendant never filed an affidavit demonstrating materiality or due diligence as required by statute. The District Court did not abuse its discretion in not granting the motion. The language of 25-4-501 is mandatory and must be construed as such. St. v. Harvey, 184 M 423, 603 P2d 661 (1979).

Knowledge of Trial Date Affidavit Sufficient: Where a plaintiff's absence was excusable and he did not know that the case was set for trial and plaintiff's counsel did the best he could in setting forth in his affidavit what he believed his client would testify to, the fact that the showing in the affidavit was technically insufficient was not grounds for denying a continuance. Westfall v. Motors Ins. Corp., 136 M 449, 348 P2d 784 (1960).

Due Diligence and Evidence to Be Shown: The affidavit on application for a continuance on the ground of the absence of a necessary witness must show that due diligence was exercised by the applicant to procure the testimony of the witness, set forth the substance thereof, and that the witness if present will testify. Davenport v. Davenport, 69 M 405, 222 P 422 (1924).

Travel Costs — Affidavits Insufficient: Where a continuance was sought in a divorce action on the ground that defendant, a necessary witness, was unable to be present because of her inability to defray the expense of travel, refusal thereof was proper in the absence of a showing that her financial condition would improve in the meantime, and of an excuse for failure to have her deposition taken. Davenport v. Davenport, 69 M 405, 222 P 422 (1924).

Affidavits Insufficient: Affidavits for a continuance not showing when the subpoena for an absent witness was issued, why it was sent to the Sheriff of a county other than that of the residence of the witness, or that there was probability or possibility that his personal attendance or deposition could be procured at a date later than that set for trial, were insufficient, and court did not err in overruling the motion for a postponement. Hunt v. Van, 61 M 395, 202 P 573 (1921).

Collateral References

Continuance *key* 46(1) through (11).

17 C.J.S. Continuances §§70 through 74, 108 through 111.

17 Am Jur. 2d Continuances §4, et seq.

Continuance of civil case because of illness or death of party. 68 ALR 2d 470.

Continuance of criminal case because of illness of accused. 66 ALR 2d 232.

Party litigant's absence in civil case because of illness of relative or member of family as grounds for continuance. 47 ALR 2d 1058.

Right of accused, in criminal case, to continuance because of absence of witness who is a fugitive from justice. 42 ALR 2d 1229.

Prejudicial effect, in civil case, of denial of continuance to call nonappearing witness whom adversary had been expected to call. 39 ALR 2d 1445.

25-4-502. No postponement when expected evidence admitted.

Case Notes

Offer to Stipulate — Refusal of Postponement Not Abuse of Discretion: Defendant moved that the setting be vacated for the term in a personal injury action because of illness of the driver of

his truck preventing the taking of his deposition. The defendant claimed that the driver was a material witness. Plaintiff's counsel offered to dismiss the action against the driver and to stipulate that the driver would testify as moving counsel stated he would. Refusal to grant the motion was not an abuse of discretion under this section, particularly where it appeared that the driver's testimony would have been merely cumulative of that of other defense witnesses. Adams v. Misener, 113 M 559, 131 P2d 472 (1942).

Grounds for Denial Stated: Under this section, the trial court may properly deny an application for a continuance based upon the absence of a material witness, if the adverse party admits that the absent witness, if present, would testify to the matters set forth in the affidavits of movant. Orem v. Hansen Packing Co., 91 M 222, 7 P2d 546 (1932).

Admission by Defendant — Continuance Properly Denied: Where counsel for plaintiff asked for a continuance on the ground that plaintiff was unable to attend because of illness, and counsel for defendant agreed that he would admit that, if present, plaintiff would testify to the matters set forth in her affidavit, the continuance was properly denied. Ward v. Strowd, 76 M 93, 244 P 1007 (1926).

Collateral References

Continuance *key* 46(1) through (11).

17 C.J.S. Continuances §§124 through 126.

17 Am. Jur. 2d Continuances §§41 through 43.

Continuance of civil case because of illness or death of party. 68 ALR 2d 470.

25-4-503. Postponement on other grounds.

Compiler's Comments

1981 Amendment: Deleted "terms the court may, in its discretion, upon" after "Upon"; inserted "the court may, in its discretion"; inserted "under such conditions as the court may direct".

Case Notes

Failure of Attorney to Inform Trial Court of Potential Conflict — Motion to Postpone Trial Properly Denied: A dissolution and child custody case was set for trial and continued twice. Four days prior to the final trial date, respondent's attorney moved for a continuance because of a federal trial set for the same day. The motion was denied. Neither respondent nor respondent's attorney appeared at the scheduled trial. At trial, the court attempted to reach respondent's attorney, but could not. The court stated that the motion to continue was untimely because it was unlikely that the attorney did not have advance notice of the federal trial and could have informed the court of the potential scheduling conflict at an earlier date. Respondent failed to establish prejudice based on denial of the continuance motion, nor were any due process rights affected because respondent received notice of the trial 2 months in advance and the trial was held as scheduled. In re Marriage of Fishbaugh, 2002 MT 175, 310 M 519, 52 P3d 395 (2002).

No Error in Failure to Grant Continuance of Parental Rights Trial Absent Affidavits or Showing of Good Cause: The father contended that the District Court erred in failing to grant his motion for a continuance of the trial to terminate his parental rights because he had only 20 days to prepare for trial. Although true that only 20 days elapsed after the father received actual notice of the hearing, he was aware for more than 4 months of the state's intention to terminate his parental rights. Further, he offered no affidavits in support of his motion to continue, offered no evidence of what he would have presented had more time been available, and failed to show any good cause beyond the argument of fundamental unfairness. The District Court noted that this was not a new case and that the father had plenty of time to get witnesses to the hearing. The hearing did not spring upon the father unexpectedly, and denial of his motion to continue was not erroneous. In re R.F., 2001 MT 199, 306 M 270, 32 P3d 1257 (2001).

Motion for Continuance Denied Although Illness Asserted: After granting motions to continue the pretrial conference and trial on several occasions based on illness and hospitalization of defendant, the trial court denied another motion for a 30-day continuance due to defendant's emphysema and hypertension. The Supreme Court affirmed after noting that defendant: (1) was present at trial; (2) testified extensively in his own behalf; (3) was not prevented from presenting his case because of his illness; and (4) had been granted several previous motions for continuance. In re Marriage of Mahaffey, 245 M 424, 801 P2d 1335, 47 St. Rep. 1172 (1990).

No Continuance for Failure to Obtain Counsel: Plaintiffs, who resided out of state, sought a continuance based on their alleged inability to obtain legal counsel. However, they had ample time to secure representation, and absent a showing of good cause, the District Court properly denied the motion for continuance. Fields v. Wells, 239 M 392, 780 P2d 1141, 46 St. Rep. 1775 (1989).

Denial of Postponement: When the noncustodial parent was notified of a District Court hearing in a child custody and support matter 6 weeks prior to the hearing, no due process rights were violated and the District Court did not abuse its discretion in refusing to continue the hearing upon being notified 20 to 30 minutes before the hearing that neither the noncustodial parent nor an attorney representing him would be present. Notice was sufficient, and the hearing constituted an opportunity to be heard, even though he did not avail himself of the opportunity. In re Marriage of Robbins, 219 M 130, 711 P2d 1347, 42 St. Rep. 1897 (1985).

Failure of Petitioner to Appear — No Showing of Good Cause: Petitioner's motion for continuance was properly denied when she knew of the date and purpose of the trial, indicated no good reason for her voluntary absence, and made no showing of either absent material evidence or other grounds for continuance in the furtherance of justice. In re Custody of C.C., K.C., & B.C., 215 M 72, 695 P2d 816, 42 St. Rep. 190 (1985).

Unsubstantiated Contentions — Postponement Not Warranted: The Supreme Court affirmed the District Court's denial of the husband's request for a continuance. No affidavit was presented showing the materiality of absent evidence and that due diligence had been used to procure it. The record did not disclose any other grounds warranting postponement under 25-4-503. The husband's contentions were unsubstantiated. In re marriage of Concepcion, 212 M 191, 687 P2d 718, 41 St. Rep. 1675 (1984).

Failure of Attorney to Appear — Continuance Denied: A husband and wife and their respective attorneys had extended notice of the date of a property settlement hearing. However, without court approval for his absence, the husband's attorney failed to appear at the hearing. The husband made a motion for a continuance so that he might obtain another attorney to represent him. The District Court denied the motion and proceeded to ask many questions of the husband and wife, allowed the husband to cross-examine, and scrupulously protected the rights of the husband. Following the trial, the District Court waited several months to allow the husband and his attorney an opportunity to present additional evidence or file motions. Since the court found a complete absence of an abuse of discretion, the motion for continuance was properly denied. Bolich v. Bolich, 199 M 45, 647 P2d 844, 39 St. Rep. 1197 (1982).

Proceedings in Another Court — Generally: The question of whether proceedings in one court should be stayed pending decision on proceedings in another court should be determined upon the basis of the following considerations: (1) a court has inherent power to stay proceedings in control of its docket, after balancing the competing interests; (2) if there is even a fair possibility that a stay will work damage to someone else, the person seeking a stay must make out a clear case of hardship or inequity in being required to go forward; and (3) a litigant may be required to submit to a delay which is not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted, especially in cases of extraordinary public moment. Henry v. District Court, 198 M 8, 645 P2d 1350, 39 St. Rep. 430 (1982).

Proceedings in Another Court — Federal Preemption Questions: Railroad sued in railroad crossing accident case moved for a stay of state court proceedings, contending that there was a substantial risk that the state decision would conflict with a federal circuit court decision; that the issue was a federal question of congressional preemption of an interstate commerce matter and thus more appropriately decided by the federal courts; that the risk of conflicting decisions would create a dilemma for the railroad in operating its trains in Montana and other states; and that the interest of justice, judicial economy, and good court administration required a stay. The Supreme Court denied a stay because there was in fact no preemption question and thus no substantial risk of conflicting decisions; the railroad did not sufficiently show that a great hardship would befall it were a stay not granted; the railroad did not satisfy the court that the hardship on it would be less than that on plaintiff; and it was very doubtful that judicial economy would be adversely affected by refusing a stay. Henry v. District Court, 198 M 8, 645 P2d 1350, 39 St. Rep. 430 (1982).

Postponement for Mistake, Surprise, or Neglect: A continuance ought to be granted whenever the facts shown upon the application therefor would authorize the court, under the appropriate provisions of law, to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, surprise, or excusable neglect. Westfall v. Motors Ins. Corp., 136 M 449, 348 P2d 784 (1960); Meredith v. Roman, 49 M 204, 141 P 643 (1914).

Discretion of Court Controlling: The power to grant or refuse a postponement on any ground is vested in the discretion of the court, and its exercise is not reviewable where no prejudice to the complaining party is shown. Downs v. Cassidy, 47 M 471, 133 P 106 (1913), followed in State ex rel. Clark v. Bailey, 99 M 484, 44 P2d 740 (1935). See also Tri-County Plumbing & Heating, Inc. v. Levee Restorations, Inc., 221 M 403, 720 P2d 247, 43 St. Rep. 928 (1986).

Collateral References

Continuance *key* 46(1) through (11).

17 C.J.S. Continuances §§88 through 93.

17 Am. Jur. 2d Continuances §12, et seq.

Appealability of order staying, or refusing to stay, action because of pendency of another action. 18 ALR 3d 400.

Continuance of civil case because of illness or death of party. 68 ALR 2d 470.

Continuance of criminal case because of illness of accused. 66 ALR 2d 232.

Party litigant's absence in civil case because of illness of relative or member of family as grounds for continuance. 47 ALR 2d 1058.

25-4-504. Depositions of witnesses upon postponement.

Collateral References

Continuance *key* 49.

17 C.J.S. Continuances §§124 through 126.

17 Am. Jur. 2d Continuances §§41 through 43.

Part 6
Procedure After Claims Partially Admitted

25-4-601. Procedure when answer admits part of plaintiff's claim.

Collateral References

Costs *key* 40; Judgment *key* 85.

49 C.J.S. Judgments §185.

25-4-602. Judgment for excess when plaintiff admits counterclaim.

Compiler's Comments

1981 Amendment: Deleted "The admission must be made a part of the judgment roll" at the end of the section.

Collateral References

Judgment *key* 85, 279.

49 C.J.S. Judgments §185.

CHAPTER 5
PARTIES

Chapter Case Notes

No Standing to Recover Damages by Party Not Owner of Property — Fax Not Considered Valid Assignment of Damage Claim: Koelzer owned an inn by a mining and power generation site near Colstrip. Koelzer discovered that mining activity had damaged the inn and filed a complaint in 1994 against the mining and power generation companies, but did not pursue the damage claim. In 1996, Dale and Shawonda Lewis approached Koelzer about purchasing the inn, and the issue of the damages and Koelzer's claim came up. The Lewises inspected the inn and discovered additional damages, which led Koelzer to reassert the damage claim, but the claim was again unresolved. Nevertheless, the Lewises offered to buy the inn, and title was eventually conveyed to Dale's parents, who were able to secure financing. Koelzer notified the companies by fax that the inn had been sold and requested that the companies work with Dale on the structural damage discussed in the past. About 1 year later, Dale received an estimate of $91,000 to repair the damages and filed a complaint seeking compensation from the companies. Dale's parents eventually filed for bankruptcy, and the Lewises finally became the owners of record in 1998. When the companies discovered that the Lewises were not the owners of the inn at the time that the suit was filed, they moved for summary judgment, which was granted by the District Court on grounds that the Lewises had no standing to assert a claim for damages arising before they acquired title. On appeal, the Supreme Court cited the general rule that persons cannot recover for damages to property that they do not own. Further, even though property damage claims have long been recognized as assignable, the fax did not meet the statutory requirements of a valid assignment and was unenforceable. Thus, on the issue of prepurchase damages, no material question of fact existed regarding ownership or assignment, so the Lewises had no standing to bring a claim for damages prior to their ownership of the inn. Summary

judgment was affirmed. Lewis v. Puget Sound Power & Light Co., 2001 MT 145, 306 M 37, 29 P3d 1028 (2001).

Chippewa-Cree Tribal Member Without Standing to Challenge Gas Tax — Incidence of Tax Upon Distributor: Carter, an enrolled member of the Chippewa-Cree Tribe, sold gasoline from a convenience store on the Rocky Boy's Reservation. Carter held a business license issued by the tribe and was not licensed by the state. She alleged that the gasoline tax was unconstitutionally applied to sales by tribal members inside the reservation because the tax is preempted by federal law. The District Court granted summary judgment, holding that Carter lacked standing. Citing Okla. Tax Comm'n v. Chickasaw Nation, 515 US 450, 132 L Ed 2d 400, 115 S Ct 2214 (1995), the Supreme Court affirmed, holding that the incidence of the tax fell upon the distributor and not upon the retailer and that the distributor is not a member of the tribe. For this reason, Carter was not directly and adversely affected by the tax and had no standing to bring the action. Carter v. Dept. of Transportation, 274 M 39, 905 P2d 1102, 52 St. Rep. 1111 (1995).

Claim Under 42 U.S.C. 1983 Not Barred by Res Judicata — Prior Summary Judgment No Bar to Consideration of Motion to Dismiss — Differing Parties: Plaintiff brought an action against the city of Great Falls to recover damages for violation of 42 U.S.C. 1983 in connection with a discharge from employment. The District Court granted the city's motion for summary judgment. Plaintiff then filed an action against her immediate supervisor, in the supervisor's official and individual capacity, making the same allegations. The supervisor moved the District Court to dismiss on the basis that the section 1983 claim was res judicata by reason of the summary judgment in the former action, and the District Court granted the motion. The Supreme Court reversed, holding that under Rule 12(b), M.R.Civ.P. (Title 25, ch. 20), the District Court's consideration of the first action was limited to consideration of the pleadings. The Supreme Court also stated that because the immediate supervisor was not a party to the first action, neither the plaintiff nor the defendant was able to present all the facts and theories in the first case that are present in the second. For these reasons, the Supreme Court held that the second action was not barred. Dagel v. Manzer, 251 M 176, 823 P2d 874, 48 St. Rep. 1166 (1991).

Parents Sued in Capacity of Guardians — Notice Insufficient to Establish Individual Liability: Defendants were sued in their capacity as guardians of their minor son for the expenses incurred in connection with the birth of an illegitimate child fathered by their son. A default judgment was rendered against defendants. The Supreme Court reversed and vacated the default judgment, holding that the guardians' duty to safeguard the rights of their son during the legal proceeding did not subject them to personal liability for their son's allegedly wrongful acts. The Supreme Court also held that because the title of the case, the allegations in the complaint, and all motions at trial addressed the defendants in their capacity as guardians, they had insufficient notice of any likelihood of personal liability. Breuer v. Poe, 245 M 22, 797 P2d 944, 47 St. Rep. 1812 (1990).

Determination of Public's Right to Use Dearborn River — Standing of Coalition of Citizens: In action for determination of the public's right to use the Dearborn River, whether the Montana Coalition for Stream Access, Inc., had standing to bring suit was immaterial because the Department of State Lands (functions now transferred to Department of Natural Resources and Conservation) and the Department of Fish, Wildlife, and Parks were also plaintiffs. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Citizen Taxpayer — Standing: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Plaintiff, in his complaint, alleged that he was a citizen, resident, elector, and taxpayer. Prior cases held that in order to establish standing to sue a governmental entity: (1) the issue for review must represent a case or controversy; (2) the complaining party must allege past, present, or threatened injury to a property or civil rights; and (3) the alleged injury must be distinguishable from injury to the public generally, but need not be exclusive to the complaining party. The Supreme Court added a further exception. The court stated that it would recognize the standing of a taxpayer, without more, to question the constitutional validity of a tax or use of tax money where the issue or issues presented directly affect the constitutional validity of the state or its political subdivisions acting to collect the tax, issue bonds, or use the proceeds thereof. The court said it would accept original jurisdiction of such suits when special circumstances, presenting issues of urgent or emergency nature, exist requiring speedy determination. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984), followed in Montanans for the Coal Trust v. St., 2000 MT 13, 298 M 69, 996 P2d 856, 57 St. Rep. 73 (2000).

Chapter Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Part 1
Designation of Parties

25-5-101. Names of parties.

Collateral References

Parties *key* 69.
67A C.J.S. Parties §5.

25-5-102. Use of abbreviated names.

Case Notes

Abbreviations Permitted: It is sufficient to describe a party by any known and accepted abbreviation of his Christian name. Clinton v. Miller, 124 M 463, 226 P2d 487 (1950).

Collateral References

Parties *key* 66 through 74; Pleading *key* 46.
67A C.J.S. Parties §§115, 172, 176.

25-5-103. Suing a party by a fictitious name.

Case Notes

Applicability of Fictitious Name Statute and Misnomer Rule to Similarly Named Defendants — Relation Back of Amended Complaint: Molina was injured on a construction site, and filed a complaint against Panco, Inc., a Washington corporation that he believed to be the general contractor, for failing to supervise the job site and to provide a safe place to work. Molina also named fictitious defendants John Does I-III in the complaint. After the complaint was served but before Panco, Inc., filed a responsive pleading, Molina learned that there were two different corporations in Washington with similar names, so he filed an amended complaint naming the true contractor, Panco Construction, Inc., and retaining the additional fictitious defendants. Panco Construction, Inc., then filed its answer and moved for summary judgment, listing as an affirmative defense that the action was barred by the statute of limitations because the amended complaint was filed 3 months and 3 days after the limitation for negligence claims in 27-2-204. Molina asserted that the statute of limitations did not apply because under this section, a fictitiously named defendant is party to the action from its commencement so the statute of limitations stops running as to the fictitious party on the date that the original complaint is filed. Molina also contended that under Rule 15(c), M.R.Civ.P. (Title 25, ch. 20), an amended complaint relates back to the date of the original complaint when the amended complaint revolves around the same operative facts as the original complaint. Molina then moved to amend the complaint, asking that the District Court rule that the amended complaint sufficed to substitute Panco Construction, Inc., for John Doe I or, alternatively, that Molina be allowed to file a second amended complaint substituting Panco Construction, Inc., for John Doe I. Molina then moved to dismiss Panco, Inc., as a defendant. The District Court subsequently granted the motion of Panco Construction, Inc., for summary judgment without ruling on Molina's motion to amend the complaint. Molina appealed, contending that Panco Construction, Inc., was not a new party to the action, but rather a presently identified, formerly fictitiously named defendant that should be considered a party from the filing of the original complaint. Panco Construction, Inc., argued that: (1) Molina had attempted to entirely replace a mistakenly named defendant with a correctly named defendant without meeting the notice requirements of Rule 15(c), M.R.Civ.P.; (2) it was not a fictitiously named defendant under this section because due diligence on Molina's part would have revealed the true identity of the defendant; and (3) Molina was precluded from arguing the applicability of Rule 4E(2), M.R.Civ.P., on appeal because the issue was never raised in District Court. The Supreme Court reversed based on the District Court's incorrect assumption that it orally granted Molina's motion to file an amended complaint and on its failure to rule on the motion to amend the complaint. The case was remanded for consideration of the motion to amend the complaint in conjunction with Rule 4E(2), M.R.Civ.P., and of the effect that that rule may or may not have on this section, the fictitious name statute, and Rule 15(c), M.R.Civ.P., the misnomer rule. Molina v. Panco Constr. Inc., 2002 MT 136, 310 M 185, 49 P3d 570 (2002). On remand, the District Court concluded that Molina was not ignorant of defendant's name because, even though Molina was misinformed by the Washington Secretary of State, he nevertheless knew defendant's true corporate name, so summary judgment was granted to defendant. On appeal, the Supreme Court disagreed and remanded again. Under a liberal interpretation of this section, Molina was allowed to substitute defendant's real name for one of the John Doe defendants in the original complaint because he had no reason to believe that the wrong name had been supplied by the Washington Secretary of State, and even though he knew

that the identity of the defendant whom he sought to name from the outset was the general contractor of the job on which he was injured, he relied on the incorrect information and thus was ignorant of the contractor's true legal name at the time that the complaint was filed. Molina v. Panco Constr., Inc., 2004 MT 198, 322 M 268, 95 P3d 687 (2004).

Wrong Defendant Sued — No Substitution: This section does not allow substitution of the proper defendant after discovery that the wrong defendant was named and the Statute of Limitations has run. Keller v. Stembridge Gun Rentals, 221 M 352, 719 P2d 764, 43 St. Rep. 886 (1986), citing LaForest v. Texaco, Inc., 179 M 42, 585 P2d 1318 (1978).

Relation Back of Amendment to Substitute True Name: When a complaint sets forth a cause of action against a defendant designated by a fictitious name under 25-5-103 and his true name is thereafter discovered and substituted by amendment, the fictitiously named defendant is considered a party to the action from its commencement, so that the Statute of Limitations stops running as to the fictitiously named defendant on the date the original complaint is filed. Sooy v. Petrolane Steel Gas, Inc., 218 M 418, 708 P2d 1014, 42 St. Rep. 1702 (1985).

Notice Required to Toll Statute of Limitations Against Fictitious Name Defendant: A plaintiff may utilize the fictitious name statute and may amend a complaint to substitute the true name of the defendant when discovered. If the amendment occurs after the Statute of Limitations has run, however, the real or intended defendant must have either been served or otherwise received notice of the institution of the action under the conditions for relation back provided in Rule 15(c), M.R.Civ.P. It is fundamental that the purpose of the Statute of Limitations is to provide a cutoff point for stale claims. Rule 15(c) carries out this policy by requiring notice of the action within the time limitations of the Statute of Limitations before an amendment adding new parties will relate back to the date of the original pleading. Vincent v. Edwards, 184 M 92, 601 P2d 1184 (1979), reversed in Sooy v. Petrolane Steel Gas, Inc., 218 M 418, 708 P2d 1014, 42 St. Rep. 1702 (1985).

Federal Diversity Jurisdiction in "John Doe" Complaint: In action against foreign corporation and its resident employee, who was joined as "John Doe" but was not served with process and did not appear, for injuries sustained by customer who tripped over orange crate in aisle of corporation's store, the test for removal of cause to federal court on diversity of citizenship was whether the employee had any real connection with the controversy. Defendant's designation as "John Doe" is permitted under this section, and the complaint states a joint cause of action of tort. Contention that there is a separable controversy and a fraudulent joinder of the defendant designated as "John Doe" within the meaning of the law, is not well grounded. Jensen v. Safeway Stores, Inc., 24 F. Supp. 585 (D.C. Mont. 1938).

Amendment of Complaint: If plaintiff was ignorant of defendant's true name when the action was commenced, he knew of it after the answer was filed, and should have amended his complaint under the terms of this section. Clark v. Oreg. Short Line R.R., 29 M 317, 74 P 734 (1903). See also Ramsey v. Cortland Cattle Co., 6 M 498, 13 P 247 (1887).

Collateral References

Parties *key* 66 through 74; Pleading *key* 46.

67A C.J.S. Parties §115.

25-5-104. Action against business association.

Case Notes

Service Upon Limited Liability Company Not Constituting Service Upon Individual Company Members — No Joinder of Member Solely for Executing on Judgment Against Company: Plaintiff obtained a judgment against a limited liability company, but when plaintiff discovered that the company had no assets to levy against, plaintiff moved to levy judgment against defendant personally. The motion was dismissed without prejudice, and plaintiff appealed, but the Supreme Court affirmed. Although defendant knew of the lawsuit involving the company, defendant was not separately served, and service upon the company did not constitute service upon the individual members of the company. Further, the District Court did not err in refusing to join defendant after judgment was rendered solely for the purpose of executing judgment because doing so would have deprived defendant of the due process right to notice and the opportunity to be heard. Ioerger v. Reiner, 2005 MT 155, 327 M 424, 114 P3d 1028 (2005), following S-W Co. v. Schwenk, 173 M 481, 568 P2d 145 (1977), Hadford v. Credit Bureau of Havre, Inc., 1998 MT 179, 289 M 529, 962 P2d 1198 (1998), Mtn. W. Bank v. Mine & Mill Hydraulics, Inc., 2003 MT 35, 314 M 248, 64 P3d 1048 (2003), and Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Unincorporated Association Considered Person Subject to Suit: MacPheat filed a libel complaint against Schauf and the insurance company association to which Schauf belonged,

claiming that Schauf wrote a libelous letter on the association letterhead to the judge who was presiding over one of MacPheat's criminal proceedings. The association moved to be removed from the action, asserting that it was simply a federally registered service mark and not a person or legal entity subject to service of process. The District Court agreed and dismissed the association from the suit. MacPheat appealed, and the Supreme Court reversed. The association made the same service mark argument in Oliver v. Farmers Ins. Group of Cos., 941 P2d 985 (Okla. 1997). In that case, the Oklahoma Supreme Court acknowledged that under traditional common law, a voluntary, unincorporated association could not be sued under its name because it did not have a legal status apart from that of its individual members, but that because of the unjustness of the rule in present day society, the rule has been modified in many jurisdictions. The Oklahoma court dismissed the service mark argument, because whatever else the association did, it clearly had a name under which a number of companies insured against risks for profit. The Montana Supreme Court found that reasoning persuasive. An unincorporated association was defined in Assoc. Press v. Mont. Senate Republican Caucus, 286 M 172, 951 P2d 65 (1997), as a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective. The association in this case was thus considered a person within the definition in Rule 4A, M.R.Civ.P. (Title 25, ch. 20), and to conclude otherwise and sanction the association's intangible classification would unnecessarily restrict those who can be sued in Montana courts and fly in the face of Montana's constitutional open courts provision. The association name was one under which its affiliates transacted business, so MacPheat could properly serve and bring suit against the association under this section without naming and serving process on the members individually. However, once the association was brought before the court, MacPheat still had the burden of establishing the liability of the association's members, if any, under the applicable substantive law. MacPheat v. Schauf, 2002 MT 23, 308 M 215, 41 P3d 895 (2002).

Section Inapplicable to Sole Proprietorships: This section does not provide authority for the levy and execution against an individual's personal assets to recover on a default judgment against that person's sole proprietorship. Jerry Martin & Associates, Inc. v. Don's Westland Bulk, 267 M 464, 884 P2d 795, 51 St. Rep. 1119 (1994).

Partnerships — Capacity to Sue in Own Name: On certification from the Ninth Circuit Court of Appeals, the Montana Supreme Court held that a joint venture between two out-of-state corporations had the capacity to bring suit as a plaintiff against a corporation under Montana law. Relying on the Uniform Partnership Act and Montana statutes that allow a partnership to be sued in its own name and to sue in Small Claims Court, the Supreme Court found clear legislative intent to treat partnerships as distinct entities with the power to sue. Decker Coal Co. v. Commonwealth Edison Co., 220 M 251, 714 P2d 155, 43 St. Rep. 337 (1986).

Service on Foreign Associations: Service of notice of a hearing for perpetuation of testimony in action against voluntary association with headquarters in another state, was sufficient on its local district secretary under section 93-3007, R.C.M. 1947 (repealed 1961), and service on one or more associates under this section was not required. State ex rel. Cook v. District Court, 102 M 424, 58 P2d 273 (1936).

Service on Partnership: This section applied to a partnership. Lindsay Great Falls Co. v. McKinney Motor Co., 79 M 136, 255 P 25 (1927); Gardiner v. Eclipse Grocery Co., 72 M 540, 234 P 490 (1925).

President of Association Not to Be Sued: A voluntary association of laborers may be sued in its common name, but in the absence of a statute authorizing it, it cannot be sued in the name of its president. Vance v. McGinley, 39 M 46, 101 P 247 (1909).

Section Not Applicable to Associated Plaintiffs: This section having no application to parties plaintiff does not authorize an action to be brought in a copartnership or firm name. Doll v. Hennessy Mercantile Co., 33 M 80, 81 P 625 (1905).

Collateral References

Associations *key* 20(1) through (3).

7 C.J.S Associations §§92 through 102.

Part 2
Capacity to Be a Party — Joinder

25-5-201. Capacity of married person to be a party.

Case Notes

Interspousal Tort Immunity Abolished: The defense of interspousal tort immunity is abolished, overruling previous decisions to the contrary. The historical reasons for retention of

immunity, i.e., unity of husband and wife as one person, family harmony, and the possibility of fraud and collusion, are no longer valid. Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Action Against Husband: The common-law doctrine under which one spouse may not sue the other for a personal tort is in force in Montana, and therefore, the complaint of a wife against her husband for damages resultant from personal injuries sustained by reason of the alleged negligence of defendant's chauffeur while plaintiff was riding in defendant's car, was vulnerable to a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P. and 25-31-503, now repealed). Conley v. Conley, 92 M 425, 15 P2d 922 (1932), overruled in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986).

Collateral References

Husband and Wife *key* 206 through 215.
41 C.J.S. Husband and Wife §111.

25-5-202. Who may defend when spouse sued.

Case Notes

Divorce Pending — Employment of Counsel by Wife: Under this section a wife, pending suit for divorce brought by her, had authority to employ counsel on behalf of her husband, in a suit for partition against both of them in which he had failed to appear. Buckhouse v. Parsons, 60 M 156, 198 P 443 (1921).

Collateral References

Husband and Wife *key* 217.
41 C.J.S. Husband and Wife §§121, 171.

25-5-203. Defendants — adverse claims to real property.

Case Notes

"Writ of Possession" Defined: The Writ of Possession is the execution process employed to recover what the judgment says the plaintiff shall have, and its issuance is governed by the general statutes on execution. It may issue at any time within 6 years after entry of the judgment under 25-13-101. It is issued by the clerk of the court as provided by 25-13-301(1). After lapse of 6 years from the entry of the judgment, it may issue by leave of court upon motion under 25-13-102 (now repealed). Dodd v. Simon, 113 M 536, 129 P2d 224 (1942).

Action to Quiet Title — Plaintiff Entitled to Writ of Possession: While a judgment in favor of plaintiff, out of possession, in an action to quiet title, need not direct the issuance of a Writ of Possession, he may have such a Writ whether the judgment so provides or not; therefore defendant may not complain of the inclusion of an order in the judgment directing its issuance. Doggett v. Johnson, 82 M 338, 267 P 292 (1928).

Joinder of Ejectment and Equitable Action: If a third party is in possession, the defendant claiming adversely may be joined as defendant with the party in possession. In that case the appropriate action would assume the aspect of an action at law in ejectment, which might, under some circumstances, be joined with a count for equitable relief. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 27 M 288, 70 P 1114 (1902).

Collateral References

Parties *key* 25.
67A C.J.S. Parties §37.

25-5-204. Joinder of state as defendant in actions affecting title to property.

Collateral References

States *key* 191(1), 212.
81A C.J.S. States §318.

Part 3
Guardian Ad Litem

25-5-301. Appointment of guardian.

Compiler's Comments

1983 Amendment: Throughout section, changed "infant" to "minor".

Case Notes

Rescission of Guardian Ad Litem's Appointment — No Effect on Jurisdiction: In an action initiated by a guardian ad litem on behalf of an alleged incompetent person, the District Court did not lack jurisdiction to dismiss the complaint after rescission of the guardian's appointment.

Neither Rule 17(c), M.R.Civ.P., nor 25-5-301 provides that a guardian ad litem is a party to a lawsuit; rather, the court held that the guardian ad litem appears in a representative capacity only, and hence his removal has no effect on District Court jurisdiction. State ex rel. Perman v. District Court, 213 M 130, 690 P2d 419, 41 St. Rep. 2002 (1984).

Application for Appointment of Guardian: A guardian ad litem is appointed upon the application of a friend or relative, or of a party to the action. In all cases where the incompetent is plaintiff, the application should be made by a relative or friend. State ex rel. Happel v. District Court, 38 M 166, 99 P 291 (1909).

Collateral References

Infants *key* 76 through 80; Insane Persons *key* 94(1).

43 C.J.S. Infants §§138 through 145; 57 C.J.S. Mental Health §§264 through 274.

42 Am. Jur. 2d Infants §160.

Protection of one who is mentally incompetent, but not so adjudicated, and who sues in his own name, by appointment of guardian ad litem or special guardian. 71 ALR 2d 1260.

Appointment of guardian ad litem for child in action for divorce, separation, or annulment involving issue of paternity, legitimacy, or legitimation. 65 ALR 2d 1392.

CHAPTER 7
TRIALS

Chapter Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Part 1
Issues — Mode of Trial

25-7-101. Issue defined, types of issues.

Case Notes

Finding of Fact Based on Issue Raised by Counterclaim: The District Court properly made a finding of fact regarding an issue raised by defendant's counterclaim even though plaintiff contended that there was an agreement that the trial would be conducted in two phases and that the issue in question would be the subject of the second phase. The plaintiff's actions during the course of the trial demonstrated she was fully aware that the court would be resolving the issue. Kis v. Pifer, 179 M 344, 588 P2d 514 (1978).

Affidavits Defining Issues: In action by property owners to enjoin construction and operation of stock car race track as a nuisance, where defendant filed affidavit to set aside temporary injunction granted without notice and demurrer to complaint, trial court improperly ordered permanent injunction, as the cause was not at issue and not ready for trial. State ex rel. Thompson v. District Court, 132 M 53, 313 P2d 1034 (1957), distinguished in Guardian Life Ins. v. Bd. of Equalization, 134 M 526, 335 P2d 310 (1959).

Admissions in Pleadings: Where defendants admit in the cross-complaint that $285 was paid on the sheep at the time the contract was entered into, the payment of that amount by the plaintiff to the defendants is not in issue. However, the right of the plaintiff to recover the $285 is in issue. Gilmore v. Mulvihill, 109 M 601, 98 P2d 335 (1940).

New Trial of Facts: The issue of fact mentioned in 25-11-101, defining a new trial, is that defined by this section as arising upon the pleadings. Beach v. Spokane Ranch & Water Co., 21 M 7, 52 P 560 (1897).

Collateral References

Pleading *key* 370.

71 C.J.S. Pleading §§763 through 771.

25-7-102. Issues of law to be decided by court.

Compiler's Comments

1981 Amendment: Inserted "Except as provided in Article II, section 7, of the Montana constitution" at the beginning of the section.

Case Notes

General 198
Admissibility of Evidence 199

GENERAL

Misinterpretation of Testimony Regarding Alleged Relinquishment of Claim — Reversible Error: Kane sued Morgan to recover the costs of two wells that Kane drilled on Morgan's property for which payment was not made. At one point in his testimony, Kane stated that he charged Morgan for the first 150 feet of drilling, but gave Morgan the rest of the 400-foot hole, and then said, "Yeah, I give it to him. I think I'd give it all to him." The District Court interpreted the statement as a relinquishment by Kane for payment of the entire well and compensated Kane only for the cost of the other well. Kane appealed. The Supreme Court applied the test in In re Marriage of Kotecki, 2000 MT 254, 301 M 460, 10 P3d 828 (2000), to determine if the finding was clearly erroneous: (1) whether the finding was supported by substantial evidence in the record; (2) whether the trial court misapprehended the effect of the evidence; and (3) if the first two factors are met, the Supreme Court is still left with a definite and firm conviction that a mistake was made. In this case, it was held that the District Court committed a mistake and misinterpreted Kane's testimony, so the Supreme Court reversed. Neither party interpreted the remark as a gift by Kane of the entire well. The comment was not followed up by either party during direct or cross-examination. Counsel for Morgan continued questioning both Kane and other witnesses as if Kane had not relinquished his claim, nor did Morgan assert relinquishment in the proposed findings of fact and conclusions of law. Kane v. Morgan, 2001 MT 182, 306 M 207, 32 P3d 747 (2001).

Sale of Automobile Franchise — Error in Failure to Resolve Mootness as Threshold Issue Before Underlying Dispute Addressed: Ford Motor Company (Ford) notified franchisee Shamrock Motors (Shamrock) that it intended to terminate Shamrock's automobile dealer franchise because Shamrock had sold 80% of its stock without Ford's knowledge or consent, which violated their franchise agreement. The Motor Vehicle Division of the Department of Justice issued a ruling that Ford had good cause, so Shamrock filed for judicial review in the District Court. Ford then removed to federal court, where the ruling was reversed, so Ford appealed to the Ninth Circuit Court. Shamrock then sold the dealership, and the decision was vacated because of lack of jurisdiction. The case was remanded to state court, where Ford moved to dismiss for mootness. The District Court denied the motion without discussion and ruled for Shamrock, concluding that the franchise could not be terminated as a result of the sale of 80% of the franchise stock. Reversing on appeal, the Supreme Court cited Adkins v. Livingston, 121 M 528, 194 P2d 238 (1948), in holding that mootness is a threshold issue that must be dealt with before the underlying dispute may be addressed. A matter is moot when, because of an event or happening, the issue has ceased to exist and no longer presents an actual controversy. A question is moot when a court cannot grant effective relief. If the parties cannot be restored to their original position, an appeal becomes moot. When Shamrock chose to sell the franchise during the appellate process, the question of whether Ford had good cause to terminate the franchise in the first instance became academic and thus moot. The District Court erred when it did not resolve the issue of mootness before addressing the merits of the claim, not recognizing that once Shamrock sold the dealership and was no longer the franchisee, there was no effective relief that the court could fashion under Title 61, ch. 4, part 2, so the appeal from the Motor Vehicle Division's ruling should have been dismissed as moot. Shamrock Motors, Inc. v. Ford Motor Co., 1999 MT 21, 293 M 188, 974 P2d 1150, 56 St. Rep. 99 (1999), followed in Shamrock Motors, Inc. v. Chrysler Corp., 1999 MT 39, 293 M 317, 974 P2d 1154, 56 St. Rep. 164 (1999).

Constitution "Other Writing" — Compelling State Interest Analysis — Application of Strict Scrutiny Test — Questions of Law — Harmless Error: In a suit for wrongful discharge from employment, it was harmless error for the District Court to submit to the jury the question of whether the right plaintiff asserted was a constitutionally protected right and, if constitutionally protected, whether it was a fundamental right and, if it was a fundamental right, whether the state provided a compelling interest for infringing upon it. Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996), distinguished in Hafner v. Dept. of Labor and Industry, 280 M 95, 929 P2d 233, 53 St. Rep. 1315 (1996).

Attorney as Expert Witness — Not to Advise Jury as to Law of Case: Insurance company argued that the District Court's instructions implying that company's position was frivolous as a matter of law were reinforced by detailed attorney opinion testimony on the law applicable to insurance coverage, in violation of 25-7-102 and Rule 704, M.R.Ev. (Title 26, ch. 10). The Supreme Court, citing Energy Oils, Inc. v. Mont. Power Co., 626 F2d 731 (9th Cir. 1980), adopted the finding that admission of opinion testimony as to the legal effect of a contract is erroneous, but in view of the District Court holding that there was insurance coverage as a matter of law, the Supreme Court concluded that counsel's testimony regarding the law of the case did not constitute reversible error under the unique facts of this case. The court found no abuse of

discretion in allowing attorneys who appear as expert witnesses to state their opinion on an insurer's duty to evaluate the facts, on what constitutes a reasonable evaluation of the facts, or on how an insurer should have approached the negotiations with the plaintiff; however, as a general rule an attorney cannot advise the jury as to the law of the case. Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217, 43 St. Rep. 1689 (1986), followed in Hart-Anderson v. Hauck, 44 St. Rep. 508 (1987) (opinion reversed and replaced by 230 M 63, 748 P2d 937, 45 St. Rep. 18 (1988)).

Standards for Admissibility of Sound-Recorded Evidence: In order for sound recordings to be admissible into evidence there must be showing of (1) the capability of the recording device; (2) the competency of the operator; (3) the authenticity of the recording; (4) the fact that no changes or deletions have been made; (5) the manner of the preservation of the recording; and (6) the identification of the speakers. St. v. Smith, 164 M 334, 523 P2d 1395 (1974).

Interpretation of Lease as Issue of Law: Interpretation of lease of building was matter for court in dispute between lessor and lessee. Solich v. Hale, 150 M 358, 435 P2d 883 (1967).

Doing Business Within State — Issue of Law: The determination whether an out-of-state publisher who advertised Montana land for sale was doing business in Montana within the purview of section 15-1701, R.C.M. 1947 (repealed 1968), or was carrying on the business of a real estate broker were questions of law under this section. Union Interchange, Inc. v. Parker, 138 M 348, 357 P2d 339 (1960), explained in Minnehoma Fin. Co. v. Van Oosten, 198 F. Supp. 200 (D.C. Mont. 1961).

Judicial Notice of Intoxicating Liquors: Where the court took judicial notice that vodka was an intoxicating liquor, the court was correct in instructing the jury that the drink known as "vodka squirt" and "vodka collins" are intoxicating liquors. St. v. Wild, 130 M 476, 305 P2d 325 (1956).

Judicial Notice — Notice by Jury: The jury as part of the court may take notice of the general geography of Montana and of the boundaries and limits of the various political subdivisions of the state. St. v. Williams, 122 M 279, 202 P2d 245 (1949).

Application to Workers' Compensation — Issue of Due Care: Under section 92-613, R.C.M. 1947 (since repealed), a question as to exercise of due care with respect to an employee covered by hospital contract is made a question of law for the court. In action against the hospital, the question of due care was submitted to the jury over objection of the defendant, although the objection did not point out the statute itself. The objections were sufficient and the issue of law was not referred to the jury by consent, so it should have been decided by the trial court under this section. Sample v. Murray Hosp., 103 M 195, 62 P2d 241 (1936).

Undisputed Facts — Issues of Law Only: Where the evidence in an action to recover the possession of jewelry claimed as a gift causa mortis was undisputed, as to the fact that such a gift had been made, the case presented in effect one on an agreed statement of facts, the question for decision became one of law for the court, and it was therefore prejudicial error to submit it to the jury. Davidson v. Stagg, 94 M 272, 22 P2d 152 (1933).

ADMISSIBILITY OF EVIDENCE

Attorney as Witness — Testimony as to His Legal Opinions on Legal Issues: Defendant claimed on appeal that plaintiffs' former attorney testified as to ultimate legal issues in the case and his legal opinion on the law involved. In view of defendant's limited trial objection that the offer of an opinion may improperly invade the province of the jury in determining the facts in the case and in view of no objection that the attorney was testifying as to legal opinions, the court refused to find error in allowing the testimony. Baird v. Norwest Bank, 255 M 317, 843 P2d 327, 49 St. Rep. 1026 (1992).

Plaintiff's Counsel and Witnesses — Reference During Trial to Defendants' Legal Duty: The trial court granted the defendants' motion to prohibit the plaintiff, witnesses, or counsel from referring to or indicating to the jury that the defendant owed a duty other than not to intentionally inflict emotional distress on the plaintiff. The court further ruled that neither party could refer to a duty of the defendant, of whatever scope or nature, until closing arguments, after the jury instructions had been read to the jury. The Supreme Court held that the order was overbroad. Under 25-7-301, either counsel may briefly state his case and the evidence he expects to introduce to support it, and may refer in opening statements to evidence to be adduced, if those statements are made in good faith and with reasonable grounds to believe the evidence is admissible. State ex rel. Fitzgerald v. District Court, 217 M 106, 703 P2d 148, 42 St. Rep. 1061 (1985).

Dying Declaration — Decision by Court: The question whether a dying declaration is admissible is one for the court's decision after hearing preliminary proof concerning the

condition of the declarant and the circumstances surrounding the making of the statement, whereupon, if admitted, the question of its sufficiency and the weight to be given it is for the jury's determination; hence refusal to submit instructions stating the rule governing the admission of such declarations was not error. St. v. Vettere, 76 M 574, 248 P 179 (1926).

Capacity — Determination by Court: The orthodox division of function between judge and jury allots, without question, to the judge the determination of all matters of fact on which the admissibility of evidence depends, and therefore of the facts of a witness' capacity to testify. St. v. Newman, 66 M 180, 213 P 805 (1923).

Admissibility of Confession — Determination by Court: The question of admissibility of a confession, alleged to have been made by defendant while in custody, is to be determined by the court after hearing evidence, in the presence of the jury, relative to the circumstances under which it was made, and its finding thereon will not be disturbed on appeal, unless clearly against the weight of the evidence. St. v. Berberick, 38 M 423, 100 P 209 (1909).

Error to Submit Admissibility to Jury: It is error to submit the question of the admissibility of an admission to the jury, and testimony relative thereto taken before the court sitting without the jury will not be examined on appeal. St. v. Sherman, 35 M 512, 90 P 981 (1907), overruling St. v. Tighe, 27 M 327, 71 P 3 (1903). See also Territory v. McClin, 1 M 394 (1871); Territory v. Underwood, 8 M 131, 19 P 398 (1887).

Collateral References

Jury *key* 12, et seq.; Trial *key* 135, 136(1) through (4).

50 C.J.S. Juries §9, et seq.; 88 C.J.S. Trial §§335 through 383; 89 C.J.S. Trial §§1018 through 1072.

75A Am. Jur. 2d Trial §714, et seq.

Reasonableness of peace officer's delay in making arrest without warrant for misdemeanor or breach of peace committed in his presence as question of law. 58 ALR 2d 1058.

25-7-103. When issues of fact to be decided by jury.

Case Notes

Questions of Fact to Be Decided by Jury: With limited exceptions, this section provides that all questions of fact are to be decided by the jury. St. v. Ford, 278 M 353, 926 P2d 245, 53 St. Rep. 947 (1996).

Whether Question of Fact Exists Not Question of Fact — No Right to Jury Trial Absent Evidence of Fact Question: Defendants asserted error in the District Court's denial of their request for a trial by jury, claiming that their affirmative defense constituted a breach of contract claim. However, before there was an entitlement to a jury trial, there had to be issues of fact for a jury to decide. Whether or not there is sufficient evidence to raise an issue of fact is a question of law for the court and not an issue of fact. The right of jury trial on any issue of fact presented by the pleadings is provisional, and if the evidence fails to form an issue of fact, the right of jury trial disappears. The Supreme Court cited numerous cases in holding that when, as in this case, insufficient evidence is presented to have the issue raised by an affirmative defense submitted to a jury, denial of a request for a jury trial is not prejudicial. Fed. Land Bank of Spokane v. Snider, 247 M 508, 808 P2d 475, 48 St. Rep. 285 (1991).

Jury Finding Walkway Unsafe: The defendant appealed a jury verdict on the basis that there was insufficient evidence to support the findings. The Supreme Court noted that while there was conflicting evidence, it was in the province of the jury to determine the credibility and weight to be given evidence. The jury did not err in reaching its decision. Davis v. Church of Jesus Christ of Latter Day Saints, 244 M 61, 796 P2d 181, 47 St. Rep. 1302 (1990), overruled, as to the distinction between liability based upon natural versus altered accumulations of ice or snow that are open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997). The Richardson standard was retroactively applied in Benson v. Heritage Inn, Inc., 1998 MT 330, 292 M 268, 971 P2d 1227, 55 St. Rep. 1341 (1998).

Substantial Evidence Supporting Personal Injury Award: Plaintiff, who turned down a $20,000 settlement offer and recovered only $7,800 from the jury, moved for a new trial on the basis that the verdict was contrary to the evidence presented at trial. The lower court's finding that substantial evidence existed to support the award (thereby exhausting its discretion to grant a new trial) was affirmed on appeal. Feller v. Fox, 237 M 150, 772 P2d 842, 46 St. Rep. 694 (1989).

Aggravating Circumstances Related to Sentencing — Jury Determination Not Required: Defendant argued that the aggravating circumstances with which the trial court justified the death penalty were equivalent to a finding of malice and that he was therefore entitled to have a jury determine facts constituting the aggravating circumstances. The Supreme Court held that

defendant was not entitled to a jury determination because the aggravating circumstances were related to sentencing only and were not elements of the crime charged. Capital sentencing procedures do not require jury participation. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988).

Special Verdict Form Disregarding Conflict of Evidence — Fatally Deficient: A special verdict form that presented the issue of breach of contract in terms that adopted defendants' view of substantial disputed facts rather than leaving the factual determination of the nature of the agreement to the jury was found fatally inadequate and was subject to remand and a new trial. NW. Nat'l Bank of Great Falls v. Weaver-Maxwell, Inc., 224 M 33, 729 P2d 1258, 43 St. Rep. 1995 (1986).

Evidence — When Sufficient to Support Verdict: Plaintiff appealed from jury verdict in favor of defendant, alleging the evidence did not support the verdict. The Supreme Court held that in order to overturn the verdict on the basis of insufficient evidence, it must find plaintiff entitled to judgment as a matter of law, and that there was insufficient evidence to warrant submitting the case to a jury. Here the court found credible evidence supporting a verdict either way and considered itself without power to set aside the decision of the trier of fact as a matter of law. The District Court properly denied plaintiff's motions for directed verdict and judgment notwithstanding the verdict. Gunlock v. W. Equip. Co., 219 M 112, 710 P2d 714, 42 St. Rep. 1882 (1985), followed in Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

Conflicting Evidence Resolved by Jury — Substantial Evidence to Support Verdict: Where the plaintiff brought a negligence action against the defendant for injuries sustained at an outdoor beer party when the defendant allegedly tossed a large rock that struck the plaintiff on the head, the Supreme Court found that there was substantial evidence to support the jury's verdict for the defendant. The evidence was equally supportive of the defendant's theory (that the plaintiff tripped and fell) as it was of the plaintiff's theory. The court held that if there is conflicting evidence in the record, the credibility and weight given to that evidence is the province of the jury and not the Supreme Court. Anderson v. Jacqueth, 205 M 493, 668 P2d 1063, 40 St. Rep. 1451 (1983). See also Wheeler v. Bozeman, 232 M 433, 757 P2d 345, 45 St. Rep. 1173 (1988).

Probable Cause in Malicious Prosecution Action: Lack of probable cause, an essential element of a malicious prosecution action, is a fact question for the jury's determination when the evidence is conflicting and is a question of law for the court only when the evidence is undisputed and allows only one conclusion on the issue; and a directed verdict is error when the evidence, including reasonable inferences, is susceptible to different conclusions by reasonable men when viewed in the light most favorable to the party opposing the directed verdict. Reece v. Pierce Flooring, 194 M 91, 634 P2d 640, 38 St. Rep. 1655 (1981).

Proof of Crimes Charged — Proof of Ownership of Stolen Money — Disbelief of Portion of Witness' Testimony as Not Requiring Total Disbelief: Defendant, charged with robbery and theft, was convicted of theft but found not guilty of robbery. One ground of his appeal was the assertion that the prosecution's evidence was insufficient to prove theft. Defense counsel argued that the jury must have distrusted the testimony of the truckstop cashier who was held up because they found the defendant not guilty of robbery. Further, since the cashier's testimony was critical to prove a theft was committed, the evidence was insufficient to prove theft if the jury disbelieved the cashier. The Supreme Court dismissed this argument because sufficient disbelief of the cashier's testimony to find the defendant not guilty of robbery would not require the jury to disbelieve all of the cashier's testimony. The jury had received instructions about its right to believe or disbelieve any portion of a witness' testimony. As long as there was substantial evidence to support the verdict, it will not be disturbed on appeal. The Supreme Court found sufficient evidence to convict and sufficient evidence to refute the defendant's argument that the truckstop did not own the stolen money. Here, proof of possession sufficed to prove ownership because the defendant's jury instruction to that effect was accepted by the court. St. v. Dolan, 190 M 195, 620 P2d 355, 37 St. Rep. 1860 (1980).

Evidence Sufficient to Support Verdict — Jury to Weigh Evidence — Presumption of Correctness: In judging whether there is evidence sufficient to support a verdict, the Supreme Court recognizes that the jury is in the best position to weigh the evidence and consider the credibility of witnesses. Thus in examining the sufficiency of the evidence review will be made in a light most favorable to the prevailing party, presuming that the findings of the District Court are correct. Rock Springs Corp. v. Pierre, 189 M 137, 615 P2d 206 (1980).

Evidence Susceptible to Two Conclusions — Jury Upheld: The Supreme Court does not substitute its view of the evidence for that of the jury; thus when the evidence furnishes

reasonable grounds for different conclusions, the finding of the jury will not be disturbed. Rock Springs Corp. v. Pierre, 189 M 137, 615 P2d 206 (1980).

Proximate Cause — Jury Question: The trial court properly refused to grant a directed verdict against defendant for failing to keep its brakes from freezing and in failing to display brake lights and keep them free from snow because whether such violations proximately caused the death of plaintiff's husband was a question of fact for the jury to determine. However, the erroneous jury instruction on the sudden emergency doctrine necessitated a new trial on the issue of liability. Kudrna v. Comet Corp., 175 M 29, 572 P2d 183 (1977).

Credibility and Weight of Evidence — Review on Appeal: Under this section the court may not invade the province of the jury when the verdict is supported by substantial evidence. The credibility of witnesses and the weight to be given their testimony are questions for determination by the jury. The verdict in the case at bar being supported by substantial evidence, the Supreme Court is thereby concluded as to the issues of fact. Gilmore v. Mulvihill, 109 M 601, 98 P2d 335 (1940).

Application to Criminal Cases: This section is applicable to civil and criminal cases alike. St. v. Sherman, 35 M 512, 90 P 981 (1907).

Collateral References

Trial *key* 134.

88 C.J.S. Trial §§357 through 368.

75A Am. Jur. 2d Trial §714, et seq.

Employer's liability for negligence of employee in driving his or her own automobile. 27 ALR 5th 174.

Materiality of testimony forming basis of perjury charge as question for court or jury in state trial. 37 ALR 4th 948.

Duty of injured person to submit to nonsurgical medical treatment to minimize tort damages. 62 ALR 3d 70.

Probable cause as question of fact or law in malicious prosecution action. 87 ALR 2d 183; 68 ALR 2d 1168.

Question of law or fact as to cause of injury or death in action under accident policy or accident provision of life policy as affected by preexisting arteriosclerosis. 82 ALR 2d 617 through 633.

Voluntariness of confession allegedly induced by police statements that if suspect confesses his relatives will be released from custody or not be arrested as question of fact. 81 ALR 2d 1441.

Negligence in executing contract sought to be reformed as question of fact. 81 ALR 2d 36.

Question of fact with respect to width and boundaries of public highway acquired by prescription or adverse user. 76 ALR 2d 538.

Acceptance of deed by grantee as question of fact or law. 74 ALR 2d 1005.

Whether momentary forgetfulness of danger constitutes contributory negligence as jury question. 74 ALR 2d 950.

Whether prosecutrix in incest case is accomplice or victim as question of law or fact. 74 ALR 2d 725.

Binding effect, on customer of stock or commodity broker, of conditions printed on confirmation slip, as question of fact. 71 ALR 2d 1090.

Weight of voice recognition testimony as question of fact. 70 ALR 2d 1012.

Question whether oral statements amount to express warranty as one of fact for jury or of law for court. 67 ALR 2d 619.

Existence of agreement to pay salary to partner as question of fact. 66 ALR 2d 1025.

"Discovery" under mining laws of radioactive minerals such as uranium as question of fact. 66 ALR 2d 560.

Waiver of, or estoppel to assert, failure to give required notice of claim of injury to municipality, county, or other governmental agency or body as presenting question for court or jury. 65 ALR 2d 1305.

Condition of surface of railroad crossing as proximate cause of injury to pedestrian, jury question as to. 64 ALR 2d 1217.

Abandonment of wrecked vessel as question of law or fact. 63 ALR 2d 1369.

Proximate cause of injury or damage by motorboat as question of fact. 63 ALR 2d 343, §5 superseded by 71 ALR 3d 1018, §15 superseded by 98 ALR 3d 1127.

Credibility of witness giving uncontradicted testimony as matter for court or jury. 62 ALR 2d 1191, §12 superseded by 26 ALR Fed. 427.

Novation through creditor's acceptance of obligation of third person as question of fact or law. 61 ALR 2d 755.

Spontaneity of declaration sought to be admitted as part of res gestae as question for court or ultimately for jury. 56 ALR 2d 372.

Authority of agent to borrow money for principal as question for jury. 55 ALR 2d 1215.

Qualified or conditional privilege with respect to liability of insurance company for libel or slander by its agent or employee as question of fact or law. 55 ALR 2d 852.

Death as consequence of burning of building, within insurance provision for coverage or double indemnity, as question of fact. 55 ALR 2d 398.

Proximate cause of injury or death from collision with guy wire as question for jury. 55 ALR 2d 196.

Implied or apparent authority of agent to purchase or order goods or merchandise as question for jury. 55 ALR 2d 111.

Weight of party's admissions as to tort occurring during his absence as questions for jury. 54 ALR 2d 1082.

Sufficiency of repudiation of express trust by trustee to cause Statute of Limitations to run as question for jury. 54 ALR 2d 74.

Question of law or fact as to admissibility as res gestae of statements or exclamations relating to cause of, or responsibility for, motor vehicle accident. 53 ALR 2d 1259.

Timeliness of tender or offer of return of consideration for release or compromise, required as condition of setting it aside, as question for jury. 53 ALR 2d 766.

Scope of employment of automobile salesman as question for jury. 53 ALR 2d 658.

Sufficiency of notice which buyer of goods must give in order to recover damages for seller's breach of warranty as presenting question for court or jury. 53 ALR 2d 280.

Question of law or fact as to status of route driver or salesman as independent contractor or employee of merchandise producer or processor for purposes of respondeat superior doctrine. 53 ALR 2d 183.

Extent of premises which may be defended without retreat under right of self-defense as question of law or fact. 52 ALR 2d 1459.

Time within which buyer must make inspection, trial, or test to determine whether goods are of requisite quality, as question for court or jury. 52 ALR 2d 922.

Contributory negligence or assumption of risk of passenger leaving seat before conveyance stops as question for jury. 52 ALR 2d 600.

Scope of employment in use of employer's vehicle, question for jury as to. 52 ALR 2d 350; 51 ALR 2d 8, 120.

Negligence or malpractice of nurse as proximate cause of injury, question of fact as to. 51 ALR 2d 973.

Proximate cause of damage or injury by stranger starting motor vehicle left parked on street as question for jury. 51 ALR 2d 651.

Cemetery or burial ground as nuisance as question of fact. 50 ALR 2d 1325.

Question of fact as to intent with respect to theft, robbery, or pilferage within automobile theft policy. 48 ALR 2d 50.

Owner's knowledge of broker's status as question for court or jury in action by broker for commission where owner sells property to broker's customer at less than stipulated price. 46 ALR 2d 884.

Question of fact as to landlord's consent to extension of renewal of lease where he accepts rent from tenant holding over. 45 ALR 2d 835.

Owner's satisfaction, under provision in private building and construction contract that work must be done to satisfaction of owner, as question of fact. 44 ALR 2d 1120.

Holder in due course status of transferee of commercial paper given by purchaser of chattel and secured by conditional sale, retention of title, or chattel mortgage, as question for jury. 44 ALR 2d 113.

Reasonableness of corporal punishment administered by teacher to pupil as question for jury. 43 ALR 2d 476.

Time within which buyer of goods must give notice in order to recover damages for seller's breach of express warranty as question for court or jury. 41 ALR 2d 825.

Sufficiency of proof of genuineness of handwriting offered as standard or exemplar for comparison with a disputed writing or signature as question for court or jury. 41 ALR 2d 579.

Testamentary character of letter as question of law or fact. 40 ALR 2d 729.

Municipal notice of snow and ice on sidewalk as question for jury. 39 ALR 2d 820.

Employer's failure to furnish assistance to employee as proximate cause of employee's death as question for jury. 36 ALR 2d 61.

Bill of sale, absolute on its face, as a chattel mortgage as question for court or jury. 33 ALR 2d 378.

Jury question as to proximate cause in action against railroad for injury to adult pedestrian attempting to pass over, under, or between cars obstructing crossing. 27 ALR 2d 382.

Death of insured while assaulting another as due to accident or accidental means as question of fact. 26 ALR 2d 399.

Qualified privilege in defamation of one relative to another by person not related to either as question for court or jury. 25 ALR 2d 1388.

Intention to abandon private easement by nonuser as question for court or jury. 25 ALR 2d 1265, §§3 through 23 superseded by 62 ALR 5th 219.

Proximate cause as a question for jury in action against electric power or telephone company for death by lightning transmitted on wires. 25 ALR 2d 742.

Intent of testator in attempted physical alteration of will after execution as question of law or fact. 24 ALR 2d 525.

Proximate cause of spread of fire purposely and lawfully kindled as question for court or jury. 24 ALR 2d 273.

Authority of employee committing assault in collecting debt, question for court or jury. 22 ALR 2d 1232 through 1242.

Right of employer to terminate contract because of employee's illness or physical incapacity as question for jury. 21 ALR 2d 1248.

Breach of lessee's obligation under express covenant as to repairs as question for jury. 20 ALR 2d 1357.

Question, as one of law for court or of fact for jury, whether oral promise was an original one or was a collateral promise to answer for the debt, default, or miscarriage of another. 20 ALR 2d 246.

Question as to who are accomplices, within rule requiring corroboration of their testimony, as one of law or fact. 19 ALR 2d 1352.

Master-servant relation where operator is furnished with leased machine or motor vehicle as question of fact or law. 17 ALR 2d 1388.

Bad faith of real estate broker in stating to prospective purchaser that property may be bought for less than list price in breach of duty to vendor as question for court or jury. 17 ALR 2d 904.

Shipper's intent to ratify carrier's unauthorized delivery or misdelivery as question of law or fact. 15 ALR 2d 812.

Question for court or jury as to clause in life, accident, or health policy excluding or limiting liability in case of insured's use of intoxicants or narcotics. 13 ALR 2d 1014.

Increase of risk for manufacture or sale of intoxicating liquor as question of fact. 2 ALR 2d 1163.

25-7-104. Mode of trial of counterclaim.

Case Notes

Breach of Covenant of Good Faith in Conducting Insurance Claim: In a foreclosure action, the insured, Britton, cross-claimed against Farmers Insurance Group (FIG) for the full amount of coverage provided by FIG's policy and for further compensatory and punitive damages by reason of "bad faith". FIG responded to the foreclosure action by setting up as a cross-claim against Britton its right under its partial assignment of mortgage and requesting foreclosure against Britton. FIG further defended against Britton's cross-claim by alleging that Britton had intentionally set the fire, had been guilty of fraud with respect to his interest in the property, and had not submitted a proper proof of loss. On appeal, the Supreme Court found that prior to filing its answer to Britton's cross-claim, FIG neither rejected Britton's proof of loss nor informed him in writing or otherwise of their contention of arson. Also, FIG's evidence regarding Britton's involvement in setting the fire was circumstantial, and there was no evidence of potential financial gain for Britton from the policy proceeds. The jury decision that FIG breached the implied covenant of good faith and fair dealing in conducting the claim was upheld. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Remedy in Contract or in Tort — Motion for Separate Trials: An insurer requested a separate trial on the affirmative defenses raised by cross-claim and requested that the trial of the remaining issues raised by the insured be postponed until after the final determination of the affirmative defenses. The Supreme Court noted that the insured, having a choice of two remedies, one in contract and one in tort, elected to pursue his claim in tort. Recovery by him on his claim in tort would have the effect of barring his claim for breach of contract. If the motion for

separate trials had been granted, it would have converted insured's claim for tort to one for breach of contract. Insured would then have been precluded from presenting any evidence as to consequential damages for the tort, let alone any evidence relating to punitive damages. His right to trial by jury of his tort claim, guaranteed by the seventh amendment to the U.S. Constitution and Art. II, sec. 26, Mont. Const., would have been prejudiced. Denial of the motion to bifurcate was proper. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Finding of Fact Based on Issue Raised by Counterclaim: The District Court properly made a finding of fact regarding an issue raised by defendant's counterclaim even though plaintiff contended that there was an agreement that the trial would be conducted in two phases and that the issue in question would be the subject of the second phase. The plaintiff's actions during the course of the trial demonstrated she was fully aware that the court would be resolving the issue. Kis v. Pifer, 179 M 344, 588 P2d 514 (1978).

Manner of Trial of Issues on Counterclaim: Where defendant sets up a counterclaim in his answer and seeks an affirmative judgment thereon against the plaintiff, the issues arising are triable as if they arose in an action brought by the defendant against plaintiff. Cont. Oil Co. v. Bell, 94 M 123, 21 P2d 65 (1933).

25-7-105. Offer of settlement.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Part 2
Selection of Jury

Part Law Review Articles

Montana Supreme Court Survey, McLean & Young, 41 Mont. L. Rev. 292, 297 (1980).

Part Collateral References

Propriety of asking prospective female jurors questions on voir dire not asked of prospective male jurors, or vice versa. 39 ALR 4th 450.

Validity of requirement or practice of selecting prospective jurors exclusively from list of registered voters. 80 ALR 3d 869.

Validity of enactment requiring juror to be an elector or voter or have qualifications thereof. 78 ALR 3d 1147.

25-7-202. Judge or jury commissioner to draw ballots.

Compiler's Comments

1983 Amendment: In first sentence, after "district judge" inserted "or jury commissioner"; after "presence of" substituted "two witnesses" for "the clerk of the court"; before "ballots" deleted "capsules containing"; after "a jury" inserted "for the cause to be tried"; and added last sentence relating to stipulation as to seating of jurors.

Case Notes

Purpose of Insuring Random Selection — Nonwaiver of Multiple Violations: A deputy clerk, prior to the 1983 amendment, removed from a metal box slips of paper which were not in capsules and which had names on them, did not shake the box prior to removing the slips, drew the slips outside the presence of the District Judge, and the names drawn were placed on a list that was not drawn by lot prior to impaneling of the trial jury. This procedure violated the fundamental statutory purpose of insuring random selection of jurors by lot from the entire panel or array. The objecting party did not have to show prejudice, and he was not barred from pressing the objection on appeal by reason of the fact he did not object until after the verdict. A new trial was ordered. Solberg v. Yellowstone County, 203 M 79, 659 P2d 290, 40 St. Rep. 308 (1983); Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

Waiver of Irregularities: Where, in a county having two resident District Judges, the second Judge did not participate in the drawing of the special venire, nor in the drawing of the trial jury in any of several actions, the objection that the jury had been illegally drawn was waived by failure to challenge the panel, with knowledge or means of knowledge at hand of the alleged illegal procedure. Ledger v. McKenzie, 107 M 335, 85 P2d 352 (1935).

Collateral References

Jury *key* 79 through 81.

50 C.J.S. Juries §§192 through 194.

47 Am. Jur. 2d Jury §100, et seq.

Confusion of name or identity in drawing, summoning, calling, or impaneling juror in civil case, as affecting verdict. 89 ALR 2d 1242.

25-7-203. Drawing a new jury when another is impaneled.

Compiler's Comments

1983 Amendment: Near middle of section, after "containing the" substituted "ballots" for "capsules"; after "any other case the" deleted "capsules containing the".

25-7-204. Mode of drawing ballots.

Compiler's Comments

1985 Amendment: Near beginning of second sentence inserted "or the jury commissioner".

1983 Amendment: Rewrote section (see 1983 Session Law for text) that formerly read: "Before the first capsule containing a ballot shall have been drawn, the box must be closed and well shaken so as to thoroughly mix the capsules therein. The district judge must draw a capsule containing a ballot with the juror's name thereon through an aperture made in the lid large enough only to admit his hand conveniently and without said judge gazing into said box before or while drawing said capsule."

Case Notes

Purpose of Insuring Random Selection — Nonwaiver of Multiple Violations: A deputy clerk, prior to the 1983 amendment, removed from a metal box slips of paper which were not in capsules and which had names on them, did not shake the box prior to removing the slips, drew the slips outside the presence of the District Judge, and the names drawn were placed on a list that was not drawn by lot prior to impaneling of the trial jury. This procedure violated the fundamental statutory purpose of insuring random selection of jurors by lot from the entire panel or array. The objecting party did not have to show prejudice, and he was not barred from pressing the objection on appeal by reason of the fact he did not object until after the verdict. A new trial was ordered. Solberg v. Yellowstone County, 203 M 79, 659 P2d 290, 40 St. Rep. 308 (1983); Dvorak v. Huntley Project Irrigation District, 196 M 167, 639 P2d 62, 38 St. Rep. 2176 (1981).

25-7-205. Persons drawn and approved to form jury.

Compiler's Comments

1981 Amendment: Inserted "or such other number as will constitute the jury".

Case Notes

Substantial Compliance Standard Clarified With Regard to Statutory Process for Forming Jury: The objective statutory procedures established by the Legislature for the random selection of jurors are intended to protect a defendant's fundamental right to a fair and impartial jury and must be substantially complied with. Under Montana case law, the substantial compliance standard is not an absolute rule inasmuch as it permits minor deviations from statutory procedure. These technical deviations do not constitute a substantial failure to comply and therefore do not give rise to a presumption of prejudice. In clarifying the substantial compliance standard, the Supreme Court took guidance from federal case law developed under the federal Jury Selection and Service Act of 1968, 28 U.S.C. 1861, et seq. In order to establish a violation under the federal Act, a defendant must show that the government substantially failed to comply with the methods set forth by statute for jury selection. Substantial failure has been construed as a violation that contravenes one of two basic principles: (1) random selection of jurors; and (2) determination of juror disqualification, excuses, exemptions, and exclusion on the basis of objective criteria. A successful challenge to the jury panel may be founded only on a material departure from the law, a deviation amounting to more than a technical irregularity. Thus, a substantial or material statutory departure that affects the random nature or objectivity of the jury selection process establishes a violation independently of the departure's consequences in an individual case, while a technical or nonmaterial violation constitutes nonprejudicial error under the substantial compliance standard. St. v. Lamere, 2000 MT 45, 298 M 358, 2 P3d 204, 57 St. Rep. 214 (2000), overruling St. v. Robbins, 1998 MT 297, 292 M 23, 971 P2d 359, 55 St. Rep. 1213 (1998).

Collateral References

Jury *key* 79(1) through (3).

50 C.J.S. Juries §§192, 193, 195, 196.

25-7-206. Procedure when insufficient number attend.

Compiler's Comments

1985 Amendment: In (1) in first sentence, inserted "judge or the" before "jury commissioner" and made minor change in phraseology; and in last sentence in (1) substituted "the court may make or order further drawings" for "under an order made as prescribed in this section, the court may make another order or successive orders".

1983 Amendment: Near beginning of (1), after "form a jury, the" substituted "jury commissioner" for "district judge"; after "pursuant to an order" inserted "of the court"; after "in the presence of" substituted "two witnesses" for "the clerk of the court".

Case Notes

Circumstances Requiring Special Panel: The procedure prescribed by 25-7-206 (before amendment), for drawing a special jury panel from the box, which must be discharged upon conclusion of the particular case for which drawn, applies only where the regular panel has been exhausted because of an unusual number of disqualifications for cause in the particular case on trial, or where the jury impaneled in the case previously submitted is still in deliberation. Lee v. Hayden, 63 M 589, 208 P 596 (1922), explained in Hanley v. Great N. Ry., 66 M 267, 213 P 235 (1923).

Collateral References

Jury *key* 65, et seq.

50 C.J.S. Juries §161.

25-7-207. Oath of jury.

Collateral References

Jury *key* 148(1) through (4).

50 C.J.S. Juries §293, et seq.

47 Am. Jur. 2d Jury §§216 through 224.

Validity of governmental requirement of oath of allegiance or loyalty as applied to jurors. 18 ALR 2d 294.

25-7-208. Ballots of jurors who have been sworn.

Compiler's Comments

1983 Amendment: Deleted "capsules containing the" before "ballots" three times.

25-7-209. Ballots of jurors not sworn.

Compiler's Comments

1983 Amendment: Near beginning of section, before "ballot" deleted "capsule containing the"; near end of section, after "undrawn" substituted "ballots" for "capsules".

25-7-221. Challenges to jurors and the jury.

Case Notes

Improper Denial of Challenge for Cause Based on Debtor-Creditor and Attorney-Client Relationships — Erroneous Ruling on Challenge for Cause Prejudicial as Matter of Law — New Trial Warranted: During voir dire, prospective juror Derrig revealed that he was president of a bank that was represented by plaintiff's trial counsel, that he had worked with plaintiff in the past in his position as bank president, and that the bank was one of plaintiff's creditors. Defendant twice challenged Derrig for cause, based on the debtor-creditor relationship between plaintiff and the bank and because of the potential for bias arising from Derrig's attorney-client relationship with plaintiff's attorney. Both challenges were denied, so defendant ultimately used a peremptory challenge to remove Derrig from the jury panel. Defendant claimed that denial of its challenge for cause was improper. Because defendant was forced to use a peremptory challenge to remove Derrig, and in fact used all its peremptory challenges, defendant maintained that it was denied an equal number of peremptory challenges and was thus entitled to a new trial. The Supreme Court agreed. Pursuant to 25-7-223, there is no substantive difference between the chief executive officer of a creditor who is responsible for the creditor's success and the creditor itself when it comes to impartiality and jury duty. Further, an ongoing attorney-client relationship between a prospective juror and trial counsel represents the strong possibility of bias in favor of the party represented by that attorney. Under the rule in King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038 (1993), and St. v. Williams, 262 M 530, 866 P2d 1099 (1993), when a District Court erroneously denies a challenge for cause, it is the substantive equivalent of granting more peremptory challenges to one side than to the other,

which is prejudicial as a matter of law, warranting reversal and a new trial. Reff-Conlin's, Inc. v. Fireman's Fund Ins. Co., 2002 MT 60, 309 M 142, 45 P3d 863 (2002).

Peremptory Challenges to Prospective Jurors — Factors Necessary to Show Purposeful Discrimination in Jury Selection — Waiver of Batson Challenge When Not Timely Raised: Ford contended that the state violated his due process rights by improperly exercising all of its peremptory challenges at trial to exclude women from the jury panel, citing J.E.B. v. Ala. ex rel. T.B., 511 US 127 (1994), as a prohibition against gender discrimination during jury selection. In a case of first impression, the Supreme Court applied a de novo review to the trial court's application of the law, deferring to the trial court's findings of fact unless clearly erroneous. The Supreme Court then reviewed the history of the discriminatory use of peremptory challenges as addressed in Batson v. Ky., 476 US 79 (1986), and its progeny, noting that the rules regarding challenges to jury selection no longer apply exclusively to prosecutors striking members of the venire who are the same race as the defendant, but that any racially motivated reason for striking a prospective juror is prohibited whether the juror shares the racial identity of the defendant or not (see Powers v. Ohio, 499 US 400 (1991)). Further, the challenge is no longer limited to the government in criminal actions but has been extended to prevent a defendant in a criminal action from using peremptory challenges to exclude jurors based on race (see Ga. v. McCollum, 505 US 42 (1992)), has been applied to private litigants in civil cases (see Edmonson v. Leesville Concrete Co., 500 US 614 (1991)), and has been used to prohibit gender discrimination in jury selection, as in J.E.B. In order to establish a prima facie case of purposeful discrimination, a defendant must show that: (1) the defendant is a member of a cognizable racial group; (2) the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; and (3) these facts and other relevant circumstances raise an inference that the prosecutor used the peremptory jury selection practice to exclude members of the venire from the petit jury on account of their race. In addition, numerous courts have held that the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria must be exercised in a timely manner, and failure to raise a Batson challenge before the jury is sworn and before the venire is dismissed results in waiver of the challenge. In Ford's case, his counsel waited until after the jury was sworn and the venire dismissed before raising the Batson challenge. Because the motion was untimely, and therefore waived, the Supreme Court declined to address the merits of Ford's claim of discriminatory use of peremptory challenges. St. v. Ford, 2001 MT 230, 306 M 517, 39 P3d 108 (2001), followed in Casiano v. Greenway Enterprises, Inc., 2002 MT 93, 309 M 358, 47 P3d 432 (2002), St. v. Parrish, 2005 MT 112, 327 M 88, 111 P3d 671 (2005), and Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

Voir Dire Discussion of Plaintiff's Disease, Treatment, and Complications and Prior Summary Judgment on Another Issue: During voir dire in a medical malpractice case, it was not improper for the judge to allow plaintiff's attorney to discuss plaintiff's disease, her past successful treatment, defendant doctor's laser surgery for the disease, the fact that defendant had never before used laser surgery for this disease, the complications from the surgery and plaintiff's current life as a result of the complications, and the fact that the judge had granted summary judgment on the issue of consent to remove plaintiff's hemorrhoid tags during the surgery. O'Leyar v. Callender, 255 M 277, 843 P2d 304, 49 St. Rep. 1008 (1992).

Improper Questioning and Excusing of Prospective Jurors by Court Clerk: In depositor's suit against bank, the court's clerks examined the prospective jurors, using questions given the clerks by depositor's counsel, without notice to bank's counsel. The clerks asked if the prospective jurors had business or transactions with the bank and released some prospective jurors based on their answers to the questions, thus excusing them for cause without notice to bank's counsel or a ruling by the court. This occurred before an initial jury panel was called. This action violated the procedure set out in 25-7-221, 25-7-224, and Rules 47(a) and 47(b), M.R.Civ.P. (Title 25, ch. 20); was outside the type of action permitted by 3-15-313; and constituted reversible error requiring a new trial. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Limits on Examination: Although the trial judge may set reasonable limits on the examination, he should permit liberal and probing examination calculated to discover possible bias or prejudice, with due regard for the interests of fairness to both parties. Borkowski v. Yost, 182 M 28, 594 P2d 688 (1979).

Purpose of Voir Dire: The purpose of voir dire is to enable counsel to determine the existence of bias and prejudice on the part of prospective jurors and to enable counsel to exercise his peremptory challenges. Borkowski v. Yost, 182 M 28, 594 P2d 688 (1979).

Questions Concerning Insurance in Voir Dire: In appropriate cases an attorney upon voir dire may ask prospective jurors whether they have any business relationship with insurance

companies and whether they are policyholders of an insurance company involved in the case. Also, upon a proper showing of possible prejudice, an attorney may ask whether a prospective juror has heard or read anything to indicate that jury verdicts for plaintiffs in personal injury cases result in higher insurance premiums for everyone; if so, whether the belief will interfere with the juror's ability to render a fair and impartial verdict. These rules are subject to a showing that counsel is acting in good faith and is not merely trying to impress on the jury the fact that defendant may be covered by insurance. Borkowski v. Yost, 182 M 28, 594 P2d 688 (1979).

Additional Challenges Allowed — Effect: Judgment will not be reversed for error when trial court allowed one defendant four peremptory challenges and four more peremptory challenges collectively to remaining two defendants because of plaintiff's inability to establish that error caused him material injury or that objectionable jurors sat on the case. Leary v. Kelly Pipe Co., 169 M 511, 549 P2d 813 (1976), overruled in King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038, 50 St. Rep. 117 (1993).

Collateral References

Jury *key* 114 through 142.

50 C.J.S. Juries §260, et seq.

47 Am. Jur. 2d Jury §228, et seq.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial. 64 ALR 3d 126.

Effect, on challenges, of substitution of juror during trial. 84 ALR 2d 1317.

Constitutionality of statute which disqualifies judge upon peremptory challenge. 115 ALR 855.

Excusing qualified juror drawn in criminal case as ground of complaint by defendant. 96 ALR 508.

25-7-222. Challenges to the array or panel.

Case Notes

Improper Denial of Challenge for Cause Based on Debtor-Creditor and Attorney-Client Relationships — Erroneous Ruling on Challenge for Cause Prejudicial as Matter of Law — New Trial Warranted: During voir dire, prospective juror Derrig revealed that he was president of a bank that was represented by plaintiff's trial counsel, that he had worked with plaintiff in the past in his position as bank president, and that the bank was one of plaintiff's creditors. Defendant twice challenged Derrig for cause, based on the debtor-creditor relationship between plaintiff and the bank and because of the potential for bias arising from Derrig's attorney-client relationship with plaintiff's attorney. Both challenges were denied, so defendant ultimately used a peremptory challenge to remove Derrig from the jury panel. Defendant claimed that denial of its challenge for cause was improper. Because defendant was forced to use a peremptory challenge to remove Derrig, and in fact used all its peremptory challenges, defendant maintained that it was denied an equal number of peremptory challenges and was thus entitled to a new trial. The Supreme Court agreed. Pursuant to 25-7-223, there is no substantive difference between the chief executive officer of a creditor who is responsible for the creditor's success and the creditor itself when it comes to impartiality and jury duty. Further, an ongoing attorney-client relationship between a prospective juror and trial counsel represents the strong possibility of bias in favor of the party represented by that attorney. Under the rule in King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038 (1993), and St. v. Williams, 262 M 530, 866 P2d 1099 (1993), when a District Court erroneously denies a challenge for cause, it is the substantive equivalent of granting more peremptory challenges to one side than to the other, which is prejudicial as a matter of law, warranting reversal and a new trial. Reff-Conlin's, Inc. v. Fireman's Fund Ins. Co., 2002 MT 60, 309 M 142, 45 P3d 863 (2002).

Additional Challenges Allowed — Effect: Judgment will not be reversed for error when court allowed one defendant four peremptory challenges and four more peremptory challenges collectively to remaining two defendants because of plaintiff's inability to establish that error caused him material injury or that objectionable jurors sat on the case. Leary v. Kelly Pipe Co., 169 M 511, 549 P2d 813 (1976), overruled in King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038, 50 St. Rep. 117 (1993).

Failure to Challenge Panel or Array as Waiver of Right: Where court minutes clearly showed that a special venire had been improperly drawn, counsel had means to discover the defect and failure to challenge the array before the jury was sworn waived the right to object on motion for new trial or appeal. Ledger v. McKenzie, 107 M 335, 85 P2d 352 (1938).

Collateral References

Jury *key* 82(1) through (4), 114 through 142.

50 C.J.S. Juries §§163, 175, 183, 191, 198, 202, 260, et seq.

47 Am. Jur. 2d Jury §247, et seq.

Bias, prejudice, or conduct of individual member or members of jury panel as ground for challenge to array or to entire panel. 76 ALR 2d 678.

25-7-223. Challenges to jurors for cause.

Compiler's Comments

1983 Amendment: Inserted (3)(b) relating to a prospective juror being a depositor of funds in a credit institution.

1981 Amendment: In (2) inserted "being the spouse of or related to a party by"; deleted "to any party" from the end of (2); in (3) deleted "master and servant" after "ward", substituted "employee" for "clerk", and deleted "a member of the family of either party or" before "a partner".

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GENERAL

Failure of Counsel to Ensure Impartial Jury During Voir Dire Constituting Ineffective Assistance — Reversible Structural Error: A potential juror disclosed in a juror questionnaire that her daughter was a paralegal at the County Attorney's office. Defense counsel failed to take note of the disclosure, to question the juror regarding any potential bias during voir dire, or to challenge the juror for cause. Defense counsel acknowledged the error on the record. The juror was picked for the panel, and Lamere was convicted. On appeal, the Supreme Court applied the two-pronged Strickland test for ineffective assistance, and because the error was on the record, the court reviewed the ineffective assistance claim de novo on direct appeal. The court concluded that counsel failed to ensure that Lamere received a fair trial by an impartial jury and that counsel's performance fell below the reasonably required level, satisfying the first Strickland prong. In addition, counsel's deficient performance constituted a structural error that undermined the fairness of the entire trial and thus was presumed to be prejudicial, satisfying the second Strickland prong. Lamere did not receive effective assistance during voir dire, the verdict was reversed, and the case was remanded for a new trial. St. v. Lamere, 2005 MT 118, 327 M 115, 112 P3d 1005 (2005). See also St. v. Good, 2002 MT 59, 309 M 113, 43 P3d 948 (2002).

Improper Denial of Challenge for Cause Based on Debtor-Creditor and Attorney-Client Relationships — Erroneous Ruling on Challenge for Cause Prejudicial as Matter of Law — New Trial Warranted: During voir dire, prospective juror Derrig revealed that he was president of a bank that was represented by plaintiff's trial counsel, that he had worked with plaintiff in the past in his position as bank president, and that the bank was one of plaintiff's creditors. Defendant twice challenged Derrig for cause, based on the debtor-creditor relationship between plaintiff and the bank and because of the potential for bias arising from Derrig's attorney-client relationship with plaintiff's attorney. Both challenges were denied, so defendant ultimately used a peremptory challenge to remove Derrig from the jury panel. Defendant claimed that denial of its challenge for cause was improper. Because defendant was forced to use a peremptory challenge to remove Derrig, and in fact used all its peremptory challenges, defendant maintained that it was denied an equal number of peremptory challenges and was thus entitled to a new trial. The Supreme Court agreed. Pursuant to this section, there is no substantive difference between the chief executive officer of a creditor who is responsible for the creditor's success and the creditor itself when it comes to impartiality and jury duty. Further, an ongoing attorney-client relationship between a prospective juror and trial counsel represents the strong possibility of bias in favor of the party represented by that attorney. Under the rule in King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038 (1993), and St. v. Williams, 262 M 530, 866 P2d 1099 (1993), when a District Court erroneously denies a challenge for cause, it is the substantive equivalent of granting more peremptory challenges to one side than to the other, which is prejudicial as a matter of law, warranting reversal and a new trial. Reff-Conlin's, Inc. v. Fireman's Fund Ins. Co., 2002 MT 60, 309 M 142, 45 P3d 863 (2002).

Strict Liability for Wrongful Death — Plaintiff's Remarriage — Nonreversible Error to Not Allow Certain Questioning: Counsel must be allowed to identify potential jurors who may be acquainted with or related to a wrongful death plaintiff's new spouse, but questioning must be carefully conducted so that no reference is made to the remarriage or to the relationship of the new spouse to plaintiff. It was error for the District Court to not allow defendant to so question

prospective jurors, but the error was harmless when defendant failed to show prejudice resulting from the error. Lutz v. Nat'l Crane Corp., 267 M 368, 884 P2d 455, 51 St. Rep. 810 (1994).

Manifest Error in Failing to Remove Jurors for Cause: It was manifest error for the District Court to fail to remove one juror who had a fixed scruple against punitive damages and had followed his scruple in a previous trial, and to remove a second juror who not only stated he preferred the management side but appeared to have difficulty in hearing and speaking. Plaintiff's counsel was therefore forced to waste peremptory challenges to remove the jurors when he might have used the challenges elsewhere on the panel. Mahan v. Farmers Union Cent. Exch., Inc., 235 M 410, 768 P2d 850, 46 St. Rep. 96 (1989).

Attorney-Client Relationship Not Basis for Challenge for Cause: An attorney-client relationship between a prospective jury member and opposing counsel does not necessarily render a juror incompetent, and where there is no current business between them, the District Court Judge did not abuse his discretion in refusing to allow a challenge for cause. Williams v. Rigler, 234 M 161, 761 P2d 833, 45 St. Rep. 1812 (1988).

Brief Questioning of Prospective Juror Regarding Insurance Employment — Not Error: Two brief questions to one prospective juror about his past work of selling insurance and a question as to whether this would bias his decision did not prejudice the defendant because there was no suggestion that the defendant had liability insurance and the questioning was done in good faith to allow counsel to look for bias or prejudice on the part of a prospective juror as set forth in the general rule of Haynes v. County of Missoula, 163 M 270, 517 P2d 370 (1973). Garza v. Peppard, 222 M 244, 722 P2d 610, 43 St. Rep. 1233 (1986).

Abuse of Discretion Warranting New Trial — Forced Use of Preemptive Challenge: It was error amounting to an abuse of discretion meriting the grant of a new trial for the District Court to deny plaintiff's challenge for cause of a potential juror that met two of the grounds for challenge set forth in this section: (1) there was a relationship or interest in the action; and (2) there was bias. The court twice refused to dismiss the juror, instead engaging in its own rehabilitative examination, forcing the plaintiff, to his prejudice, to exercise a preemptive challenge. Tacke v. Vermeer Mfg. Co., 220 M 1, 713 P2d 527, 43 St. Rep. 123 (1986).

General Animosity Toward Defendant in Personal Injury Action — Not Sufficient Grounds for Challenge to Juror for Cause: In a personal injury action against Burlington Northern, Inc. (BN), it was not error for the trial court to refuse to dismiss for cause a juror who testified that he ships grain on BN each year and believes that BN grossly overcharges for shipping when the juror also testified that his feelings toward BN would not prevent him from being fair in this case. Anderson v. Burlington N., Inc., 218 M 456, 709 P2d 641, 42 St. Rep. 1738 (1985).

Improper Questioning and Excusing of Prospective Jurors by Court Clerk: In depositor's suit against bank, the court's clerks examined the prospective jurors, using questions given the clerks by depositor's counsel, without notice to bank's counsel. The clerks asked if the prospective jurors had business or transactions with the bank and released some prospective jurors based on their answers to the questions, thus excusing them for cause without notice to bank's counsel or a ruling by the court. This occurred before an initial jury panel was called. This action violated the procedure set out in 25-7-221, 25-7-224, and Rules 47(a) and 47(b), M.R.Civ.P. (Title 25, ch. 20); was outside the type of action permitted by 3-15-313; and constituted reversible error requiring a new trial. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Personal Belief of Juror as Cause — Extensive Questioning by Court Prejudicial: During voir dire in a wrongful death action, a prospective juror stated strong reservations about awarding damages for the death of a family member. After extensive questioning by the court, the prospective juror agreed to lay aside her personal feelings and follow the law. The plaintiff's challenge for cause was denied. The plaintiff then moved for mistrial claiming that the court's questioning of the prospective juror had prejudiced the entire panel. The court's failure to excuse the prospective juror for cause was manifest error. Additionally, considerable questioning by the court should take place outside the presence of the panel. Abernathy v. Eline Oil Field Services, Inc., 200 M 205, 650 P2d 772, 39 St. Rep. 1688 (1982).

Taxpayers' Interest Insufficient as Bias: Where county brought an action for damages to bridge, it was not an abuse of discretion for the District Court to deny a motion for a change of venue even though the jury was necessarily made up of taxpayers of that county each of whom had a pecuniary interest averaging $31. Carter County v. Cambrian Corp., 143 M 193, 387 P2d 904 (1963).

School District Taxpayers' Interest Insufficient as Bias: Taxpayers of a school district were qualified jurors in action by school district against fire insurers for loss of school building as they

did not have such an interest (without more) as to be subject to challenge for cause. School District v. Globe & Republic Ins. Co. of Am., 142 M 220, 383 P2d 482 (1963).

Breadth of Statute — Constitutional Guaranty of Jury Trial Not Impaired: The constitutional guaranty of an impartial jury will not be destroyed by the fact that the statute, though professing to do so, does not include all of the grounds that clearly render the juror incompetent. Watson v. Bozeman, 117 M 5, 156 P2d 178 (1945).

Determination of Juror Qualifications — Discretion of Trial Court: Where the prospective jurors have been examined as to bias and prejudice and the issue of disqualification has been raised, a determination by the trial court that such jurors are qualified rests in sound judicial discretion and will not be set aside unless there is a manifest abuse of that discretion. Watson v. Bozeman, 117 M 5, 156 P2d 178 (1945).

Previous Jury Service — Prejudice Not Presumed: Prejudice to the defendant cannot be presumed from the fact that plaintiff, as a member of the jury panel, had associated with other members thereof, and had served on four trial juries previous to the trial of plaintiff's case. Watson v. Bozeman, 117 M 5, 156 P2d 178 (1945).

Bias — Civil and Criminal Practice: In civil practice, the Legislature has not changed the rule of the common law which excludes jurors upon the ground of actual bias, although a material change has been made in this respect, in criminal practice, by section 94-7122, R.C.M. 1947 (repealed). For new provisions, see Title 46, ch. 16, part 3 (renumbered 46-16-111, 46-16-112, and 46-16-114 through 46-16-118), 46-16-403, and 46-16-603. Shane v. Butte Elec. Ry., 37 M 599, 97 P 958 (1908).

OPINION AS TO MERITS

Personal Belief of Juror as Cause — Extensive Questioning by Court Prejudicial: During voir dire in a wrongful death action, a prospective juror stated strong reservations about awarding damages for the death of a family member. After extensive questioning by the court, the prospective juror agreed to lay aside her personal feelings and follow the law. The plaintiff's challenge for cause was denied. The plaintiff then moved for mistrial claiming that the court's questioning of the prospective juror had prejudiced the entire panel. The court's failure to excuse the prospective juror for cause was manifest error. Additionally, considerable questioning by the court should take place outside the presence of the panel. Abernathy v. Eline Oil Field Services, Inc., 200 M 205, 650 P2d 772, 39 St. Rep. 1688 (1982).

Previous Testimony Heard: Only a specified challenge within the statute may be relied upon and no other considered upon appeal. The fact that a juror listened to witnesses during previous trial and didn't hear all of them was not, on the facts shown, sufficient to disqualify him under subsection (6) of this section. Simons v. Jennings, 100 M 55, 46 P2d 704 (1935).

Prejudice Against Class: A juror cannot be said to be fair and impartial who has formed an opinion which will take evidence to remove, and who entertains a prejudice against the class to which the defendant belongs, although he states that his opinion is based on newspaper reports or common rumor, and he can fairly try the case according to the evidence. Shane v. Butte Elec. Ry., 37 M 599, 97 P 958 (1908).

Opinion Formed — Testimony Notwithstanding: A juror is not competent who testifies that he has formed an opinion concerning the merits of the case by talking with one of the parties and believing what he said regarding it; that he cannot say that it is an unqualified opinion; that sufficient evidence would change his opinion; that he thinks he can render an impartial verdict; and that his opinion is dependent upon the truth of what he had heard. Ruff v. Rader, 2 M 211 (1875).

Statement of Case as Opinion: A juror who hears and accepts as true the statement of a case by a party or witness forms an "unqualified opinion" of the merits of the case. Ruff v. Rader, 2 M 211 (1875).

Law Review Articles

Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 322 (1983).

Collateral References

Jury *key* 124 through 133.

50 C.J.S. Juries §267, et seq.

47 Am. Jur. 2d Jury §228, et seq.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits. 69 ALR 4th 131.

Jury: who is lawyer or attorney disqualified or exempt from service, or subject to challenge for cause. 57 ALR 4th 1260.

Professional or business relations between proposed juror and attorney as ground for challenge for cause. 52 ALR 4th 964.

Jury: visual impairment as disqualification. 48 ALR 4th 1154.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. 95 ALR 3d 172.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. 94 ALR 3d 15.

Similarity of occupation between proposed juror and alleged victim of crime as affecting juror's competency. 71 ALR 3d 974.

Jury: membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge. 63 ALR 3d 1052.

Beliefs regarding capital punishment as disqualifying juror in capital case—post-Witherspoon cases. 39 ALR 3d 550.

Juror's relationship to witness in civil case as ground of disqualification. 85 ALR 2d 851.

Disqualification, as jurors, of residents or taxpayers of litigating political subdivision, in absence of specific controlling statute. 81 ALR 2d 708.

Juror's previous knowledge of facts of civil case as disqualification. 73 ALR 2d 1312.

Racial, religious, economic, social, or political prejudice of proposed juror as ground of challenge on voir dire in civil case. 72 ALR 2d 905, §5 superseded by 95 ALR 3d 172.

Right to challenge for cause as prejudiced by appearance of additional counsel in civil cases after impaneling of jury. 56 ALR 2d 971.

Racial, religious, economic, social, or political prejudice of proposed juror as ground of challenge on voir dire in criminal case. 54 ALR 2d 1204, §§4, 5 superseded by 63 ALR 3d 1052, 94 ALR 3d 15, 28 ALR Fed. 26; §6 superseded by 95 ALR 3d 172; §35 superseded by 85 ALR Fed. 864.

Waiver of objection to juror on the ground of his deafness. 15 ALR 2d 537.

25-7-224. Peremptory challenges to jurors.

Compiler's Comments

1981 Amendment: At end of (1) deleted "If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff"; at beginning of (2) changed "Where" to "When"; added the last sentence of (2) relating to peremptory challenges allowed when other than 6 or 12 jurors are to be seated; in (3) substituted "Peremptory challenges shall be taken as provided in Rule 47(b), M.R.Civ.P." for "They shall be exercised by the plaintiff first striking one and the defendant then striking one, and so on until each side has exhausted or waived his rights."

Case Notes

Improper Denial of Challenge for Cause Based on Debtor-Creditor and Attorney-Client Relationships — Erroneous Ruling on Challenge for Cause Prejudicial as Matter of Law — New Trial Warranted: During voir dire, prospective juror Derrig revealed that he was president of a bank that was represented by plaintiff's trial counsel, that he had worked with plaintiff in the past in his position as bank president, and that the bank was one of plaintiff's creditors. Defendant twice challenged Derrig for cause, based on the debtor-creditor relationship between plaintiff and the bank and because of the potential for bias arising from Derrig's attorney-client relationship with plaintiff's attorney. Both challenges were denied, so defendant ultimately used a peremptory challenge to remove Derrig from the jury panel. Defendant claimed that denial of its challenge for cause was improper. Because defendant was forced to use a peremptory challenge to remove Derrig, and in fact used all its peremptory challenges, defendant maintained that it was denied an equal number of peremptory challenges and was thus entitled to a new trial. The Supreme Court agreed. Pursuant to 25-7-223, there is no substantive difference between the chief executive officer of a creditor who is responsible for the creditor's success and the creditor itself when it comes to impartiality and jury duty. Further, an ongoing attorney-client relationship between a prospective juror and trial counsel represents the strong possibility of bias in favor of the party represented by that attorney. Under the rule in King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038 (1993), and St. v. Williams, 262 M 530, 866 P2d 1099 (1993), when a District Court erroneously denies a challenge for cause, it is the substantive equivalent of granting more peremptory challenges to one side than to the other, which is prejudicial as a matter of law, warranting reversal and a new trial. Reff-Conlin's, Inc. v. Fireman's Fund Ins. Co., 2002 MT 60, 309 M 142, 45 P3d 863 (2002).

Peremptory Challenges to Prospective Jurors — Factors Necessary to Show Purposeful Discrimination in Jury Selection — Waiver of Batson Challenge When Not Timely Raised: Ford

contended that the state violated his due process rights by improperly exercising all of its peremptory challenges at trial to exclude women from the jury panel, citing J.E.B. v. Ala. ex rel. T.B., 511 US 127 (1994), as a prohibition against gender discrimination during jury selection. In a case of first impression, the Supreme Court applied a de novo review to the trial court's application of the law, deferring to the trial court's findings of fact unless clearly erroneous. The Supreme Court then reviewed the history of the discriminatory use of peremptory challenges as addressed in Batson v. Ky., 476 US 79 (1986), and its progeny, noting that the rules regarding challenges to jury selection no longer apply exclusively to prosecutors striking members of the venire who are the same race as the defendant, but that any racially motivated reason for striking a prospective juror is prohibited whether the juror shares the racial identity of the defendant or not (see Powers v. Ohio, 499 US 400 (1991)). Further, the challenge is no longer limited to the government in criminal actions but has been extended to prevent a defendant in a criminal action from using peremptory challenges to exclude jurors based on race (see Ga. v. McCollum, 505 US 42 (1992)), has been applied to private litigants in civil cases (see Edmonson v. Leesville Concrete Co., 500 US 614 (1991)), and has been used to prohibit gender discrimination in jury selection, as in J.E.B. In order to establish a prima facie case of purposeful discrimination, a defendant must show that: (1) the defendant is a member of a cognizable racial group; (2) the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; and (3) these facts and other relevant circumstances raise an inference that the prosecutor used the peremptory jury selection practice to exclude members of the venire from the petit jury on account of their race. In addition, numerous courts have held that the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria must be exercised in a timely manner, and failure to raise a Batson challenge before the jury is sworn and before the venire is dismissed results in waiver of the challenge. In Ford's case, his counsel waited until after the jury was sworn and the venire dismissed before raising the Batson challenge. Because the motion was untimely, and therefore waived, the Supreme Court declined to address the merits of Ford's claim of discriminatory use of peremptory challenges. St. v. Ford, 2001 MT 230, 306 M 517, 39 P3d 108 (2001), followed in Casiano v. Greenway Enterprises, Inc., 2002 MT 93, 309 M 358, 47 P3d 432 (2002), St. v. Parrish, 2005 MT 112, 327 M 88, 111 P3d 671 (2005), and Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

No Extra Peremptories for Two Defendant Doctors Not Blaming Each Other for Patient's Death — Failure to Prove Hostile Interests: In a trial between a surviving spouse and two doctors who treated plaintiff's husband, who died of hantavirus, which was not diagnosed, the doctors did not try to pass the blame off on each other. Each had his own interest to protect, but there was no showing that their interests were hostile to each other. That there was the potential for one to escape liability at the possible expense of the other did not show that their interests were hostile to each other. A defendant's interest in self-protection from an adverse jury verdict does not necessarily indicate hostility toward a codefendant. Both doctors asserted that they were not negligent. Doctor Swift did not plead any affirmative defense or cross-claim against Dr. Anderson, and Dr. Anderson's affirmative defenses did not suggest any hostility toward Dr. Swift. The lower court therefore erred in granting each doctor four peremptory challenges instead of making them share the normal four. A grant of additional peremptory challenges is a tactical advantage that is unmistakable but nearly impossible to prove; therefore, prejudice from an improper grant is presumed as a matter of law. Plaintiff, who failed to prove negligence, is entitled to reversal and a new trial. Bueling v. Swift, 1998 MT 112, 288 M 472, 958 P2d 694, 55 St. Rep. 441 (1998), followed in Armstrong v. Gondeiro, 2000 MT 326, 303 M 37, 15 P3d 386, 57 St. Rep. 1381 (2000).

Additional Peremptory Challenges Granted to Hostile Parties — Rule to Be Applied: King sued the Montana Power Company and two wholly owned subsidiaries for wrongful discharge. At trial, the District Court granted eight peremptory challenges to the three codefendants. Because a requirement for a demonstration of prejudice would invade the internal processes of the jury, the Supreme Court held that no prejudice need be shown in order for additional peremptory challenges to be granted to one side in a lawsuit and expressly overruled Leary v. Kelly Pipe Co., 169 M 511, 549 P2d 813 (1976), which required prejudice. The Supreme Court held that parties seeking additional peremptory challenges must request them prior to trial, the issue should be raised by motion prior to voir dire if no pretrial conference is held, the number of peremptory challenges should be included in the pretrial order, and the trial court should expressly set forth in the record the reasons for its ruling. If peremptory challenges are improperly granted, prejudice is presumed as a matter of law. In the present case, the Supreme Court held that the District Court incorrectly required "diversity of interest" instead of "hostility" and that the facts showed insufficient hostility to require additional peremptory

challenges allowed by the District Court. The District Court therefore committed reversible error in granting those additional challenges, and a new trial was ordered. King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038, 50 St. Rep. 117 (1993).

Manifest Error in Failing to Remove Jurors for Cause: It was manifest error for the District Court to fail to remove one juror who had a fixed scruple against punitive damages and had followed his scruple in a previous trial, and to remove a second juror who not only stated he preferred the management side but appeared to have difficulty in hearing and speaking. Plaintiff's counsel was therefore forced to waste peremptory challenges to remove the jurors when he might have used the challenges elsewhere on the panel. Mahan v. Farmers Union Cent. Exch., Inc., 235 M 410, 768 P2d 850, 46 St. Rep. 96 (1989).

Number of Peremptory Challenges: Under this section, each party may have four peremptory challenges. "Each party" has been interpreted to mean "each side" unless the position of the codefendants is shown to be "hostile". Here the suits were joined involuntarily, and defendants/respondents in this action have indicated they would seek indemnification from other codefendants. Therefore, the codefendants were found to be hostile, and four peremptory challenges each are permitted. Williams v. Rigler, 234 M 161, 761 P2d 833, 45 St. Rep. 1812 (1988).

Jury Passed for Cause — Partiality Issues Waived: Defendant could not successfully argue that the jury was not fair and impartial when defendant passed the jury for cause. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Substantial Right — Forced Use of Challenge — Abuse of Discretion: Because the trial court improperly denied a challenge for cause, the plaintiff was forced to use a peremptory challenge. Although the right to a peremptory challenge is a substantial right, only where there is an abuse of discretion is there reversible error. Where the court extensively questioned and thereby rehabilitated a prospective juror, an abuse of discretion occurred. Abernathy v. Eline Oil Field Services, Inc., 200 M 205, 650 P2d 772, 39 St. Rep. 1688 (1982), followed in Walden v. St., 250 M 132, 818 P2d 1190, 48 St. Rep. 893 (1991).

No Presumption of Prejudice Where Four Peremptory Challenges Allowed Per Hostile Defendant: Failure of the District Court to follow the procedural guidelines set out in Hunsaker v. Bozeman Deaconess Foundation, 179 M 305, 588 P2d 493, 35 St. Rep. 1647 (1978), for ruling on the question of the number of peremptory challenges allowed does not give rise to a presumption of prejudice when a sufficient record exists to review the propriety of the court's order and when, as here, each codefendant was entitled to four peremptory challenges because they were hostile to one another as to the theory of liability they held in common. Under 25-7-224, which allows each party four peremptory challenges, "each party" means "each side" unless the positions of the codefendants are hostile to each other. Lauman v. Lee, 192 M 84, 626 P2d 830, 38 St. Rep. 499 (1981), followed in Gee v. Egbert, 209 M 1, 679 P2d 1194, 41 St. Rep. 515 (1984). See also Adams v. Cheney, 203 M 187, 661 P2d 434, 40 St. Rep. 383 (1983).

Number of Challenges When Multiple Parties:

Since the record at the time the court entered its ruling is devoid of evidence showing the parties were "hostile", each is entitled to four peremptory challenges. Upon review the court is compelled to take a hindsight approach to the issue and determine from the entire trial record if the appellant was prejudiced. Hunsaker v. Bozeman Deaconess Foundation, 179 M 305, 588 P2d 493 (1978).

The court properly allowed each defendant four peremptory challenges since they had interests and defenses antagonistic in fact. Kudrna v. Comet Corp., 175 M 29, 572 P2d 183 (1977).

Additional Challenges Allowed — Effect: Judgment will not be reversed for error when court allowed one defendant four peremptory challenges and four more peremptory challenges collectively to remaining two defendants because of plaintiff's inability to establish that error caused him material injury or that objectionable jurors sat on the case. Leary v. Kelly Pipe Co., 169 M 511, 549 P2d 813 (1976), overruled in King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038, 50 St. Rep. 117 (1993).

Consolidation of Cases for Trial — Number of Challenges Allowed: When cases are properly ordered consolidated for trial they become a single action so far as selecting a jury is concerned. Each of the parties plaintiff and the parties defendant, irrespective of the number making up such parties, was entitled collectively to four peremptory challenges, and no more. Ferron v. Intermountain Transp. Co., 115 M 388, 143 P2d 893 (1943), overruled in Leary v. Kelly Pipe Co., 169 M 511, 549 P2d 813 (1976).

Challenges of Codefendants — Conflict of Interests: Though each of two or more codefendants who are hostile to each other is entitled to the number of peremptory challenges of jurors allowed

by this section to parties litigant, where neither their joint answer, which asserted defenses common to all, nor the evidence disclosed any conflict of interest, they constituted but one party, and as such were entitled to but four peremptory challenges. Mullery v. Great N. Ry., 50 M 408, 148 P 323 (1915). See also Chenoweth v. Great N. Ry., 50 M 481, 148 P 330 (1915).

Number of Challenges Allowed — "Each Party" Defined: The provision of this section, that "each party" to a civil action shall be entitled to four peremptory challenges, means each side or party litigant, and not each person of whom the respective sides or parties litigant are made up. Mullery v. Great N. Ry., 50 M 408, 148 P 323 (1915). See also Chenoweth v. Great N. Ry., 50 M 481, 148 P 330 (1915).

Waiver of Challenge — Equity Cases: Where a party plaintiff had used two of his four peremptory challenges, and waived his third and fourth, he was not thereafter entitled to challenge the juror placed in the box to fill the vacancy occasioned by the exercise of defendant's fourth challenge, especially in an equity case, where the findings were merely advisory and could be disregarded by the court. O'Malley v. O'Malley, 46 M 549, 129 P 501 (1913).

Right to Peremptory Challenges Absolute: Each party to a civil action may, by a mere objection, peremptorily challenge four jurors, and when these challenges are exercised the court has no discretion in the matter whatever. State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 M 529, 77 P 312 (1904).

Waiver of Challenge as to Particular Juror Only: Where the State waived its fourth peremptory challenge and the defendant exhausted his peremptory challenges, it was not error, on the panel's being filled and passed for cause, to permit the State to peremptorily challenge a juror who was in the box when the State waived its fourth challenge. The State's waiver of its fourth challenge was not a waiver of any subsequent challenge to which it was entitled. St. v. Peel, 23 M 358, 59 P 169 (1899), distinguished in Feeley v. Lacey, 133 M 283, 322 P2d 1104 (1958).

Waiver of Challenges — Limitation on Rule: Where either party fails to challenge in his turn, he is considered to waive the challenge or challenges he might use at that time, but this rule goes no further than is necessary to preserve the alternation required by the statute. St. v. Peel, 23 M 358, 59 P 169 (1899), distinguished in Feeley v. Lacey, 133 M 283, 322 P2d 1104 (1958). See also Chenoweth v. Great N. Ry., 50 M 481, 148 P 330 (1915).

Criminal Prosecution — Alternate Peremptory Challenges: In a prosecution for murder, the accused was properly compelled to exhaust alternately two peremptory challenges to each one taken by the State, where none were taken until the panel was full. St. v. Sloan, 22 M 293, 56 P 364 (1899). See also Chenoweth v. Great N. Ry., 50 M 481, 148 P 330 (1915).

Law Review Articles

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).

Collateral References

Jury *key* 4, 114 through 142.

50 C.J.S. Juries §§279 through 285.

47 Am. Jur. 2d Jury §234, et seq.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury—post-Batson state cases. 47 ALR 5th 259.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury—post-Batson state cases. 20 ALR 5th 398.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR 3d 14, §4 superseded by 47 ALR 5th 259, 110 ALR Fed. 690, 20 ALR 5th 398.

Jury: number of peremptory challenges allowable in civil case where there are more than two parties involved. 32 ALR 3d 747.

Number of peremptory challenges allowable where there are two or more parties on same side. 21 ALR 3d 725.

Right to peremptory challenge as prejudiced by appearance of additional counsel in civil case after impaneling jury. 56 ALR 2d 971.

Waiver of peremptory challenge in civil case other than by acceptance of juror. 56 ALR 2d 742.

Allowance of, or refusal to allow, peremptory challenge after acceptance of juror. 3 ALR 2d 499.

Use of peremptory challenges to exclude ethnic and racial groups, other than Black Americans, from criminal jury—post-Batson federal cases. 110 ALR Fed 690.

Part 3
Order and Conduct of Trial by Jury

25-7-301. Order of trial.

Compiler's Comments

1981 Amendment: In (1) and (3) substituted "The party who has the burden of proof" for "The party on whom rests the burden of the issues"; in (3) substituted "shall" for "must".

Case Notes

General 217
Jury Instructions 219

GENERAL

Argument — Comment on Lack of Testimony When Witness Testimony Barred by Court Order — Harmless Error: In a civil action for damages against Huggins and the Carpet Barn, stemming from criminal acts damaging plaintiffs David and Susan Black's automobiles, defendants made a motion in limine to exclude certain expert witnesses for the plaintiffs from testifying. After the motion was granted, defendants commented to the jury during final arguments that the plaintiffs had failed to produce any expert witnesses on the issue for which those witnesses had been excluded by the District Court's order and also commented on the fact that Susan had not testified, even though her deposition was not admitted by virtue of the District Court's ruling. The Supreme Court held that because the plaintiffs had violated a scheduling order that resulted in the expert witnesses' testimony being excluded, the defendants could properly comment upon the lack of evidence and, although the District Court erred in excluding Susan Black's deposition, that error was harmless error because the deposition was cumulative evidence. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

No Abuse of Discretion in Court Interrupting Argument Unsupported by Evidence: On closing arguments, plaintiffs' attorney began to discuss and demonstrate evidence that was not proved or a matter of record. It was not an abuse of discretion, nor did it prejudice plaintiffs' case, when the trial court interrupted and instructed counsel in chambers, and subsequently the jury, that a party may not during closing arguments discuss or introduce facts not previously proved. Harwood v. Glacier Elec. Co-op, Inc., 285 M 481, 949 P2d 651, 54 St. Rep. 1257 (1997).

Fair Trial Not Jeopardized by Scheduled Recesses: The Supreme Court held that the trial court had not abused its discretion in scheduling recesses at the pretrial conference. The plaintiffs did not object to the schedule and offered no evidence of outside influences affecting the jury during the recesses. Young v. Horton, 259 M 34, 855 P2d 502, 50 St. Rep. 662 (1993).

Time for Allowing Defendant's Attorney to Examine Him After Plaintiff Examines Him as Adverse Witness: The judge did not err when he precluded examination of defendant by his attorney directly after defendant was examined as an adverse witness by plaintiff's attorney. The judge may use his discretion to rearrange the order of the trial. The defendant was called as a witness the next day and given a full opportunity to provide testimony and evidence to support his case and to counter plaintiff's case. O'Leyar v. Callender, 255 M 277, 843 P2d 304, 49 St. Rep. 1008 (1992).

Disclosure of Rebuttal Witness Not Required: The law does not require the advance disclosure of rebuttal witnesses. Valley Properties Ltd. Partnership v. Steadman's Hardware, Inc., 251 M 242, 824 P2d 250, 49 St. Rep. 13 (1992), citing Massman v. Helena, 237 M 234, 773 P2d 1206 (1989). See also Lutz v. Nat'l Crane Corp., 267 M 368, 884 P2d 455, 51 St. Rep. 810 (1994).

Motion for Mistrial Based on Counsel's Opening Statements Properly Denied: Defendant moved for a mistrial based on alleged prejudice stemming from opening statements made by counsel for a codefendant that implicated defendant but were unsupported by evidence. The judge properly exercised his discretion in denying the motion by instructing the jury that anything said by an attorney and not substantiated by the evidence was to be totally disregarded by the jury. St. v. Graves, 241 M 533, 788 P2d 311, 47 St. Rep. 483 (1990). See also St. v. Kolstad, 166 M 185, 531 P2d 1346 (1975).

No Error for Refusal to Allow Rebuttal Testimony: In a case involving the destruction of a building by fire, the trial court did not err in refusing to allow a retired firefighter to give his expert opinion on behalf of the plaintiffs during rebuttal testimony concerning the alleged negligent firefighting methods employed by the defendant city firefighters. The proposed testimony related to the issue of whether the city negligently fought the fire and was not a new matter raised by the defense; it was one of the main issues raised by the plaintiffs in their complaint. Having failed during their case in chief to meet the burden of proving that the

defendant negligently fought the fire, the plaintiffs cannot then assert that the city's alleged negligent firefighting was a new issue first raised by the defense and open to rebuttal testimony. Massman v. Helena, 237 M 234, 773 P2d 1206, 46 St. Rep. 764 (1989).

Plaintiff's Counsel and Witnesses — Reference During Trial to Defendants' Legal Duty: The trial court granted the defendants' motion to prohibit the plaintiff, witnesses, or counsel from referring to or indicating to the jury that the defendant owed a duty other than not to intentionally inflict emotional distress on the plaintiff. The court further ruled that neither party could refer to a duty of the defendant, of whatever scope or nature, until closing arguments, after the jury instructions had been read to the jury. The Supreme Court held that the order was overbroad. Under 25-7-301, either counsel may briefly state his case and the evidence he expects to introduce to support it, and may refer in opening statements to evidence to be adduced, if those statements are made in good faith and with reasonable grounds to believe the evidence is admissible. State ex rel. Fitzgerald v. District Court, 217 M 106, 703 P2d 148, 42 St. Rep. 1061 (1985).

Evidence After Case in Chief — Permissible Uses: Parties are not confined to rebuttal evidence after the close of the case in chief if the court, in the furtherance of justice, permits them for good reasons to offer evidence in their original cause—for example, when it is offered to counter a new matter offered by the other party. Mtn. W. Farm Bureau Mut. Ins. Co. v. Girton, 215 M 408, 697 P2d 1362, 42 St. Rep. 500 (1985).

Surprise Evidence After Case in Chief — Other Party's Rights: Defendants claimed they were surprised by plaintiff's evidence admitted after plaintiff's case in chief. Defendants requested only 10 minutes to prepare for the witness. It was granted. If they could not prepare they should have requested more time, and it was improper to allege on appeal that inadequate time to prepare was granted. Mtn. W. Farm Bureau Mut. Ins. Co. v. Girton, 215 M 408, 697 P2d 1362, 42 St. Rep. 500 (1985).

Refusal to Admit Repetitive Testimony Upheld: Where the marriage of the parties was previously dissolved following a hearing in which testimony was introduced showing the effect of the wife's working upon the academic grades of the parties' child, the court did not err, upon hearing a petition for modification of the maintenance award, in refusing to admit testimony on the grades-work relationship that had been heard upon dissolution. The record indicates that the husband was not precluded, in the hearing upon the petition for modification, from introducing evidence concerning change in conditions since the dissolution decree. The District Court had sufficient information to determine if a change in circumstances had occurred, and testimony as to prior events was unnecessary. Tidball v. Tidball, 192 M 1, 625 P2d 1147, 38 St. Rep. 482 (1981).

Attorney's Fees Lien Foreclosure: Attorney's fees are recoverable by the prevailing party in a lien foreclosure action. The fact that evidence of attorney's fees was allowed to be presented upon reopening of plaintiff's case in chief is within the discretion of the trial court, and defendant made no showing that he was injured by the manner in which the evidence was presented. Maxwell v. Anderson, 181 M 215, 593 P2d 29 (1979).

Failure to Properly Instruct: There was a complete failure to instruct the jury on damages and to properly instruct the jury on the issues relating to respondent's counterclaims. Hence, the trial court decision was vacated and remanded for a new trial. Billings Leasing Co. v. Payne, 176 M 217, 577 P2d 386 (1978).

Basis for Approving Instructions: The trial court did not err in refusing certain instructions when repetitious, misleading, or an incorrect statement of the law or in giving instructions which were a correct statement of all relevant rules that have emerged from accepted case authorities. McGee v. Burlington N., Inc., 174 M 466, 571 P2d 784 (1977).

Instructions to Jury — Waiver of Objections: Plaintiff gave implied consent and waived objection by actively participating without objection in proceedings wherein trial court gave oral answer to question asked by the jury and orally confirmed the correctness of other instructions orally stated by counsel. Seder v. Peter Kiewit Sons' Co., 156 M 322, 479 P2d 448 (1971).

Argument — Measure of Damages: In an action by a father for the wrongful death of his infant son it was not reversible error for the trial court to permit the plaintiff's counsel, over objection, in their argument to the jury, to suggest a mathematical basis for fixing damages for loss of love, affection, and companionship on a per diem basis, where the trial judge instructed the jury that any remark of counsel not sustained by the evidence should be disregarded. Wyant v. Dunn, 140 M 181, 368 P2d 917 (1962).

Rebuttal Evidence — Limitations: Rebutting evidence is confined to that which tends to counteract new matter offered by the adverse party. Gustafson v. N. Pac. Ry., 137 M 154, 351 P2d 212 (1960), followed in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994). Miller

was followed in Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999).

Argument — Opening and Closing — Eminent Domain: In eminent domain proceedings the party upon whom the burden of proof rests is entitled to open and close. St. v. Peterson, 134 M 52, 328 P2d 617 (1958).

Rebuttal Evidence — Discretion of Court: In the matter of order of rebuttal proof the trial court is permitted to exercise a reasonable discretion, subject to review only in case of abuse thereof. Spurgeon v. Imperial Elevator Co., 99 M 432, 43 P2d 891 (1935).

Argument — Opening and Closing — Burden of Proof: Defendant in an action to recover the purchase price of machinery, who sought by his answer to defeat plaintiff's right to recover on the ground that fraud had been practiced upon him in making the sale and who had the affirmative of every issue raised by the pleadings, had the right to open and close. Connelly Co. v. Schlueter Bros., 69 M 65, 220 P 103 (1923).

Rebuttal Evidence Properly Excluded: Where plaintiff did not inject any new matter in rebuttal and defendants did not ask leave to offer evidence in their original case or make any offer of proof, refusal to permit them to introduce testimony in surrebuttal was not an abuse of discretion. First Nat'l Bank of Saco v. Vagg, 65 M 34, 212 P 509 (1922).

Argument — Opening and Closing — Counterclaim: Where, at the close of plaintiff's case, it was stipulated that if plaintiff was entitled to judgment in an action on a contract of lease of sheep, it was to be for a certain amount. The defendant, relying on counterclaims for damages, had the burden of proof and the right to open and close the argument. Power & Bro., Ltd. v. Turner, 37 M 521, 97 P 950 (1908).

JURY INSTRUCTIONS

No Error in Defining Risk as Chance of Pecuniary Loss: The jury found for the plaintiff, Deonier, in a breach of fiduciary duty case against the insurer for which Deonier was a selling agent and awarded Deonier $1 million in punitive damages in addition to compensatory damages. The defendant argued that the lower court erred in defining risk as a chance of pecuniary loss rather than a likely risk that the plaintiff would suffer a pecuniary loss. The Supreme Court found the instruction acceptable on the grounds that Black's Law Dictionary defines risk as a "chance of injury, damage or loss". Deonier & Associates v. Paul Revere Life Ins. Co., 2004 MT 297, 323 M 387, 101 P3d 742 (2004).

No Prejudice in Jury Instructions Explaining General Elements of Legal Malpractice: Plaintiffs contended that general instructions regarding the elements of legal malpractice given to the jury in a legal malpractice case were internally inconsistent, incomplete, and essentially confusing. Defendant attorney asserted that the jury was advised that the attorney had a duty to use the care and skill ordinarily used by lawyers practicing in Montana and that the jury was not confused by an instruction that did not recite every duty discussed by an expert. The Supreme Court agreed with defendant. Although the trial court might have crafted other instructions that may have better assisted the jury in considering the law applicable to the case, when taken as a whole, the instructions, when coupled with extensive expert testimony for both parties, adequately described the attorney's standard of care and did not potentially mislead or confuse the jury, resulting in prejudice to plaintiffs. Byers v. Cummings, 2004 MT 69, 320 M 339, 87 P3d 465 (2004).

Jury Question Concerning Amount of Damages in Injury Case — Use of Special Verdict Form Not Abuse of Discretion: Ele alleged that he was injured in a motor vehicle accident for which Ehnes admitted liability. In the pretrial order, Ehnes agreed that the sole issue of fact at trial was the amount of Ele's accident-related injury and damage claims. The first question on the District Court's verdict form stated that Ehnes had admitted responsibility for the accident and asked if Ele was injured as a result. The jury said no and returned the verdict. Ele contended that the verdict form was inconsistent with instructions on negligence because it did not ask if Ehnes' conduct was the cause of damages. Ele also asserted that the verdict form should not have included the question of whether he was injured because the amount of injury was the only question for trial. The Supreme Court considered whether the District Court abused its discretion and decided that it did not. Causation was in fact the first issue posed in the instruction, and inclusion of that issue did not conflict with the pretrial order. The use of the term "accident-related" in the pretrial order confirmed that the issue remaining for trial was not merely the amount of Ele's damages, but the amount of damages caused by and related to the accident. Ele v. Ehnes, 2003 MT 131, 316 M 69, 68 P3d 835 (2003).

Oil and Gas Habendum Clause Obligating Maintenance of Production — Jury Instructions Allowing Consideration of Causes of Cessation of Production Improper When Evidence Shows

Lack of Production of Paying Quantities: Actions to terminate oil and gas leases invoke two distinct inquiries: (1) whether the lease is producing in paying quantities; and (2) if not, whether the cessation in production is permanent or temporary. As an ownership-in-place state, in Montana, the lessee's interest terminates upon the occurrence of a stated event, which, under the habendum clause in effect here, was the cessation of production in paying quantities. Paying quantities is defined as the amount that would pay a small profit over the cost of operation, excluding the initial cost of bringing the well into production. Thus, the finder of fact must necessarily consider income generated from the property and the expenses incurred in its operation. However, in an effort to mitigate the harshness of the automatic termination rule, courts developed the temporary cessation of production rule, which shifts the burden to defendant to prove that cessation is temporary once plaintiff establishes that the lease has halted production. To determine whether a cessation is temporary or permanent, a jurisdiction considers the cause of the cessation, the time reasonably required to restore production, and the diligence exercised by the lessee in restoring production. Ownership-in-place jurisdictions generally limit temporary cessations to mechanical or production breakdowns. If there is a lack of market, if the lease is capable of producing in paying quantities, and if the lessee is using reasonable diligence to market the product, Montana law considers the lease as one that is producing in paying quantities and will not reach the temporary cessation of production question. The District Court in this case allowed jury consideration of oil prices, economic considerations, and defendant's financial condition in determining whether cessation was temporary or permanent. However, plaintiff established that the leases in question failed to produce in paying quantities during the prescribed accounting period. At that point, analysis implicating economic factors concluded. Therefore, the Supreme Court held that allowing jury consideration of defendant's economic factors was an abuse of discretion and was prejudicial to plaintiff, warranting a new trial. Somont Oil Co., Inc. v. A&G Drilling, Inc., 2002 MT 141, 310 M 221, 49 P3d 598 (2002), following Berthelote v. Loy Oil Co., 95 M 434, 28 P2d 187 (1933), and Christian v. A. A. Oil Corp., 161 M 420, 506 P2d 1369 (1973). See also Watson v. Rochmill, 155 SW 2d 783 (Tex. 1941).

Jury Instructions Regarding Causation and Superseding, Intervening Cause Not Conflicting: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. Although conceding that the jury instructions were correct statements of the law, Payless nevertheless asserted that the instructions, when read together, were confusing regarding Payless's liability when the case involved a defense of superseding, intervening cause. The Supreme Court found that the instructions were appropriate and not conflicting and that nothing in the record indicated that the jury was confused. The jury sent out no written questions to the court and deliberated less than 2 hours before unanimously agreeing on its answers to six special verdict questions. Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000).

Agricultural Lease — No Error in Failure to Give Instruction on Implied Contract Covenant to Farm in Workmanlike Manner — Express Lease Terms Stricter Than Requested Instruction on Implied Term: The Schumachers leased property that they owned to Stephens through an agricultural lease. The lease required Stephens to farm with "diligence and care" and to do "all work necessary . . . and to the best interest of lessor, all in such time and manner as shall be to the best advantage and economy". The Schumachers sued Stephens, alleging that Stephens breached the implied contract covenant of good faith and fair dealing. The District Court refused to give the Schumachers' requested instruction on an implied covenant in the lease that would have required Stephens to farm the property in a "competent, skilled, workmanlike and husbandlike fashion". The Supreme Court noted that: (1) the District Court was correct in not giving an instruction on negligence because the Schumachers' complaint and evidence contained no such theory; (2) the District Court did instruct on the implied covenant of good faith and fair dealing; (3) the standard of care required of Stephens was expressly stated in the lease itself; and (4) the Schumachers had not shown that they were prejudiced by the failure to give the requested instruction. For these reasons, the Supreme Court held that it was not error for the District Court to refuse to give an instruction on an implied covenant to farm in a workmanlike manner. Schumacher v. Stephens, 1998 MT 58, 288 M 115, 956 P2d 76, 55 St. Rep. 247 (1998).

Agricultural Lease — No Error in Failure to Give Plaintiffs' Instruction on Effect of Material Participation Provisions — Instruction on Mutual Cooperation Held Sufficient: The Schumachers leased property that they owned to Stephens through an agricultural lease. Later, when the Schumachers sued Stephens over Stephens' failure to comply with the terms of the lease, Stephens claimed in defense that the Schumachers had breached the material participation agreements in the lease and that therefore he was excused from compliance. The

Schumachers requested an instruction stating that if the jury found that Stephens failed to cooperate with the plaintiffs, then Stephens was not entitled to claim that he was excused from liability because of his contention that the Schumachers breached the material participation agreements in the lease. The District Court refused to give the instruction and instead gave an instruction stating that "the failure of a party to fully perform a contract is excused if his performance is prevented or delayed by the conduct of the other party". The Supreme Court noted that the Schumachers had not shown that they were prejudiced in any way by the failure of the District Court to give the requested instruction. Citing Fillinger v. NW. Agency, Inc., of Great Falls, 283 M 71, 938 P2d 1347 (1997), the Supreme Court held that: (1) a party assigning error to a refused instruction must show that the party was prejudiced by the refusal; and (2) the refused instruction must be reviewed in the context of the instructions that were given and the evidence produced at trial. Under these standards, the Supreme Court held that the instruction given by the District Court was sufficient. Schumacher v. Stephens, 1998 MT 58, 288 M 115, 956 P2d 76, 55 St. Rep. 247 (1998).

Evidence to Be Offered on Jury Instruction:

A party is not prejudiced by the refusal of a proposed jury instruction when the subject matter of the instruction is not applicable to the pleadings and facts or is unsupported by evidence introduced at trial. Harwood v. Glacier Elec. Co-op, Inc., 285 M 481, 949 P2d 651, 54 St. Rep. 1257 (1997), following King v. Zimmerman, 266 M 54, 878 P2d 895 (1994).

Plaintiff contends that it was error to fail to instruct the jury that the Public Service Commission was negligent as a matter of law for failing to act on the petition of the Rosebud County Commissioners requesting installation of warning devices at the railroad crossing where the accident occurred. Such an instruction would have injected an issue upon which neither side offered any evidence at trial. It is not error to refuse an instruction that is not supported by the evidence. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980).

Exclusion of Expert Testimony — Insufficient Factual Grounds and Testimony Directed to Question of Law: Plaintiffs contended that they attempted to introduce evidence of the applicability of the National Electrical Code (NEC) and the National Electrical Safety Code (NESC) through testimony of an expert and that it was error for the trial court to deny a jury instruction regarding the NEC and NESC. However, the instruction was properly denied because there were insufficient factual grounds to establish the relevancy of the NEC and NESC and because the expert's testimony was directed to a question of law. Harwood v. Glacier Elec. Co-op, Inc., 285 M 481, 949 P2d 651, 54 St. Rep. 1257 (1997).

Refusal to Give Proposed Jury Instruction — Substantial Rights Not Affected — No Reversible Error: It is not reversible error for a District Court to refuse an offered instruction unless the refusal affects the substantial rights of the party that proposed the instruction. Barthule v. Karman, 268 M 477, 886 P2d 971, 51 St. Rep. 1423 (1994), following Cottrell v. Burlington N. RR Co., 261 M 296, 863 P2d 381 (1993).

Not Error to Fail to Instruct That Severity of Injury Did Not Mean There Must Be Negligence: A doctor in a medical malpractice case argued on appeal that the judge should have given a "mere fact of injury" instruction because no instruction was given to prevent the jury from believing that because the injuries were so severe, there must have been negligence. There was no error because the given instructions stated in part: (1) that plaintiff had the burden of proving the doctor was negligent, that the plaintiff was injured, and that the doctor's negligence was a proximate cause of plaintiff's injury; (2) that it is the doctor's duty to use the skill and learning ordinarily used in like cases by other doctors practicing in that same specialty and holding the same national board certification and that violation of that duty is negligence; and (3) that the proper test for determining negligence in a doctor's actions is whether the doctor meets the accepted standards of skill and care. O'Leyar v. Callender, 255 M 277, 843 P2d 304, 49 St. Rep. 1008 (1992).

Advice of Counsel as Affirmative Defense — When Jury Instruction Warranted: In order to warrant an instruction on the affirmative defense of advice of counsel, defendant must establish prima facie that he fully and fairly presented to counsel all facts within his knowledge. It is insufficient for defendant to describe the factual allegations underlying the prosecution and then testify generally that all facts were conveyed to the prosecutor. Rather, defendant must specifically testify as to the details of the information conveyed to the prosecutor at that time. Hill v. Burlingame, 244 M 246, 797 P2d 925, 47 St. Rep. 1580 (1990), citing Cornner v. Hamilton, 62 M 239, 204 P 489 (1922).

Jury Instruction on Issue of Retaliation for Participation in Discrimination Action: Acts of retaliation for participating in proceedings before the Human Rights Commission are discrimination actions separate and apart from the claim of discrimination in the original

proceedings. Plaintiff is therefore entitled to jury instructions based on his claim of retaliation and is further entitled to comment on the retaliation in oral argument. Mahan v. Farmers Union Cent. Exch., Inc., 235 M 410, 768 P2d 850, 46 St. Rep. 96 (1989).

Instruction Adequate Concerning Shifting of Blame: Instruction adopted by the trial court was adequate in directing the jury that the only parties that could be held liable were those named in the suit at the time of trial. Rollins v. Blair, 235 M 343, 767 P2d 328, 46 St. Rep. 39 (1989).

Instruction in Comparative Negligence, Not Sudden Emergency: A jury instruction, which presented three standards of care expected of motor vehicle drivers and said that failure to meet the standards constituted negligence, was more concrete than the sudden emergency instruction banned in White v. Phillips, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986). Because it spoke to both drivers, it was considered an instruction in comparative negligence, not one in sudden emergency, and was properly given. Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988).

"Cline Instruction" Improper Statement of Law Regarding DUI: A jury instruction approved by the Supreme Court in St. v. Cline, 135 M 372, 339 P2d 657 (1959), stating that a violation of 61-8-401 occurred if a person drove while impaired by alcohol to the "slightest degree", was held to no longer be a proper statement of the law in light of subsequent legislative amendments which specifically spell out the extent of the influence of intoxicants necessary for conviction. The court held that the instruction must be either revised or abandoned to conform with 61-8-401 and remanded for a new trial. Helena v. Davis, 222 M 492, 723 P2d 224, 43 St. Rep. 1447 (1986).

Jury Instruction Regarding Ambiguities in Product Labeling and Instructions for Use — Issue of Fact: Herbicide manufacturer contended the District Court erred in instructing the jury that ambiguities in the wording on product labels and in application instructions were to be construed against the manufacturers, claiming that this rule of construction was a rule of law for the court to apply and not a proper subject for a jury instruction. Plaintiff argued that the instruction was justified because the manufacturer presented the meaning of the application instructions as a factual issue at trial. The Supreme Court agreed, concluding that the jury instruction was a correct statement of law under the facts of the case. Vandalia Ranch, Inc. v. Farmers Union Oil & Supply Co., 221 M 253, 718 P2d 647, 43 St. Rep. 790 (1986).

Verbatim Reading of Unfair Claim Settlement Practices as Jury Instruction — Harmless Error: An insurer claimed the District Court erred in including in its charge to the jury a verbatim reproduction of the 14 proscribed unfair claim settlement practices contained in 33-18-201, contending that a majority of the practices had no applicability to this case. On appeal, the Supreme Court found there was at least an arguable basis for submission to the jury of 12 of the 14 practices enumerated, and that inclusion of the two inapplicable practices in the jury instruction was harmless and not prejudicial. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Amending Special Verdict Form Several Hours After Jury Deliberations Began — Error: After several hours of deliberation, the jury returned with questions. In response to those questions, it was error for the court to amend the special verdict forms to include a determination by the jury as to whether a party acted willfully or wantonly. Although the instruction would not have been error if given at the proper time, the late inclusion denied the party the right to argue his case and properly present it before the jury. White v. Phillips, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Sudden Emergency Instruction — No Longer to Be Used: The Supreme Court held that the sudden emergency instruction may no longer be used because the instruction, which provided a test for actions done in the course of a sudden emergency, added nothing to the established law applicable to any negligence case and might only leave an impression in the minds of jurors that a driver is somehow excused from the ordinary standard of care because an emergency existed. White v. Phillips, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986), distinguished in Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988).

Duty to Warn of Known Danger — Lack of Warning of Known Danger as Defect: In a tort action over injury caused by a hay baler, the Supreme Court held, based on the holding of Brown v. N. Am. Mfg. Co., 176 M 98, 576 P2d 711 (1978), that it was error to instruct the jury that a manufacturer has no duty to warn a person who claims to be entitled to a warning if the person actually knows of the danger. Under the facts of this case, there is a duty to warn of a known danger if the product is unreasonably dangerous and lack of such warning can make an otherwise nondefective product defective. Tacke v. Vermeer Mfg. Co., 220 M 1, 713 P2d 527, 43 St. Rep. 123 (1986). Recognition of a failure to warn claim and the Brown criteria were applied in

Riley v. Am. Honda Motor Co., Inc., 259 M 128, 855 P2d 196, 50 St. Rep. 714 (1993). See also Emery v. Federated Foods, Inc., 262 M 83, 863 P2d 426, 50 St. Rep. 1454 (1993).

Tort Action — Refusal to Instruct on Party's Central Contention — Reversible Error: In a tort action, it was error for the District Court to refuse to instruct on the central contentions of the plaintiff and instead undertake to instruct the jury in an incomplete manner. Taken as a whole, the instructions did not allow the jury to consider plaintiff's central contentions regarding unnecessary hazard rendering the machine defective and unreasonably dangerous. It is reversible error to refuse to instruct on an important part of a party's theory of the case. Tacke v. Vermeer Mfg. Co., 220 M 1, 713 P2d 527, 43 St. Rep. 123 (1986).

Instruction on Duty to Examine Bank Statement That Was Not Sent: Trial court properly refused defendant bank's offered jury instruction on the duty of plaintiff depositor to examine statements and report errors within a reasonable time because the statements were not sent to depositor and there was no question in the case as to his unauthorized signature or as to alterations. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Instructions Expanding Pleadings — Prejudice Negated by New Trial on Other Grounds: The grant of a new trial negated any prejudice to defendant from unexpected proposed supplemental jury instructions submitted by plaintiff on the last court day before trial began. The defendant argued the additional instructions were in effect amendments to the pleadings and contained new legal theories. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Instructions on Statutes Preferred: In a wrongful death action arising out of a head-on collision, plaintiff offered instructions quoting federal and state laws which concern the dimming of headlights at night on the highway. The court gave the instruction concerning the federal regulations but refused to give the instruction quoting 61-9-220 and 61-9-221. Plaintiff pointed out that a violation of the federal regulation may be considered by the jury in determining negligence, while a violation of a Montana statute is negligence as a matter of law. The Supreme Court said it would have been preferable for the District Court to instruct on Montana statutes as they pertain to the use of high and low beams of headlights at night. The court also found that the instruction given was consistent with the statutes, so the jury was not misled. Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985).

Evidence Sufficient to Instruct in Tort Action on Driving Under Influence — Statutory Violation and Proximate Cause Instructions: During the course of a tort trial involving an automobile accident, some evidence was produced indicating the driver may have consumed some alcohol prior to the accident, and drug paraphernalia was found in his car. There was sufficient evidence to instruct the jury regarding driving under the influence. It was not error to give a jury instruction stating that a Montana statute makes it unlawful to drive under the influence because the instruction must be read in conjunction with other instructions, one of which provides that although conduct in violation of a statute constitutes negligence as a matter of law, such a violation is of no consequence unless it was the proximate cause of an injury suffered by the plaintiff. Foreman v. Minnie, 211 M 441, 689 P2d 1210, 41 St. Rep. 1478 (1984).

Negligence Instruction Commenting on Evidence — Theory of Instruction Covered by Other Instructions: Defendant's instruction based on the theory that codefendant was 100% negligent was denied because the court believed it commented on the evidence. Other instructions adequately covered the theory that codefendant was 100% negligent, and the jury found the codefendant 100% negligent. The instruction was thus properly denied. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984).

Review of Jury Instructions — Balancing Required: When considering jury instructions it must be remembered that often a jury is deluged with numerous instructions, many of which attempt to explain complex questions of law. The court on review must therefore balance the possible confusion created by layer upon layer of instructions with the necessity of providing the appropriate legal theories. Goodnough v. St., 199 M 9, 647 P2d 364, 39 St. Rep. 1170 (1982).

"Sudden Emergency" Instruction Not to Be Given in Ordinary Auto Accident Cases:

As defendant passed codefendant driving downhill, codefendant speeded up and defendant cut in front of him while only 20 feet from an oncoming vehicle. Codefendant overturned in the other lane, and the next two oncoming vehicles were involved in a collision with him. Defendant's proposed sudden emergency doctrine instruction was properly refused. The instruction should not be given in an ordinary motor vehicle accident case. It is unnecessary and confusing, and the ordinary rules of negligence are applicable and sufficient. Further, a test for giving the instruction is that the perilous situation was not created by the person confronted by it and whom the instruction favors; in this case, whether defendant was negligent was very much in

dispute, and the instruction was a comment on the evidence as it implied no negligence on his part. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984).

Walter and Claire Eslinger were killed when a truck belonging to defendant collided with their automobile. The road was snow-covered and slick, and the intersection was rutted. When the Eslingers' car hit the rutted area, it began fishtailing. Defendant contended Eslinger lost control of his car and skidded into the truck's lane. Plaintiffs contended that the truck locked its brakes and jackknifed across the road. The trial court allowed a "sudden emergency" instruction, which was relied upon by defendant, and no negligence was found on the part of defendant. The Supreme Court said that the giving of the "sudden emergency" instruction was reversible error. In view of Montana's adoption of comparative negligence, the court admonished trial courts not to give the instruction in ordinary automobile accident cases. This does not create a different standard or diminish the existing standard to be applied in an emergency. The conduct required is still that of a reasonable man under the circumstances as they would appear to one using proper care. The emergency is only one of the circumstances to be considered. Eslinger v. Ringsby Truck Lines, Inc., 195 M 292, 636 P2d 254, 38 St. Rep. 1863 (1981).

"Mere Happening" Instruction — Propriety — No Inference Except Res Ipso Loquitur: Plaintiff, a mail carrier, was attempting to negotiate a left turn. Evidence was unclear as to whether he signaled for the turn. The roadway into which he was attempting to turn was a private driveway, open to public use. While turning he was struck by defendant who was attempting to pass. The road was lined for passing and visibility was clear. The jury was instructed that "[t]he mere fact that an accident happened, considered alone, does not give rise to legal inference that it was caused by negligence or that any party to this action was negligent or otherwise at fault". The Supreme Court said that it can be confusing to a jury to give this instruction and recommended against it, but held that it was not prejudicial error to give the instruction in this case in light of the facts of the case and other instructions given. The Supreme Court affirmed that the "mere happening" instruction is totally incompatible in res ipsa loquitur cases. It is the law in negligence cases that negligence may not be inferred from the happening of an accident, but that res ipsa loquitur is an exception to the rule. Sampson v. Snow, 194 M 392, 632 P2d 1122, 38 St. Rep. 1441 (1981).

Intent Crucial Factor — Evidence Not Overwhelming — "Sandstrom Instruction" Error: The defendant was tried and convicted of theft and burglary. A "Sandstrom type" instruction was given. The defendant appealed, claiming to have had his normal thought processes affected at the time by a drug overdose. The Supreme Court held that, under this set of facts, defendant's intent was a crucial fact question. The instruction was not worded to allow merely a permissive inference of the defendant's intent and could have been interpreted as mandatory. Since evidence of intent was not overwhelming, it was reversible error to give the instruction. St. v. Kyle, 192 M 374, 628 P2d 263, 38 St. Rep. 578Q (1981).

Jury Instruction on Procuring Cause — Real Estate Listing: The defendant contended it was error for the court to give instructions on procuring cause in a case involving payment of a real estate commission. The District Court did not err, as the instructions given were contractual interpretation instructions taken almost verbatim from Montana statutes. A contract is to be construed so as to make it definite, operative, and reasonable; words are to be understood in their usual sense; and technical words are to be interpreted in the sense used in the business to which they relate. In this case, the court did just that. In addition, because the instructions set forth the actual law of Montana for the construction of contracts, they are part of the contract itself. Barrett v. Balland, 191 M 39, 622 P2d 180, 37 St. Rep. 2038 (1980).

Acceptable Jury Instructions — Duty of Counsel to Present When Alleging Improper Instruction: Defendant in a sexual intercourse without consent trial relied on the theory that the victim consented. Since evidence supporting the theory was admitted, defendant argued that the jury should have been instructed regarding that theory. Each of defendant's offered consent instructions was replete with misleading statements and misstatements of Montana law. Failure to present a specific acceptable instruction regarding its own theory precludes the defense from alleging reversible error for lack of proper instruction. St. v. Pecora, 190 M 115, 619 P2d 173, 37 St. Rep. 1742 (1980).

Cautionary Rape Instruction — Factors Requiring: The defendant was convicted of sexual intercourse without consent with his adopted 20-year-old daughter. The defendant offered and the trial court refused the cautionary "Smith instruction" that the charge of rape is easily made and difficult to disprove. This instruction is intended to be given in cases in which private malice, a motive for revenge on the part of the victim, or a lack of corroboration on the issue of consent is indicated. These factors were not present here, so it was not improper to refuse the instruction. St. v. Pecora, 190 M 115, 619 P2d 173, 37 St. Rep. 1742 (1980).

Jury Instructions to Be Based on Law: It was error for the trial court to instruct the jury using the Manual on Uniform Traffic Control Devices. This manual does not have the force of law and is merely advisory. Until the Highway Commission (now Transportation Commission) acts with respect to the manual, it does not place a duty on any party. The jury should have been instructed on the statutory duties of the railroad with respect to operating trains over its crossings, its common-law duties with respect to safety in the exercise of ordinary care, and, as a correlative matter, the duties of a motorist, both statutory and common-law, at a railroad crossing. Runkle v. Burlington N., Inc., 188 M 286, 613 P2d 982 (1980).

Instruction Concerning County's Satisfaction of Judgment — Instructions Properly Refused: The District Court instructed the jury that it was not to concern itself with the manner in which Sanders County would pay any judgment rendered against it in this case. The District Court refused plaintiff's instruction on possible sources of payment. This was proper, since further instruction might have led the jury into speculation on issues not properly before it as trier of fact. Wollaston v. Burlington N., Inc., 188 M 192, 612 P2d 1277 (1980).

Nonprejudicial Cumulative Error on Danger of Crossing: The court admitted part and refused part of the State of Montana's Railroad Crossing Protection Policy on the ground that the hazard rating for the railroad crossing in question was not necessarily connected to its hazard rating at the time of the accident. The District Court also admitted some and refused other evidence relating to traffic counts and hazard indexes. The District Court by instruction defined ordinary care and by further instructions told the jury that public authorities have the duty to exercise ordinary or reasonable care to plan and design the highways to make them reasonably safe for the traveling public. The District Court also instructed that the duty of the county in maintaining the crossing was commensurate with the increased hazard occasioned by any obstructions, so that it was the duty of the county to exercise ordinary care under the circumstances shown. Evidence was presented for the jury to consider in determining whether or not the county exercised ordinary care in failing to provide additional signal devices at the crossing. The claimed errors were therefore not prejudicial to plaintiff, since they were only cumulative on one side or the other of the issue of how hazardous the crossing was. Wollaston v. Burlington N., Inc., 188 M 192, 612 P2d 1277 (1980).

Assumption of Risk — Evidence Introduced to Support Instruction: Plaintiff contends that it was error to instruct the jury concerning assumption of risk, because the facts of this case do not involve the type of negligent behavior to which assumption of risk applies. Plaintiff contends assumption of risk applies only to a relationship between a plaintiff and a defendant, not between a plaintiff and a third party. The instruction was a correct statement of the law as it existed at the time. Conflicting evidence was admitted at trial as to whether plaintiff assumed the risk of his injuries by riding with an incompetent driver, so the instruction was properly given. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980).

Failure to Object to Instruction: Plaintiff argued that the District Court failed to charge the jury properly on the elements of negligent entrustment. He failed, however, to object to the instruction at trial. The contention that an instruction does not state the law cannot be considered on appeal absent a proper objection at trial. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980).

Jury Instruction on Negligence as Matter of Law — Effect of Department Manual: Plaintiff contended that it was error to refuse to instruct the jury that the State and Burlington Northern were negligent as a matter of law in failing to place signals on the railroad crossing where the accident occurred, in conformity with the Department of Highways' (now Department of Transportation's) Manual on Traffic Control Devices. The manual, however, does not have equal dignity with statutory law. Before the defendants can be charged with negligence in violating the manual, it must first be determined: (1) that the crossing was extra hazardous; and (2) that failure to install additional warning signals was the proximate cause of plaintiff's injuries. These were questions of fact for the jury since conflicting evidence was offered at trial, so no error was committed by failing to give the requested instructions. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980).

Jury Instruction Reciting Statute: The District Court recited section 11-614, R.C.M. 1947 (now repealed), when instructing the jury. Although this practice sets forth applicable statutes verbatim, it can cause confusion. In cases where multiple problems or circumstances are within the same statute or a statute is badly drawn, it is far better to develop one's own instruction. In a close circumstance it would be error to use the statute if for no other reason than that it has misled the jury. Tobacco River Lumber Co. v. Yoppe, 184 M 357, 602 P2d 1008 (1979).

Collateral References

Trial *key* 25, 59, et seq., 106, et seq., 202, et seq.

88 C.J.S. Trial §§91 through 97, 188 through 206.

75 Am. Jur. 2d Trial §§354 through 394, 436 through 460; 75A Am. Jur. 2d Trial §§490 through 496, 535 through 539.

Opening statement of counsel as to per diem or similar mathematical basis for fixing damages for pain and suffering. 3 ALR 4th 940.

Ruling on offer of proof as error. 89 ALR 2d 279.

Indoctrination by court of persons summoned for jury service as equivalent to instructions. 89 ALR 2d 218, 243.

Counsel's use in opening statement, in relation to damages in personal injury or wrongful death case, of blackboard, chart, diagram, or placard not introduced in evidence. 86 ALR 2d 242.

Right to open and close argument in trial of condemnation proceedings. 73 ALR 2d 618.

Counsel's right in arguing civil case to read medical or other learned treatise to jury. 72 ALR 2d 931.

Prejudicial effect of reference, in opening statement of counsel, to settlement efforts or negotiation. 67 ALR 2d 560.

Counsel's right in criminal prosecution to argue law or to read law books to jury. 67 ALR 2d 245.

Counsel's right in civil case to argue law or to read law books to jury. 66 ALR 2d 9.

25-7-302. Directed verdict when no issues of fact.

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GENERAL

Motion to Dismiss in Jury Trial — Reviewed as Motion for Directed Verdict: When a motion to dismiss was inadvertently granted in a jury trial, but both parties recognized the error and treated it as a motion for directed verdict, then the Supreme Court utilized rules for granting a motion for directed verdict in its review. In this case the District Court erred since the evidence clearly presents questions of fact and precludes judgment as a matter of law. Sant v. Baril, 173 M 14, 566 P2d 48 (1977).

Motions By Both Parties — Court to Try Facts and Law: Where both plaintiff and defendant move the court for a directed verdict, the trial judge becomes the trier of questions both of law and of fact. Granier v. Chagnon, 122 M 327, 203 P2d 982 (1949).

Failure to Object — No Denial of Right to Jury Trial: Where both parties to an action move for a directed verdict and the unsuccessful one does not request the court to submit any issue to the jury, he cannot complain on appeal that the right of trial by jury was denied him. Moore v. Crittenden, 62 M 309, 204 P 1035 (1922).

Directed Verdict or Discharge of Jury — Difference Not Material: It is not important in cases of failure of proof, whether the trial court directs the jury to render a verdict for either party, or discharges the jury and renders judgment; in either case the result is the decision of the court. Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910).

Directed Verdicts as to Law — Powers of Court Not Enlarged: This section permits a directed verdict when the case presents only questions of law, but it does not in any way enlarge the powers of the court as applied to the facts. Dunseth v. Butte Elec. Ry., 41 M 14, 108 P 567 (1910).

Judgment on a Directed Verdict as a Judgment on the Merits: A judgment on a directed verdict may or may not be a judgment on the merits, dependent upon the question decided by the court and the scope of the ruling. Dunseth v. Butte Elec. Ry., 41 M 14, 108 P 567 (1910), explained in McCulloch v. Horton, 102 M 135, 56 P2d 1344 (1936).

TEST APPLIED TO EVIDENCE — GENERAL RULE

Standard of Appellate Review: As set out in St. v. Mummey, 264 M 272, 871 P2d 868, 51 St. Rep. 198 (1994), the standard of review for a trial court's refusal to grant a defendant's motion for directed verdict is whether, after reviewing the evidence in a light most favorable to the prosecutor, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. St. v. Benson, 266 M 415, 880 P2d 1338, 51 St. Rep. 892 (1994).

In reviewing an order directing a verdict for the defendant, the Supreme Court would consider only the evidence of the plaintiff, excluding a bare scintilla but including every fair inference which might be drawn from the facts proved, as well as any evidence introduced by defendant which tended to support the plaintiff's case, and if the evidence viewed in the most

favorable light tended to establish the case made by plaintiff's pleadings, the order would be reversed. McIntosh v. Linder-Kind Lumber Co., 144 M 1, 393 P2d 782 (1964).

Directed Verdict — Standard of Review: The test commonly employed to determine if the evidence is legally sufficient to withdraw cases and issues from the jury is whether reasonable men could draw different conclusions from the evidence. If only one conclusion is reasonably proper, the directed verdict is proper. Davis v. Sheriff, 234 M 126, 762 P2d 221, 45 St. Rep. 1783 (1988), following Semenza v. Leitzke, 232 M 15, 754 P2d 509, 45 St. Rep. 829 (1988). See also Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996).

Evidence of Jury Issues — No Directed Verdict: An insurer contended District Court Judge erred in not granting its motion for directed verdict so as to relieve it from extracontractual damages and for liability on its implied duty of good faith and fair dealing. A motion for directed verdict is properly granted only in the complete absence of any evidence to warrant submission to the jury. Had the insurer relied on admissible circumstantial evidence and promptly denied the claim, the Supreme Court would have been constrained to hold that the insured was not entitled to extracontractual or punative damages. However, the court found at least eight elements in the handling of the claim that made a jury issue of whether the insurer breached its duty of fair dealing. Noting that the jury had been properly instructed on the issue of good faith, no error was found in denying the motion for directed verdict. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Directed Verdict Proper Only When Conclusions Must Follow as a Matter of Law: A cause should never be withdrawn from a jury unless the conclusion sought to be drawn from the facts must follow as a matter of law, and recovery cannot be had upon any view that could reasonably be drawn from the facts which the evidence tends to prove. Cremer v. Cremer Rodeo Land & Livestock Co., 181 M 87, 592 P2d 485 (1979).

Evidence Considered in Light Most Favorable to Plaintiff: Upon a motion for a directed verdict by the defendant, the evidence introduced by plaintiff will be considered in the light most favorable to plaintiff and as proving whatever it tends to prove. Cremer v. Cremer Rodeo Land & Livestock Co., 181 M 87, 592 P2d 485 (1979).

Review of Directed Verdict: In reviewing an order directing a verdict for defendant, the reviewing court will only consider the evidence introduced by the plaintiff and if that evidence, viewed in the light most favorable to the plaintiff, tends to establish the case made by the plaintiff's pleadings the order will be reversed. Cremer v. Cremer Rodeo Land & Livestock Co., 181 M 87, 592 P2d 485 (1979).

When Directed Verdict Proper — Common Test: The test commonly used to determine if the evidence is legally sufficient to withdraw cases and issues from the jury is whether reasonable men could draw different conclusions from the evidence. If only one conclusion is reasonably proper then the directed verdict is proper. Cremer v. Cremer Rodeo Land & Livestock Co., 181 M 87, 592 P2d 485 (1979).

Differences by Reasonable Men — Jury Question: A jury question is presented only when reasonable men might differ as to the conclusions of fact to be drawn from the evidence, viewed in the light most favorable to the party against whom the motion is made. Parini v. Lanch, 148 M 188, 418 P2d 861 (1966).

Insufficiency in Fact and Law: A directed verdict may be granted when the evidence is so insufficient in fact as to be insufficient in law. Parini v. Lanch, 148 M 188, 418 P2d 861 (1966).

Directed Verdict on Questions of Law: Direction to the jury to bring in a verdict for plaintiff is permissible when a case presents only a question of law. Hurley v. Star Transfer Co., 141 M 176, 376 P2d 504 (1962); Kraus v. Newman, 137 M 388, 352 P2d 261 (1960).

Directed Verdict Where Verdict to Be Set Aside: It follows that the court's action in directing a verdict for defendants was correct where the court would have been required to set the verdict aside had the cause of action been submitted to the jury resulting in a verdict for plaintiff. Erie v. Wahl, 116 M 515, 155 P2d 201 (1945).

No Conflict in Evidence: Where there is no conflict in the evidence, the situation is the same as where the facts are stipulated. Under such circumstances the case can present only a matter of law to be decided by the judge. Erie v. Wahl, 116 M 515, 155 P2d 201 (1945).

No Proof on One Side of Case: When one side of a case is without proof, the case is stripped of questions of fact, and presents only a question of law for decision by the court. Moore v. Crittenden, 62 M 309, 204 P 1035 (1922); Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910).

Uncontradicted Testimony Alone Insufficient: The fact that testimony is uncontradicted is not alone sufficient to warrant a directed verdict, where the inferences to be drawn from all the

circumstances are open to different conclusions by reasonable men. First Nat'l Bank v. Wilson, 57 M 384, 188 P 371 (1920), distinguished in Lister v. Donlan, 85 M 571, 281 P 348 (1929).

One Conclusion by Reasonable Men: If a case is being tried to a jury, and the evidence is such that reasonable men can come to but one conclusion thereon, the court may, as the case requires, direct a verdict for the party entitled to it, or withdraw the case from the jury and render judgment. Old Kentucky Distillery v. Stromberg-Mullins Co., 54 M 285, 169 P 734 (1917); Milwaukee Land Co. v. Ruesink, 50 M 489, 148 P 396 (1915).

Question of Substantial Evidence as Question of Law: Whether there is any substantial evidence in the case, made by the party upon whom the burden rests, is always a question of law; if there is not, the court ought to withdraw the case from the jury and direct judgment. Escallier v. Great N. Ry., 46 M 238, 127 P 458 (1912).

Conclusion to Follow as a Matter of Law: No cause should ever be withdrawn from the jury unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish. Shaw v. New Year Gold Mines Co., 31 M 138, 77 P 515 (1904); McCabe v. Mont. Cent. Ry., 30 M 323, 76 P 701 (1904); Nord v. Boston & Mont. Consol. Copper & Silver Min. Co., 30 M 48, 75 P 681 (1904); Michener v. Fransham, 29 M 240, 74 P 448 (1903); Cain v. Gold Mtn. Min. Co., 27 M 529, 71 P 1004 (1903).

Questions of Law Only: A verdict should not be directed unless the case presents only questions of law. Michener v. Fransham, 29 M 240, 74 P 448 (1903).

MOTION NOT TO BE GRANTED
SUFFICIENT CONTRARY EVIDENCE

Evidence of Sex Discrimination Warranting Submission to Jury — Directed Verdict Improper: Allison brought a claim against the town of Clyde Park, alleging disability, sex, and age discrimination in employment. At the close of Allison's case in chief, the court granted the town's motion for a directed verdict on the sex discrimination claim, but declined a similar motion on the age discrimination claim. The court allowed submission of both the age discrimination and disability claims to the jury, which returned a verdict against Allison on both claims. On appeal, Allison argued that the jury should also have been allowed to decide the sex discrimination claim. Motions for directed verdict are properly granted only when there is a complete absence of evidence to warrant submission to the jury when the evidence is considered in the light most favorable to the party opposing the motion. Here, Allison produced evidence, although minimal, in support of the sex discrimination claim, so the directed verdict on that issue was incorrectly granted. The case was remanded for trial on the sex discrimination claim. Allison v. Clyde Park, 2000 MT 267, 302 M 55, 11 P3d 544, 57 St. Rep. 1119 (2000).

Time of Discovery of Injury Because of Childhood Sexual Abuse as Jury Question — Motion for Directed Verdict Properly Denied: Substantial conflicts in the evidence existed regarding the time at which plaintiff discovered that her mental disorders were connected to sexual abuse that she experienced as a child. It is within the province of the jury to resolve conflicting evidence; therefore, the District Court properly denied defendant's motion for a directed verdict based on the time bar in 27-2-216. Werre v. David, 275 M 376, 913 P2d 625, 53 St. Rep. 187 (1996).

Disputed Facts — No Error in Failure to Direct Verdict of Negligence Per Se: Chad was hit, while on his bicycle, by a car driven by Matt. Matt testified that he stopped and looked at the intersection but did not see Chad on his bicycle. Chad's counsel requested that the District Court direct the jury to find that Matt was negligent as a matter of law, which the District Court refused to do. Citing Payne v. Sorenson, 183 M 323, 599 P2d 362 (1979), the Supreme Court held that a directed verdict would have been appropriate only if the undisputed facts showed that Matt was negligent. Here, there was a dispute as to whether Chad could have been seen if Matt had looked to see what could be seen. Because of the conflicting evidence, only the jury could resolve the issue. Chambers v. Pierson, 266 M 436, 880 P2d 1350, 51 St. Rep. 921 (1994).

Denial of Directed Verdict Proper — Sufficient Evidence to Create Question of Whether U.C.C. Notice Given: Defendant, Tezak, moved for a directed verdict on the basis that he was told by plaintiff's attorney to ignore the notice that his repossessed trucks were to be sold. The Supreme Court affirmed the lower court's denial of the motion, stating that there was sufficient evidence to let the jury decide if Tezak's right to ignore the notice was conditional. Mack Financial Corp. v. Tezak, 253 M 492, 834 P2d 396, 49 St. Rep. 556 (1992).

Alteration of Natural Accumulation of Ice and Snow — Directed Verdict Improper: Daily shoveling of a sidewalk resulting in a buildup of ice and snow on both sides of the sidewalk, coupled with the possible careless use of chemical de-icer, could have increased the hazard created by the natural accumulation of ice and snow and created a jury question which rendered

a directed verdict improper. Case was reversed and remanded for a new trial. Boehm v. Alanon Club, 222 M 373, 722 P2d 1160, 43 St. Rep. 1341 (1986), citing Cereck v. Albertson's, Inc., 195 M 409, 637 P2d 509 (1981), and Willis v. St. Peter's Hosp., 157 M 417, 486 P2d 593 (1971). Boehm, Cereck, and Willis were overruled, as to the distinction between liability based upon natural versus altered accumulations of ice or snow that are open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997). Cereck was also overruled in Richardson as to the standard that a property owner is absolved of liability because a dangerous condition upon the premises is open and obvious. The Richardson standard was retroactively applied in Benson v. Heritage Inn, Inc., 1998 MT 330, 292 M 268, 971 P2d 1227, 55 St. Rep. 1341 (1998).

Evidence — When Sufficient to Support Verdict: Plaintiff appealed from jury verdict in favor of defendant, alleging the evidence did not support the verdict. The Supreme Court held that in order to overturn the verdict on the basis of insufficient evidence, it must find plaintiff entitled to judgment as a matter of law, and that there was insufficient evidence to warrant submitting the case to a jury. Here the court found credible evidence supporting a verdict either way and considered itself without power to set aside the decision of the trier of fact as a matter of law. The District Court properly denied plaintiff's motions for directed verdict and judgment notwithstanding the verdict. Gunlock v. W. Equip. Co., 219 M 112, 710 P2d 714, 42 St. Rep. 1882 (1985), followed in Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

Traffic Accident at Uncontrolled Intersection — Factual Dispute on Vehicles Entering Intersection at Same Time: It was error to grant a directed verdict on the issue of liability under 61-8-339 in favor of the driver of a vehicle entering an uncontrolled intersection from the right when there was a factual issue on whether the vehicles entered the intersection at the same time. Thibaudeau v. Uglum, 201 M 260, 653 P2d 855, 39 St. Rep. 2096 (1982).

Directed Verdict Denied — Issues of Fact: The court was correct in refusing to direct a verdict for plaintiff, or any party, when the trial issues involved questions of fact regarding the negligence of defendants and contributory negligence of plaintiff and when a review of the record demonstrated no clear preponderance of evidence on either side justifying a directed verdict. Lawlor v. County of Flathead, 177 M 508, 582 P2d 751 (1978).

Actual and Constructive Fraud: When applying the standard for ruling on a motion for directed verdict, the Supreme Court concluded that the evidence presented was entitled to jury consideration and therefore the directed verdict was properly denied. Harrington v. Holiday Rambler Corp., 176 M 37, 575 P2d 578 (1978).

Proximate Cause — Jury Question: The court properly refused to grant a directed verdict against defendant for failing to keep its brakes from freezing and in failing to display brake lights and keep them free from snow because whether such violations proximately caused the death of plaintiff's husband was a question of fact for the jury to determine. However, the erroneous jury instruction on the sudden emergency doctrine necessitated a new trial on the issue of liability. Kudrna v. Comet Corp., 175 M 29, 572 P2d 183 (1977).

Motion Denied — Sufficiency of Evidence: There was sufficient evidence of an FSAA violation to submit the issue to the jury. McGee v. Burlington N., Inc., 174 M 466, 571 P2d 784 (1977).

Valid Will: Directed verdict upholding contested will was improper where, under the evidence, reasonable and fairminded men might have reached the conclusion that the will was invalid due to fraud, undue influence, or lack of testamentary capacity. Estate of Hall v. Milkovich, 158 M 438, 492 P2d 1388 (1972), distinguished in Estate of Powers, 163 M 67, 515 P2d 368 (1973).

Dull Hand Pick: Evidence in an action by a section hand for personal injuries sustained by reason of a defective pick which had become so dull that instead of breaking a rock it scattered particles thereof causing one of such particles to strike him in the eye, was sufficient to justify a jury in finding that the pick was not in a reasonably safe condition for use, and the court erred in ordering a directed verdict for defendant railway company. Johnson v. Chicago, Milwaukee & St. Paul Ry., 71 M 390, 230 P 52 (1924).

Action on Check: Where in an action by a bank to recover a balance alleged due from defendant on a check given it some 5 years prior to the bringing of the action, defendant contending that the check had been paid but after cancellation had never been returned to him, the evidence, conflicting in character, showing that, though defendant was a large depositor in the bank, the check had never been charged to his account nor a record made of it upon plaintiff's books, the court erred in directing a verdict in favor of plaintiff, the showing made by defendant having been sufficient to sustain a judgment in favor of defendant. Rosebud St. Bank v. Kesl, 68 M 518, 219 P 814 (1923).

Any Substantial Evidence: A verdict cannot be directed for defendant where substantial evidence is introduced prior to the motion for direction which in any way tends to support plaintiff's contention, the weight of such evidence being a question for the jury. Moran v. Ebey, 39 M 517, 104 P 522 (1909); Lehane v. Butte Elec. Ry., 37 M 564, 97 P 1038 (1908); Ball v. Gussenhoven, 29 M 321, 74 P 871 (1904).

MOTION TO BE GRANTED
SUFFICIENT CONTRARY EVIDENCE

Directed Verdict in a Res Ipsa Case: It is proper for a District Court to grant a motion for a directed verdict in a res ipsa case if the inference of negligence is so strong that persons of reasonable minds could not reach differing conclusions as to the negligence of the defendant. Helmke v. Goff, 182 M 494, 597 P2d 1131 (1979).

Directed Verdict in Contested Will Proceedings: When upon trial of an issue by a jury the case presents only questions of law, the judge may direct the jury to return a verdict in favor of the party entitled thereto. Where there is no substantial evidence of incompetency at the time of making the will, it is error to allow the issue to go to the jury. In re Estate of Monaco, Monaco v. Cecconi, 180 M 111, 589 P2d 156 (1979).

Proof of Manufacturer Defect: The trial court did not err in granting defendants' motion for directed verdict when plaintiff failed to prove that the defect that caused an engine fire existed when the vehicle left the hands of the defendants — a necessary element in breach of implied warranty of merchantability, strict liability, and res ipsa loquitur legal theories. St. Paul Mercury Ins. Co. v. Jeep Corp. & Am. Motors Sales, 175 M 69, 572 P2d 204 (1977).

Negligence Per Se — Directed Verdict: The trial court should have granted a directed verdict against defendant truckdriver who carelessly placed himself in a position of not being able to stop behind codefendant's truck and negligently passed to avoid collision but collided instead with an oncoming vehicle in which plaintiff's husband was a passenger. The trial court was in error to instruct the jury on sudden emergency when the driver's negligence created his own emergency. Kudrna v. Comet Corp., 175 M 29, 572 P2d 183 (1977).

Issue of Fact or Law: Where plaintiff was waiting to make a left turn because of an oncoming pickup truck and was struck from the rear by defendant's truck it was reversible error for District Court to deny plaintiff's motion for a direct verdict as her conduct could not have constituted contributory negligence as a matter of law because the law does not contemplate a standard of care so lofty as to require the driver of a preceding vehicle to vacate its lawful location in order to clear the way for an admittedly negligent driver approaching from the rear as one is not required to anticipate the negligence of another. Grabs v. Missoula Cartage Co., 169 M 216, 545 P2d 1079 (1976).

Evidence Not Introduced: In negligence suit, defendant was entitled to directed verdict where only evidence attempting to establish proximate causal connection between breach of duty and plaintiff's injuries and damages was reports of persons not present at trial, which were private documents and not part of a case file of attending physicians. Pickett v. Kyger, 151 M 87, 439 P2d 57 (1968), distinguished in Klaus v. Hillberry, 157 M 277, 485 P2d 54 (1971).

Destroyed Building: Denial of motion for directed verdict by lessor of destroyed building being sued by lessee claiming that premises were repairable was cause for reversal where, viewing evidence most favorable to plaintiff lessee and considering as proven everything which evidence tended to prove, reasonable man could come to no other conclusion but that building was destroyed. Solich v. Hale, 150 M 358, 435 P2d 883 (1967).

Every Reasonable Precaution Taken: Owner of building destroyed by gas explosion was entitled to directed verdict against general contractor who was clearly liable on evidence, but not against gas company who should have been granted its motion for directed verdict on record unequivocally demonstrating that gas company took every reasonable precaution to protect customers as required by law. Bridges v. Moritz, 149 M 273, 425 P2d 721 (1967).

Collision With Horse: Directed verdict on liability of defendant for injuries sustained by plaintiff, when defendant's car struck mare which was being led by rope attached to saddle on gelding upon which plaintiff was riding, was proper where negligence of defendant was shown by evidence that defendant had been drinking; that he was driving the car at 30-35 mph while passengers were hunting gophers beside the road; that defendant was not aware of the mare which he struck until the collision was inevitable; and that he failed to stop after realizing that he had struck horse in violation of 61-7-103. Parini v. Lanch, 148 M 188, 418 P2d 861 (1966).

Failure of Party to Introduce Testimony — Motion Improperly Granted: Where in an action to recover the purchase price of fire-extinguishing apparatus the defendant interposed a counterclaim for $10,000 for breach of the contract, the failure of plaintiff to introduce any

testimony did not authorize the trial court to direct a verdict for defendant in that amount for unliquidated damages, the weight to be given to the defendant's testimony and the amount recoverable by him having been within the exclusive province of the jury. Gen. Fire Extinguisher Co. v. NW. Auto Supply Co., 70 M 1, 223 P 504 (1924).

Defense Based on Hearsay: Where the evidence of the plaintiff in support of his claim was clear and satisfactory, and that of the defendant consisted of an affidavit which was hearsay, the court was authorized to direct a verdict in plaintiff's favor. Bean v. Missoula Lumber Co., 40 M 31, 104 P 869 (1909).

Collateral References

Trial *key* 134, et seq.

88 C.J.S. Trial §§335 through 483.

Propriety of direction of verdict in favor of fewer than all defendants at close of plaintiff's case. 82 ALR 3d 974.

Direction of verdict in favor of insurer where presumption against suicide is overcome as a matter of law by physical facts related to death in action on life or accident insurance policy. 85 ALR 2d 722.

Direction of verdict in action under accident policy or accident provision of life policy as affected by preexisting arteriosclerosis. 82 ALR 2d 634.

Directed verdict, in absence of direct testimony, of identity of motor vehicle involved in accident. 81 ALR 2d 867.

Consideration by trial court, in passing on motion for direction of verdict, of inadmissible hearsay evidence introduced without objection. 79 ALR 2d 914.

Direction of verdict in action under Federal Employers' Liability Act for negligence in requiring employee to work in cramped space, or cramped or strained position. 77 ALR 2d 781.

Direction of verdict in action for injury or damage from motor vehicle accident assertedly caused by insect. 73 ALR 2d 1217.

Direction of verdict based on uncontradicted testimony as affected by credibility of witness. 62 ALR 2d 1191, §12 superseded by 26 ALR Fed. 427.

Directed verdict in action against railroad company, under Federal Employers' Liability Act, for injury to or death of employee resulting from collision of trains. 59 ALR 2d 580.

Directed verdict in action for malpractice in nose or throat treatment or surgery. 57 ALR 2d 216.

Direction of verdict in action involving implied or apparent authority of agent to purchase or order goods or merchandise. 55 ALR 2d 114.

Direction of verdict in Federal Employers' Liability Act cases as affected by res ipsa loquitur doctrine. 35 ALR 2d 562.

Direction of verdict in action against railroad for injury to adult pedestrian attempting to pass over, under, or between cars obstructing crossing. 27 ALR 2d 369.

Directed verdict in action involving question whether injury to or death of insured while assaulting another was due to accident or accidental means. 26 ALR 2d 399.

Direction of verdict in action involving duty and liability of vehicle driver blinded by glare of lights. 22 ALR 2d 292, §§6 through 22 superseded by 64 ALR 3d 551; §§23 through 27 superseded by 64 ALR 3d 760.

25-7-303. Activity of court during jury's absence.

Collateral References

Trial *key* 26, 324.

25-7-304. Procedure when a juror becomes sick.

Compiler's Comments

1981 Amendment: Inserted "subject to the provisions of Rule 47(c), M.R.Civ.P."

Collateral References

Jury *key* 149.

50 C.J.S. Juries §§289 through 291.

47 Am. Jur. 2d Jury §182.

25-7-305. Procedure when jury prevented from giving verdict.

Case Notes

Application to Hung Jury — Findings and Conclusions Improper: In an action at law, after the case has been submitted to the jury, which failed to agree upon a verdict, the court cannot

make findings of fact and conclusions of law and base a judgment thereon, but should direct that the case be tried again. Murray v. Hauser, 21 M 120, 53 P 99 (1898).

Collateral References

Trial *key* 180, 316.
89 C.J.S. Trial §§453, 482.

Part 4
Conduct of Jury

25-7-401. View by jury of the premises.

Case Notes

General 232
Discretion of Trial Court 233

GENERAL

No Objection to Jury View — New Trial Not Granted: Plaintiff contended that District Court erred in not granting a new trial when the jury was allowed to view the property prior to the time the plaintiff rested her case and in not giving a cautionary instruction. However, the record showed that plaintiff's counsel made no objection to the jury view and did not request a cautionary instruction. The Supreme Court found no District Court error for a procedure to which plaintiff did not object. Bushnell v. Cook, 221 M 296, 718 P2d 665, 43 St. Rep. 825 (1986).

Visits to Scene — Purpose: In considering a motion to suppress evidence discovered during a search of the defendant's motel room, the trial judge visited the room under circumstances allegedly similar to those on the night of the search. In expressing its disapproval of the trial court's participation in the recreation of the scene, the Supreme Court stated that visits to the scene should be designed for the trier of fact to view the scene, not for the trier of fact to place himself in the shoes of one of the parties. St. v. Wilson, 218 M 359, 708 P2d 270, 42 St. Rep. 1647 (1985).

Time of Viewing — Alterations to Premises: Where alterations to defendant's bowling alley had little relationship to the cause of the accident, it was not an abuse of discretion to allow the jury to view the premises on which the accident occurred after the alterations had been made. Clark v. Worrall, 146 M 374, 406 P2d 822 (1965).

Time of Viewing — Eminent Domain: While the matter of permitting the jury in eminent domain proceedings to view the lands sought to be condemned lies within the sound discretion of the trial court, and though permission to view prior to the reception of the testimony may not be held an abuse of discretion in all cases, the better practice is not to permit a view until the case has sufficiently progressed to the point where it is known what the various items of damages to be considered are. St. v. Bradshaw Land & Livestock Co., 99 M 95, 43 P2d 674 (1935).

Failure to Object to Viewing as Waiver of Review of Viewing Order: By failing to object to an order of the trial court, made in its discretion and at the close of the testimony in a prosecution for murder, permitting the jury to view an automobile in which the shooting occurred, defendant waived his right to secure a review of the propriety of the order urged on the ground that no proper foundation had been laid for the view in that it was not shown that the car was in the same condition as at the time of the killing. St. v. Cates, 97 M 173, 33 P2d 578 (1934).

Presence of Defendant at Viewing — Waiver of Right: Since the only purpose of a view by the jury of the place where a homicide was committed is to enable the jurors better to understand the evidence heard by them at the trial, and since testimony may not there be taken for any purpose, the defendant may waive his right to be present at the viewing, and where he did not make a request for permission to be present at the view of an automobile in and near which the shooting occurred, he waived his right in that behalf. St. v. Cates, 97 M 173, 33 P2d 578 (1934).

Excessive Damages — Jury Award Not Conclusive in Spite of Viewing: Since in ordinary civil actions where the jury has viewed the premises charged by plaintiff to have been damaged, its verdict is not conclusive as to the amount awarded, the same rule prevails in condemnation proceedings, and therefore the trial court in such proceedings may set the verdict aside and grant a new trial if it appears that the verdict is excessive. St. v. Anderson, 92 M 313, 13 P2d 228 (1932).

Purpose of Viewing: The purpose of the view provided for herein is to enable the jury to apply the testimony of the witnesses to the observed conditions about which they have spoken, and also to determine the truth of statements made by them with reference to these conditions. Ferris v. McNally, 45 M 20, 121 P 889 (1912).

Observations to Be Considered by Jury: It is proper for a jury, who has viewed the property which is the subject of litigation, to take into consideration the result of its observations in connection with the evidence in deliberating upon the verdict. Ormund v. Granite Mtn. Min. Co., 11 M 303, 28 P 289 (1891), distinguished in Murray v. Heinze, 17 M 353, 42 P 1057 (1895). See also White v. Barling, 36 M 413, 93 P 348 (1907); St. v. Landry, 29 M 218, 74 P 418 (1903).

DISCRETION OF TRIAL COURT

Viewing Within Discretion of Trial Court: A viewing is within the discretion of the trial court, even where there has been a change in the condition of the scene of the accident or the thing which contributed to the accident. Clark v. Worrall, 146 M 374, 406 P2d 822 (1965), followed in McJunkin v. Kaufman, 229 M 432, 748 P2d 910, 44 St. Rep. 2111 (1987).

Abuse of Discretion Required: Refusal of trial court to permit jury to view premises will not be reviewed by the Supreme Court in the absence of a showing of an abuse of discretion. Puetz v. Carlson, 139 M 373, 364 P2d 742 (1961).

Refusal to View Mine: Where, in a personal injury suit, drawings of the machinery, the faulty condition of which plaintiff alleged as the cause of his injury, had been presented to the jury for inspection, and upon inquiry by the court, the jurors all stated that they understood the situation, the court acted within its discretion when it refused to direct a view of the machinery itself, at a mine a considerable distance from the place of trial. Stephens v. Elliott, 36 M 92, 92 P 45 (1907).

Clear Error Required: The language of this section leaves the question whether the jury shall be allowed to inspect the premises in the discretion of the trial court, and its refusal to permit the inspection will not be reviewed by the Supreme Court, in the absence of a clear showing of error. Maloney v. King, 30 M 158, 76 P 4 (1904).

Collateral References

Trial *key* 28(1) through (3).

88 C.J.S. Trial §§117 through 119.

75 Am. Jur. 2d Trial §§258 through 270.

Propriety of permitting view by jury in civil personal injury or death action as affected by claimed change of conditions since accident or incident. 85 ALR 2d 512.

Prejudicial effect of indicating to jury in civil case desire of party for view by jury. 76 ALR 2d 766.

Prejudicial effect, in civil case, of acts of jurors in viewing premises with witnesses. 52 ALR 2d 194.

Necessity for presence of judge at view by jury in criminal case. 47 ALR 2d 1227.

Prejudicial effect of misconduct by one other than juror during authorized view by jury in civil case. 45 ALR 2d 1128.

Right of jurors to sustain their verdict by affidavits or testimony to effect that they were not influenced by impressions from unauthorized view of the property. 93 ALR 1452.

May demonstration before jury, otherwise proper, be permitted outside of courtroom. 60 ALR 574.

Presence of accused during view by jury. 30 ALR 1357, supplemented by 90 ALR 597.

Occurrences during a view as warranting the jury's discharge without letting in plea of former jeopardy upon subsequent trial. 4 ALR 1266.

25-7-402. Admonition when jury permitted to separate.

Case Notes

Juror's Affidavit of Juror Misconduct — Inadmissible Under Ahmann Exception — No Evidence of External Influence — Right to Fair and Impartial Jury Not Violated: Berg argued that he was entitled to a new trial because of jury misconduct and attached to his motion the affidavit of juror Flinders stating that juror Carroll said at one point during the trial, in regard to witness testimony: "That's it; that's all I need to hear; it's all over." The affidavit also stated that juror Carroll pointed to another juror and said in regard to the juror, "That's one we'll have to convince." The Supreme Court noted that although affidavits are usually used to prove juror misconduct under 25-11-102(2), they may also, under the exception rationale used in Ahmann v. Am. Fed. Sav. & Loan Ass'n, 235 M 184, 766 P2d 853 (1988), be used pursuant to 25-11-102(1) when the only two people with knowledge of the infraction are a juror and another person. However, the Supreme Court found that the Ahmann exception did not apply when the communication was between jurors. The Supreme Court also discussed the applicability of Rule 606(b), M.R.Ev. (Title 26, ch. 10), and determined that the comments made by juror Carroll were not an external influence upon the jury and therefore did not fall within the exception to the

general prohibition against use of juror affidavits to impeach a jury contained in Rule 606(b). Regarding Berg's final argument that the jury misconduct violated the District Court's instructions and Berg's right to a fair and impartial jury, the Supreme Court reviewed California case law raised by Berg and concluded that it was inapplicable in Montana. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Out-of-Court Discussion Between Interested Witness and Juror About Matter Unrelated to Case — No Prejudice: It was not an error to deny plaintiff in a motor vehicle accident case a mistrial after a female officer for defendant corporation briefly spoke with three female jurors during a recess about a suspected rapist thought to be roaming the town. Plaintiff claimed that the conversation may have tended to establish some rapport between the corporate officer and the jurors because they discussed a matter of common concern to women. The District Court Judge investigated the matter and stated that the conversation was unrelated to the trial and did not prejudice the jurors. Mason v. Ditzel, 255 M 364, 842 P2d 707, 49 St. Rep. 986 (1992).

Mistrial Denied Despite Juror Misconduct — No Error: A juror disregarded trial court instructions by talking with a County Attorney, who assisted in the prosecution, about the propriety of allowing evidence of child abuse in open court. Another juror was seen entering Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) offices after evidence was allowed showing the agency was peripherally involved in the case, and there was evidence the juror discussed the defendant and her children during a conversation at a restaurant. Arguably, the jury misconduct tended to injure the defendant, and therefore prejudice should be presumed; however, the trial judge could determine that there was sufficient evidence to rebut the presumption. Since there was not clear and convincing evidence of error in denying a motion for mistrial, the ruling was affirmed. St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987).

Collateral References

Trial *key* 301, 303.

89 C.J.S. Trial §§453, 454.

75A Am. Jur. 2d Trial §§1078, 1079, 1086.

Separation or dispersal of jury in civil case after submission. 77 ALR 2d 1086.

Contact between juror and outsider during trial of civil case. 64 ALR 2d 158.

Contact between juror and party or counsel during trial of civil case. 62 ALR 2d 298.

Prejudicial effect, in civil case, of communication between witness and juror. 52 ALR 2d 182.

Permitting jurors to attend theater or the like during course of criminal trial as ground for mistrial, new trial, or reversal. 33 ALR 2d 847.

Separation of jury in criminal case as ground for new trial. 21 ALR 2d 1088.

25-7-403. Conduct of jury after case submitted to it.

Case Notes

Improper for Bailiff to Give Jury Dictionaries: A bailiff who gave a jury, upon its request, an ordinary dictionary and a legal dictionary violated this section's provision that a bailiff may not, without the judge's permission, communicate with the jury. Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995).

Jury's Use of Dictionary Definitions Conflicting With Instructions: The jury used an ordinary dictionary and a legal dictionary, improperly given to the jury by the bailiff at the jury's request, to look up the terms "proximate cause" and "prudent". The definitions relating to causation did not contain the foreseeability element that was contained in an instruction given to the jury. The jury's conduct constituted improper independent research on extraneous material that redefined the critical element of causation by effectively eliminating from the instruction any reference to foreseeability. This was sufficient to demonstrate probable prejudice and potential injury to defendant, against whom the jury returned a verdict in this action. At the very least, there was a reasonable probability that the jury's misconduct influenced its decision, and as a consequence, defendant's substantial rights were compromised, along with his right to a fair trial. The trial judge's denial of a new trial was reversed, and the case was remanded. Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995).

Standard of Review of Grant or Denial of New Trial — Jury or Bailiff Misconduct: In the two most recent cases in which jury or bailiff misconduct was the basis for granting or denying a new trial, the Supreme Court stated that the standard is that the decision is within the sound discretion of the trial judge, whose decision will not be disturbed absent a showing of manifest abuse of that discretion. The Supreme Court reaffirmed this standard and overruled those cases with a different standard. Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995).

Bailiff's Misconduct in Communicating With Jury — New Trial Warranted: During deliberations, the jury had a question regarding application of the comparative negligence statute and payment of damages. The jury notified the bailiff that it wanted to ask the question. The bailiff said that he did not know the answer and that all the attorneys and court personnel would have to be called back into court to properly respond, a process that would take about as long as it takes "for hell to freeze over". Other jurors overheard the remark and decided to resolve the issue on their own. The bailiff's communication with the jury rather than conducting the jury into court for resolution of its question was a violation of 25-7-405 and this section that affected the right to a fair trial. Affidavits from eight jurors that they were not influenced by the bailiff's conduct failed as proof of a fair trial when weighed against the bailiff's actions. The District Court did not abuse its discretion in granting a new trial. Henrichs v. Todd, 245 M 286, 800 P2d 710, 47 St. Rep. 2112 (1990).

Alternate Juror — Conversation After Jury Retires: A jury alternate returned to the jury room with the jury after the case had been submitted for decision, which defendant contended was reversible error, since 46-16-503 requires an officer of the court to prevent conversations between the jurors and others after the jury retires. The Supreme Court held that an alternate, although excluded from deliberating and voting, is in every other respect a juror; therefore, an alternate does not fall within the statutory ban against conversations with others. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Verdict Not Invalid Per Se Because of Jurors' Drinking: An insurer maintained that the jury verdict was invalid per se because of "drinking by a jury after deliberations have begun". The Supreme Court, noting its decision in Wibaux Realty Co. v. N. Pac. Ry. Co., 101 M 126, 54 P2d 1175 (1935), held that unless a party litigant is culpable, the consumption of alcoholic beverages by a juror during deliberations, which consumption is not excessive and which is not shown to have led to a miscarriage of justice, is not grounds for reversal of a jury verdict. While cautioning judges and bailiffs that no persons serving on a jury should be allowed alcoholic beverages during deliberations, particularly at county expense, the court declined to adopt a per se rule invalidating jury verdicts on the record presented here. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Communication in Alternate Juror's Presence: Although an alternate juror was only in the same room as the jury during their deliberations in violation of Rule 47(c), M.R.Civ.P. for a few minutes, the court was not at liberty to make exceptions based on time, actual harm, or the fact that the person was an alternate juror, given the solemnity associated with the jury system and the possibility of a loss of faith in that system. Highway Comm'n v. Dunks, 166 M 239, 531 P2d 1316 (1975), distinguished in St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Denial of New Trial Following Jury Misconduct — Lack of Prejudice: Trial court did not err in denying plaintiff's motion for a new trial, on the ground of misconduct of jury during its deliberations, supported by affidavits of four jurors indicating that the irregularity was not on a material matter in dispute, where plaintiff was probably not prejudiced by juror's misconduct in improperly referring to prior litigation in which plaintiff had been involved, the poll of the jury showing an eight to four verdict for the plaintiff. Schmoyer v. Bourdeau, 148 M 340, 420 P2d 316 (1966), followed in Easterday v. Canty, 219 M 420, 712 P2d 1305, 43 St. Rep. 60 (1986) (overruled on other grounds by the adoption of Rule 5, Uniform District Court Rules), and overruled as to standard of review in Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995). (See official comment.)

Duty of Jury After Retiring: When the jury retires to the jury room it should be concerned only with the evidence and the law; the verdict, thus, is a result of a fair expression of opinion by all the jurors. Schmoyer v. Bourdeau, 148 M 340, 420 P2d 316 (1966).

Two-Thirds Verdict — Constitutionality: The provision that two-thirds of a jury in a civil action may agree upon a verdict, is based upon constitutional authority. Spencer v. Spencer, 31 M 631, 79 P 320 (1905).

Voidance of Special Findings — Opinions of Jurors: Special findings acquiesced in by the required two-thirds of a jury may not be set aside by reason of affidavits made by dissenting jurors that, in their opinion, the conclusion of the majority was reached by giving a wrong construction or too much weight to a part of the evidence. Spencer v. Spencer, 31 M 631, 79 P 320 (1905).

Collateral References

Trial *key* 306.

89 C.J.S. Trial §462, et seq.

75B Am. Jur. 2d Trial §1647, et seq.

Prejudicial effect, in civil case, of communications between judges and jurors. 33 ALR 5th 205.

Prejudicial effect, in civil case, of communications between court officials or attendants and jurors. 31 ALR 5th 572.

Propriety of juror's test or experiments in jury room. 31 ALR 4th 566.

Effect on verdict in civil case of haste or shortness of time in which the jury reached it. 91 ALR 2d 1220.

Right to have reporter's notes read to jury. 50 ALR 2d 176.

Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed. 35 ALR 2d 769.

Propriety of permitting jury to take X-ray picture introduced in evidence with them into jury room. 10 ALR 2d 918.

Communications between jurors and others as ground for new trial or reversal in criminal case. 62 ALR 1466; 34 ALR 103; 22 ALR 254.

Party Voluntarily Intervening Subject to Adverse Judgment: Double AA Corporation sought specific performance to require Newland & Company, a trust company, to convey land that it held in trust and had entered into a contract to sell to Double AA. Sievers intervened in the case, arguing that specific judgment should not be granted on the basis that he had purchased part of the remainder interest in the trust property and had a first option to purchase the property based on the remainder interest. Sievers sought a ruling from the lower court that he had the first option to purchase the property. The Supreme Court held that the lower court had not abused its discretion in ruling that Sievers did not have a first right of purchase even though not all of the remainder interest holders had intervened in the case to protect their interests. Even though they had not intervened, the remainder interest holders were aligned with the trustee, and any decision that Sievers might have obtained that was adverse to the trustee would also have been adverse to them. Double AA Corp. v. Newland & Co., 273 M 486, 905 P2d 138, 52 St. Rep. 1073 (1995), distinguishing Warnack v. Coneen Fam. Trust, 266 M 203, 879 P2d 715 (1994).

25-7-404. Papers which may be taken into jury room.

Case Notes

Medical Malpractice — Not Error to Permit Highlighted Medical Records and Photographs in Jury Room: In a medical malpractice action in which appellant claimed that negligent medical treatment of his ingrown toenail caused the necessity for amputation of his leg, it was not error for the trial judge to permit the jury to have, during its deliberations, highlighted copies of appellant's medical records and photographs of his leg. Kyriss v. St., 218 M 162, 707 P2d 5, 42 St. Rep. 1487 (1985).

Subsequent Request by Jury: Trial court did not err in permitting State's exhibits, consisting of photographs of scene of accident, to be taken to jury room when asked for by jury about 1 hour after it began deliberation. St. v. Medicine Bull, 152 M 34, 445 P2d 916 (1968).

Pleadings Allowed in Jury Room — Instructions to Jury as Sufficient: While the jury may be permitted to take with them to the jury room any pleadings in the case and if they desire study the issues for themselves, the practice of setting forth in the instructions a clear and concise statement of the nature of the case and the issues to be determined is to be commended. Frederick v. Hale, 42 M 153, 112 P 70 (1910); Rand v. Butte Elec. Ry., 40 M 398, 107 P 87 (1910); Paxton v. Woodward, 31 M 195, 78 P 215 (1904).

Evidence Not Admitted: It was not error in an action against a railroad company for killing cattle on the track, to refuse to allow the jury to take with them a map of the place where the accident occurred, which was not admitted in evidence, but only used by the witnesses while testifying in explaining their testimony. Carman v. Mont. Cent. Ry., 32 M 137, 79 P 690 (1905).

Collateral References

Trial *key* 307(1) through (4).

89 C.J.S. Trial §465, et seq.

75B Am. Jur. 2d Trial §1665, et seq.

Prejudicial effect of jury's procurement or use of book during deliberations in civil cases. 31 ALR 4th 623.

Use in jury room of pamphlets or handbooks prepared by court for indoctrination of persons summoned for jury service. 89 ALR 2d 222.

Propriety of jury making a comparison of disputed writing with standard produced in court, without the aid of an expert witness. 80 ALR 2d 272.

Right to have reporter's notes read to jury. 50 ALR 2d 176.

Propriety of permitting jury to take X-ray picture introduced in evidence with them into jury room. 10 ALR 2d 918.

25-7-405. Jury's request for further information.

Case Notes

Bailiff's Misconduct in Communicating With Jury — New Trial Warranted: During deliberations, the jury had a question regarding application of the comparative negligence statute and payment of damages. The jury notified the bailiff that it wanted to ask the question. The bailiff said that he did not know the answer and that all the attorneys and court personnel would have to be called back into court to properly respond, a process that would take about as long as it takes "for hell to freeze over". Other jurors overheard the remark and decided to resolve the issue on their own. The bailiff's communication with the jury rather than conducting the jury into court for resolution of its question was a violation of 25-7-403 and this section that affected the right to a fair trial. Affidavits from eight jurors that they were not influenced by the bailiff's conduct failed as proof of a fair trial when weighed against the bailiff's actions. The District Court did not abuse its discretion in granting a new trial. Henrichs v. Todd, 245 M 286, 800 P2d 710, 47 St. Rep. 2112 (1990).

No Insertion of New Theory or Defense — Answer Proper: After the jury began deliberating, they presented a question to the court. Counsel for both parties participated in the answer. Plaintiffs later contended they were prejudiced through denial of an opportunity to argue the issue. However, the issue in question was already before the court, and the answer did not present a new theory or defense into the case; therefore, plaintiffs suffered no substantial injustice. Semenza v. Leitzke, 232 M 15, 754 P2d 509, 45 St. Rep. 829 (1988).

Retired Jury's Questions to Judge — No Prejudicial Error Where Bailiff Was Go-Between: When jury in action arising out of contract asked the judge, by and through the bailiff, whether all forms for a verdict had to be filled out, the bailiff was told to tell the jury to use only such form as fitted the verdict. To avoid error, the better practice would have been to conduct the jury into court for the desired information, pursuant to this section. However, because of the innocuous nature of the communication to the jury, the Supreme Court did not find that any substantial right of the defendants was affected and found no prejudicial error. Fordyce v. Hansen, 198 M 344, 646 P2d 519, 39 St. Rep. 1043 (1982).

Oral Instructions to Jury — Waiver of Objection: Plaintiff gave implied consent and waived objection by failure to object and by active participation in proceedings wherein trial court, without the presence of a stenographer, gave oral answer to question asked by the jury and orally confirmed the correctness of other instructions orally requested by counsel. Seder v. Peter Kiewit Sons' Co., 156 M 322, 479 P2d 448 (1971).

Request to Be Brought Into Court Not Mandatory: Although this section provides that the jury may request that it be brought into court, this is not mandatory and the jury may send an inquiry out to the court. State ex rel. St. Highway Comm'n v. Wheeler, 148 M 246, 419 P2d 492 (1966).

Reading of Testimony to Jury: Where retired jury disagrees as to the testimony, the trial judge, in the presence of or after notice to the parties or counsel, should either give such testimony orally from the bench if the judge has a clear recollection thereof, with the stenographer taking down what he says, or should read to the jury the stenographer's transcript of the disputed testimony duly certified as correct, but no testimony should be read merely because the jury desires to have its memory refreshed. Pilgeram v. Haas, 118 M 431, 167 P2d 339 (1946).

Section Not Applicable to Criminal Cases: This section is applicable to civil cases only. St. v. Fisher, 23 M 540, 59 P 919 (1900).

Testimony Reviewed: Where, after having been charged and having retired to consider its verdict, a jury at its own request was brought back into the courtroom and permitted to hear the testimony of two witnesses read from the stenographer's notes, no error had been committed on the basis of secondary evidence since the court had no authority to permit the examination of witnesses at such a time, and the notes taken by an official stenographer on a trial are presumably correct. Freezer v. Sweeney, 8 M 508, 21 P 20 (1886), distinguished in Pilgeram v. Haas, 118 M 431, 167 P2d 339 (1946).

Collateral References

Trial *key* 312(1) through (3).

89 C.J.S Trial §473, et seq.

75A Am. Jur. 2d Trial §§1109, 1110.

Right to have reporter's notes read to jury. 50 ALR 2d 176.

Procedure to be followed where jury requests information as to possibility of pardon or parole from sentence imposed. 35 ALR 2d 769.

Coercive effect of verdict-urging by judge in civil case. 19 ALR 2d 1257.

Right of accused to additional argument on matters covered by amended or additional instructions. 15 ALR 2d 490.

Part 5
Jury's Verdict

Part Case Notes

Negligence Special Verdict Form — Harmless Error on Strict Liability Instruction: Plaintiff contended that it was error for the trial court to give a particular instruction as he contended it was an incomplete and misleading statement of the law of strict liability. The Supreme Court held that any alleged error was harmless because the plaintiff did not object to a special verdict form that required the jury to decide the case on negligence alone. Kleinsasser v. Superior Derrick Serv., Inc., 218 M 371, 708 P2d 568, 42 St. Rep. 1662 (1985). See also Drilcon, Inc. v. Roil Energy Corp., Inc., 230 M 166, 749 P2d 1058, 45 St. Rep. 114 (1988).

25-7-501. Return of verdict — polling the jury.

Case Notes

Refusal to Allow Poll of Jury — New Trial Improperly Granted: Court abused discretion in granting new trial based solely on ground that it had erred in refusing to grant request for poll of jury. Error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that, in response to question by judge, foreman of jury advised him they had agreed upon verdict and that, following reading of verdict, judge inquired if it was true verdict of at least eight of them and jury answered in affirmative. Martello v. Darlow, 151 M 232, 441 P2d 175 (1968).

Attack on Verdict by Motion for a New Trial: After a case has been submitted to the jury and a verdict returned, accepted, and filed at the direction of the trial court and the jury discharged, the only way to reach the verdict, if insufficient or against the law, is by a timely motion for new trial. Fauver v. Wilkoske, 123 M 228, 211 P2d 420 (1949).

Collateral References

Trial *key* 321, et seq.

89 C.J.S. Trial §492, et seq.

75B Am. Jur. 2d Trial §§1763, 1767.

Propriety of attorney's communication with jurors after trial. 19 ALR 4th 1209.

Polling of jury in civil cases. 71 ALR 2d 640.

Accused's right to poll of jury. 49 ALR 2d 619.

Validity and effect of verdict of "not guilty". 7 ALR 2d 1341.

25-7-502. Content of verdict — action or counterclaim for recovery of money.

Case Notes

Offset for Advanced Wage Benefits Proper Even Though No Apportionment Between General Damages and Wage Loss in Jury Verdict: At the close of trial, Burlington Northern objected to a verdict form that would have itemized the nature of the damages awarded by the jury. The lower court refused to grant the railroad an offset against the judgment for advanced wage benefits paid to the plaintiff. On appeal, plaintiff's attorney argued that the offset should not be granted because the form of the verdict made it impossible to determine what, if any, amounts were awarded by the jury for wage loss. The Supreme Court held that, by logical deduction, some of the award was for wage loss and remanded the case to the lower court for a determination of the amount of offsets to which Burlington Northern was entitled. Cottrell v. Burlington N. RR Co., 261 M 296, 863 P2d 381, 50 St. Rep. 1323 (1993).

Failure to Award Offset — Judgment Improperly Granted: In a breach of contract action in which defendant counterclaimed, the jury, during deliberations, asked if it could determine damages, with the court to hear from counsel as to the amount of offset to be subtracted from the damages awarded. The trial judge consulted both counsel and with their approval told the jury that it should determine damages and the judge would determine any offset. After a damages verdict for defendant, defendant obtained a judgment without waiting for an offset hearing and served notice of the judgment on plaintiff. Plaintiff's motion to amend the judgment as premature in absence of a hearing and decision on offset was denied. The judgment on the verdict was vacated and the case remanded for proceedings and a determination on any offset. Schmidt v. Colonial Terrace Associates, 202 M 46, 656 P2d 807, 39 St. Rep. 2318 (1982).

Amending Damages in Verdict Form: The trial court erred in amending the verdict form, over objection, and submitting to the jury, after instructions were settled, an issue of damages when such damages were not pleaded, were not based on evidence, and were not covered by jury instructions. Agrilease, Inc. v. Gray, 173 M 151, 566 P2d 1114 (1977).

Directed Verdict Improperly Granted: Where in an action to recover the purchase price of fire-extinguishing apparatus the defendant interposed a counterclaim for $10,000 for breach of the contract, the failure of plaintiff to introduce any testimony did not authorize the trial court to direct a verdict for defendant in that amount for unliquidated damages, the weight to be given to the defendant's testimony and the amount recoverable by him having been within the exclusive province of the jury. Gen. Fire Extinguisher Co. v. NW. Auto Supply Co., 70 M 1, 223 P 504 (1924).

Allowance of Interest by Court as Error — Same Allowed by Jury: In entering judgment, it is the duty of the court to follow the verdict, and the allowance of interest in this case was error, the verdict indicating that the jury had followed the instructions and made all allowances, including interest, to which they thought defendants entitled. Butte Elec. Ry. v. Mathews, 34 M 487, 87 P 460 (1907). See also Helena Power Transmission Co. v. Spratt, 40 M 254, 106 P 5 (1910).

Admitted Amount — Form of Verdict: A verdict in favor of plaintiff is sufficient without stating the amount awarded, where the answer admitted the indebtedness and amount thereof, and the only denial was that the debt was not yet due. Josephi v. Mady Clothing Co., 13 M 195, 33 P 1 (1892).

Collateral References

Trial *key* 332, et seq.

89 C.J.S. Trial §§497, 506.

Propriety and effect of jury's apportionment of damages as between tortfeasors jointly and severally liable. 46 ALR 3d 801.

Verdict for money judgment which finds for party for ambiguous or no amount. 49 ALR 2d 1328.

25-7-503. Content of verdict — action for recovery of personal property.

Case Notes

Demand for Return Required — Jurisdiction of Court: In an action to recover possession of personal property where plaintiff has secured temporary possession through the auxiliary remedy of claim and delivery, the court is without jurisdiction to award the successful defendant the return of the property if he fails to claim a return in his answer. Fergus Motor Co. v. Schott, 95 M 249, 26 P2d 365 (1933).

Demand for Return Required: Where defendant in an action in claim and delivery fails in his answer to demand the return of the property or its value, and the jury's verdict is in favor of plaintiff as to a portion thereof only, failure of the trial court to incorporate in the judgment a provision in favor of defendant as to the portion eliminated by the jury is not error. Hayes v. Moffatt, 83 M 185, 271 P 452 (1928).

Jury Award of Value Not Applicable to Agreed Value: The provision that the jury shall find the value of the property does not apply where the value is conceded by both parties to be a certain amount. Dalke v. Pancoast, 63 M 524, 208 P 589 (1922).

Right of Defendant to Recover Damages Recognized: This section and 27-17-401 recognize the right of the defendant in a claim and delivery action, who is awarded a return of the property, to recover damages for the wrongful taking and detention of it. Hammond v. Thompson, 54 M 609, 173 P 229 (1918).

Damages Awarded for Retention of Property Pending Appeal: Following a judgment rendered in District Court against the appellant for damages caused by the unlawful retention of the respondent's property, the appellant retained the property and appealed to the Supreme Court. On appeal the respondent claimed he was entitled to damages for the unlawful retention of the property pending appeal. If the respondent is entitled to further damages, collection of them must be had by a separate action, as the doctrine of law allowing the award of damages, for property retained pending appeal, by an appellant court applies only to judgments of a Justices' Court reviewed de novo by a District Court. Chesnut v. Sales, 49 M 318, 141 P 986 (1914).

Judgment for Property or Value Thereof: In an action of claim and delivery, a judgment that the party entitled to the possession of the property in controversy shall have it or, in case the property itself cannot be recovered, then such party to have its value is proper under this section. Chesnut v. Sales, 49 M 318, 141 P 986 (1914); 44 M 534, 121 P 481 (1912).

Verdict to Dispose of All Issues: The verdict, in an action of claim and delivery, should in terms, dispose of all the issues submitted to the jury. Hickey v. Breen, 40 M 368, 106 P 881 (1910); Woods v. Latta, 35 M 9, 88 P 402 (1907).

Substantial Conformity of Verdict: The verdict, in an action of claim and delivery, conforms substantially with the requirements of this section, where it contains a general finding in favor of the plaintiff, together with a finding of value. Sullivan v. Girson, 39 M 274, 102 P 320 (1909).

Judgment to Be in the Alternative: In a claim and delivery action the verdict of the jury need not be in the alternative, but the judgment must be in the alternative, as provided by 27-17-401. The verdict must support the judgment, and both verdict and judgment must conform to the law. Hynes v. Barnes, 30 M 25, 75 P 523 (1904). See also Hickey v. Breen, 40 M 368, 106 P 881 (1910).

Deficient Verdict — Finding of Facts: Under this section, a failure to find all the facts that should be found by a jury does not invalidate the verdict. Wheeler v. Jones, 16 M 87, 40 P 77 (1895); Miles v. Edsall, 7 M 185, 14 P 701 (1887).

Collateral References

Replevin *key* 92 through 97.

77 C.J.S. Replevin §§92, 93.

Allowance, in replevin action, of loss of profits from deprivation of use of detained property. 48 ALR 2d 1053.

Recovery of damages in replevin for value of use of property detained by successful party having only security interest as conditional vendor, chattel mortgage, or the like. 33 ALR 2d 774.

Part 6
Trial by the Court

Part Case Notes

Visits to Scene — Purpose: In considering a motion to suppress evidence discovered during a search of the defendant's motel room, the trial judge visited the room under circumstances allegedly similar to those on the night of the search. In expressing its disapproval of the trial court's participation in the recreation of the scene, the Supreme Court stated that visits to the scene should be designed for the trier of fact to view the scene, not for the trier of fact to place himself in the shoes of one of the parties. St. v. Wilson, 218 M 359, 708 P2d 270, 42 St. Rep. 1647 (1985).

25-7-602. Trial upon agreed statement of facts.

Case Notes

Answer Pleading Insufficient Knowledge Creates Factual Dispute Subject to Trial — Disposition of Trial Issues by TRO Prohibited — Verified Complaint Not Basis for Agreed Facts — Denial of Due Process: After a writ of execution was issued against certain property belonging to her husband, Nancy filed a verified complaint against the Sheriff who would execute on the property. She also filed a petition for a temporary restraining order (TRO), claiming to be a tenant by the entirety in the property subject to execution. The District Court issued the TRO and, at a later show cause hearing, discussed the underlying law with counsel but took no testimony. The Sheriff then filed his answer, pleading insufficient knowledge to admit or deny. A creditor was later allowed to intervene. The creditor's answer also pleaded insufficient knowledge, but his brief took a position opposing Nancy's view of the law applicable to ownership of the property. Nancy then responded with a brief in which she asked the District Court to allow oral argument and reiterated her view of the law. The District Court issued findings and conclusions and quashed the writ of execution, relying upon the "undisputed" facts alleged in Nancy's verified complaint. The Supreme Court reversed, noting that under Rule 8(b), M.R.Civ.P. (Title 25, ch. 20), the effect of pleading insufficient knowledge is to deny a plaintiff's allegations. The Sheriff's and intervenor's answers pleading insufficient knowledge put into issue the allegations in Nancy's complaint. The only way that those issues of fact could be resolved, short of a trial on the merits, was by a motion for summary judgment or judgment on the pleadings, neither of which was made. The Supreme Court also noted that there was no discovery and no hearing at which facts were determined because there was no testimony taken by the District Court. Citing Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), and Knudson v. McDunn, 271 M 61, 894 P2d 295 (1995), the Supreme Court held that a District Court may not determine, in proceedings on a preliminary injunction or a temporary restraining order, those issues that may arise in a trial on the merits. In this case, the District Court negated Nancy's burden of proof and, without notice, precluded discovery and deprived the Sheriff and the intervenor of the opportunity to disprove Nancy's allegations concerning her right of ownership in the property, thereby depriving the Sheriff and intervenor of their right to

procedural due process under the Montana Constitution. For these reasons, the Supreme Court reversed the District Court and remanded for proceedings consistent with the Supreme Court's opinion. Lurie v. Sheriff, 284 M 207, 944 P2d 205, 54 St. Rep. 847 (1997).

Agreed Facts as Court's Findings — Special Verdict — Additional Findings: Where cause was submitted on an agreed statement of facts consisting of an agreement as to the truth of certain allegations of the answer and that the trial court should consider certain documentary evidence, the agreed statement automatically became the court's findings and had the effect of a special verdict as to the facts agreed upon. The court was bound to make its conclusions on the stipulation insofar as the necessary facts were agreed upon, and as to facts not agreed, it could refer to the evidence for their determination. State ex rel. Nelson v. District Court, 107 M 167, 81 P2d 699 (1938).

Agreed Statement Binding Upon Parties and Court: Where a statement of facts has been voluntarily made, agreed to, and submitted to the trial court, it is binding upon the parties and the court. McCarthy v. Employers' Fire Ins. Co., 97 M 540, 37 P2d 579 (1934); Read v. Lewis & Clark County, 55 M 412, 178 P 177 (1919).

Insufficiency of Agreed Facts: On submission of a cause to the trial court on an agreed statement of facts, the statement must show all the facts necessary to a decision, i.e., ultimate facts presenting only questions of law, and not circumstances which may tend to prove such facts. If in the judgment of the trial court the statement is not sufficient to enable it to render judgment, it may disregard it and continue the cause for further proceedings. McCarthy v. Employers' Fire Ins. Co., 97 M 540, 37 P2d 579 (1934).

Contrary Conclusions of Law — Judgment Vitiated: A conclusion of law contradictory of the agreed statement is sufficient to vitiate the judgment. Warren v. Chouteau County, 82 M 115, 265 P 676 (1928); Birney v. Warren, 28 M 64, 72 P 293 (1903).

Review of Decision Made Upon Agreed Facts — Role of Supreme Court: In a cause decided by the District Court upon an agreed statement of facts, the office of the Supreme Court on appeal goes no further than to ascertain and determine whether the trial court drew the correct inference from the facts stipulated and rendered the proper judgment. Warren v. Chouteau County, 82 M 115, 265 P 676 (1928); Read v. Lewis & Clark County, 55 M 412, 178 P 177 (1919).

Purpose of Stipulation: The purpose of a stipulation that a certain thing is a fact is to relieve the parties from the necessity of introducing evidence as to it. If such fact is material, the court is bound by the stipulation as to that fact. It is equivalent to a special finding. Spaulding v. Stone, 46 M 483, 129 P 327 (1912).

Agreed Statement as Finding of Facts: An agreed statement of facts, upon which a case is tried, has the effect of a finding of facts. Hale v. County of Jefferson, 39 M 137, 101 P 973 (1909).

Collateral References

Trial *key* 368.
89 C.J.S. Trial §578.
3 Am. Jur. 2d Agreed Case §22, et seq.

Part 7
Referees

25-7-701. Oath of referee.

Collateral References

Reference *key* 42.
76 C.J.S. References §45.

25-7-702. Grounds for objection to appointment of referee.

Collateral References

Reference *key* 41.
76 C.J.S. References §44.

CHAPTER 8
DEPOSIT IN COURT — DELIVERY TO PARTY

Part 1
General Provisions

25-8-101. When court may order deposit or delivery.

Case Notes

Attorney Fees and Costs for Interpleader Payable From Court Deposit: A stakeholder, disinterested in the result, who interpleads money or property so that the court may decide the true owner, is entitled to costs and reasonable attorney fees, which may be charged against the stake to be distributed. Whether the stake must then be replenished by the losing party is within the discretion of the court. Generally the losing party is under no absolute duty to pay the interpleader's attorney fees and costs if a bona fide conflict existed. Soha v. West, 196 M 95, 637 P2d 1185, 38 St. Rep. 2153 (1981).

Sufficiency of Deposit — Action in Equity: In action to prohibit defendant from canceling an agreement for sale of lands even though the deposit in court might be insufficient as a tender to defendant, plaintiff might be relieved from forfeiture upon a showing of facts sufficient to appeal to the conscience of a court of equity under 28-1-104. Blackfeet Tribe of Blackfeet Indian Reservation v. Klies Livestock Co., 160 F. Supp. 131 (D.C. Mont. 1958).

Payment of Judgment Refused: Where tender in payment of judgment was refused, payment could not be made by deposit in court. Galbreath v. Armstrong, 121 M 387, 193 P2d 630 (1948).

Collateral References

Deposits in Court *key* 1, et seq.
26A C.J.S. Deposits in Court §1, et seq.
23 Am. Jur. 2d Deposits in Court §1, et seq.

25-8-103. With whom money deposited.

Collateral References

Deposits in Court *key* 3, 4.
26A C.J.S. Deposits in Court §§5, 6.
23 Am. Jur. 2d Deposits in Court §§9, 11.

25-8-104. Safekeeping of deposit by county treasurer.

Collateral References

Deposits in Court *key* 3, 4.
26A C.J.S. Deposits in Court §§5, 6.
23 Am. Jur. 2d Deposits in Court §§9, 11.

CHAPTER 9
JUDGMENT

Chapter Case Notes

Defendant Not Allowed to Characterize Damages: Shilhaneks were injured in a vehicle accident, and defendants were ordered to pay more than $3 million in damages, including punitive damages. Defendants requested that the $750,000 tendered to Shilhaneks to date be allocated toward payment of the punitive award and that Shilhaneks be required to file a corresponding satisfaction of judgment with respect to the punitive damages award, in essence asserting that a defendant has the power to specifically designate payment toward a particular award. Defendants cited 25-9-311 for the rule that a satisfaction of judgment must be provided by the party in whose favor judgment is entered and contended that under 28-1-1106 and 28-1-1225, the power lies with the debtor, not the creditor, when it comes to designating to which particular obligation a payment should be credited. The District Court denied the request, noting that Title 28 applies only to contractual obligations and that Title 25 governs obligations arising from judgments. The District Court did not abuse its discretion, given defendants' failure to provide a legal basis that would allow them to dictate how damages owed are characterized, the fact that defendants owed more than double the available insurance coverage and were obligated to pay the policy limits to satisfy the verdict, and that allocating 22% of the available

insurance proceeds to the punitive damage award would have harsh tax consequences on Shilhaneks. Shilhanek v. D-2 Trucking, Inc., 2000 MT 16, 298 M 101, 994 P2d 1105, 57 St. Rep. 89 (2000).

Person Not Party to Action May Not Be Party to Judgment: The lower court ruled that a prescriptive easement existed for Dawson even though he was not a party to the lawsuit. The Supreme Court held that a person who is not a party to an action may not be a party to the judgment. Warnack v. Coneen Family Trust, 266 M 203, 879 P2d 715, 51 St. Rep. 739 (1994), followed in Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Offset of Tort Judgment With Amount Owed on Contract Underlying Tort as Within Equity Power of Court: Defendant fraudulently induced plaintiffs to purchase property by misrepresenting the quality of the road that she intended to build as access to the property. The District Court required her to file an accounting reflecting the principal balance due her from each of the plaintiffs for property purchased under the contracts for deed, and the court then offset and credited the amounts due plaintiffs from the judgment against the balance of the principal owed by plaintiffs under the contracts for deed. Although the contracts themselves were not at issue, the respective obligations of the parties arose from the same transaction and damages were related to the value of the premises and the purchase price, which was the basis of the principal under the contract. It was within the equity power of the court to allow a setoff of debts under these circumstances because that power exists independent of statute when grounds for equitable interposition are shown, such as fraud or insolvency. Dew v. Dower, 258 M 114, 852 P2d 549, 50 St. Rep. 454 (1993). On remand, the District Court found that although one cotenant had quitclaimed all interest in the property to the plaintiff cotenant, the right to personal damages did not pass with the transfer of the property. Clarifying Dew, supra, the Supreme Court noted that the discussion regarding the equity power of the District Court was confined solely to its ability to set off the principal balances on the contracts for deed against the damages plaintiff sustained. As such, the District Court was not invested with the broad equitable power to award plaintiff 100% of the personal damages attributable to fraud when he was not entitled to such an award by law. Because the underlying action was for personal damages, not property damages, the court properly determined that plaintiff was entitled to only 50% of the personal damages arising from defendant's fraud. However, the court miscalculated the amount of accrued interest owing, so the case was remanded for a recalculation of damages. Dew v. Dower, 269 M 286, 888 P2d 421, 51 St. Rep. 1388 (1994). See also S. Surety Co. of N.Y. v. Maney, 121 P2d 295 (Okla. 1941).

Consent Judgment Not to Be Challenged Absent Appeal — Lack of Notice Terms Binding: A consent decree, adopted and filed with the District Court as a settlement agreement, provided for payment through the District Court as escrow agent, and on payment or nonpayment the District Court could release the escrowed documents to the appropriate party "without notice to the other party". On nonpayment, the documents were released, including an order and Writ of Assistance that had been previously consented to at the time the consent decree was adopted. The Supreme Court held that since the consent decree was a final order and had not been appealed, it could not be considered, and that the order and Writ followed the decree exactly and could not be considered. The lack of notice to either party was not a denial of due process because the consent decree expressly so provided. Thus, appellant knowingly and voluntarily waived notice. Sadler v. Hart, 220 M 355, 715 P2d 50, 43 St. Rep. 434 (1986).

Chapter Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

The Effect of Lack of Jurisdiction, Slaight, 16 Mont. L. Rev. 54 (1955).

Part 1
General Provisions

25-9-101. Judgment to be on the merits.

Case Notes

Record on Appeal — Lack of Transcript: Arguments on the sufficiency of the evidence in action on charges of unfair labor practices could not be considered without a transcript of the testimony at the original administrative hearing. The cause was remanded to the trial court for election by the employee either to order and pay for the transcript so the trial court could receive it and enter further judgment or to accept affirmation of the trial court's decision. Klundt v. St., 222 M 172, 720 P2d 1181, 43 St. Rep. 1148 (1986).

Failure to Hear Liability Issue: A complaint for an injunction was filed, and a temporary restraining order was granted. On defendant's appeal of denial of his motion to quash, the order

was upheld and the case remanded "with directions to expedite the trial of the cause for damages". Plaintiffs' motion for summary judgment based on the Supreme Court opinion was granted, the court stating that the Supreme Court had affirmed its judgment and directed the District Court to have a hearing on damages following remand. There was in fact never a hearing or trial on the merits of the issue of liability, and it is clear that the District Court misconstrued the language of the Supreme Court opinion, which had not decided the issue of liability but had merely decided it was proper to continue the temporary restraining order and had remanded for an expedited trial. The foreclosure of defendant's opportunity for a hearing denied him due process, and the summary judgment was reversed and the case remanded for a trial on the merits. Boyer v. Kargacin, 202 M 54, 656 P2d 197, 39 St. Rep. 2323 (1982).

Judgment Awarding Nominal Damages as Judgment on Merits: A judgment allowing recovery of only $1 by landowners for interference with water rights, on ground that evidence showed that damages were contributed to or occasioned by fault of landowner's lessee to such a degree as to preclude recovery of substantial damages, was a "judgment on the merits" under statutes so as to be res judicata of landowners' subsequent action for loss of profits from lessee's failure to exercise option to buy land, allegedly resulting from such interference. Dern v. Tanner, 96 F2d 401 (9th Cir. 1938).

Judgment on the Pleadings as Judgment on the Merits: For a judgment on the pleadings to constitute a judgment on the "merits", it must determine the merits of the controversy, as distinguished from the merits of the pleading attacked. Glass v. Basin & Bay St. Min. Co., 35 M 567, 90 P 753 (1907).

Judgment to Show Conclusion: A judgment must show of itself that it concludes the merits of the controversy. Glass v. Basin & Bay St. Min. Co., 34 M 88, 85 P 746 (1906).

Collateral References

Judgment *key* 191.

49 C.J.S. Judgments §100.

Res judicata effect of judgment denying relief for lack of jurisdiction or venue. 49 ALR 2d 1036.

25-9-102. Judgment for or against married person.

Collateral References

Husband and Wife *key* 238(3).

25-9-103. Death of party after verdict, no lien.

Collateral References

Judgment *key* 12, 762.

49 C.J.S. Judgments §§29, 458.

Part 2
Contents of Judgment

25-9-201. Whose rights determined in judgment.

Compiler's Comments

1981 Amendment: Inserted "Subject to the provisions of Rule 54(b), M.R.Civ.P."; and made a minor change in grammar.

Case Notes

Witness Not Party to Judgment and Not Entitled to Prescriptive Easement: A person who is not a party to the action cannot be a party to the judgment. Therefore, in a prescriptive easement action, witnesses who lived in the area of the disputed road and testified as to their use of the road could not be granted a prescriptive easement because they were not parties to the action. Kessinger v. Matulevich, 278 M 450, 925 P2d 864, 53 St. Rep. 1002 (1996), followed in Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000).

Party Voluntarily Intervening Subject to Adverse Judgment: Double AA Corporation sought specific performance to require Newland & Company, a trust company, to convey land that it held in trust and had entered into a contract to sell to Double AA. Sievers intervened in the case, arguing that specific judgment should not be granted on the basis that he had purchased part of the remainder interest in the trust property and had a first option to purchase the property based on the remainder interest. Sievers sought a ruling from the lower court that he had the first option to purchase the property. The Supreme Court held that the lower court had not abused its discretion in ruling that Sievers did not have a first right of purchase even though not all of the remainder interest holders had intervened in the case to protect their interests. Even

though they had not intervened, the remainder interest holders were aligned with the trustee, and any decision that Sievers might have obtained that was adverse to the trustee would also have been adverse to them. Double AA Corp. v. Newland & Co., 273 M 486, 905 P2d 138, 52 St. Rep. 1073 (1995), distinguishing Warnack v. Coneen Fam. Trust, 266 M 203, 879 P2d 715 (1994).

Cross-Complaints — Rights as Between Defendants: The rule that cross-complaint must ask relief modifying or overcoming plaintiff's cause of action applies only in cases where relief sought relates to plaintiff's subject matter or affects the property to which it relates but held not applicable where judgment determines defendants' rights between themselves. State ex rel. Union Cent. Life Ins. Co. v. District Court, 102 M 371, 58 P2d 491 (1936).

Collateral References

Execution *key* 87; Judgment *key* 234, et seq.

49 C.J.S. Judgments §§27, 33.

25-9-202. Designation in judgment of principal debtors and sureties.

Case Notes

Application to Suretyship Relations: This section refers to the rendition of judgments upon obligations the makers of which signed in fact as principal and surety and not to judgments upon those on which the makers are all principals. It also applies to cases in which the parties whose rights are to be determined are before the court and not to cases in which judgment is sought, at the option of the plaintiff, against one of the obligors. Brownlee v. Young, 25 M 38, 63 P 798 (1901).

25-9-203. How amount expressed.

Case Notes

Appointing Ministerial Officer to Assess Damages: The court erred in appointing a ministerial officer to determine the cost of repairs which the court would assess as damages; it makes the award indefinite and delegates an exclusive judicial function. McMahon v. Falls Mobile Home Center, 173 M 68, 566 P2d 75 (1977).

Collateral References

Judgment *key* 222.

49 C.J.S. Judgments §76.

Judgment ambiguous or silent as to amount of recovery as defective for lack of certainty. 55 ALR 2d 723.

25-9-204. Clerk to include interest in judgment.

Case Notes

When Interest Commences — Breach of Contract: In a breach of contract case, the trial court awarded interest from the date of the breach of contract. The appellants argued that interest should have commenced on the date of judgment pursuant to 25-9-204. The Supreme Court held that the trial court erred in applying 27-1-211 to the case. Two of the criteria in that statute were met, as the plaintiff was entitled to recover damages and the right to recover damages vested on the date of the breach. However, the amount of the damages due upon breach was not clearly ascertainable, as required by 27-1-211, until determined by the trial court. The Supreme Court had interpreted the statute to mean that no interest could run until a fixed amount of damages had been arrived at, either by agreement, appraisal, or judgment. Since this was not an action on a negotiable instrument or for the definite unpaid balance of a contract or account, in which the damages would be a sum certain, 27-1-211 was not applicable. Interest from the date of judgment at the legal rate of 10% a year was allowable under 25-9-204 and 25-9-205. Carriger v. Ballenger, 192 M 479, 628 P2d 1106, 38 St. Rep. 864 (1981).

Interest Allowed From Date Verdict Rendered: Where the amount due a father for the wrongful death of his minor son was not ascertained (or ascertainable) until after the jury had returned its verdict, interest was allowable only from the date the verdict was rendered. Wyant v. Dunn, 140 M 181, 368 P2d 917 (1962).

Interest on Judgment: When a debt becomes merged in a judgment, there can be no question of the right to enter the judgment for the amount thereof and accrued interest, the whole to bear interest thereafter at 8% a year. Gallatin Valley Elec. Ry. v. Neible, 57 M 27, 186 P 689 (1919).

Application to Supreme Court Judgments: This section may very well be construed as applying to judgments rendered or ordered by an appellate court. At any rate, it should be so applied as to make it the duty of the clerk below, in the absence of specific directions as to interest, to include in the judgment interest from the date of the order of the Supreme Court to the time of entry of the judgment. State ex rel. Dolenty v. Reece, 43 M 291, 115 P 681 (1911).

Collateral References

Judgment *key* 223, 224.
49 C.J.S. Judgments §77.

25-9-205. Amount of interest.

Compiler's Comments

2005 Amendment: Chapter 392 in (1) in first sentence after "state" inserted "and on the cost incurred to obtain or enforce a judgment"; and made minor changes in style. Amendment effective October 1, 2005.

Application: Section 3, Ch. 373, L. 1979, provided: "This act applies only to judgments entered after June 30, 1979."

Section 2, Ch. 649, L. 1979, provided: "This act applies to all judgments entered before and remaining unsatisfied on July 1, 1979, except that the 10% interest rate becomes effective on July 1, 1979."

Section Renumbered: This section was renumbered by the Code Commissioner from 31-1-110 to this section. No changes were made in the language of the text.

Case Notes

Inclusion of Statutorily Allowed Interest in Dissolution Decree: Under this section, interest is payable on judgments at 10% a year. That rate is appropriate in marriage dissolution cases if the decree is silent as to interest. However, it is within the discretion of the District Court to include the rate of interest in the dissolution decree. In this case, the District Court ordered the husband to pay the wife $32,000 plus 10% interest before September 30, 2001, and an additional $19,500 plus 10% interest over a 3-year period. The court did not abuse its discretion by including the amount of postjudgment interest in the dissolution decree. In re Marriage of Hedges, 2002 MT 204, 311 M 230, 53 P3d 1273 (2002). See also Williams v. Budke, 186 M 71, 606 P2d 515 (1980), and Gibson v. Gibson, 206 M 460, 671 P2d 629 (1983).

Rate for Prejudgment Interest Same as Rate for Postjudgment Interest: Although the rate of postjudgment interest is statutorily established in this section, there is no comparable statutory provision for the rate of prejudgment interest. The Supreme Court concluded that, in the best interest of parties trying to anticipate their rights or obligations in an effort to avoid litigation and to provide guidance to District Courts for awards of prejudgment interest, the appropriate rate for prejudgment interest when it is awarded should be the same as the rate awarded for postjudgment interest. In re Marriage of DeBuff, 2002 MT 159, 310 M 382, 50 P3d 1070 (2002).

Dissolution Decree Granting Ranch to Husband — Wife Not Entitled to Appreciation or Subject to Liability Accruing on Property — Judgment Interest Owing on Money Judgment: A dissolution decree entered in 1996 granted ranch property to the husband and a liquidated money judgment of $305,855 to the wife. When the remainder of the issues concerning the marital estate was finally addressed in 1999, the wife contended that the subsequent appreciation of the ranch marital assets must be accounted for in determining the final disposition of the 1996 decree. The Supreme Court held that the wife was not entitled either to appreciation or, conversely, to any liability that may have accrued on the property because the ranch was exclusively awarded to the husband. However, the wife was entitled to judgment interest on the money as a statutory right pursuant to this section. On remand, the Supreme Court applied the statutory 10% interest rate to the balance of the wife's money judgment that remained unpaid following entry of the decree, not including interest accruing during the pendency of the appeal. The Supreme Court refigured the dollar amount due the wife after adjusting the figure, which had been incorrectly offset by the District Court because of the wife's alleged receipt of livestock and sales and an interest debt allegedly due to the husband's mother under a "conspiratorial sham" designed to deprive the wife of her interest in the farm property and to directly benefit the husband. In re Marriage of Pospisil, 2000 MT 132, 299 M 527, 1 P3d 364, 57 St. Rep. 547 (2000).

Thirteen Percent Interest Award Not Usurious: Defendants contended that an amount awarded plaintiff in a breach of contract action included a usurious 13% rate of compounded interest. However, the interest award was affirmed because: (1) evidence in the record supported the conclusion that defendants agreed to pay 13% interest in return for waiver of a balloon payment requirement; (2) the question of compounding interest on the taxes and payments was not objected to by defendants at the time relevant documents were introduced at trial; (3) defendants had the opportunity but neglected to argue their position to the jury; and (4) defendants did not ask the court to have the jury break out in the verdict form how it computed the damage award. Keller v. Dooling, 248 M 535, 813 P2d 437, 48 St. Rep. 554 (1991).

Interest Chargeable on Debt Created by Property Settlement Agreement: Following the rationale of In re Marriage of Martens, 196 M 71, 637 P2d 526 (1981), and Williams v. Budke, 186 M 71, 606 P2d 515 (1980), the Supreme Court applied this section in granting interest on a principle obligation created by the parties' property settlement and custody agreement, In re Marriage of Mannix, 242 M 137, 788 P2d 1363, 47 St. Rep. 668 (1990), followed in Tipp v. Skjelset, 1998 MT 263, 291 M 288, 967 P2d 787, 55 St. Rep. 1084 (1998).

Interest Due in Foreclosure Action: The District Court properly ordered payment of interest in a foreclosure action based on the promissory note rate until the date of judgment and at the 10% statutory rate thereafter. Aetna Life Ins. Co. v. Slack, 232 M 250, 756 P2d 1140, 45 St. Rep. 1028 (1988).

Interest on Judgment Not Compound Interest: In its initial summary judgment order, the District Court awarded a real estate broker the commission due plus interest at 6% on that amount from date of breach to date of judgment, pursuant to 27-1-211. On a second summary judgment dismissing a counterclaim, the court found the broker entitled to judgment at 10% on the initial judgment. The Supreme Court found this award was not compound interest in violation of 25-9-205, but was interest on the judgment, a correct calculation of interest due. Ellingson Agency, Inc. v. Baltrusch, 228 M 360, 742 P2d 1009, 44 St. Rep. 1598 (1987).

Breach in Sale of Restaurant — Measure of Damages and Interest: Where restaurant buyers breached a sales contract, the trial court properly granted sellers the amount expended on outstanding accounts payable incurred by the buyers, such as power service, garbage service, and advertising debts, as well as interest at 10% from the date of judgment. Stevens v. Abbott, 228 M 101, 740 P2d 1136, 44 St. Rep. 1374 (1987).

Contract Interest Rate for Particular Item — Statutory Rate Applied to Other Items: Plaintiff received damages for the value of a lease breached by defendant and for plaintiff's costs in renovating the premises as required by the lease. The lease provided that lessee would indemnify lessor for finance costs of the renovation at an 18% rate. The court properly gave plaintiff interest at the statutory 10% rate instead of the 18% rate. An interest rate in one relatively minor and discrete part of the lease should not be an umbrella over the entire obligation, and it is contrary to the parties' legitimate expectations to allow such an umbrella where the lease is otherwise complete in almost every detail. If the parties intended the 18% rate to apply to all obligations arising from the contract, including breach, they could have easily so provided in the lease. Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985).

Modification of Incorrect Money Judgment — Interest Due on Retroactively Due Increase: If a judgment is effective from the date of entry and any changes to the judgment relate back to the entry date, it follows that interest is assessed from the date of judgment. Where a child support and maintenance decree was later modified and larger payments granted, with the increase made retroactive to the date of the original decree, interest was due on that retroactive amount, beginning on the date of the original decree. In re Marriage of Wilson, 216 M 392, 701 P2d 1372, 42 St. Rep. 894 (1985).

Interest Due on Lost Profits: Under this statute, a builder who was not in breach and who did not cause the breach of a construction contract was entitled to the full amount of his lost profits but not to 10% interest a year on those lost profits. The trial court improperly awarded 10% interest. The court stated that the builder was entitled to interest as provided by the contract, but the contract contained no such provision. Martin Dev. Co. v. Keeney Constr. Co., 216 M 212, 703 P2d 143, 42 St. Rep. 752 (1985). On a later appeal, the parties were bound by the facts and law established in this prior case. Relitigation of issues was barred by collateral estoppel, and claims of legal malpractice were barred by the statute of limitations. Peschel v. Jones, 232 M 516, 760 P2d 51, 45 St. Rep. 1244 (1988).

Workers' Compensation Court — No Interest on Claimants' Judgments: On remand from the Supreme Court to the Workers' Compensation Court for a determination of reasonable costs and attorney fees, the Workers' Compensation Court determined that claimant was not entitled to interest based on past due compensation and medical benefits awarded by its earlier judgment. The Supreme Court affirmed. The penalties and assessments allowed against an insurer under the Workers' Compensation Act are the exclusive penalties and assessments that can be assessed against an insurer in absence of authorizing legislation. Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985).

Interest and Expenses Allowable: Plaintiff entered a buy-sell to purchase defendants' ranch. One of his major considerations was gaining investment tax credits. Defendants refused to perform, and plaintiff filed a breach of contract action. The District Court found for plaintiff and awarded him prejudgment interest at 10% on his state and federal income tax obligation, the

earnest money, and his capital expenditures on the ranch. On appeal, the Supreme Court held that interest on the earnest money was all that should be allowed as prejudgment interest under 27-1-211. Prejudgment interest should be 6% under 31-1-106. Interest should then be allowed on the judgment according to 27-1-211 at the amount of 10% under 25-9-205. The expenses that are allowable to a plaintiff are found in 25-10-201, and 25-10-101 outlines when costs are allowed. The cost of depositions not used during trial is not allowed. Various travel expenditures would not have been chargeable to defendants if the contract had been performed. The portion of capital expenditures allowed should be only the loss plaintiff suffered as a result of expenditures from the time of signing the buy-sell to the time of breach. Ehly v. Cady, 212 M 82, 687 P2d 687, 41 St. Rep. 1611 (1984).

Backpay and Interest Formulas Upheld: The Woolworth formula, used to calculate the amount of backpay owed Young, and the Florida Steel formula, used to calculate the amount of interest awarded on backpay, were appropriate for this case. The first formula applied quarterly calculations, and the second formula applied a variable interest in excess of Montana's statutory limit. The statutory provision on interest must not supplant but should complement the legitimate ends of public policy. Great Falls v. Young, 211 M 13, 686 P2d 185, 41 St. Rep. 1174 (1984).

Interest Payable on Cash Award Property Settlement: Where the defendant husband in a divorce proceeding argued unsuccessfully that the parties had orally modified a property settlement agreement requiring a cash award to the wife, the Supreme Court awarded interest on the unpaid cash award from the date it was required to be paid under the dissolution decree until the time of actual payment. Under the rationale of Knudson v. Knudson, 191 M 204, 622 P2d 1025, 38 St. Rep. 154 (1981), once a person is liable for a money judgment resulting from a property settlement and payment is not made, the person entitled to the settlement is further entitled to a fair rate of interest. Gibson v. Gibson, 206 M 460, 671 P2d 629, 40 St. Rep. 1780 (1983). See also Tipp v. Skjelset, 1998 MT 263, 291 M 288, 967 P2d 787, 55 St. Rep. 1084 (1998).

Applicable Only Where Marital Dissolution Decree Silent as to Interest: As this section applies to a judgment arising out of a marital dissolution decree only when that decree is silent as to interest, it was within discretion of the court to set interest at 6% a year when the decree was not silent as to interest. In re the Marriage of Martens v. Martens, 196 M 71, 637 P2d 523, 38 St. Rep. 2135 (1981).

Property Settlement — Liability for Interest Pending Appeal — Burden of Parties: Where, following a decree dissolving the marriage of the parties and awarding a money judgment to the wife, the husband obtained a stay of execution pending appeal, the trial court did not err upon remand in ordering the husband to pay interest upon the previous judgment, calculated from the day the judgment was originally rendered. Under the holding in Resner v. N. Pac. Ry., 161 M 177, 505 P2d 86 (1973), a judgment bears interest from the date of its entry even though it is subject to direct attack. As the husband made no attempt to see what obligations were accruing, the court will not allow the husband to avoid his interest obligations by claiming that his wife did not do enough to secure it. Knudson v. Knudson, 191 M 204, 622 P2d 1025, 38 St. Rep. 154 (1981). Resner was overruled in Woods v. Burlington N. Ry., 2004 MT 384, 325 M 106, 104 P3d 1045 (2004).

Retail Installment Sale — Evidence Supporting — Allowable Interest on Past Due Account: The defendant failed to make payment for materials supplied by plaintiff. The invoices of purchase stated that an interest rate of 1.5% a month would be levied on past due accounts. Plaintiff filed a mechanics' lien (now construction lien) representing the amount due and the service charge of 1.5% a month and sued to foreclose the lien. The defendant filed a confession of judgment for the full amount of purchase, plus interest at a legal rate. Plaintiff rejected the confession of judgment. Judgment was entered in favor of plaintiff for the amount of purchases plus interest at a rate of 10% a year. Plaintiff appealed, seeking interest at the 1.5% a month rate. The Supreme Court held that the invoices, two of which were signed by both parties, describing the material purchased and stating the amount due and the interest rate to be charged, were sufficient to obligate defendant to pay the 1.5% charge on the unpaid balance. Although the invoices did not meet all the requirements of a retail installment contract, defendant's admission as to their authenticity and confession of judgment more than adequately evidenced that the purchases were retail installment sales. O'Neil Lumber Co. v. Nickelodeon Co., 190 M 25, 617 P2d 1291, 37 St. Rep. 1731 (1980).

Visitation and Obligation to Support — Interest on Unpaid Support: The Supreme Court rejected respondent's contention that he had no obligation to support his child under a divorce decree unless he exercised his right of visitation. The lower court incorrectly applied the rule in this case. Visitation has no bearing whatsoever upon the father's legal and moral obligation to

support his child. Similarly, the father could not claim laches to avoid support payments owing over an 8-year period. Furthermore, on the basis of Williams v. Budke, 186 M 71, 606 P2d 515 (1980), appellant is entitled to receive interest on the past-due payments. Fitzgerald v. Fitzgerald, 190 M 66, 618 P2d 867, 37 St. Rep. 1350 (1980), followed, with regard to inapplicability of laches and equitable estoppel to recovery of child support arrears, in In re Marriage of Petranek, 255 M 458, 843 P2d 784, 49 St. Rep. 1107 (1992).

Interest on Delinquent Support Payments: When the marital dissolution decree is silent as to interest, interest is automatically collectible by the judgment creditor spouse on past-due payments for support money or maintenance the same as any other money judgment under 25-9-205. Williams v. Budke, 186 M 71, 606 P2d 515 (1980), followed in In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004).

Conversion and Special Damages: Where, in action for conversion, plaintiff elected to accept value of property at time of conversion and special damages were also allowed, interest on the value of the property would run from time of conversion but interest on the special damages were assessed after verdict. Galbreath v. Armstrong, 121 M 387, 193 P2d 630 (1948).

Probate Proceedings: An order allowing an attorney's fee for services rendered to a special administrator was not a "judgment" within the meaning of this section. In re Bielenberg's Estate, 98 M 546, 40 P2d 49 (1935).

Mechanics' Lien (Now Construction Lien) Proceeding: When claimant considerably overstated the amount of his claim in the lien filed and court was required to decide the amount due, interest, a creature of statute, was allowable only from the date of the decision. Eskestrand v. Wunder, 94 M 57, 20 P2d 622 (1933).

Foreclosure Decree: After decree in a foreclosure suit, the mortgage debt became merged in the judgment, and in a subsequent action, looking to the redemption of the property, interest was properly allowed at 8% per annum. Toole v. Weirick, 39 M 359, 102 P 590 (1909).

Constitutionality: This section is not unconstitutional as affecting a contract right. Stanford v. Coram, 28 M 288, 72 P 655 (1903).

Effect of Amendment: A judgment rendered prior to the date when the amendment to this section went into effect bore interest of 10% until that date and only 8% thereafter. Stanford v. Coram, 28 M 288, 72 P 655 (1903).

Collateral References

Interest on degree or judgment of probate court allowing a claim against estate or making an allowance for services. 54 ALR 2d 814.

Period before judgment for which interest is recoverable on damages for injury to, or detention, loss, or destruction of, property. 36 ALR 2d 337.

Date of verdict or date of entry of judgment thereon as beginning of interest period on judgment. 1 ALR 2d 479.

Part 3
Entry of Judgment and Satisfaction — Lien

25-9-301. Docketing of judgment — lien — expiration.

Compiler's Comments

2001 Amendment: Chapter 515 in (2) near middle of second sentence after "provided in" substituted "61-6-123" for "subsection (3)" and after "continues for" substituted "10 years" for "6 years". Amendment effective October 1, 2001.

1995 Amendment: Chapter 60 in (3), near middle after "support obligation", inserted "or 10 years from entry of a lump-sum judgment or order for support arrears, whichever is later"; and made minor changes in style.

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

1993 Amendment: Chapter 631 at beginning of second sentence of (2) inserted exception clause; inserted (3) continuing lien for 10 years after termination of the support obligation; and made minor changes in style.

Preamble: The preamble attached to Ch. 631, L. 1993, provided: "WHEREAS, it is necessary to draft a composite bill containing unrelated sections in order to present the proposed program improvements in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills.

THEREFORE, the Legislature finds it appropriate to enact the following legislation."

Severability: Section 29, Ch. 631, L. 1993, was a severability clause.

Case Notes

Failure to Record Aircraft Conveyance With Federal Agency — Unrecorded Ownership Interest Invalid to Cut Off Right to Levy on Aircraft: Ford signed a promissory note for $28,503.62, plus interest, for products purchased from Lewistown Propane Co. (Lewistown). Lewistown sought to collect on the promissory note, and Ford subsequently filed a confession of judgment with the District Court for the full amount. At this time, Becky was allegedly helping Ford to refinance Ford's debt, and Ford sold three pieces of farm machinery and an airplane to Becky. Section 503(c) of the Federal Aviation Act of 1958 requires that every aircraft transfer be evidenced by a recorded instrument before the rights of innocent third parties can be affected; however, neither Ford nor Becky recorded the transfer. When Lewistown attempted to collect on its judgment, it inquired with the state Department of Transportation and the Federal Aviation Administration about the ownership of the aircraft and determined that the aircraft was still registered in Ford's name and had no liens or encumbrances attached, and that Ford had paid the annual federal registration fees. Lewistown then seized the aircraft and advised Ford that it intended to sell the aircraft to satisfy the judgment against Ford. Upon learning of the seizure of the aircraft, Becky intervened and sought a stay of execution of judgment, which the District Court granted. Lewistown appealed and the Supreme Court reversed. Lewistown, as judgment creditor, was entitled to rely on the federal records, but because Becky's ownership interest was unrecorded at the time of Lewistown's execution of the levy, Becky's interest was invalid as to Lewistown and could not be used to cut off Lewistown's right to levy on the aircraft. Lewistown Propane Co. v. Ford, 2002 MT 27, 308 M 243, 42 P3d 229 (2002), applying Kovacich v. Norgaard, 221 M 26, 716 P2d 633 (1986).

Deficiency Judgment — Order to Assign Future Proceeds From Separate Cause of Action to Judgment Creditor Not Erroneous: Andersen executed a promissory note in favor of the Alpine Buffalo, Elk and Llama Ranch, Inc. (Alpine), and secured the note with real property. When no payments were made, Alpine received a judgment and foreclosure decree. After Andersen's property was sold, Alpine also received a deficiency judgment in the amount still owing. Andersen neither appealed the judgment nor made payment. Alpine later learned that Andersen was plaintiff in a pending malpractice claim against her former attorney, so Alpine sought and received an assignment of the prospective proceeds from that action. Andersen appealed the assignment order, claiming that Alpine's reliance on Rule 70, M.R.Civ.P. (Title 25, ch. 20), was misplaced because that rule is a civil contempt statute that applies only to a contemptuous party. Alpine conceded the inapplicability of the rule, but the Supreme Court pointed out that Rule 70 was not the sole basis for Alpine's motion for assignment, citing Smith v. Foss, 177 M 443, 582 P2d 329 (1978), for the proposition that a District Court possesses jurisdiction to enter any necessary orders to enforce its judgments. The District Court's assignment order did not assign Andersen's legal malpractice cause of action to Alpine, nor did Alpine receive all legal rights and title to that action. Rather, the assignment order merely required Andersen to assign future proceeds from the other litigation to Alpine in an amount limited to the funds necessary to satisfy the deficiency judgment amount. Andersen failed to establish error in the District Court's order requiring Andersen, as judgment debtor, to assign future proceeds from the separate cause of action to Alpine, the judgment creditor. Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001), distinguishing Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935), and Youngblood v. Am. St. Ins. Co., 262 M 391, 866 P2d 203 (1993).

Judgment Not Creating Lien Prior to Execution on Personal Property: In settling the assets of a partnership, the District Court stated that its judgment constituted a lien against all personal property of the partnership. The remaining partner contended that based on this section, the court lacked authority to create a lien against personal property and that a judgment cannot become a lien against personal property until there has been an execution to enforce the judgment. Reversing, the Supreme Court agreed that there is no authority for a District Court to summarily convert a judgment to a lien against personal property, noting that a lien does not arise prior to execution on personal property. In re Estate of Bolinger, 1998 MT 303, 292 M 97, 971 P2d 767, 55 St. Rep. 1251 (1998).

Judgment Lien Extinguished by Operation of Law: In a case filed in order to have a series of conveyances declared fraudulent, the District Court erred by failing to determine that the judgment lien was extinguished by operation of law, terminating any rights of the plaintiff to the subject property. A judgment may be enforced for a period of 10 years from docketing; a writ of execution may be issued to enforce a judgment for a period of 6 years, which may be extended by the court for up to an additional 4 years; a judgment lien continues for 6 years following docketing of the judgment and then expires by operation of law (see 2001 amendment); a judgment may be extended past its 10-year duration only by filing a separate action to obtain a

new judgment on the existing judgment. Jones v. Arnold, 272 M 317, 900 P2d 917, 52 St. Rep. 779 (1995).

Lien Not Extinguished by Passage of Six Years — Diligent Defense: Pursuant to a court decision in 1982, the plaintiff Stoddard was granted specific performance of a contract to convey real property to him from the Gookins. The decision also remanded the case for a determination of damages due the Gookins. As ordered by the Supreme Court, the Gookins deeded the property to Stoddard in 1982. Stoddard in turn transferred a one-third interest in the property to his attorney. In 1986, the lower court determined that the Gookins were entitled to $104,000 in damages. To satisfy the judgment, the Gookins levied against Stoddard's two-thirds interest in the property and sold it for $88,000. The Gookins then sought to levy against the one-third interest in the property held by Huntley, Stoddard's attorney. The Supreme Court held that Huntley had notice that the 1982 decision created a lien on all real property of the judgment debtor, Stoddard. The Supreme Court ruled that the lien created by this section did not expire 6 years after the 1982 case because that case had been remanded to determine damages and the action to sell Huntley's interest in the property had been brought within 6 years of the 1986 decision (see 2001 amendment). The Gookins had diligently defended and pursued their rights and interest in the property. Laches did not apply. Gookin v. Huntley, 254 M 302, 837 P2d 412, 49 St. Rep. 807 (1992).

State Probate Jurisdiction of Federal Claim — Homestead Exemption — Priority of Liens: Creditor obtained a default judgment in the U.S. District Court for the Southern District of New York against an Alaska resident and attempted to execute on property in Montana that had subsequently come under Montana's exclusive probate jurisdiction. While the federal court retained jurisdiction over claims impacting the estate, the court could not seize and control property in the possession of the state probate court. It was within the jurisdiction of the state court to determine that the real property was subject to family protection allowances and exempt from execution. Although the lien was attached prior to debtor's death, the lien was extinguished upon the exercise of the family protection allowances, and the homestead allowance was exempt from and had priority over all other claims against the estate. In re Estate of Wilhelm, 233 M 255, 760 P2d 718, 45 St. Rep. 1468 (1988).

Equitable Ownership Interest Adequate for Lien Purposes: In order to determine whether the holder of an equitable title was an owner of real property for purposes of establishing a lien under this section, the Supreme Court decided an equitable ownership interest was sufficient. The intent of 25-13-501 is clearly to make a judgment lien operative against all real property interests. Hannah v. Martinson, 232 M 469, 758 P2d 276, 45 St. Rep. 1203 (1988).

What Interest Judgment Lien Attaches: A judgment lien can only attach to the actual interest of the judgment debtor. It cannot attach to an interest that does not exist, nor can it claim superiority as against a valid prior interest. A judgment lien can only bind an interest in real property when the debtor himself, during the existence of the judgment lien, could voluntarily transfer or alienate the interest. Hannah v. Martinson, 232 M 469, 758 P2d 276, 45 St. Rep. 1203 (1988), followed in Disler v. Ford Motor Credit Co., 2000 MT 304, 302 M 391, 15 P3d 864, 57 St. Rep. 1288 (2000).

Survival of Judgment Lien in Bankruptcy — When: Appellants entered a confession of judgment in favor of respondent bank, creating judgment liens on property on which respondent held a secured interest and on other property. In a subsequent bankruptcy proceeding, the bankruptcy court voided the judgment liens as preferential transfers under 11 U.S.C. 547, while preserving "liens and encumbrances" on the property in which respondent held a secured interest. In an action by respondent to execute its lien on secured property, appellant maintained the lien had been voided by bankruptcy court. The Supreme Court looked beyond the record and determined there was no preferential transfer as to the secured property and that the judgment lien on that property survived the bankruptcy court order. Citizens Bank of Mont. v. Brown, 218 M 151, 706 P2d 831, 42 St. Rep. 1477 (1985).

Effect of Discharge in Bankruptcy on Judicial Lien Created by Docketing Judgment: In September 1980, respondent obtained and docketed a judgment against appellants. In May 1981, appellants filed a joint declaration of homestead covering their residence. In August 1981, appellants filed a joint Chapter 7 bankruptcy petition. In December 1981, appellants obtained a personal discharge in bankruptcy. In January 1982, respondent obtained a Writ of Execution and notice of sale and levy upon appellants' residence. Appellants then filed suit against respondent, alleging that respondent's judgment had been voided by the discharge in bankruptcy. The Supreme Court ruled that docketing of the judgment under 25-9-301 had created a judicial lien, that because the appellants had not sought avoidance of respondent's lien

in the bankruptcy proceedings, the lien survived the discharge in bankruptcy, and that the lien can be enforced under 70-32-203. Reichert v. Koch, 202 M 167, 655 P2d 993, 40 St. Rep. 8 (1983).

Lien Not Applicable to Personal Property: The lien created by this section is not applicable in the case of a bequest of personal property to a legatee. Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958).

Automatic Attachment to Inherited Real Estate: A docketed judgment is a lien on real estate subsequently acquired by debtor as heir through distribution of his father's estate, even though there was nothing in the records of the County Clerk and Recorder showing the heir's interest. Title vests on death, subject to preexisting obligations. Gaines v. Van Demark, 106 M 1, 74 P2d 454 (1937).

Sale by Judgment Debtor: Where at the time real property was conveyed it was burdened with a judgment lien, the vendee took it subject to such lien, and when thereafter the property was sold on execution to satisfy the lien, the purchaser acquired all the rights the judgment debtor had in the property at the time the judgment became a lien upon it; hence the deed made by the debtor to his vendee did not give a title superior to that of the execution purchaser. Commercial Bank & Trust Co. v. Jordan, 85 M 375, 278 P 832 (1929).

No Application to Undisclosed Interest: Construing the provisions of this section with those of 25-13-501, an interest in real estate not disclosed of record is not subject to the lien of a docketed judgment. Piccolo v. Tanaka, 78 M 445, 253 P 890 (1927), distinguished in Gaines v. Van Demark, 106 M 1, 74 P2d 454 (1937).

After-Acquired Property — Automatic Attachment: A grantee under a deed absolute on its face but in fact a mortgage reconveyed the property by deed to the grantors and presented it for record 5 minutes before a second grantee of the same grantors presented his, also given as security for a loan. Immediately upon the filing for record of the first deed, the grantors were reinvested with the legal title and the judgment lien of a creditor at once attached to the interest of the wife therein and was therefore prior and superior to the claim of the second grantee under decree of foreclosure of his mortgage deed. Isom v. Larson, 78 M 395, 255 P 1049 (1927), distinguished in Gaines v. Van Demark, 106 M 1, 74 P2d 454 (1937).

Application to Undisclosed Common Interest: While the judgment lien provided for by this section attaches to property held by a tenant in common, it does not attach while the debtor's title is undisclosed of record. Isom v. Larson, 78 M 395, 255 P 1049 (1927), distinguished in Gaines v. Van Demark, 106 M 1, 74 P2d 454 (1937).

Expiration of Lien — Time Required for Execution: In order to preserve the priority obtained by a judgment lien on real property, a sale under execution must be made during the life of such lien, 6 years from the date of judgment (this section), or execution must have been issued and proceedings on judicial sale begun before the lien becomes barred, and to avoid operation of such bar, the sale must be proceeded with without any delay greater than is permitted by 25-13-404, the mere issuance of execution being of no avail. Marlowe v. Missoula Gas Co., 68 M 372, 219 P 1111 (1923).

Variance in Names of Vendor and Judgment Debtor — Actual Notice Required: The record of a money judgment against Mrs. C. J. E. cannot be held to have imparted constructive notice to a purchaser of real property from Anna E., the record title holder, that the property was impressed with a lien of judgment, unless the purchaser had actual knowledge that Mrs. C. J. E. and Anna E. were the same person. Poulos v. Lyman Bros. Co., 63 M 561, 208 P 598 (1922).

Time When Judgment Becomes Lien: A judgment is not a lien upon the real estate of the judgment debtor until it is entered on the judgment docket. McMillan v. Davenport, 44 M 23, 118 P 756 (1911); Sklower v. Abbott, 19 M 228, 47 P 901 (1897).

Presumption of Compliance With Statute: In the absence of anything to the contrary, it will be presumed that the Clerk of the District Court performed his official duty as prescribed in this section. Britannia Min. Co. v. USF&G Co., 43 M 93, 115 P 46 (1911).

Application to Federal Court Judgments: This section, by force of the federal statute, applies to the judgments of federal courts within the state. Great Falls Nat'l Bank v. McClure, 176 F 208 (9th Cir. 1910).

Merger of Attachment Lien in Judgment: The lien of an attachment is merged in that of the judgment recovered in the main action; and the judgment continues and may be enforced by execution and levy against any of the real property of the defendant, whether covered by the attachment or not, at any time within 6 years, but not afterward. (See 2001 amendment.) Great Falls Nat'l Bank v. McClure, 176 F 208 (9th Cir. 1910).

Deficiency Judgment Following Execution Sale: Under this section and sections 1571 through 1574, R.C.M. 1921 (since repealed), where real estate is sold under execution and bid in by the judgment creditor for less than the amount of his judgment, the judgment debtor may

transfer the interest remaining in him, during the period of redemption, to a third person, who, upon redemption within the statutory time, acquires the legal title free from the lien of a deficiency judgment theretofore entered. McQueeney v. Toomey, 36 M 282, 92 P 561 (1907).

Execution of Judgment — Right of Redemption: An execution sale transfers the legal title to the purchaser, leaving in the judgment debtor simply the right to redeem. McQueeney v. Toomey, 36 M 282, 92 P 561 (1907).

Granting of Judgment Not to Create Lien: The mere rendition of a judgment creates no lien. Wyman v. Jensen, 26 M 227, 67 P 114 (1902).

Setting Aside Fraudulent Conveyance — Necessity to Allege Docketing of Judgment: A complaint by a judgment creditor to set aside his debtor's conveyance of realty as fraudulent, which does not allege the docketing of the creditor's judgment, is insufficient. Wyman v. Jensen, 26 M 227, 67 P 114 (1902).

Attachment to Mining Claim: An unpatented mining claim being real estate, a judgment lien attaches to it under this section. Butte Hardware Co. v. Frank, 25 M 344, 65 P 1 (1901).

Lien Subject to Title in Other Persons: The lien given by this section is not a specific lien or a lien in rem. It affects or charges only the actual interest of the debtor in the land, the subject of the ownership, and does not create a preference over but is subject to all prior legal or equitable titles in other persons. Rockefeller v. Dellinger, 22 M 418, 56 P 822 (1899). See also Stockmen's Nat'l Bank v. Hofeldt, 54 M 205, 169 P 48 (1917).

Judgment Lien Subject to Prior Liens: A judgment lien is not a specific lien upon the real estate of the judgment debtor, so as to constitute a property in the land itself to the exclusion of a prior equitable title in a third person, but is a general lien, securing a right to levy or a preference over interests subsequently acquired and is subject to all prior liens, whether legal or equitable. Vaughn v. Schmalsle, 10 M 186, 25 P 102 (1890), followed in Hannah v. Martinson, 232 M 469, 758 P2d 276, 45 St. Rep. 1203 (1988).

Attorney General's Opinions

County Attorney Not Authorized to Compromise Support Order on Behalf of Obligee: A County Attorney, in carrying out his responsibility under URESA to represent obligees, may not enter into an agreement with an obligor or his agent to compromise a support order or to allow the sale of property on which a support order is a lien, since under 40-4-208 a support order may only be modified by a court. Further, 40-4-208 provides that a modification of a court support decree may affect only amounts that accrue subsequent to the motion for modification. 41 A.G. Op. 7 (1985).

Collateral References

Judgment *key* 771 through 774, 794 through 798.

49 C.J.S. Judgments §§126 through 128, 466 through 469, 488, et seq.

46 Am. Jur. 2d Judgments §§121, et seq., 360, et seq.

Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy. 51 ALR 4th 906.

Issuance or levy of execution as extending period of judgment lien. 77 ALR 2d 1064.

Interest of spouse in estate by entireties as subject to judgment lien in satisfaction of his or her individual debt. 75 ALR 2d 1188.

Solid mineral royalty as real or personal property for purposes of lien of judgment. 68 ALR 2d 735.

Mere rendition or formal entry or docketing of judgment as prerequisite to issuance of valid execution thereon. 65 ALR 2d 1162.

Subjection of community property or interest therein to lien of judgment for personal tort of spouse. 10 ALR 2d 988.

Right of holder of lien to proceeds of property insurance payable to owner not bound to carry insurance for former's benefit. 9 ALR 2d 299.

Vendee's interest under executory contract as subject to judgment lien. 1 ALR 2d 740.

Interest subject to a homestead right in others as subject to lien of judgment or to attachment or execution. 122 ALR 1150.

Rank of creditor's claim against decedent's estate for his rights in respect of property of estate as affected by reduction of his claim to judgment against executor or administrator, or levy of attachment or execution. 121 ALR 656.

Lien of judgment as affected by guardianship of incompetent for infant judgment debtor. 119 ALR 1212.

Creation of homestead rights in real estate as affecting existing judgment lien. 110 ALR 883.

Priority as between judgments of different dates as regards lien on subsequently acquired property. 67 ALR 1301.

25-9-302. Filing of transcript of docket in another county — lien — expiration.

Compiler's Comments

2003 Amendments — Composite Section: Chapter 45 in (1) in last sentence in exception clause substituted "61-6-123" for "subsection (2)" and increased duration of lien from "6 years" to "10 years from the date of the entry of the judgment". Amendment effective February 26, 2003.

Chapter 510 in (1) in last sentence increased lien time from 6 years to 10 years. Amendment effective October 1, 2003.

1995 Amendment: Chapter 60 in (2), near middle after "support obligation", inserted "or 10 years from entry of a lump-sum judgment or order for support arrears, whichever is later"; and made minor changes in style.

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

1993 Amendment: Chapter 631 at beginning of second sentence of (1) inserted exception clause; inserted (2) continuing lien for 10 years after termination of the support obligation; and made minor changes in style.

Preamble: The preamble attached to Ch. 631, L. 1993, provided: "WHEREAS, it is necessary to draft a composite bill containing unrelated sections in order to present the proposed program improvements in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills.

THEREFORE, the Legislature finds it appropriate to enact the following legislation."

Severability: Section 29, Ch. 631, L. 1993, was a severability clause.

Case Notes

Attachment in Second County — Transcript Not Required: Where an attachment issued by the court in one county was levied on real estate in another, it was not essential to the establishment of a lien to file a transcript of the judgment in the other county, as provided by this section. Andrews v. Smithson, 114 M 360, 136 P2d 531 (1943); A. M. Holter Hardware Co. v. Ontario Min. Co., 24 M 184, 61 P 3 (1900).

Oil and Gas Lease as After-Acquired Property: Treating a royalty interest in an oil and gas lease as an interest in land, a judgment lien will, under this section, attach though title thereto was not acquired until after the filing of the docket, provided the debtor's title was then disclosed of record. Johannes v. Dwire, 94 M 590, 23 P2d 971 (1933), distinguished in Gaines v. Van Demark, 106 M 1, 74 P2d 454 (1937).

Effect of Filing in Second County: The effect of filing in a county other than that in which a money judgment was rendered a certified transcript of the docket is to impress a lien upon all real property owned by the judgment debtor in the county of its filing, not exempt from execution, or acquired by him thereafter and prior to the expiration of the lien or the satisfaction of the judgment, the lien, however, not attaching to any specific piece of property. Poulos v. Lyman Bros. Co., 63 M 561, 208 P 598 (1922).

Attorney General's Opinions

Filing Abstracts of Judgment in Another County: An abstract of a Justice's Court judgment may be filed in the office of the Clerk of any District Court. Alternatively, the abstract may be filed and docketed in the county in which the judgment was rendered and may then be issued and filed with the District Court Clerk of another county pursuant to 25-9-302. Under either procedure, the Justice's Court judgment then becomes a lien on any real property owned by the judgment debtor in the county in which the abstract is filed. 37 A.G. Op. 24 (1977).

Collateral References

Judgment *key* 768(1), (2), 795, et seq.

49 C.J.S. Judgments §§462, 467, et seq.

46 Am. Jur. 2d Judgments §408.

25-9-303. Filing of transcript of docket of federal court — lien — expiration.

Compiler's Comments

2003 Amendment: Chapter 510 in (1) in third sentence increased lien time from 6 years to 10 years. Amendment effective October 1, 2003.

1995 Amendment: Chapter 60 in (2), near middle after "support obligation", inserted "or 10 years from entry of a lump-sum judgment or order for support arrears, whichever is later"; and made minor changes in style.

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

1993 Amendment: Chapter 631 at beginning of second sentence of (1) inserted exception clause; inserted (2) continuing lien for 10 years after termination of the support obligation; and made minor changes in style.

Preamble: The preamble attached to Ch. 631, L. 1993, provided: "WHEREAS, it is necessary to draft a composite bill containing unrelated sections in order to present the proposed program improvements in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills.

THEREFORE, the Legislature finds it appropriate to enact the following legislation."

Severability: Section 29, Ch. 631, L. 1993, was a severability clause.

Case Notes

Registration of Foreign Judgment — No New Judgment Created: Plaintiffs and a Wyoming bank entered into a consent judgment, which was subsequently registered in a Montana federal District Court. The bank then filed a transcript of the judgment in state District Court, and plaintiffs moved to quash the writ of execution, which was subsequently denied by the court. On appeal, the Supreme Court reversed and applied the analysis of Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union, 128 F. Supp. 697 (D.C. Hawaii 1955), ruling that registration under 28 U.S.C. 1963 constituted a purely ministerial act and that the 6-year period during which a writ of execution can be issued commences on the date on which the judgment was docketed in the original forum when the judgment was filed in Montana federal District Court. Robinson v. First Wyo. Bank, 274 M 307, 909 P2d 689, 52 St. Rep. 1245 (1995).

Collateral References

Judgment *key* 768(1).

49 C.J.S. Judgments §§462, 467.

28 U.S.C. §1962.

25-9-311. Entry of satisfaction of judgment in docket.

Case Notes

Defendant Not Allowed to Characterize Damages: Shilhaneks were injured in a vehicle accident, and defendants were ordered to pay more than $3 million in damages, including punitive damages. Defendants requested that the $750,000 tendered to Shilhaneks to date be allocated toward payment of the punitive award and that Shilhaneks be required to file a corresponding satisfaction of judgment with respect to the punitive damages award, in essence asserting that a defendant has the power to specifically designate payment toward a particular award. Defendants cited this section for the rule that a satisfaction of judgment must be provided by the party in whose favor judgment is entered and contended that under 28-1-1106 and 28-1-1225, the power lies with the debtor, not the creditor, when it comes to designating to which particular obligation a payment should be credited. The District Court denied the request, noting that Title 28 applies only to contractual obligations and that Title 25 governs obligations arising from judgments. The District Court did not abuse its discretion, given defendants' failure to provide a legal basis that would allow them to dictate how damages owed are characterized, the fact that defendants owed more than double the available insurance coverage and were obligated to pay the policy limits to satisfy the verdict, and that allocating 22% of the available insurance proceeds to the punitive damage award would have harsh tax consequences on Shilhaneks. Shilhanek v. D-2 Trucking, Inc., 2000 MT 16, 298 M 101, 994 P2d 1105, 57 St. Rep. 89 (2000).

Findings and Conclusions of Federal Bankruptcy Court Binding Upon State District Court — Forum Selection Clause in Bankruptcy Settlement Agreement Binding: After a federal Bankruptcy Court in Missouri issued a judgment against Lurie, Lurie and the liquidating trustee, Blackwell, held settlement negotiations resulting in three settlement agreements. The agreements were signed by Blackwell but not by Lurie. The Bankruptcy Court gave Lurie an extended period of time in which to close the agreements. Later, after the Bankruptcy Court issued findings and conclusions and an order finding that Lurie could not, as a matter of law, comply with the agreements and that certain release language in the agreements was therefore unenforceable, Lurie filed "releases" in a Montana District Court and moved the District Court to order the release of the judgment of the Bankruptcy Court, which had been filed against Lurie as a foreign judgment. The Supreme Court held that the District Court had properly concluded that the findings and conclusions and the order of the Missouri Bankruptcy Court were binding upon the District Court under 26-3-201. The Supreme Court further held that whether the three settlement agreements, unsigned but "released" by Lurie, satisfied the judgment against Lurie

under this section was not a matter for the District Court to decide because the settlement agreements contained forum selection clauses designating the federal Bankruptcy Court in Missouri as the only court in which issues relating to the enforcement of the agreements could be litigated. Blackwell v. Lurie, 284 M 351, 943 P2d 1318, 54 St. Rep. 916 (1997). See also Lurie v. Blackwell, 285 M 404, 948 P2d 1161, 54 St. Rep. 1215 (1997), and Lurie v. Sheriff, 2000 MT 103, 299 M 283, 999 P2d 342, 57 St. Rep. 414 (2000).

Judgment — Setoff Based on Stipulation: Plaintiff received a judgment against defendant. Defendant appealed, and the appeal was dismissed with prejudice when defendant advised the court that defendant did not wish to proceed with it. Defendant then filed a motion for a set off of an amount that plaintiff and defendant were both liable to pay to a third party. Defendant's attorney and plaintiff's attorney had entered into a stipulation that plaintiff was primarily liable and defendant secondarily liable for that amount and that if defendant paid it, the payment would be set off against any judgment granted plaintiff against defendant. The lower court properly set off that amount as partial satisfaction of the judgment. Although the motion was not made within the time required by the rules, it was properly considered because the Clerk of Court did not give defendant notice of entry of the judgment against defendant; therefore, the time for filing the motion had not commenced to run, since the motion was to be made within a certain time from the notice of entry of judgment. AAR Constr., Inc. v. Fergus Elec. Co-op., Inc., 215 M 102, 695 P2d 819, 42 St. Rep. 214 (1985).

Compelling Acknowledgment of Satisfaction: Until a judgment is in fact satisfied, the court has no authority to compel an acknowledgment of satisfaction or endorsement on the face of the judgment or on the margin of the record of judgment. Galbreath v. Armstrong, 121 M 387, 193 P2d 630 (1948).

Tender of Satisfaction Insufficient: "Satisfaction in fact" means payment of the judgment without the entry of record of such payment, and a tender of satisfaction is not the same as satisfaction. Galbreath v. Armstrong, 121 M 387, 193 P2d 630 (1948).

Tender of Satisfaction Refused: Where tender of satisfaction of judgment is refused, there can be no "satisfaction in fact" of the judgment by the payment of the money into court, but the debt must be extinguished under the provisions of 28-1-1225. Galbreath v. Armstrong, 121 M 387, 193 P2d 630 (1948).

Injunction Against Sale on Execution — Adequate Remedy at Law: A judgment debtor whose property was about to be sold under execution, after the judgment had been otherwise satisfied, had a plain, speedy, and adequate remedy at law, and therefore injunction did not lie to restrain the sale. Donovan v. McDevitt, 36 M 61, 92 P 49 (1907).

Duplication of Judgments — Satisfaction of All: Where a judgment once entered upon a verdict is again entered nunc pro tunc and is affirmed on appeal, the appellant cannot complain that two judgments stand against him upon the same cause of action and verdict, as under this section, upon satisfaction of said judgment, entry of satisfaction must be made, showing a cancellation of all judgments entered upon said verdict. Work v. N. Pac. R.R., 11 M 513, 29 P 280 (1891).

Collateral References

Judgment *key* 894, 897.

49 C.J.S. Judgments §§580, 581.

47 Am. Jur. 2d Judgments §1005.

Remedy and procedure to avoid release or satisfaction of judgment. 9 ALR 2d 553.

Part 4
Periodic Payment of Damages — Medical Malpractice Damage Limitations

Part Compiler's Comments

Severability: Section 7, Ch. 634, L. 1987, was a severability section.

Part Law Review Articles

Structured Settlements in Practice, Carestia, 46 Mont. L. Rev. 25 (1985).

Part Collateral References

Propriety and effect of "structured settlements" whereby damages are paid in installments over a period of time, and attorneys' fees arrangements in relation thereto. 31 ALR 4th 95.

25-9-403. Request for periodic payment of future damages — nonmalpractice claims.

Compiler's Comments

1995 Amendment: Chapter 461 in (1), at beginning, inserted exception clause; and made minor changes in style.

Saving Clause: Section 5, Ch. 461, L. 1995, was a saving clause.

Severability: Section 6, Ch. 461, L. 1995, was a severability clause.

Applicability: Section 7, Ch. 461, L. 1995, provided: "[This act] applies to causes of action arising on or after October 1, 1995."

25-9-411. Medical malpractice noneconomic damages limitation.

Compiler's Comments

1997 Amendment: Chapter 429 deleted former (2)(b)(ii) that read: "second, reductions under 27-1-703"; in (2)(b)(ii) substituted "second, setoffs and credits" for "third, setoffs and credits"; and made minor changes in style. Amendment effective on occurrence of contingency.

Preamble: The preamble attached to Ch. 429, L. 1997, provided: "WHEREAS, efforts of the Legislature to amend the comparative negligence statute, which is premised on a modified joint and several liability scheme, have repeatedly been struck down by the Montana Supreme Court; and

WHEREAS, the Montana Supreme Court rulings prohibiting the consideration of fault attributable to nonparties impair the effectiveness of the current modified joint and several liability system in Montana; and

WHEREAS, the Legislature intends that the policy of the state should be a system of comparative fault in which persons are held responsible only to the extent to which they cause or contribute to the harm; and

WHEREAS, the current system of joint and several liability, which apportions all liability only among parties to the action, fails to apportion liability among all tortfeasors according to their equitable share of fault; and

WHEREAS, the Legislature recognizes that public policy favors fair settlements that accurately reflect the liability of settled or released parties; and

WHEREAS, the Legislature is concerned with the present inequitable results of solvent defendants having to pay for the liability of insolvent, immune, or settled parties; and

WHEREAS, the present system of joint and several liability for all tort actions does not reflect the state's policy of liability in proportion to fault; and

WHEREAS, the Legislature recognizes that joint and several liability should be retained for certain situations; and

WHEREAS, at least ten other states have abrogated the doctrine of joint and several liability, except for specific situations; and

WHEREAS, the Legislature has the power to alter tort causes of action to promote legitimate state interests.

THEREFORE, the Legislature declares that the doctrine of joint and several liability is abolished, except for specific causes of action, and is replaced with a comparative fault system utilizing the principles of several liability."

Severability: Section 9, Ch. 429, L. 1997, was a severability clause.

Saving Clause: Section 5, Ch. 461, L. 1995, was a saving clause.

Severability: Section 6, Ch. 461, L. 1995, was a severability clause.

Applicability: Section 7, Ch. 461, L. 1995, provided: "[This act] applies to causes of action arising on or after October 1, 1995."

25-9-412. Periodic payment of future damages in medical malpractice cases.

Compiler's Comments

Saving Clause: Section 5, Ch. 461, L. 1995, was a saving clause.

Severability: Section 6, Ch. 461, L. 1995, was a severability clause.

Applicability: Section 7, Ch. 461, L. 1995, provided: "[This act] applies to causes of action arising on or after October 1, 1995."

Part 5
Uniform Enforcement of Foreign Judgments

25-9-503. Filing and status of foreign judgments.

Case Notes

Erroneous Denial of Motion to Quash Writ of Execution: A federal District Court allowed a default judgment against Clark in favor of plaintiffs. In order to execute the judgment on Clark's

Montana assets, plaintiffs docketed the judgment in federal District Court in Montana, and about the same time, plaintiffs brought an action in Montana state court, asserting that Clark fraudulently transferred real property in order to avoid reimbursing plaintiffs. Following denial of the fraudulent transfer claim in Gulf Ins. Co. v. Clark, 2001 MT 45, 304 M 264, 20 P3d 780 (2001), plaintiffs docketed the federal judgment in Lake County District Court, requesting and receiving a writ of execution, and a levying officer than executed on Clark's accounts. Upon notice of the levy on the accounts, Clark moved to quash the writ of execution, asserting that the federal judgment was invalid, that the writ was void because the federal District Court never obtained proper personal jurisdiction, and that service by publication was inadequate because the federal order required personal service. The state District Court concluded that Clark cited no authority allowing a state court to invalidate a federal District Court's judgment when the federal transcription of judgment is filed for execution in state court, so Clark's motion to quash was denied, and Clark appealed. As set out in Carr v. Bett, 1998 MT 266, 291 M 326, 970 P2d 1017 (1998), a party seeking to vacate a foreign judgment filed in Montana state courts may do so only upon defenses that make the underlying judgment invalid or unenforceable, which include a lack of personal or subject matter jurisdiction of the rendering court, fraud in the procurement of the judgment, lack of due process, or satisfaction. However, if a foreign judgment is valid, it should have the same credit, validity, and effect in every other court of the United States that it had in the court in which it was pronounced. Thus, the state District Court erred in concluding that it had no authority to review whether the federal court had personal jurisdiction over Clark. The Supreme Court then went on to consider whether Clark was properly subject to the federal court's jurisdiction in order to determine if the federal default judgment was valid. Service by publication did not provide the federal court with jurisdiction to enter the default judgment because that service was not properly completed and was thus ineffective. In its order granting service by publication, the federal court concluded that service could not be accomplished other than by publication, effectively determining, based on plaintiffs' representations, that personal service had not been accomplished. Therefore, the state District Court committed reversible error when it failed to hold that service by publication was not properly accomplished pursuant to the federal court order. Gulf Ins. Co. v. Clark, 2003 MT 87, 315 M 121, 68 P3d 673 (2003).

Defenses Must Be Directed at Validity of Foreign Judgment: Citing Durfee v. Duke, 375 US 106 (1963), which held that full faith and credit generally requires each state to give to a judgment of a sister state at least the res judicata effect that the judgment would be accorded the state that rendered it, the Montana Supreme Court held that the only defenses that may be raised to destroy the full faith and credit obligation owed to a final judgment are those directed at the validity of the judgment, such as lack of personal or subject matter jurisdiction, fraud, lack of due process, satisfaction, or other grounds that make the foreign judgment invalid or unenforceable. Carr v. Bett, 1998 MT 266, 291 M 326, 970 P2d 1017, 55 St. Rep. 1098 (1998).

Full Faith and Credit Afforded Out-of-State Renewable Child Support Judgment — Res Judicata Applicable: Article IV, sec. 1, U.S. Const., provides that full faith and credit be given in each state to the public acts, records, and judicial proceedings of every other state. As restated in Baker v. Gen. Motors Corp., 522 US 222, 139 L Ed 2d 580, 118 S Ct 657 (1998), a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. When issues of jurisdiction have been determined by one court, the doctrine of res judicata precludes a second court from considering jurisdiction as long as the first court fully and fairly considered the issue, and that judgment, as to jurisdiction, is entitled to full faith and credit in the second court. In the present case, a Utah renewable child support judgment, in which the Utah court established jurisdiction of the parties, was entitled to full faith and credit in Montana, despite contentions by the husband that he no longer had minimum contacts with Utah after moving to Montana. The jurisdiction arguments raised before the Montana Supreme Court were identical to the arguments that were previously raised, fairly considered, and finally decided in Utah, precluding relitigation by the Montana court under res judicata. In re Child Support of Mason, 1998 MT 192, 290 M 253, 964 P2d 743, 55 St. Rep. 803 (1998).

No State Jurisdiction to Enforce Tribal Court Judgment on Reservation Via Uniform Foreign Money-Judgments Recognition Act: Two non-Indian plaintiffs obtained judgments in the Fort Peck Tribal Court against Anderson, an enrolled tribal member living within the boundaries of the Fort Peck Indian Reservation, for Anderson's purchase of cattle feed supplement and for work performed on the reservation in developing water sources in Anderson's pastures. Plaintiffs then filed suit in District Court against Anderson under the Uniform Foreign Money-Judgments Recognition Act (Recognition Act), requesting that the court recognize the tribal court judgments and give full faith and credit to the judgments, with rights of full

enforcement pursuant to Montana law. The District Court ruled that the tribal court judgments must be recognized under the Recognition Act because the Fort Peck Tribes fall within the definition of "foreign state". The court also concluded that even though the Recognition Act does not apply to tribal court judgments, the judgments must be recognized under the doctrine of comity. On appeal, the Supreme Court reversed, ruling that the District Court erred in determining that the tribal court judgments could be enforced within the exterior boundaries of the Fort Peck Indian Reservation by the provisions of the Recognition Act. If the judgment debtor is a tribal member living within the exterior boundaries of the reservation, the tribal court has exclusive jurisdiction to enforce a tribal court judgment against assets owned by the member and located within the boundaries of the reservation. Under the Recognition Act, Montana courts have no jurisdiction to enforce a judgment within the jurisdiction of the court rendering the judgment. Anderson v. Engelke, 1998 MT 24, 287 M 283, 954 P2d 1106, 55 St. Rep. 86 (1998).

Tribal Support Order Entitled to Full Faith and Credit: The lower court held that the state could seek to enforce a tribal court's child support order only by initiating an action in District Court rather than pursuing administrative enforcement. The Supreme Court held that under the Child Support Enforcement Act, the tribal support order was entitled to full faith and credit and therefore could be enforced by the simplified registration procedures of the Act and that, additionally, income could be withheld without court action under the Montana Child Support Enforcement Act. In re Support Obligation of Day v. St., 272 M 170, 900 P2d 296, 52 St. Rep. 680 (1995), distinguishing Wippert v. Blackfeet Tribe, 201 M 299, 654 P2d 512 (1982). However, see Anderson v. Engelke, 1998 MT 24, 287 M 283, 954 P2d 1106, 55 St. Rep. 86 (1998), ruling that a tribal court judgment cannot be enforced via the Uniform Foreign Money-Judgments Recognition Act against assets owned by a tribal member and located within the boundaries of a reservation.

Attorney General's Opinions

Authentication of Foreign Judgment: A foreign judgment filed under the Uniform Enforcement of Foreign Judgments Act must be authenticated in accordance with the provisions of Rule 44(a)(1), M.R.Civ.P. (Title 25, ch. 20). 44 A.G. Op. 38 (1992).

Fees Collectible Upon Filing of Foreign Judgment: Once a foreign judgment has been properly filed pursuant to this section, the Clerk of Court is required to treat the foreign judgment as a domestic judgment. The $60 fee paid at the time of filing replaces the filing fee paid at the commencement of an action or appearance of a defendant under 25-1-201(1)(a), the fee collected on the entry of judgment from the prevailing party under 25-1-201(1)(c), and the fee for filing and docketing a transcript of judgment or abstract of judgment from another court under 25-1-201(1)(h). The Clerk should therefore collect the $60 fee required in 25-9-506, the $5 fee for issuing an execution or order of sale on a foreclosure of a lien under 25-1-201(1)(i), and any other fees for services requested by the judgment creditor in the enforcement of the judgment. 44 A.G. Op. 38 (1992).

Tribal Court Judgment Not to Be Filed as Foreign Judgment — Exception: A judgment, decree, or order of an Indian tribal court may not be filed as a foreign judgment under the Uniform Enforcement of Foreign Judgments Act unless the judgment, decree, or order concerns an Indian child custody proceeding. 44 A.G. Op. 15 (1991).

25-9-504. Notice of filing.

Case Notes

Dismissal for Lack of Subject Matter Jurisdiction — Barton Doctrine Followed — Substantive Defenses Irrelevant: Lurie filed a complaint in state court alleging abuse of process against Blackwell, individually and in his capacity as liquidating trustee. Blackwell removed the case to federal District Court, which dismissed the complaint and remanded to state court. The state District Court granted Blackwell's motion to dismiss based on the Barton doctrine that provides that leave of the appointing forum must be obtained by any party wishing to institute an action in a nonappointing forum against a trustee for acts done in the trustee's official capacity and with the trustee's authority. The Supreme Court upheld the dismissal and refused to rule on Blackwell's substantive defenses, once it determined that it had no subject matter jurisdiction. Lurie v. Blackwell, 285 M 404, 948 P2d 1161, 54 St. Rep. 1215 (1997).

Capacity of Plaintiff Not Stated in Notice of Filing of Foreign Judgment — Foreign Judgment Not Defective: After a foreign judgment of a Missouri Bankruptcy Court was filed against him, Lurie argued that the judgment was defective because the notice of filing failed to disclose that the plaintiff, a liquidating bankruptcy trustee, acted in his capacity as trustee. The Supreme Court held that there is nothing in this section that requires the capacity of the plaintiff to be stated. The Supreme Court also noted that under Rule 17(a), M.R.Civ.P. (Title 25, ch. 20),

Blackwell, the bankruptcy trustee, was allowed to bring suit in his own name and also pointed out that the judgment of the Bankruptcy Court clearly identified Blackwell as the liquidating trustee and that because of the prior bankruptcy proceedings in which Lurie participated, Lurie must have known or should have known that Blackwell was bringing the action in his capacity as liquidating trustee and not in his individual capacity. Blackwell v. Lurie, 284 M 351, 943 P2d 1318, 54 St. Rep. 916 (1997).

Findings and Conclusions of Federal Bankruptcy Court Binding Upon State District Court — Forum Selection Clause in Bankruptcy Settlement Agreement Binding: After a federal Bankruptcy Court in Missouri issued a judgment against Lurie, Lurie and the liquidating trustee, Blackwell, held settlement negotiations resulting in three settlement agreements. The agreements were signed by Blackwell but not by Lurie. The Bankruptcy Court gave Lurie an extended period of time in which to close the agreements. Later, after the Bankruptcy Court issued findings and conclusions and an order finding that Lurie could not, as a matter of law, comply with the agreements and that certain release language in the agreements was therefore unenforceable, Lurie filed "releases" in a Montana District Court and moved the District Court to order the release of the judgment of the Bankruptcy Court, which had been filed against Lurie as a foreign judgment. The Supreme Court held that the District Court had properly concluded that the findings and conclusions and the order of the Missouri Bankruptcy Court were binding upon the District Court under 26-3-201. The Supreme Court further held that whether the three settlement agreements, unsigned but "released" by Lurie, satisfied the judgment against Lurie under 25-9-311 was not a matter for the District Court to decide because the settlement agreements contained forum selection clauses designating the federal Bankruptcy Court in Missouri as the only court in which issues relating to the enforcement of the agreements could be litigated. Blackwell v. Lurie, 284 M 351, 943 P2d 1318, 54 St. Rep. 916 (1997). See also Lurie v. Blackwell, 285 M 404, 948 P2d 1161, 54 St. Rep. 1215 (1997), and Lurie v. Sheriff, 2000 MT 103, 299 M 283, 999 P2d 342, 57 St. Rep. 414 (2000).

25-9-506. Fees.

Compiler's Comments

2005 Amendment: Chapter 163 deleted former (2) that read: "(2) A person filing a judgment against a customer of a foreign capital depository, as defined in 32-8-103, shall pay to the clerk of court a fee of $2,500"; and made minor changes in style. Amendment effective October 1, 2005.

2001 Amendment: Chapter 585 inserted (4) requiring fees to be forwarded to state treasurer for deposit in state general fund. Amendment effective July 1, 2002.

Code Commissioner Instruction: Pursuant to sec. 47, Ch. 257, L. 2001, in (4) in version effective July 1, 2002, the code commissioner changed "state treasurer" to "department of revenue".

Saving Clause: Section 55, Ch. 585, L. 2001, was a saving clause.

1997 Amendment: Chapter 382 at beginning of (1) inserted exception clause; inserted (2) establishing a $2,500 fee for filing a judgment against a customer of a foreign capital depository; and made minor changes in style.

1997 Statement of Intent: The statement of intent attached to Ch. 382, L. 1997, provided: "A statement of intent is required for this bill because the bill gives the state banking board and the department of commerce authority to adopt administrative rules to effectuate the purposes, policies, and provisions of this bill. The legislature intends that rules be adopted by the state banking board to govern the processes and procedures for both issuing a charter and for suspending or revoking a charter for a foreign capital depository. Because the department of commerce bears responsibility for the regulation and supervision of a foreign capital depository, the legislature finds it prudent to delegate rulemaking authority to that department with respect to the conduct of examinations and inspections, for mandatory reports, and for other related administrative matters. Because the financial privacy of depository customers must be afforded the highest protection possible within the parameters of state and federal law and because an applicant for a depository charter must be provided a readily discernable combination of certainty and flexibility with respect to the services provided by a depository, a blanket delegation of rulemaking authority is not granted to either the board or the department."

Severability: Section 87, Ch. 382, L. 1997, was a severability clause.

Attorney General's Opinions

Distribution of Foreign Judgment Filing Fee: The $60 fee collected by the Clerk of Court at the time of filing a foreign judgment must be distributed in accordance with the provisions of 25-1-201(2). (See 2001 amendment.) 44 A.G. Op. 38 (1992).

Fees Collectible Upon Filing of Foreign Judgment: Once a foreign judgment has been properly filed pursuant to 25-9-503, the Clerk of Court is required to treat the foreign judgment as a domestic judgment. The $60 fee paid at the time of filing replaces the filing fee paid at the commencement of an action or appearance of a defendant under 25-1-201(1)(a), the fee collected on the entry of judgment from the prevailing party under 25-1-201(1)(c), and the fee for filing and docketing a transcript of judgment or abstract of judgment from another court under 25-1-201(1)(h). The Clerk should therefore collect the $60 fee required in this section, the $5 fee for issuing an execution or order of sale on a foreclosure of a lien under 25-1-201(1)(i), and any other fees for services requested by the judgment creditor in the enforcement of the judgment. 44 A.G. Op. 38 (1992).

Part 6
Uniform Foreign Money-Judgments Recognition Act

Part Compiler's Comments

Source: This part is based on the Uniform Foreign Money-Judgments Act.

Part Case Notes

No State Jurisdiction to Enforce Tribal Court Judgment on Reservation Via Uniform Foreign Money-Judgments Recognition Act: Two non-Indian plaintiffs obtained judgments in the Fort Peck Tribal Court against Anderson, an enrolled tribal member living within the boundaries of the Fort Peck Indian Reservation, for Anderson's purchase of cattle feed supplement and for work performed on the reservation in developing water sources in Anderson's pastures. Plaintiffs then filed suit in District Court against Anderson under the Uniform Foreign Money-Judgments Recognition Act (Recognition Act), requesting that the court recognize the tribal court judgments and give full faith and credit to the judgments, with rights of full enforcement pursuant to Montana law. The District Court ruled that the tribal court judgments must be recognized under the Recognition Act because the Fort Peck Tribes fall within the definition of "foreign state". The court also concluded that even though the Recognition Act does not apply to tribal court judgments, the judgments must be recognized under the doctrine of comity. On appeal, the Supreme Court reversed, ruling that the District Court erred in determining that the tribal court judgments could be enforced within the exterior boundaries of the Fort Peck Indian Reservation by the provisions of the Recognition Act. If the judgment debtor is a tribal member living within the exterior boundaries of the reservation, the tribal court has exclusive jurisdiction to enforce a tribal court judgment against assets owned by the member and located within the boundaries of the reservation. Under the Recognition Act, Montana courts have no jurisdiction to enforce a judgment within the jurisdiction of the court rendering the judgment. Anderson v. Engelke, 1998 MT 24, 287 M 283, 954 P2d 1106, 55 St. Rep. 86 (1998).

25-9-602. Definitions.

Case Notes

Indian Tribes Not Foreign States With Respect to Recognition Act: Day argued that the state could not collect unpaid child support from him because the statute of limitations for tribal court judgments was 5 years and therefore Montana's 10-year limitations period did not apply. The lower court applied the Uniform Foreign Money-Judgments Recognition Act to the case and concluded that an Indian tribe is a foreign state and because the tribal court's judgment was no longer enforceable within the tribe's boundaries, then it was not enforceable under the Act. The Supreme Court held that in regard to tribal support orders, the federal Full Faith and Credit for Child Support Orders Act specifically defines Indian tribes as states and not foreign states and held that the longer statute of limitations between two states applied and therefore Montana could seek unpaid child support from Day. The Supreme Court also held that the federal Act, although not enacted at the time that the support accrued, was in effect at the time of the trial and should have been applied by the lower court. In re Support Obligation of Day v. St., 272 M 170, 900 P2d 296, 52 St. Rep. 680 (1995).

25-9-603. Applicability.

Official Comments

Where an appeal is pending or the defendant intends to appeal, the court of the enacting state has power to stay proceedings in accordance with section 6 [25-9-607] of the Act.

Compiler's Comments

2005 Amendment: Chapter 163 near beginning after "judgment" deleted "other than a judgment obtained against a customer of a foreign capital depository, as defined in 32-8-103"; and made minor changes in style. Amendment effective October 1, 2005.

1997 Amendment: Chapter 382 near beginning, after "judgment", inserted "other than a judgment obtained against a customer of a foreign capital depository, as defined in 32-8-103".

1997 Statement of Intent: The statement of intent attached to Ch. 382, L. 1997, provided: "A statement of intent is required for this bill because the bill gives the state banking board and the department of commerce authority to adopt administrative rules to effectuate the purposes, policies, and provisions of this bill. The legislature intends that rules be adopted by the state banking board to govern the processes and procedures for both issuing a charter and for suspending or revoking a charter for a foreign capital depository. Because the department of commerce bears responsibility for the regulation and supervision of a foreign capital depository, the legislature finds it prudent to delegate rulemaking authority to that department with respect to the conduct of examinations and inspections, for mandatory reports, and for other related administrative matters. Because the financial privacy of depository customers must be afforded the highest protection possible within the parameters of state and federal law and because an applicant for a depository charter must be provided a readily discernable combination of certainty and flexibility with respect to the services provided by a depository, a blanket delegation of rulemaking authority is not granted to either the board or the department."

Severability: Section 87, Ch. 382, L. 1997, was a severability clause.

Case Notes

Indian Tribes Not Foreign States With Respect to Recognition Act: Day argued that the state could not collect unpaid child support from him because the statute of limitations for tribal court judgments was 5 years and therefore Montana's 10-year limitations period did not apply. The lower court applied the Uniform Foreign Money-Judgments Recognition Act to the case and concluded that an Indian tribe is a foreign state and because the tribal court's judgment was no longer enforceable within the tribe's boundaries, then it was not enforceable under the Act. The Supreme Court held that in regard to tribal support orders, the federal Full Faith and Credit for Child Support Orders Act specifically defines Indian tribes as states and not foreign states and held that the longer statute of limitations between two states applied and therefore Montana could seek unpaid child support from Day. The Supreme Court also held that the federal Act, although not enacted at the time that the support accrued, was in effect at the time of the trial and should have been applied by the lower court. In re Support Obligation of Day v. St., 272 M 170, 900 P2d 296, 52 St. Rep. 680 (1995).

25-9-604. Recognition and enforcement.

Official Comments

The method of enforcement will be that of the Uniform Enforcement of Foreign Judgments Act of 1948 in a state having enacted that Act.

25-9-605. Grounds for nonrecognition.

Official Comments

The first ground for non-recognition under subsection (a) [(1)] has been stated authoritatively by the Supreme Court of the United States in Hilton v. Guyot, 159 U.S. 113, 205, 16 S.Ct. 139, 40 L.Ed. 95 (1895). As indicated in that decision, a mere difference in the procedural system is not a sufficient basis for non-recognition. A case of serious injustice must be involved.

The last ground for non-recognition under subsection (b) [(2)] authorizes a court to refuse recognition and enforcement of a judgment rendered in a foreign country on the basis only of personal service when it believes the original action should have been dismissed by the court in the foreign country on grounds of forum non conveniens.

25-9-606. Personal jurisdiction.

Official Comments

New bases of jurisdiction have been recognized by courts in recent years. The Act does not codify all these new bases. Subsection (b) [(2)] makes clear that the Act does not prevent the courts in the enacting state from recognizing foreign judgments rendered on the bases of jurisdiction not mentioned in the Act.

25-9-609. Uniformity of interpretation.

Compiler's Comments

2005 Amendment: Chapter 163 in beginning deleted "Except for the provisions in part 8 of this chapter pertaining to a customer of a foreign capital depository, as defined in 32-8-103"; and made minor changes in style. Amendment effective October 1, 2005.

1997 Amendment: Chapter 382 at beginning inserted exception clause.

1997 Statement of Intent: The statement of intent attached to Ch. 382, L. 1997, provided: "A statement of intent is required for this bill because the bill gives the state banking board and the department of commerce authority to adopt administrative rules to effectuate the purposes, policies, and provisions of this bill. The legislature intends that rules be adopted by the state banking board to govern the processes and procedures for both issuing a charter and for suspending or revoking a charter for a foreign capital depository. Because the department of commerce bears responsibility for the regulation and supervision of a foreign capital depository, the legislature finds it prudent to delegate rulemaking authority to that department with respect to the conduct of examinations and inspections, for mandatory reports, and for other related administrative matters. Because the financial privacy of depository customers must be afforded the highest protection possible within the parameters of state and federal law and because an applicant for a depository charter must be provided a readily discernable combination of certainty and flexibility with respect to the services provided by a depository, a blanket delegation of rulemaking authority is not granted to either the board or the department."

Severability: Section 87, Ch. 382, L. 1997, was a severability clause.

Part 7
Uniform Foreign-Money Claims Act

Part Official Comments

PREFATORY NOTE

This Act facilitates uniform judicial determination of claims expressed in the money of foreign countries. It requires judgments and arbitration awards in these cases to be entered in the foreign money rather than in United States dollars. The debtor may pay the judgment in dollars on the basis of the rate of exchange prevailing at the time of payment.

A Uniform Act governing foreign-money claims has become desirable because:

These claims have increased greatly as a result of the growth in international trade.

Values of foreign moneys as compared to the United States dollar fluctuate more over shorter periods of time than was formerly the case.

United States jurisdictions treat recoveries on foreign-money claims differently than most of our major trading partners.

A lack of uniformity among the states in resolving foreign-money claims stimulates forum shopping and creates a lack of certainty in the law.

American courts historically follow one of two different rules in selecting a time during litigation for converting foreign money into United States dollars. These are called the "breach day rule" - the date the money should have been paid - and the "judgment date rule" - when judgment is entered. Many other countries use the "payment day rule" - when the judgment is paid. See Miliangos v. George Frank (Textiles) Ltd., (1976) A.C. 1007. The merits of this approach have begun to be recognized in this country. The payment day rule is endorsed by this Act.

The three rules produce wildly disparate results in terms of making an injured person whole. This is illustrated by the following example:

An American citizen (A) owes 18,790 pounds sterling to a British corporation (BCo) suing in New York, and the pound is falling against the dollar. Due to the declining value of the pound, the three rules worked out as follows:

Date	Rate of Exchange	BCo Gets
Breach day	Pound = $2.20	$41,338
Judgment day	Pound = $1.50	$28,185
Payment day	Pound = $1.20	$22,548

A judgment of $41,338 may be entered based on the breach day rule. However, the payment in dollars was worth 34,449 pounds ($41,338 divided by $1.20) when eventually received, an excess of L15,659 over the actual loss.

This example is adapted from an actual case. See Comptex v. LaBow, 783 F.2d 333 (2d Cir. 1986). The facts are simplified.

If conversion is delayed until the date of actual payment, the creditor is recompensed with its own money or the financial equivalent in United States dollars; the debtor bears the risk of a fall in the debtor's money or reaps the benefit of a rise therein. If conversion is made at breach or judgment date, the risk of fluctuation in value of a money not of its selection falls on the creditor.

The real issue is where the risk of exchange rate fluctuation should be placed. This Act recognizes the right of the parties to agree upon the money that governs their relationship. In the absence of an agreement, the Act adopts the rule of giving the aggrieved party the amount to which it is entitled in its own money or the money in which the loss was suffered.

The principle of the Act is to restore the aggrieved party to the economic position it would have been in had the wrong not occurred. Thus, for example, if oil is spilled on the coast of France by an American ship, the loss is felt by the French in francs and a judgment of an American court for damages should reflect this fact. Courts should enter judgments in the money customarily used by the injured person.

The payment day rule, on which the Act is based, meets the reasonable expectations of the parties involved. It places the aggrieved party in the position it would have been in financially but for the wrong that gave rise to the claim. States which adopt it will align themselves with most of the major civilized countries of the world.

The Act also covers other issues that may arise in connection with foreign-money claims. These include revalorization and interest. In order to determine aliquot shares for distributions from funds created in insolvency and estate proceedings, the Act specifies use of the date the distribution proceeding was initiated for conversion of foreign money into United States dollars.

Part Compiler's Comments

Source: This part is based on the Uniform Foreign-Money Claims Act.

Severability: Section 16, Ch. 152, L. 1993, was a severability clause.

Applicability: Section 17, Ch. 152, L. 1993, provided: "[This act] [25-9-701 through 25-9-715] applies to actions and distribution proceedings commenced after October 1, 1993."

25-9-702. Definitions.

Official Comments

1. "Action." A suit or arbitration may be legal or equitable in nature, but it must be based on a pecuniary claim.

2. "Bank-offered spot rate" is the rate at which a bank will sell the requisite amount of foreign money for immediate or nearly immediate use by the buyer.

3. "Conversion date." Exchange rates may fluctuate from day to day. A date must be picked for calculating the value of foreign money in terms of United States dollars. As used in the Act, "conversion date" means the day before a foreign-money claim is paid or set-off. The day refers to the time period of the place of the payor, not necessarily that of the recipient. The exchange rate prevailing at or near the close of business on the banking day before the day payment is made will be well known at the time of payment. See Comment 2 to Section 7 [25-9-708].

4. "Distribution proceeding." In keeping with the concept underlying Section 2 [25-9-703], the coverage of this statute is limited to judicial actions and nonjudicial proceedings which involve the creation of a fund from which pro-rata distributions are made to claimants. As provided in Section 8 [25-9-709], a different conversion date is required where either input to or outgo from a fund involves two or more different moneys. Thus, the term includes a mortgage foreclosure proceeding, judicial or under a trust deed, distribution of property in divorce and child support proceedings, distributions in the administration of a trust or a decedent's estate, an assignment for the benefit of creditors, an equity receivership, a liquidation by a statutory successor, a voluntary dissolution of a business or a nonprofit enterprise or the like when in each case a fund must be shared among claimants and where, usually, the fund will not satisfy all claimants of the same class. An asset or a liability of the fund must also involve one or more foreign-money claims, but not all of the claims can be in the same money.

5. "Foreign money." Since only the federal government has the power to coin money and regulate the value thereof, the term "foreign" means a government other than that of the United States of America. Special Drawing Rights of the International Monetary Fund are foreign money even though the United States is a member of the Fund. Foreign governments included are all those whose moneys are, in the currency markets of the world, exchangeable for the money of other currencies even though the government is not recognized by the United States.

6. "Foreign-money claim." The term "claim" is not limited to any one party to an action or a distribution proceeding and may be asserted by a plaintiff or a defendant or by a party to an arbitration or distribution proceeding. It may be based on a foreign judgment, or sound in contract, quasi-contract, or tort.

7. "Money." The definition includes composite currencies such as European Currency Units created by agreement of the governments that are members of the European Monetary System or the Special Drawing Rights created under the auspices of the International Money Fund. These

are "stores of value" used to determine the quantity of payment in some international transactions.

8. "Money of the claim." See Section 4 [25-9-705] and the Comment thereto.

9. "Party." This combines the Uniform Commercial Code's definitions of "person" and "organization," but is limited to those who are parties to transactions or involved in events which could give rise to a foreign-money claim.

10. "Rate of Exchange." A free market rate is to be used rather than an official rate if both exist. Some countries have transactional differences in exchange rates with slightly different rates; for example, in Belgium one rate prevails for commercial and another for financial transactions. Both rates are recognized in money market transactions. The last sentence of the definition indicates that the rate appropriate to the transaction is the rate to be used.

11. "Spot rate" is the term used in the financial markets of the United States for the rate of exchange for immediate or nearly immediate transfers from one money to another, as distinguished from the rates for future options or future deliveries.

In the foreign exchange markets, as in the stock markets, quotations are either "bid" or "ask," and the spread between is where the dealer makes a profit. An "offered spot rate" is the rate at which the offeror will sell the particular money. It is, of course, higher than the rate at which that person will buy the same money. "Spot" refers to the time the trade is made, not the time for settlement, which in spot transactions is often two days after the date of the trade.

12. "State." The definition, as in other Uniform Laws, is extended to include areas given the same, or nearly the same, treatment in law as the states.

25-9-703. Scope.

Official Comments

Under the rules of the conflict of laws, the determination of when a foreign money is converted to United States dollars is generally considered a procedural matter for the law of the forum. Subsection (b) [(2)] removes any doubt.

25-9-704. Variation by agreement.

Official Comments

1. A basic policy of the Act is to preserve freedom of contract and to permit parties to resolve disputed matters by contract at any time, even as to choice of law problems. The parties may agree upon the date and time for conversion. After entry of judgment the parties may agree upon how the judgment is to be satisfied.

2. Subsection (b) [(2)] covers cases where, for example, claims for petroleum may be settled in United States dollars but settlement for joint costs of exploration may be in pounds sterling. The parties also may agree on the money to be used for damages. The second sentence recognizes that a price stated in a particular money does not indicate, without more evidence, an intent that all damages from breach are to be in the same money. The principle of freedom of contract allows the parties to allocate the risks of currency fluctuations between foreign moneys as they desire. Sections 4 [25-9-705] and 5 [25-9-706] provide rules in the absence of special agreements by the parties for determining the money to be used. Parties may by agreement select a particular market or foreign exchange dealer to be used for exchange purposes.

25-9-705. Determining money of claim.

Official Comments

1. Subsection (a) [(1)] uses "payment" in a broad sense not related to just the price, but to any obligation arising out of a contract to transfer money. See also Section 3(b) [25-9-704(2)].

2. Subsection (b) [(2)] states rules to fill gaps in the agreement of the parties with rules as to the allocation of risks of fluctuations in exchange rates. The three rules will normally apply in the order stated. Prior dealings may indicate the desired money. If there are none, it is appropriate to use the money indicated by trade usage or custom for transactions of like kind. The final rule of subsection (a) [(1)] is one established in English cases. See The Despina R and the Folias, (1979) A.C. 685. An example is the use of an operating account in United States dollars by a French company to buy Japanese yen for ship repairs; the loss is felt in the depletion of the dollar bank account. Appropriateness of a rule is to be determined by the judge from the facts of the case. See Section 6(d) [25-9-704(4)].

25-9-706. Determining amount of money of certain contract claims.

Official Comments

1. Subsections (a) [(1)] and (b) [(2)] cover different interpretation problems. One arises where the amount of the money to be paid is measured by another money, one of which is foreign.

An example is "pay 5,000 Swiss francs in pounds sterling." The issue is the time at which the rate of exchange into pounds sterling is to be applied. Subsection (a) [(1)] says in a "measured by" situation with no rate specified, the rate of exchange that controls is the one prevailing at or near the close of business on the day before the day of payment. See Section 1(2) [25-9-702(3)], the definition of "conversion date."

2. Another problem arises when an exchange rate in effect before a default is used, as in "pay on November 30, 1989, 5,000 Swiss francs in pounds sterling at the exchange rate prevailing on June 30, 1989." In this case, the issue is how long does the specified exchange rate control in the absence of a clear expression of intent?

Inclusion of a fixed rate as of a date before default, under subsection (b)[(2)], remains effective only if payment is made within a reasonable time after default, not to exceed 30 days. The 30-day limitation accords usually with the expectation of the parties. Parties may agree to a longer time.

3. The most common application of subsection (c) [(3)] will be found in international loan transactions. For example, a loan by a Japanese bank to an American company could be made with dollars purchased by yen for the purpose. The loan agreement could provide for repayment in dollars of an amount which, when received by the lender, would repurchase the amount of yen used to acquire the dollars advanced.

An exemption is needed from the application of usury laws that may be interpreted to hold that the indexing of the principal amount creates additional interest. See Aztec Properties, Inc. v. Union Planters National Bank, 530 S.W.2d 756 (Tenn. Sup. Ct. 1975). The subsection removes all doubts as to the legal enforceability of such agreements under theories such as usury, merger in a judgment, unconscionability, or the like.

25-9-707. Asserting and defending foreign-money claim.

Official Comments

1. Subsection (a) [(1)] covers not only the claim of a plaintiff but also the assertion by a defendant of a defense, set-off, or counterclaim. Subsection (b) [(2)] provides that the money asserted as the money of its defenses by the defendant need not be the same as that of the plaintiff.

2. The money to be used as the money of the claim is a threshold issue to be determined, if contested, by the court after any factual issues as to expenditures, custom, usage, or course of dealing are decided. See subsection (b) [(2)]. If a payment is made or a debt incurred in a money other than that in which the loss was felt, the party asserting the foreign-money claim should establish the amount of the money of the claim used to procure the money of expenditure and the applicable exchange rate used.

3. Judgments may be entered in more than one money when dealings impact on more than one area. An inn-keeper in Mexico, for example, in taking in customers from many countries, should be held to foresee that treatment for injuries at the inn would occur not only in Mexico, but also in the native land of the injured party or in a third country.

25-9-708. Judgments and awards on foreign-money claims — times of money conversion — form of judgment.

Official Comments

1. Subsection (a) [(1)] changes a number of statutes in the states which can be construed to require all values in legal proceedings to be expressed in United States dollars. Professor Brand, in his article in the Yale Journal of International Law, Vol. 11:139 at page 169, identified 18 states having statutes which could require all judgments to be entered in dollars. They are Arkansas, California, Idaho, Iowa, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. Brand, ibid. fn. 166. Hence, direct statutory authority must be given the courts in those states, and will be helpful in other states. In some states other statutes may need amendments. See, e.g., Wisc. Stats. 138.01, 138.02, 138.03, and 779.05.

2. Subsection (d) [(4)] gives defendants the option of paying in dollars which are, at the payment date, practically the economic equivalent of the foreign money awarded. The judgment creditor should be indifferent to whether the debtor exercises the right to pay in dollars as the only difference is a small bank charge for exchanging the dollars for the foreign money. The concept of the rate of the banking day next before the payment day is taken from Section 131 of the Province of Ontario, Canada, Courts of Justice Act (Ch. 11 Ont. Stats. (1984) as recently amended). It gives the defendant and the sheriff conducting the sale the necessary conversion rate comfortably ahead of its use. Newspaper quotations are usually said to be "at or near the close of business" on the stated date, so that phrase is used in this Act.

3. Subsection (e) [(5)] provides for netting the affirmative recoveries of a defendant and plaintiff, whether in the same money or in different moneys, but preserving the quantum of each for appellate purposes. The theory is that when claims are reduced to money, they become mutual debts and should be set-off, so that a person's exchange rate fluctuation risk continues only for the surplus in its money of the claim. The set-off is made by the judge or arbitrator.

4. The form of judgment in subsection (f) [(6)] should be varied appropriately where the money to be paid is measured by a foreign money. See Section 5 [25-9-706].

25-9-709. Conversions of foreign money in distribution proceeding.

Official Comments

All claims must be in the same money when determining aliquot shares in a distribution proceeding. The Act requires use of the date the proceeding was initiated for applying the exchange rate to convert foreign-money claims into United States dollars. See Re Lines Bros. Ltd., (1982) 2 All E.R. 99. A claim may be amended to show the proper conversion rate and the proper amount of United States dollars.

25-9-710. Prejudgment and judgment interest.

Official Comments

1. As to pre-judgment interest, the Act adopts the majority rule in the United States that pre-judgment interest follows the substantive law of the case under conflict of laws rules, both as to the right to recover and the rate. English courts use a different rule, i.e., the borrowing rate used by plaintiff or prevailing in the country issuing the money of the judgment. See Helmsing Schiffarts G.M.B.H. v. Malta Drydock Corp. (1977) 2 Lloyd's Rep. 44 (Maltese money but borrowed in West Germany; German rate); Miliangos v. George Frank (Textiles) Ltd. (No. 2) (1976) 1 QB 487 at 489 (Swiss money, Swiss interest rate). Although pre-judgment interest is one form of damages, provision for pre-judgment interest is not to be taken as indicating that no other damages for delay in payment can be awarded under the substantive law applicable to the determination of damages. Cf. Isaac Naylor & Sons, Ltd. v. New Zealand Co-operative Wool Marketing Association, Ltd. (1981) 1 N.Z.L.R. 361 (exchange loss due to delay as additional damages).

2. Allowances of pre-judgment interest in some states depend upon a party's conduct with respect to settlement or delay of the proceeding. Subsection (b) [(2)] treats these state laws as either procedural in nature or expressions of a significant policy, in either case to be governed by the law of the forum state.

3. Interest on a judgment is considered to be procedural and also goes by the law of the forum. There is a problem here in that there is great discrepancy among the states in the rates for judgment interest. When a judgment is in a foreign money, United States interest rates may result in some overcompensation or undercompensation as compared to what would be awarded in the jurisdiction issuing the foreign money. But in both the United States and in foreign countries, most jurisdictions have fixed statutory rates that do not readily respond to the inflation or deflation of the value of their money in the world market. Hence it was decided to apply the usual rules of the conflict of laws.

25-9-711. Enforcement of foreign judgments.

Official Comments

1. Some states have special acts that simply cover the recognition, entry, and enforcement of foreign judgments. Common law enforcement is by action. Subsection (a) [(1)] refers to the common law method; it is subject to subsection (b) [(2)] which refers to statutory procedures. Subsection (c) [(3)] applies to both procedures.

2. Subsection (d) [(4)] avoids constitutional issues under the full faith and credit clause by requiring that judgments of sister states be enforced as entered in the sister state.

25-9-712. Determining United States dollar value of foreign-money claims for limited purposes.

Official Comments

This section protects those who must determine how much should be held subject to a levy or other collection process or what the dollar amount of a supersedeas or other surety bond should be. If the judgment debtor is damaged by a gross overstatement of the dollar amount in the affidavit or certificate of counsel for the judgment creditor or the bank officer, recovery should be against that person.

25-9-713. Effect of currency revalorization.

Official Comments

1. Subsection (a) [(1)] refers to situations in which a country authorizes the issue of a new money to take the place of the old money at a stated ratio. An example is Brazil's recent abolition of cruzieros for cruzados. The subsection mandates that foreign money claims should be subjected to the same ratio.

2. The Act takes no position on the effect of money repudiations or revalorizations so drastic as to be, in effect, confiscations. Remedy, if any, for these is usually found through diplomatic channels. Equally, the Act takes no position on the effect of exchange control laws. The effect, if any, on obligations to pay is left to other law.

25-9-714. Supplementary general principles of law.

Official Comments

The section is taken from Section 1-103 of the Uniform Commercial Code.

CHAPTER 10
COSTS

Chapter Case Notes

Attorney Fees Not Awardable on Affidavit of Counsel — Hearing Required: Even though a contract may provide for the award of reasonable attorney fees, it is improper to award attorney fees solely on the affidavit of counsel without holding an evidentiary hearing on the matter. Stark v. Borner, 234 M 254, 762 P2d 857, 45 St. Rep. 1885 (1988).

Court-Appointed Counsel for Indigent Party in Civil Proceeding — No Requirement: There is no constitutional or statutory requirement that an indigent party be provided with court-appointed counsel in a civil proceeding. In re Adoption of K.L.J.K., 224 M 418, 730 P2d 1135, 43 St. Rep. 2297 (1986).

No Explicit Authority for Award of Attorney Fees in Disqualification Action: As there is no provision in 3-1-802 that allows a judge to award attorney fees to a party or damages to a nonparty, such award is improper. Unless a statute provides explicitly for an award of attorney fees to the prevailing party, a court cannot make such an award. In re Marriage of Gahr, 212 M 481, 689 P2d 257, 41 St. Rep. 1879 (1984).

Part 1
Imposition of Costs

Part Case Notes

Recoupment of Costs Provided for Defense of Claims Outside Insurance Policy Coverage: Plaintiff defended claims from third parties against defendant, but the claims were subsequently determined to be barred by exclusionary language in defendant's policy. Plaintiff sought to recoup the costs expended on defendant's behalf, and the District Court awarded plaintiff's costs. On appeal, the Supreme Court affirmed the award. Plaintiff timely and explicitly reserved the right to recoup the defense costs by notifying defendant of plaintiff's reservation of rights prior to paying the costs and thus expressly reserved its right to recoup defense costs if a court determined that plaintiff had no duty to provide the costs. Defendant implicitly accepted plaintiff's reserved rights by posing no objection to the reservation. Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc., 2005 MT 50, 326 M 174, 108 P3d 469 (2005). See also Grinnell Mut. Reins. Co. v. Shierk, 996 F. Supp. 836 (S.D. Ill. 1998), and United Nat'l Ins. Co. v. SST Fitness Corp., 309 F3d 914 (6th Cir. 2002).

Attorney Fees — General Rules for Determining Prevailing Party: No single factor solely determines the prevailing party for the purpose of attorney fees. The party awarded a money judgment is not necessarily the successful or prevailing party, though such a judgment is an important factor in deciding who prevailed. A party surviving an action involving a counterclaim, setoff, refund, or penalty and who has the net judgment should generally be considered the prevailing party. If a counterclaiming defendant receives only a portion of his requested relief, but the plaintiff's claim is totally denied, the defendant should receive his attorney fees. If plaintiff and defendant both seek relief and each is awarded part of the requested relief, the party prevailing on the main issue in controversy must be allowed attorney fees. Schmidt v. Colonial Terrace Associates, 215 M 62, 694 P2d 1340, 42 St. Rep. 182 (1985).

Contract Allowing Costs to Prevailing Party — Contrary Subsequent Agreement: In an action in which each party claimed breach of a contract, where the parties agreed to an order that each would pay one-half of a special master's fee, the order was not in error, even though the contract provided for costs to the prevailing party. Schmidt v. Colonial Terrace Associates, 215 M 62, 694 P2d 1340, 42 St. Rep. 182 (1985).

25-10-101. When costs allowed, of course, to plaintiff.

Compiler's Comments

1981 Amendment: Added (7) that read: "in an action for property damage arising out of the ownership, maintenance, or use of a motor vehicle if he is entitled to attorney's fees under 25-10-303".

Case Notes

Award of Costs to Employer in Employment Discrimination Case Proper — Federal Law Applicable Only to Award of Attorney Fees: In an employment discrimination case, the District Court awarded partial summary judgment to the employer and, after deducting the costs of a frivolous videotaped deposition, awarded costs to the employer. Rolison contended that the court erred by applying Montana law to the award of costs rather than 42 U.S.C. 2000e-5(k) and Christiansburg Garment Co. v. EEOC, 434 US 412 (1978), and asserted that a defendant in an action brought under Title VII of the federal Civil Rights Act of 1964 may recover costs from a plaintiff only if the action was frivolous, unreasonable, or without foundation. The Supreme Court disagreed after noting that the federal statute and Christiansburg both apply to the award of attorney fees, not costs. Therefore, the District Court properly applied 25-10-102 and this section rather than federal law in awarding costs to the defendant. Rolison v. Bozeman Deaconess Health Serv., Inc., 2005 MT 95, 326 M 491, 111 P3d 202 (2005).

Pro Rata Calculation of Attorney Fees Based on Percentage of Plaintiff's Successful Claims Rejected: The District Court awarded plaintiff attorney fees for a breach of warranty claim against a siding installer and a siding manufacturer, which was the only theory based on contract for which plaintiff received a verdict against both defendants. To calculate the award, the court allocated the total amount of time expended by plaintiff's attorneys among the seven claims that existed prior to summary judgment and the three claims that existed thereafter on a pro rata basis, awarding plaintiff one-seventh of the attorneys' time expended prior to summary judgment and one-third of their time after summary judgment. Plaintiff contended that the pro rata calculation was in error, and the Supreme Court agreed. A similar mathematical approach was rejected by the U.S. Supreme Court in Hensley v. Eckerhart, 461 US 424 (1983), as providing little aid in determining what is a reasonable fee in light of all relevant factors. The award was also inconsistent with the guidelines established in Swenson v. Janke, 274 M 354, 908 P2d 678 (1995), for determining a reasonable fee award, and because the District Court failed to consider the Swenson factors, the award was remanded for recalculation. Osterman v. Sears, Roebuck & Co., 2003 MT 327, 318 M 342, 80 P3d 435 (2003).

Insurer's Breach of Duty to Indemnify — Recovery of Attorney Fees by Injured Third-Party Claimant Who Prevails in Insurance Coverage Action Against Motor Vehicle Liability Insurer — Modification of Insurance Exception — Standard of Review of Question of Law: Following remand in Christensen v. Mtn. W. Farm Bureau Mut. Ins. Co., 2000 MT 378, 303 M 493, 22 P3d 624 (2000), the Christensens requested attorney fees incurred in the declaratory judgment action. The District Court denied the request, and the Christensens appealed. Generally, under the American rule, a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory provision, although equitable exceptions are recognized. Here, the parties agreed that there was no contractual authority to support an award of attorney fees, although the Supreme Court held in Trustees of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 M 210, 69 P3d 663 (2003), that 27-8-313 authorizes a District Court to award attorney fees when the court, in its discretion, considers such an award to be necessary or proper. The Christensens submitted that the defendant insurer was obligated to reimburse them based on the insurance exception rationale articulated in Home Ins. Co. v. Pinski Bros., Inc., 160 M 219, 500 P2d 945 (1972), which approved an award of attorney fees in cases in which an insurer breaches its obligation to defend an insured. The Supreme Court noted that the issue presented a question of law, so the standard of review was whether the District Court's interpretation of law was correct. The Supreme Court held that an insurer that breaches its duty to indemnify is liable for attorney fees when an insured is forced to assume the burden of legal action to obtain the full benefit of the insurance contract, regardless of whether the insurer's duty to defend is at issue. However, in this case, the Christensens were third-party beneficiaries, and the Supreme Court declined to extend the insurance exception to third-party claimants because that would sanction attorney

fee awards for simply demonstrating the existence of any insurance contract from which a third-party claimant successfully established coverage, which would undermine the American rule. Thus, although the Christensens were precluded from recovering attorney fees under the obligatory insurance exception, the case was remanded for a determination of whether attorney fees were necessary or proper under 27-8-313 and Trustees of Ind. Univ. v. Buxbaum. Mtn. W. Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, 315 M 231, 69 P3d 652 (2003), overruling Yovish v. United Serv. Auto. Ass'n, 243 M 284, 794 P2d 682 (1990).

Challenge to Driver's License Suspension Considered Special Proceeding — Successful Defendant Entitled to Costs: Neal's driver's license was suspended for failure to take a breath test. Neal challenged the suspension, claiming that he did not refuse to take a breath test, and the District Court agreed. Neal's license was reinstated and Neal was granted costs. The state objected to the award of costs, and the District Court amended the original order and denied costs, so Neal appealed. Neal contended that as the prevailing party, an award of costs was proper under subsection (2) of this section because the license was valued at more than $50 or under subsection (4) of this section because the petition to reinstate the license was a special proceeding. The state contended that the particular provisions of 25-10-711 prevailed over the general provisions of this section, so this section did not apply. The Supreme Court disagreed, finding no inconsistency between the statutes. Section 25-10-711 applies to actions in which a party prevails against a government entity and can establish that the government's claim or defense was frivolous or pursued in bad faith, but no such finding is required for recovery of costs under this section. The court went on to find that Neal's claim that costs were proper based on the license value was unfounded, because no finding of valuation was ever determined. However, the court concluded that a challenge to a driver's license suspension or revocation was a special proceeding pursuant to 27-1-102, and that as the prevailing party in the action, Neal was entitled to costs pursuant to this section. Neal v. St., 2003 MT 53, 314 M 357, 66 P3d 280 (2003).

Test for Determining Prevailing Party in Mixed Motive Employment Discrimination Case: Laudert suffered liver failure while employed by the Richland County Sheriff's Department (RCSD) and had to resign. Following Laudert's full recovery, his former position came open again and he applied but was not rehired. He filed a discrimination charge on grounds of age and disability. The hearings examiner found that questions asked by the RCSD interview panel constituted direct evidence that RCSD had unlawfully considered Laudert's disability, but did not award damages because Laudert would not have been hired even in the absence of any unlawful consideration of his disability. The District Court held that Laudert was not entitled to attorney fees because he did not prevail on the ultimate basis for his petition. Laudert appealed the denial of attorney fees, asserting that because the hearings examiner found that his disability had been unlawfully considered and because affirmative relief was awarded against RCSD in the form of an injunctive order requiring RCSD to submit a written policy regarding hiring procedures, including guidelines regarding future inquiry into applicant disabilities, he was the prevailing party. The Supreme Court held that the District Court erred in applying the "central issue" and "primary relief sought" tests for determining the prevailing party, analyses expressly repudiated in Tex. St. Teachers Ass'n v. Garland Independent School District, 489 US 782 (1989). Requiring plaintiff to prevail on the ultimate basis for a petition is an inappropriate test for determining whether attorney fees should be awarded under 49-2-505. Under Farrar v. Hobby, 506 US 103 (1992), a plaintiff prevails when actual relief on the merits of the claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. Here, the order of affirmative injunctive relief clearly modified RCSD's behavior. However, the Supreme Court rejected the Farrar requirement that a plaintiff secure a direct benefit at the time of the judgment in order to be a prevailing party because that requirement would not further the purpose of awarding attorney fees under Title 49, ch. 2, commonly known as the Montana Human Rights Act. Complaints of civil rights abuses that successfully establish a finding of discrimination and an order of injunctive relief are the type of meritorious litigation that should be encouraged. The District Court's determination that Laudert did not prevail because RCSD proved it would have made the same hiring decision, despite its consideration of Laudert's disability, was reversible error. Laudert v. Richland County Sheriff's Dept., 2000 MT 218, 301 M 114, 7 P3d 386, 57 St. Rep. 872 (2000). Following remand for determination of a reasonable fee award under 49-2-505, the District Court noted that Laudert was the prevailing party in the 2000 case, even though Laudert's request for damages was denied, and awarded Laudert's counsel fees for all time expended. The RCSD appealed, but the Supreme Court affirmed. The Supreme Court cited Pa. v. Del. Valley Citizens' Council for Clean Air, 478 US 546 (1986), for the strong presumption, given the rationale behind fee-shifting provisions, that the lodestar amount is a reasonable fee, noting

that fee-shifting statutes were not designed to be windfalls for attorneys or to replicate the amount that an attorney would receive in other types of litigation, but rather to enable private parties to retain the legal assistance necessary to seek redress when their rights are violated. The court also applied the two-step approach in Hensley v. Eckerhart, 461 US 424 (1983), to address other considerations that may lead to a fee adjustment in cases when attorney fees are recoverable by a partially prevailing plaintiff in pursuit of unsuccessful claims. Under Hensley, an attorney should receive fees for the full services provided when plaintiff has obtained excellent results, even if plaintiff does not prevail on every claim. In this case, Laudert achieved the level of success necessary to support the award of the full amount of fees claimed, and the District Court did not err in awarding the full amount. Laudert v. Richland County Sheriff's Dept., 2001 MT 287, 307 M 403, 38 P3d 790 (2001). See also Ihler v. Chisholm, 2000 MT 37, 298 M 254, 995 P2d 439 (2000). See also Dolan v. School District No. 10, 195 M 340, 636 P2d 825 (1981), and Wagner v. Empire Dev. Corp., 228 M 370, 743 P2d 586 (1987).

No Attorney Fees Awarded Absent Prevailing Party: H-D Irrigating, Inc., bought land and irrigation equipment from Hobble Diamond Cattle Company and Kimble Properties, Inc., respectively, then sued both companies for constructive fraud when the land eroded and caused damage to the irrigation system. The District Court held that neither party was the prevailing party and that each party was responsible for its own attorney fees and costs. The Supreme Court agreed. Generally, attorney fees are not recoverable absent a statutory or contractual provision. Here, both parties gained a victory but also suffered a loss, and the District Court did not abuse its discretion when it did not award attorney fees. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000). See also McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794, 57 St. Rep. 855 (2000).

Payment Required by Contract Not Considered Loss — Attorney Fees and Costs to Prevailing Party: An agreement in a real property transaction provided for attorney fees to the prevailing party. Plaintiff brought an action to determine ownership of the property and was awarded summary judgment, part of which required plaintiff to pay one of the defendants $100,000 pursuant to a profit sweep provision of the agreement. Defendants cited Parcel v. Myers, 214 M 220, 697 P2d 89, 41 St. Rep. 2426 (1984), claiming that plaintiff could not be considered the prevailing party because plaintiff may have gained a victory but had also suffered a loss. However, the payment could not be considered a loss to plaintiff because it was an obligation required to satisfy the agreement, so attorney fees and costs should have been awarded plaintiff as prevailing party. Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

"Costs" Held Not to Include Expenses of Deposition for Perpetuation of Testimony Incurred After Offer of Judgment: The Valeos sued Tabish for damage to the Valeos' road allegedly caused by Tabish's trucks. Tabish answered alleging contributory negligence. Thereafter, Tabish made an offer of judgment that the Valeos did not accept and subsequently incurred $609.29 for cost of airfare, hotel, and car rental in the taking of a deposition for perpetuation of testimony. The jury returned a verdict for Tabish, and the District Court entered judgment to include the $609.29 claimed by Tabish in his memorandum of costs. The Supreme Court reversed the District Court's opinion and held that "costs", as used in Rule 68, M.R.Civ.P. (Title 25, ch. 20), should not be construed more broadly than the same word in 25-10-201 and held that its previous opinion in Fisher v. St. Farm Ins. Co., 281 M 236, 934 P2d 163 (1997), supported that conclusion. The Supreme Court also rejected Tabish's argument that the word "costs", as used in Rule 68, must provide an independent right to receive costs other than as defined and provided in 25-10-102 and this section or the rule would otherwise serve no independent purpose to encourage the settlement of litigation. The Supreme Court noted that Tabish provided no authority for that argument and that the language of 25-10-102 and this section is significantly different from the language of Rule 68. Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

No Reciprocal Right to Attorney Fees: The Valeos sued Tabish for damage to the Valeos' road allegedly caused by Tabish's trucks. Tabish answered, alleging contributory negligence and requesting attorney fees pursuant to 25-10-303. The Valeos moved for partial summary judgment on the issue of fees, and the District Court denied the motion. The jury returned a verdict for Tabish, and the District Court awarded Tabish attorney fees. The Supreme Court held that there is no reciprocal right to attorney fees under 25-10-303 because that statute grants only a plaintiff the right to attorney fees. Granting fees to a defendant pursuant to 25-10-303 would require the Supreme Court to insert language into that statute that isn't there, an act prohibited by 1-2-101. The Supreme Court dismissed Tabish's argument that fees are authorized by 25-10-102 and this section, pointing out that those statutes authorize the payment

of only costs, not attorney fees. The Supreme Court also analyzed numerous cases cited by Tabish as authority for his claim that the payment of fees is reciprocal, holding that in each previous Supreme Court opinion cited by Tabish, the Supreme Court relied upon a different statute other than 25-10-303. For that reason, those cases were inapplicable to the issue before the Supreme Court. The Supreme Court therefore reversed the District Court and denied the defendant payment of his attorney fees. Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

Attorney Fees Payable Under Clear Language of Contract — Costs Awarded as Matter of Course: It was error for the trial court to order the parties to pay their own attorney fees and costs when the clear and unambiguous language of the property sale contract in question provided that plaintiffs, as the successful party, were entitled to recover fees. Further, under this section, plaintiffs were entitled to the award of court costs, as a matter of course, by virtue of receiving judgment in their favor. Quigley v. Acker, 1998 MT 72, 288 M 190, 955 P2d 1377, 55 St. Rep. 295 (1998).

Costs Allowable in Summary Judgment Case — Remand: Springer prevailed in an action against a traffic control officer and the city of Bozeman to recover damages for destruction of a vehicle without notice. The District Court awarded Springer $1,500 in damages and $1,636.32 in costs. Citing Thayer v. Hicks, 243 M 138, 793 P2d 784 (1990), the city argued that the court abused its discretion in awarding costs because most of the identified costs did not fall within the purview of 25-10-201. Generally, a party that ultimately prevails on summary judgment is entitled to the same allowable costs as if the case had been disposed of at trial. On appeal, the Supreme Court reviewed the bill of costs; affirmed the award of filing fees; reversed the award for long-distance telephone calls pursuant to Thayer; and remanded for a determination of whether awards for photocopy costs, facsimile transmission expenses, postage costs, shipping charges, a service fee, counsel's mileage expenses, and deposition costs were allowable. Springer v. Becker, 284 M 267, 949 P2d 641, 54 St. Rep. 876 (1997).

Contract Overcharge and Negligence Claims Barred by Res Judicata When Other Party Had Already Sued for Failure to Pay: A trucker obtained default judgment in Justice's Court for the failure of Greenwood to pay the full amount that the trucker charged for hauling cattle. Greenwood had claimed that the amount charged was more than agreed upon and refused to pay the difference. He also deducted an amount for the trucker's alleged injury to two steers. Greenwood's later District Court action alleging that the contract was void for an overcharge and alleging the negligent injury of the two steers was barred by res judicata. The Supreme Court also ruled that the case was not one of those rare ones in which a court could use its equitable powers to award attorney fees, which were requested by the trucker. Greenwood v. Steve Nelson Trucking, Inc., 270 M 216, 890 P2d 765, 52 St. Rep. 151 (1995).

Costs Prior to Entry of Partial Summary Judgment: The trial court awarded the plaintiffs costs incurred subsequent to the entry of a partial summary judgment. On appeal, the Supreme Court remanded the case for the trial court to determine the costs due the plaintiffs for costs incurred prior to entry of the partial summary judgment. Smith v. Johnson, 245 M 137, 798 P2d 106, 47 St. Rep. 1661 (1990).

Question of Insurance Coverage Under Policy — Award of Costs Discretionary: The lower court granted the insurer's motion for summary judgment, holding that there was no coverage of the plaintiff's personal injuries under the contract, but denied the insurer's motion for costs. The Supreme Court affirmed, stating that there was no statutory grounds for costs, thus making the award of costs discretionary. Erickson v. Dairyland Ins. Co., 241 M 119, 785 P2d 705, 47 St. Rep. 130 (1990).

Costs in Contempt — Injunction Action: Defendant was found to be in contempt of a previous court order allowing plaintiff to regulate a water supply system. Plaintiffs sought to enjoin defendant from further interference with the system. After finding defendant in contempt, the court awarded costs to plaintiff. On appeal, defendant contended his contempt fine should be part of the costs, relying on State ex rel. Foss v. District Court, 216 M 327, 701 P2d 342, 42 St. Rep. 845 (1985). The Supreme Court held that because this was an injunction action, costs were awardable under 25-10-101(6) and could be in addition to the fine. Walker v. Warner, 228 M 162, 740 P2d 1147, 44 St. Rep. 1424 (1987).

Reformation of Contract — No Prevailing Party — Denial of Costs and Attorney Fees: In suit for reformation of contract for deed and for negligent misrepresentation, the District Court reduced the sales contract by $1,500 but denied plaintiff's damage claims and refused to award plaintiff costs and attorney fees. The Supreme Court held that District Court did not abuse its discretion in denying costs and attorney fees in absence of a statute or contract provision. Plaintiff was not entitled to costs under 25-10-101 because the action did not involve title to

property and plaintiff did not receive a "judgment in his favor". There is no prevailing party when both parties gain a victory but also suffer a loss. Parcel v. Myers, 214 M 220, 697 P2d 89, 41 St. Rep. 2426 (1984).

Liability Dispute Between Insurers — Costs and Fees: In a proceeding that was essentially between two insurers to determine which of two overlapping policies covered auto accident, the winner was not entitled to costs and attorney fees. Bill Atkin Volkswagen, Inc. v. McClafferty, 213 M 99, 689 P2d 1237, 41 St. Rep. 1981 (1984).

Interest and Expenses Allowable: Plaintiff entered a buy-sell to purchase defendants' ranch. One of his major considerations was gaining investment tax credits. Defendants refused to perform, and plaintiff filed a breach of contract action. The District Court found for plaintiff and awarded him prejudgment interest at 10% on his state and federal income tax obligation, the earnest money, and his capital expenditures on the ranch. On appeal, the Supreme Court held that interest on the earnest money was all that should be allowed as prejudgment interest under 27-1-211. Prejudgment interest should be 6% under 31-1-106. Interest should then be allowed on the judgment according to 27-1-211 at the amount of 10% under 25-9-205. The expenses that are allowable to a plaintiff are found in 25-10-201, and 25-10-101 outlines when costs are allowed. The cost of depositions not used during trial is not allowed. Various travel expenditures would not have been chargeable to defendants if the contract had been performed. The portion of capital expenditures allowed should be only the loss plaintiff suffered as a result of expenditures from the time of signing the buy-sell to the time of breach. Ehly v. Cady, 212 M 82, 687 P2d 687, 41 St. Rep. 1611 (1984).

Duty to Defend — Attorney Fees: Plaintiff tendered defense of a counterclaim to defendant. Defendant refused to defend, contending the allegations of the counterclaim were excluded from policy coverage. This declaratory judgment action was then brought. The court found that the counterclaim was within the policy coverage. Relying on Home Ins. Co. v. Pinski Bros., Inc., 160 M 219, 500 P2d 945 (1972), the court awarded attorney fees and costs for wrongful refusal to defend. Lindsay Drilling v. USF&G, 208 M 91, 676 P2d 203, 41 St. Rep. 193 (1984).

Title Insurers' Failure to Defend First and Second Suits Against Insured — Liability for Costs of First Suit: Adjoining landowner sued insured for interference with his easement rights, title insurance companies refused to defend, insured hired his own counsel, the suit was settled, and adjoining landowner again sued insured when insured refused to abide by the settlement. The insurers again refused to defend. The policy obligated insurers to defend any litigation founded upon a defect, lien, encumbrance, or other matter insured against. Insurers had failed to disclose and insure against the easements, though they were contained in the title records. The insurers acted in bad faith in refusing to defend the first suit but not in refusing to defend the second suit, since it arose from insurers' refusal to abide by the settlement in the first suit. Insurers were liable to insured for his costs in defending the first suit, and punitive damages could be imposed for failure to defend. Lipinski v. Title Ins. Co., 202 M 1, 655 P2d 970, 39 St. Rep. 2283 (1982).

Plaintiff Losing Quiet Title Action Not Entitled to Attorneys' Fees: Under 25-10-101 and 25-10-102 attorneys' fees may be awarded as a matter of course to the party receiving a favorable judgment involving real property. Thus, when plaintiff filed a quiet title action and ended up losing possession of property he was not entitled to attorneys' fees unless awarded by discretion of the court under 25-10-103, and the court properly decreed that each party pay their own costs. Stimatz v. St., 189 M 179, 615 P2d 228 (1980).

Costs Awardable to Party Prevailing at Trial: Plaintiffs contracted with defendant to build their log home. Before and after occupancy of the home, structural problems requiring repair occurred. Plaintiffs prevailed at trial but were denied costs. Costs are awardable under Rule 54(d), M.R.Civ.P., and 25-10-101(3). Held, that the plaintiffs were entitled to costs at trial. Carroccia v. Todd, 189 M 172, 615 P2d 225 (1980).

Costs and Fees for Voluntary Dismissal: The defendant was entitled to reasonable costs and attorney fees in order to cure prejudice to the defense when trial court granted plaintiff's motion for voluntary dismissal under Rule 41(a), M.R.Civ.P. Petritz v. Albertsons, Inc., 187 M 102, 608 P2d 1089 (1980), distinguished in USF&G Co. v. Rodgers, 267 M 178, 882 P2d 1037, 51 St. Rep. 1023 (1994).

Party Prevailing on Main Issue Entitled to Costs: In this case the court adopted the California rule in interpreting cost statutes. If a plaintiff files a complaint in an action covered by 25-10-101 and succeeds only partially, the plaintiff is entitled to costs. If an action is filed and the defendant counterclaims and succeeds in having the plaintiff's claim totally denied but only recovers a portion of the relief demanded in the counterclaim, the defendant should receive costs. If, however, a party initiates a lawsuit, the defendant counterclaims, and the judgment awards both parties part of the relief they seek, the party prevailing on the main issue in controversy in

the case must be allowed costs. The main issue in this case was the existence of an easement across the disputed road. Respondents prevailed on that issue. The cost statutes therefore entitled them to the costs of suit, including the cost of the survey necessary to determine the boundary between the Medhus and Dutter properties. Medhus v. Dutter, 184 M 437, 603 P2d 669 (1979), followed in Hoven v. Amrine, 224 M 15, 727 P2d 533, 43 St. Rep. 1977 (1986), and in Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994).

Fee Agreement Negotiations — Effect: The result of the negotiations between an attorney and his client as to their fee agreement is not controlling in fixing a reasonable attorney fee to assess against the opposing party. Such an award must be determined in accordance with the guidelines enumerated in Crncevich v. Georgetown Recreation Corp., 168 M 113, 541 P2d 56 (1975). Olson v. Carter, 175 M 105, 572 P2d 1238 (1977); Engebretson v. Putnam, 174 M 409, 571 P2d 368 (1977).

Attorney's Fees: On foreclosure of mortgage, federal tax lien took priority over attorney's fees allowed under 71-1-233 since attorney's lien failed to meet "choate" test at the time the amount of federal taxes owed on the property was fixed. First Nat'l Bank of Lewistown v. Tilzey, 238 F. Supp. 750 (D.C. Mont. 1965).

Recovery of Costs When Value of Personal Property Not Shown: In an action in claim and delivery to recover the possession of machinery, where a verdict was directed for plaintiff and plaintiff had failed to offer proof of the value of the machinery, the court should not have made any allowance of costs to the plaintiff. Key v. Clements, 133 M 344, 323 P2d 603 (1958).

Application to Writ of Prohibition — Attorney's Fees: If pleaded, attorney fees are allowable as an item of damages in prohibition cases. State ex rel. Taylor v. District Court, 131 M 397, 310 P2d 779 (1957).

Theory of Complainant Not Determinative: Where plaintiff in an action for accounting did not prevail on exact theory outlined in his complaint but he did obtain precise relief sought, trial court properly entered judgment awarding costs to him. Ivins v. Hardy, 120 M 35, 179 P2d 745 (1947).

Prevailing Party Prima Facie Entitled to Costs: Plaintiff, a stockholder in a bank, was awarded judgment, with costs, on his complaint to require a bank officer to turn over a commission, earned on a loan, to the bank. The District Court properly gave judgment for costs as the prevailing party is prima facie entitled to costs under this statute, there being no abuse of discretion shown. Sullivan v. Mountain, 117 M 224, 160 P2d 477 (1945).

Successful Counterclaim by Defendant — Plaintiff's Costs Denied: Where plaintiff sued the defendant for damages sustained in an automobile accident and the jury returned a verdict in favor of the defendant on his counterclaim, it was error for the court to allow plaintiff his costs, as the counterclaim constituted part of the defense to the plaintiff's claim and, because the counterclaim was granted, it is clear that the plaintiff did not prevail. Marcus v. Bowman, 110 M 412, 101 P2d 68 (1940).

Judgment Previously Paid — Defendant Entitled to Costs of Defense: In an action on foreclosure of mechanics' lien (now construction lien), where the court concluded that the lien had been discharged and the amount recovered on a judgment had previously been tendered by defendant, defendant was the prevailing party and as such was entitled to his costs of useless litigation. Luebben v. Metlen, 110 M 350, 100 P2d 935 (1940).

Amendment of Decree to Award Costs: Where the successful party in a water right suit was awarded all he prayed for, including injunctive relief, but neither findings, conclusions, nor decree mentioned costs, the trial court had the power to amend the decree by nunc pro tunc order awarding costs where his opponent, after the cost bill had been filed, waived his right to have them retaxed by not asserting it. State ex rel. Kruletz v. District Court, 110 M 36, 98 P2d 883 (1940).

Recovery of Costs After Claim Fully Paid: A plumbing company, asserting claim stipulated to have been fully paid by surety on federal public building contractor's bond, in intervening petition filed in action on such bond, to recover for materials furnished and work performed under agreement between intervener and contractor, is not entitled to recover attorney's fees and costs. It cannot reasonably be held that one whose claim has been paid in full can on any legal theory recover over $50, exclusive of interest. U.S. v. Seaboard Sur. Co., 26 F. Supp. 681 (D.C. Mont. 1938).

Multiple Parties in Water Rights Action — Section Inapplicable: In view of the peculiar nature of water right suits where every party thereto is an antagonist of every other party, the provisions of this section relative to costs recoverable by the successful party are not strictly applicable and may be applied only by making some apportionment of costs. Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936).

Nominal Damages — Costs Not to Be Awarded: Under this section, one recovering nominal damages only is not entitled to costs. Doyle v. Union Bank & Trust Co., 102 M 563, 59 P2d 1171 (1936).

Real Property Use and Occupation: In an action by the purchaser of land at foreclosure sale to recover from a tenant in possession the reasonable value of its use and occupation, in which the recovery was less than $50, plaintiff was not, under subsection (3) of this section, entitled to his costs. Patterson v. Law, 78 M 221, 254 P 412 (1927).

Real Property Damages — Loss Immaterial: In an action for damages for trespass committed by defendant in pasturing his sheep upon plaintiff's land, plaintiff was entitled to recover his costs irrespective of the amount of the verdict in his favor, under subsection (1) of this section. Kiehl v. Holliday, 77 M 451, 251 P 527 (1926).

Successive Trials — Costs Recoverable for Both: Under this section, a successful litigant may recover all costs from his adversary, whether incurred in one or more trials of the cause; therefore, where plaintiff, though successful on the first trial secured a retrial on the ground of inadequacy of the verdict and had judgment, the court properly awarded him costs incident to both trials. Brunnabend v. Tibbles, 76 M 288, 246 P 536 (1926), distinguished in Christie v. Morris, 119 M 383, 176 P2d 660 (1946).

Costs Not Provided by Statute — Lack of Judicial Discretion: Costs eo nomine being the creatures of statute, they are not recoverable unless provided for therein, courts being without discretion to allow them where not so provided for. Jones v. Great N. Ry., 68 M 231, 217 P 673 (1923).

Application to Supervisory Writs of Supreme Court: Relator in an application to the Supreme Court for Writ of Supervisory Control running to the District Court is entitled to his costs, upon a judgment in his favor. State ex rel. Loundagin v. Tattan, 56 M 211, 181 P 984 (1919).

Habeas Corpus as Special Proceeding: A habeas corpus proceeding is a special proceeding in the nature of an action, the disposition of the Writ is a judgment, and the relator a plaintiff, within the meaning of this section. State ex rel. Brandegee v. Clements, 52 M 57, 155 P 271 (1916); State ex rel. Newell v. Newell, 13 M 302, 34 P 28 (1893); State ex rel. Shannon v. Reynolds, 13 M 423, 34 P 613 (1893).

Application to Writ of Prohibition — Action Against Justice's Court: Under this section and 25-10-102 one who successfully prosecutes a Writ, prohibiting a Justice of the Peace from proceeding further in an action in which the Justice has unlawfully issued a search warrant, is entitled to his costs. In such cases the prevailing party is entitled to his costs as a matter of course. State ex rel. Streit v. Justice Court, 45 M 375, 123 P 405 (1912).

Statutory Basis Only for Costs: The power to allow costs is purely statutory, and unless some statutory authority exists for their allowance, an allowance thereof is erroneous. Colusa Parrot Min. & Smelting Co. v. Barnard, 28 M 11, 72 P 45 (1903).

Tender by Defendant After Suit — Costs Allowable: Where defendant paid $1,095 after suit brought and in a stipulation admitted a balance due plaintiff of $6.64 but made no offer to allow judgment for that amount, it was error to refuse plaintiff a judgment for costs on his obtaining judgment for the $6.64. Pape v. Chauvin-Fant Furniture Co., 25 M 417, 65 P 424 (1901).

Law Review Articles

Contract Damages in Montana—Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Collateral References

Costs *key* 32.

20 C.J.S. Costs §§4 through 45.

20 Am. Jur. 2d Costs §§10 through 26, 89, 96.

Right of wife to allowance for expense money and attorney's fee in habeas corpus action for custody of child. 82 ALR 2d 1090.

25-10-102. When costs allowed, of course, to defendant.

Case Notes

Award of Costs to Employer in Employment Discrimination Case Proper — Federal Law Applicable Only to Award of Attorney Fees: In an employment discrimination case, the District Court awarded partial summary judgment to the employer and, after deducting the costs of a frivolous videotaped deposition, awarded costs to the employer. Rolison contended that the court erred by applying Montana law to the award of costs rather than 42 U.S.C. 2000e-5(k) and Christiansburg Garment Co. v. EEOC, 434 US 412 (1978), and asserted that a defendant in an action brought under Title VII of the federal Civil Rights Act of 1964 may recover costs from a

plaintiff only if the action was frivolous, unreasonable, or without foundation. The Supreme Court disagreed after noting that the federal statute and Christiansburg both apply to the award of attorney fees, not costs. Therefore, the District Court properly applied 25-10-101 and this section rather than federal law in awarding costs to the defendant. Rolison v. Bozeman Deaconess Health Serv., Inc., 2005 MT 95, 326 M 491, 111 P3d 202 (2005).

"Costs" Held Not to Include Expenses of Deposition for Perpetuation of Testimony Incurred After Offer of Judgment: The Valeos sued Tabish for damage to the Valeos' road allegedly caused by Tabish's trucks. Tabish answered alleging contributory negligence. Thereafter, Tabish made an offer of judgment that the Valeos did not accept and subsequently incurred $609.29 for cost of airfare, hotel, and car rental in the taking of a deposition for perpetuation of testimony. The jury returned a verdict for Tabish, and the District Court entered judgment to include the $609.29 claimed by Tabish in his memorandum of costs. The Supreme Court reversed the District Court's opinion and held that "costs", as used in Rule 68, M.R.Civ.P. (Title 25, ch. 20), should not be construed more broadly than the same word in 25-10-201 and held that its previous opinion in Fisher v. St. Farm Ins. Co., 281 M 236, 934 P2d 163 (1997), supported that conclusion. The Supreme Court also rejected Tabish's argument that the word "costs", as used in Rule 68, must provide an independent right to receive costs other than as defined and provided in 25-10-101 and this section or the rule would otherwise serve no independent purpose to encourage the settlement of litigation. The Supreme Court noted that Tabish provided no authority for that argument and that the language of 25-10-101 and this section is significantly different from the language of Rule 68. Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

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Costs and Fees for Voluntary Dismissal: Plaintiff voluntarily dismissed the case under Rule 41(a)(1), M.R.Civ.P. (Title 25, ch. 20), before an answer or a summary judgment motion was filed by defendant. It was error for the District Court to award defendant costs for substantial discovery made before dismissal. The District Court erroneously relied on discretionary authority under Rule 41(a)(2) to award costs when dismissal was made under that subsection. USF&G Co. v. Rodgers, 267 M 178, 882 P2d 1037, 51 St. Rep. 1023 (1994).

Recovery of Costs by Prevailing Party for Depositions Used at Trial: Costs may be allowed by the District Court against a losing party only for depositions used as evidence at the trial or for impeachment purposes during the trial. Semenza v. Leitzke, 232 M 15, 754 P2d 509, 45 St. Rep. 829 (1988), followed in McGinley v. Ole's Country Stores, Inc., 241 M 248, 786 P2d 1156, 47 St. Rep. 181 (1990), and in Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994).

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Party Prevailing on Main Issue Entitled to Costs: In this case the court adopted the California rule in interpreting cost statutes. If a plaintiff files a complaint in an action covered by 25-10-101 and succeeds only partially, the plaintiff is entitled to costs. If an action is filed and the defendant counterclaims and succeeds in having the plaintiff's claim totally denied but only recovers a portion of the relief demanded in the counterclaim, the defendant should receive costs. If, however, a party initiates a lawsuit, the defendant counterclaims, and the judgment awards

both parties part of the relief they seek, the party prevailing on the main issue in controversy in the case must be allowed costs. The main issue in this case was the existence of an easement across the disputed road. Respondents prevailed on that issue. The cost statutes therefore entitled them to the costs of suit, including the cost of the survey necessary to determine the boundary between the Medhus and Dutter properties. Medhus v. Dutter, 184 M 437, 603 P2d 669 (1979), followed in Hoven v. Amrine, 224 M 15, 727 P2d 533, 43 St. Rep. 1977 (1986).

Costs Awarded to Defendant — Timely Filing: The mandatory language of 25-10-102 required the award of costs to a defendant who prevailed in a suit intended to enjoin him from further trespassing on a road that the lower court declared defendant had a prescriptive easement over since timely application for costs was made pursuant to 25-10-501. St. v. Cronin, 179 M 481, 587 P2d 395 (1978).

Counterclaim Dismissed — Costs of Defense Allowable: Where, in an action to recover damages, the jury returned a verdict in favor of the defendants, whose cross complaint containing a counterclaim had been dismissed, the trial court erred in allowing costs to plaintiff but acted properly in allowing defendants' bill for costs. Marcus v. Bowman, 110 M 412, 101 P2d 68 (1940), followed in Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988).

Partial Decree for Defendant — Costs Allowed: Where in an action to quiet plaintiff's rights in 46 tracts and defendant claimed title to 27 of the tracts, the judgment, which decreed that plaintiff was entitled to 21 but made no disposition of the other 25, was in effect one against plaintiff as to the latter number and in favor of defendant, he failing only as to 2 tracts claimed by him, and the court did not err in rendering judgment for defendant for his costs. Aronow v. Hill, 87 M 153, 286 P 140 (1930).

Severance of Multiple Defendants — Costs Allowed: Where plaintiff at the time the cause was called for trial dismissed the action against one of several defendants, a severance of the action as to that defendant took place and he was entitled to the costs necessarily incurred by him in preparing for trial, summoning witnesses, etc., the same as if he had been made the sole defendant in the first instance. Patterson v. Law, 78 M 221, 254 P 412 (1927).

Costs Awarded Against State in Special Proceeding: A proceeding for the forfeiture of intoxicating liquors and property used in violation of the prohibition law and seized under section 11106, R.C.M. 1921 (since repealed), was neither a criminal nor a civil action but was special in its nature, and costs may be awarded the claimant against the State when it is the losing party. St. v. Rouleau, 68 M 529, 219 P 1096 (1923).

Defendant Partially Successful — Apportionment of Costs Not Allowed: In the absence of statutory authorization therefor, costs may not be apportioned between plaintiff and defendant where the former had judgment on one of his causes of action and the latter had judgment on the other; this section applies only to an action wherein defendant recovers judgment and plaintiff is altogether unsuccessful. Jones v. Great N. Ry., 68 M 231, 217 P 673 (1923).

Costs for Counterclaim Allowable: Costs were properly allowed defendant on his recovering $35 under a counterclaim. Spencer v. Mungus, 28 M 357, 72 P 663 (1903).

Supreme Court — Dismissal of Special Proceedings: Costs will be allowed in the Supreme Court to defendant where a special proceeding is dismissed, though the judgment awards no costs, and judgment for costs will be entered on application. State ex rel. Baker v. District Court, 24 M 425, 62 P 688 (1900). See also State ex rel. Healy v. District Court, 26 M 224, 67 P 114, 68 P 470 (1902).

Law Review Articles

Contract Damages in Montana—Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Collateral References

Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims. 66 ALR 3d 1115.

Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as "prevailing party" or "successful party". 66 ALR 3d 1087.

25-10-103. When costs discretionary.

Case Notes

No Equitable Exception to American Rule for Parties Forced to Bring Suit to Determine Legal Rights Against Party Presenting Frivolous Defense in Bad Faith: Plaintiffs in a forcible detainer action contended that they should be granted attorney fees as an exception to the American Rule that a party in a civil action is not entitled to attorney fees absent a specific contractual or

statutory grant of those fees because plaintiffs were forced to bring a lawsuit to determine their legal property rights against a defendant who presented a frivolous defense asserted in bad faith. The District Court declined to award attorney fees, and on appeal, the Supreme Court affirmed, noting that a malicious or bad faith equitable exception to the American Rule has consistently been denied and that the exception in Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001), did not apply. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Attorney Fees Proper to Defend Untimely and Inappropriate Nonmeritorious Action: An award of attorney fees to plaintiff was within the District Court's discretion when plaintiff, as a wholly innocent party, was forced to employ counsel to defend a nonmeritorious motion that was both untimely and inappropriate. Connell v. Dept. of Social and Rehabilitation Services, 2003 MT 361, 319 M 69, 81 P3d 1279 (2003), following Foy v. Anderson, 176 M 507, 580 P2d 114 (1978).

Award of Attorney Fees Under Private Attorney General Doctrine Inapplicable to Legislative Actions: Plaintiffs, including several individuals and cities, prevailed in an action declaring as unconstitutional a statutory process for designating a county building code jurisdictional area and eliminating municipal jurisdictional areas by an election procedure limited to record owners of real property instead of the general constituency. Plaintiffs sought attorney fees from defendants, including several counties and the state, under the private attorney general doctrine exception established in Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999). The Supreme Court found that although it might be equitable to award attorney fees to plaintiffs under the doctrine, the inequity of imposing those fees against the defendant counties who neither fashioned nor passed the unconstitutional law was overriding. Thus, the only entity remaining against whom fees could be assessed was the state, for the actions of the Legislature, but under 2-9-111, the Legislature is immune from suit for any action or omission, so there was no avenue whereby attorney fees could be assessed, and the request for fees was denied. Finke v. State ex rel. McGrath, 2003 MT 48, 314 M 314, 65 P3d 576 (2003).

Application of Rule 68, M.R.Civ.P., Does Not Preclude Award of Presettlement Offer Costs: In a contract dispute, the state had made a pretrial offer of settlement that was rejected by the plaintiff contractors. The recovery by the contractors was for less than the pretrial settlement offer, and the lower court awarded the state its postoffer costs as mandated by Rule 68, M.R.Civ.P. (Title 25, ch. 20). The lower court also awarded the state its presettlement offer costs. The contractors argued that the rule limits allowable costs to those incurred after the offer of settlement. The Supreme Court held that the rule mandates an award of postsettlement offer costs but that it does not limit the discretion granted a court under this section to award presettlement offer costs. Idaho Asphalt Supply v. Dept. of Transportation, 2001 MT 27, 304 M 157, 18 P3d 1018 (2001).

Test for Determining Prevailing Party in Mixed Motive Employment Discrimination Case: Laudert suffered liver failure while employed by the Richland County Sheriff's Department (RCSD) and had to resign. Following Laudert's full recovery, his former position came open again and he applied but was not rehired. He filed a discrimination charge on grounds of age and disability. The hearings examiner found that questions asked by the RCSD interview panel constituted direct evidence that RCSD had unlawfully considered Laudert's disability, but did not award damages because Laudert would not have been hired even in the absence of any unlawful consideration of his disability. The District Court held that Laudert was not entitled to attorney fees because he did not prevail on the ultimate basis for his petition. Laudert appealed the denial of attorney fees, asserting that because the hearings examiner found that his disability had been unlawfully considered and because affirmative relief was awarded against RCSD in the form of an injunctive order requiring RCSD to submit a written policy regarding hiring procedures, including guidelines regarding future inquiry into applicant disabilities, he was the prevailing party. The Supreme Court held that the District Court erred in applying the "central issue" and "primary relief sought" tests for determining the prevailing party, analyses expressly repudiated in Tex. St. Teachers Ass'n v. Garland Independent School District, 489 US 782 (1989). Requiring plaintiff to prevail on the ultimate basis for a petition is an inappropriate test for determining whether attorney fees should be awarded under 49-2-505. Under Farrar v. Hobby, 506 US 103 (1992), a plaintiff prevails when actual relief on the merits of the claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. Here, the order of affirmative injunctive relief clearly modified RCSD's behavior. However, the Supreme Court rejected the Farrar requirement that a plaintiff secure a direct benefit at the time of the judgment in order to be a

prevailing party because that requirement would not further the purpose of awarding attorney fees under Title 49, ch. 2, commonly known as the Montana Human Rights Act. Complaints of civil rights abuses that successfully establish a finding of discrimination and an order of injunctive relief are the type of meritorious litigation that should be encouraged. The District Court's determination that Laudert did not prevail because RCSD proved it would have made the same hiring decision, despite its consideration of Laudert's disability, was reversible error. Laudert v. Richland County Sheriff's Dept., 2000 MT 218, 301 M 114, 7 P3d 386, 57 St. Rep. 872 (2000). Following remand for determination of a reasonable fee award under 49-2-505, the District Court noted that Laudert was the prevailing party in the 2000 case, even though Laudert's request for damages was denied, and awarded Laudert's counsel fees for all time expended. The RCSD appealed, but the Supreme Court affirmed. The Supreme Court cited Pa. v. Del. Valley Citizens' Council for Clean Air, 478 US 546 (1986), for the strong presumption, given the rationale behind fee-shifting provisions, that the lodestar amount is a reasonable fee, noting that fee-shifting statutes were not designed to be windfalls for attorneys or to replicate the amount that an attorney would receive in other types of litigation, but rather to enable private parties to retain the legal assistance necessary to seek redress when their rights are violated. The court also applied the two-step approach in Hensley v. Eckerhart, 461 US 424 (1983), to address other considerations that may lead to a fee adjustment in cases when attorney fees are recoverable by a partially prevailing plaintiff in pursuit of unsuccessful claims. Under Hensley, an attorney should receive fees for the full services provided when plaintiff has obtained excellent results, even if plaintiff does not prevail on every claim. In this case, Laudert achieved the level of success necessary to support the award of the full amount of fees claimed, and the District Court did not err in awarding the full amount. Laudert v. Richland County Sheriff's Dept., 2001 MT 287, 307 M 403, 38 P3d 790 (2001). See also Ihler v. Chisholm, 2000 MT 37, 298 M 254, 995 P2d 439 (2000). See also Dolan v. School District No. 10, 195 M 340, 636 P2d 825 (1981), and Wagner v. Empire Dev. Corp., 228 M 370, 743 P2d 586 (1987).

No Attorney Fees Awarded Absent Prevailing Party: H-D Irrigating, Inc., bought land and irrigation equipment from Hobble Diamond Cattle Company and Kimble Properties, Inc., respectively, then sued both companies for constructive fraud when the land eroded and caused damage to the irrigation system. The District Court held that neither party was the prevailing party and that each party was responsible for its own attorney fees and costs. The Supreme Court agreed. Generally, attorney fees are not recoverable absent a statutory or contractual provision. Here, both parties gained a victory but also suffered a loss, and the District Court did not abuse its discretion when it did not award attorney fees. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000). See also McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794, 57 St. Rep. 855 (2000).

Doctrine of Private Attorney General Applied — Three-Part Test for Awarding Attorney Fees: The District Court concluded that under 25-10-711, attorney fees were not available to plaintiff in this case because the action involved "neither frivolous conduct, extreme conduct, nor bad faith by the State". Plaintiff argued that it was entitled to attorney fees under the doctrine of private attorney general, which is an equitable exception to the American rule that a party is not entitled to attorney fees absent a specific contractual or statutory provision. Under Serrano v. Priest, 569 P2d 1303 (Calif. 1977), there are three basic factors to be considered in awarding attorney fees based on the doctrine of private attorney general: (1) the strength or societal importance of the public policy vindicated by the litigation; (2) the necessity of private enforcement and the magnitude of the resultant burden on plaintiff; and (3) the number of people standing to benefit from the decision. Here, plaintiff prevailed in a challenge to the constitutionality of numerous statutes regarding the state's administration of school trust lands. The litigation involved important public policies grounded in the constitution, requiring private constitutional enforcement, and benefited a large class of citizens interested in Montana's public schools. The District Court ignored recognized principles in denying plaintiff's reasonable attorney fees, resulting in substantial injustice. The Supreme Court applied the Serrano test and reversed for an award of attorney fees to plaintiff under the doctrine of private attorney general. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following In re Porter, 156 M 190, 478 P2d 866 (1970), distinguishing School District v. St., 236 M 44, 769 P2d 684, 46 St. Rep. 169 (1989), and followed in Columbia Falls Elementary School District No. 6 v. St., 2005 MT 69, 326 M 304, 109 P3d 257 (2005).

Living Trust — Costs and Attorney Fees Awarded to Trustee From Trust — Judicial Construction of Trust Documents: Clifford Dern and his wife Mary established a living trust for the benefit of their family. Derril Dern, a cotrustee, refused to sign a quitclaim deed conveying

various properties left to the trust beneficiaries, and Mary brought an action to determine the beneficiaries' rights. The District Court relied upon this section for its determination that payment of costs was discretionary with the court. The Supreme Court held that this section applies only in those situations in which costs are not otherwise provided for. In this case, article 3 of the trust documents states that the trustee may pay "expenses of administration" from the trust. In reliance on that language and on 72-33-631, the Supreme Court held that the fees were a necessary expense of the trust, given Derril's refusal to sign the deed. The Supreme Court also noted that 72-33-631 allows repayment of expenditures incurred by the trustee in administration of the trust, that that provision was patterned after a section of the California probate code, and that California decisions interpreting that section of the California probate code hold that reasonable attorney fees are considered necessary expenses of trust administration. The Supreme Court also pointed out that its decision to allow fees is further buttressed by decisions interpreting 72-12-206. Finally, because the trust documents provided that only expenses of the trust were to be paid from the "trust estate", without further delineation of what constitutes the "trust estate", the Supreme Court interpreted those words to mean the entire trust estate, and because the marital trust estate was the only remaining source of funding for the entire estate, the fees were to be paid from the marital trust estate. In re Estate of Dern, 279 M 138, 928 P2d 123, 53 St. Rep. 1087 (1996).

Payment of Attorney Fees Not Required — Inclusion of Litigation Cost in Corporate Value Approved: McCann Ranch, Inc. (MRI), brought a declaratory judgment action against Sharon in order to determine the value of her 600 minority shares for purposes of the dissolution of her marriage. Sharon argued that the District Court erred in refusing to award her attorney fees and costs. The Supreme Court held that inasmuch as the action was a declaratory judgment action brought by the corporation, attorney fees were not payable. The Supreme Court noted that even if the action had been a minority shareholder action, award of attorney fees was discretionary. The District Court did not abuse its discretion because there was no "prevailing party" in the action. The Supreme Court also held that the District Court did not err in the calculation of MRI's litigation expenses for inclusion in the corporate assets prior to valuation of Sharon's shares because the expenses as valued by Sharon were not supported by the record. McCann Ranch, Inc. v. Quigley-McCann, 276 M 205, 915 P2d 239, 53 St. Rep. 349 (1996).

Question of Insurance Coverage Under Policy — Award of Costs Discretionary: The lower court granted the insurer's motion for summary judgment, holding that there was no coverage of the plaintiff's personal injuries under the contract, but denied the insurer's motion for costs. The Supreme Court affirmed, stating that there was no statutory grounds for costs, thus making the award of costs discretionary. Erickson v. Dairyland Ins. Co., 241 M 119, 785 P2d 705, 47 St. Rep. 130 (1990).

Failure to Prevail or Establish Frivolous Defense — Costs Disallowed: The trial court's conclusion that plaintiff had not prevailed in an action and that each party acted in good faith in bringing and defending the lawsuit was sufficient to preclude the award of fees and costs under 25-10-711 and under the court's exercise of its equity power. Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

Costs in Contempt — Injunction Action: Defendant was found to be in contempt of a previous court order allowing plaintiff to regulate a water supply system. Plaintiffs sought to enjoin defendant from further interference with the system. After finding defendant in contempt, the court awarded costs to plaintiff. On appeal, defendant contended his contempt fine should be part of the costs, relying on State ex rel. Foss v. District Court, 216 M 327, 701 P2d 342, 42 St. Rep. 845 (1985). The Supreme Court held that because this was an injunction action, costs were awardable under 25-10-101(6) and could be in addition to the fine. Walker v. Warner, 228 M 162, 740 P2d 1147, 44 St. Rep. 1424 (1987).

Contempt Order — Costs Award Proper — Attorney Fees Award Improper: In reviewing a contempt order that arose out of a water rights dispute, the Supreme Court ruled that an award of costs to the irrigation district as the prevailing party was proper, but that an award of attorney fees to the district was not proper. The court reasoned that no applicable statute or contractual provision provided for attorney fees and that the case did not fit within the exceptions recognized in Foy v. Anderson, 176 M 507, 580 P2d 114, 35 St. Rep. 811 (1978). State ex rel. Foss v. District Court, 216 M 327, 701 P2d 342, 42 St. Rep. 845 (1985).

Reformation of Contract — No Prevailing Party — Denial of Costs and Attorney Fees: In suit for reformation of contract for deed and for negligent misrepresentation, the District Court reduced the sales contract by $1,500 but denied plaintiff's damage claims and refused to award plaintiff costs and attorney fees. The Supreme Court held that District Court did not abuse its discretion in denying costs and attorney fees in absence of a statute or contract provision.

Plaintiff was not entitled to costs under 25-10-101 because the action did not involve title to property and plaintiff did not receive a "judgment in his favor". There is no prevailing party when both parties gain a victory but also suffer a loss. Parcel v. Myers, 214 M 220, 697 P2d 89, 41 St. Rep. 2426 (1984).

Plaintiff Losing Quiet Title Action Not Entitled to Attorney Fees: Under 25-10-101 and 25-10-102 attorneys' fees may be awarded as a matter of course to the party receiving a favorable judgment involving real property. Thus, when plaintiff filed a quiet title action and ended up losing possession of the property he was not entitled to attorneys' fees unless awarded by discretion of the court under 25-10-103, and the court properly decreed that each party pay their own costs. Stimatz v. St., 189 M 179, 615 P2d 228 (1980).

Costs in Condemnation Proceeding: Although the plaintiff is the losing party in an eminent domain proceeding and therefore not the party benefited in the proceeding, he can nevertheless be accountable for defendants' costs. Groundwater v. Wright, 180 M 27, 588 P2d 1003 (1979).

Recovery Upon Theory Other Than Alleged — Costs Properly Allowed: Where the plaintiff brought an action against the defendant to dissolve an alleged partnership, for an accounting and to compel the sale of partnership property, and the court found that a partnership did not exist but that the relationship between the parties was that of joint adventurers and granted the requested relief, costs were properly allowed under this section as the plaintiff was given the relief requested. Ivins v. Hardy, 120 M 35, 179 P2d 745 (1947), overruled as to issue of whether partnership existed in Walsh v. Ellingson Agency, 188 M 367, 613 P2d 1381 (1980).

Stakeholder's Costs — Abuse of Discretion: The court abused its discretion in awarding costs to one of two claimants to a fund, against a stakeholder who had paid it into court to await judgment as to which of the two claimants was the true owner; the successful claimant and defendant stakeholder were each entitled to their costs as against the unsuccessful claimant. Zunchich v. Sec. Bldg. & Loan Ass'n, 85 M 341, 278 P 1011 (1929).

Award of Costs in Divorce Proceedings — Unsuccessful Defendant Unable to Pay: In equity cases the awarding of costs rests within the discretion of the trial court, and if it appears from the existence of the circumstances sufficient to overcome the prima facie right of the prevailing party to his costs that it would be inequitable to compel the losing one to pay them, it may impose them upon the former; therefore, where a decree of divorce was awarded to plaintiff husband and it was shown that the wife was without means, awarding of costs to her may not be said to have amounted to an abuse of discretion on the part of the court. Albrecht v. Albrecht, 83 M 37, 269 P 158 (1928).

Costs Statutorily Created — Discretion as Provided by Statute Only: Costs eo nomine were not recoverable by either party at the common law; they are the creatures of statute, and in adjudging them, courts must be guided by the sections of the Codes awarding them, and they are without discretion in the matter except in the class of cases referred to in this section and section 25-10-104. Albrecht v. Albrecht, 83 M 37, 269 P 158 (1928).

Costs as Condition to New Trial — Discretion of Court: This section, though not in terms authorizing the District Court to impose terms as a condition to the granting of a new trial, was sufficiently broad to vest that court with such discretionary power. Brunnabend v. Tibbles, 76 M 288, 246 P 536 (1926).

Discretion of Court Under Other Section: It may be within the power of the Legislature to lodge the whole matter of costs in the discretion of the courts, but until it does so, they have no discretion in adjudging them, except in the class of cases mentioned in this section and 25-10-104. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 27 M 288, 70 P 1114 (1902).

Collateral References

Costs *key* 11 through 15, 20.

20 Am. Jur. 2d Costs §§81, 101.

Authority of trial judge to impose costs or other sanctions against attorney who fails to appear at, or proceed with, scheduled trial. 29 ALR 4th 160.

Construction and application of state statute or rule subjecting party making untrue allegations or denials to payment of costs or attorneys' fees. 68 ALR 3d 209.

Allowance of attorneys' fees in, or other costs of, litigation by beneficiary respecting trust. 9 ALR 2d 1132.

25-10-104. When costs of appeal discretionary.

Case Notes

Neither Party Totally Successful — Cost of Transcript Properly Split: Both parties appealed, but each party lost a portion of its appeal. Weber paid the initial cost of the transcript that was

used by both parties in preparing their appeal. Because neither party was totally successful, the District Court properly divided the cost of the transcript between the parties. Weber v. St., 258 M 62, 852 P2d 117, 50 St. Rep. 425 (1993).

Minor Changes in Grant of Custody on Remand — No Legal Issues Reversed: In affirming a decision on remand by the District Court to hold each party responsible for its own costs of the original appeal and to equally divide the costs of the children's lawyer, the court followed State ex rel. Nesbitt v. District Court, 119 M 198, 173 P2d 412 (1946), in holding that under Rule 33, M.R.App.P. (Title 25, ch. 21), the slight modification in the previous decree did not make appellant the successful party on appeal and that absent reversal of legal questions in favor of either party, assignment of individual costs was proper. In re Marriage of Kuzara, 224 M 124, 728 P2d 786, 43 St. Rep. 2068 (1986).

Attorney Fees — Not Included in Costs on Appeal: There was substantial evidence to support the findings of the lower court in regard to award of attorney fees at the trial level. Furthermore, the wife was not entitled to attorney fees on appeal since they are not included in costs recoverable by the prevailing party on appeal. Allen v. Allen, 175 M 527, 575 P2d 74 (1978).

"Discretion" as Discretion of Appellate Court: The discretion referred to in this section is the discretion of the appellate court and not the discretion of the trial court. State ex rel. Nesbitt v. District Court, 119 M 198, 173 P2d 412 (1946).

Plaintiff Paying Remittitur as "Successful Party": Where Supreme Court upheld judgment for plaintiffs in all respects except that it found judgment excessive in a small amount and remanded cause to the District Court to grant new trial unless plaintiffs filed a remittitur, plaintiffs were the "successful parties" on appeal and were therefore entitled to their costs and trial court erred in awarding costs on appeal to defendants. State ex rel. Nesbitt v. District Court, 119 M 198, 173 P2d 412 (1946).

Cause Remanded for Amendment of Petition — Costs Allowed: Supreme Court's order reversing District Court's order dismissing petition for appointment as City Attorney under veterans' preference laws but remanding cause with directions to permit amendment of petition so as to bring it within such laws gave petitioner no substantive right rendering him successful party entitled to costs in Supreme Court. State ex rel. O'Sullivan v. District Court, 119 M 189, 172 P2d 816 (1946).

No Request for Costs in Modification and Affirmance of Judgment: Where the Supreme Court modified judgment and affirmed it as modified but did not mention costs, which were discretionary under this section, and appellant in his motion for rehearing did not ask for determination thereof, the District Court in modifying the judgment as directed on remittitur did not err in making an order requiring each party to pay his own costs in both courts. Lloyd v. Great Falls, 107 M 588, 87 P2d 187 (1939).

Excessive Costs on Appeal for Transcript: Where appellant inserts matter in the transcript on appeal not properly part of it or duplicates papers when an appropriate reference would have answered the purpose and by so doing causes the transcript to exceed 100 pages, thus calling for the printing thereof, cost of printing, otherwise recoverable, was disallowed on reversal of judgment. Linney v. Chicago, Milwaukee, St. Paul & Pac. R.R., 94 M 229, 21 P2d 1101 (1933).

Costs Statutorily Created — Discretion as Provided by Statute Only: Costs eo nomine were not recoverable by either party at the common law; they are the creatures of statute, and in adjudging them, courts must be guided by the sections of the Codes awarding them, and they are without discretion in the matter except in the class of cases referred to in 25-10-103 and this section. Albrecht v. Albrecht, 83 M 37, 269 P 158 (1928).

Failure to Assert Error in Trial Court — Respondent to Collect Costs on Appeal:

Where appellant by proper motion in the District Court could have obtained the relief granted him on appeal by way of modification of the judgment, the respondent will be awarded his costs on appeal as upon full affirmance of the judgment. In re Fort Shaw Irrigation District, 81 M 170, 261 P 962 (1927).

Where appellant made no effort in the trial court to have an apparent error in an award of damages corrected on motion for a new trial and the judgment is modified on appeal to the extent of such erroneous award, the respondent will be awarded his costs on appeal notwithstanding such modification. Ramsbacher v. Hohman, 80 M 480, 261 P 273 (1927).

Memorandum of Costs Required: The successful party is entitled to his costs on appeal, whether or not a formal order to that effect is made by the Supreme Court, if he files a memorandum of his costs with the Clerk of the District Court within 30 days after the remittitur is filed with that officer; failure to do so deprives him of his right to have them included in the judgment in his favor on a subsequent trial. First St. Bank v. Larsen, 72 M 400, 233 P 960 (1925).

Supreme Court Order for Costs — Enforcement by District Court: The disposition of costs on an appeal is, under this section and 72-10-111, within the discretion of the Supreme Court; and if such court directs the costs to be charged against the respondents and such order has become final when the remittitur issues, the District Court has no jurisdiction over that order except to enforce it; it has no power to change or modify the order. In re Williams' Estate, 52 M 366, 157 P 963 (1916).

Law Review Articles

Contract Damages in Montana—Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Collateral References

Costs *key* 224, 230.
20 C.J.S. Costs §§157 through 173.
20 Am. Jur. 2d Costs §26.

25-10-105. Costs of review other than by appeal.

Case Notes

Successful Party in Review by Certiorari — Cost Allowed: Prevailing party in proceeding for review of contempt judgment by Writ of Certiorari is entitled to recover its costs in the action. State ex rel. Porter v. First Judicial District, 123 M 447, 215 P2d 279 (1957).

Certiorari to Review Contempt Judgment — District Court Entitled to Costs: Under this section the respondent court is entitled to recover the costs incident to the preparation and certification of its return to the Supreme Court, on dismissal of an application for Writ of Certiorari to review an order of the District Court adjudging one guilty of contempt, and upon service of memorandum of costs and allowance thereof by the reviewing court, it will enter judgment and award the lower court execution therefor. State ex rel. Young v. District Court, 102 M 487, 58 P2d 1243 (1936).

Habeas Corpus and Certiorari — Costs Allowed for Transcription of Record: Where, on habeas corpus and certiorari, in aid thereof to review an order of commitment in a contempt proceeding, relator asked that the evidence be certified up, defendant, on dismissal at the cost of relator, is entitled to costs for the expense of transcribing the evidence into longhand. In re Boyle, 26 M 365, 68 P 409 (1902).

Habeas Corpus — Costs Allowed in Unmeritorious Proceedings: One who invokes the Writ of Habeas Corpus, without meritorious cause, may be properly taxed with the costs of the proceedings under this section. State ex rel. Shannon v. Reynolds, 13 M 423, 34 P 613 (1893).

Collateral References

Certiorari *key* 71, et seq; Costs *key* 221.

25-10-106. Several defendants not united in interest.

Case Notes

Voluntary Dismissal as to One Defendant — Entitled to Costs: Where plaintiff at the time the cause was called for trial dismissed the action against one of several defendants, a severance of the action as to that defendant took place and he was entitled to the costs necessarily incurred by him in preparing for trial, summoning witnesses, etc., the same as if he had been made the sole defendant in the first instance. Patterson v. Law, 78 M 221, 254 P 412 (1927).

Collateral References

Costs *key* 91.
20 C.J.S. Costs §53.

25-10-107. Costs when tender was made before commencement of action.

Case Notes

Waiver of Deposit in Court: Where the court concluded in an action to foreclose a mechanics' lien (now construction lien) that the lien had been discharged before suit on an account stated, but claimant, holding the defendant's check for several months, without demand for deposit in court, sued for but did not recover more, defendant was the prevailing party and was entitled to his costs for useless litigation, and plaintiff may not assert that because the provision of this statute was not complied with he may evade payment of defendant's costs but will be held to have waived the requirement. Luebben v. Metlen, 110 M 350, 100 P2d 935 (1940).

Failure to Deposit in Court: Where defendant alleged that before commencement of suit he had tendered to plaintiff the amount to which he was entitled and the jury awarded to plaintiff the amount so tendered but defendant had failed to deposit in court the sum tendered, defendant

was not and plaintiff was entitled to costs. Stagg v. Broadway Garage Co., 87 M 254, 286 P 415 (1930); Lewis v. Pennock, 68 M 448, 219 P 631 (1923).

Collateral References

Costs *key* 42.

20 Am. Jur. 2d Costs §§18 through 21.

25-10-108. Imposing costs on party acting as representative.

Case Notes

Order for Administrator to Personally Pay Costs — Jurisdiction of District Court: Where the Supreme Court in the disposition of an appeal from an order settling an administrator's account remands the cause with directions to require that officer to file a further account and orders that the costs incident to the appeal be paid by the administrator personally, the jurisdiction of the District Court is limited to the enforcement of the order, except that it may determine disputed questions of costs or on final settlement of the account allow such portion of the costs incurred as a charge against the estate as justice may require. Swanson v. Gnose, 106 M 262, 76 P2d 643 (1938); In re Jennings' Estate, 79 M 73, 254 P 1067 (1927).

Reasonableness of Appeals — No Evidence of Bad Faith Found: Where an administrator, jointly with another, had prosecuted a number of appeals to the Supreme Court, all but one of which were decided adversely to him, but in all of them there was sufficient doubt to justify his desire for a final decision by the appellate court, it will not be held, in the absence of proof making his dereliction apparent, that he acted in bad faith in taking the appeals, and the action of the court in allowing him credit in his accounts for such reasonable and necessary costs as were actually incurred by him in taking the appeals will be sustained. In re Davis' Estate, 35 M 273, 88 P 957 (1907).

Collateral References

Costs *key* 96, 103, et seq.; Executors and Administrators *key* 456, et seq.; Trusts *key* 377.

20 C.J.S. Costs §54; 34 C.J.S. Executors and Administrators §§895 through 899; 90 C.J.S. Trusts §376.

20 Am. Jur. 2d Costs §§32, 33.

Allowance out of decedent's estate for cost incurred by parties interested in granting or revoking of letters of administration or letters testamentary. 90 ALR 101.

25-10-109. Prisoner attendance at civil proceeding prohibited — exceptions — costs.

Compiler's Comments

Severability: Section 6, Ch. 475, L. 1997, was a severability clause.

Effective Date: Section 7, Ch. 475, L. 1997, provided: "[This act] is effective on passage and approval." Approved May 1, 1997.

Part 2
Allowable Costs

25-10-201. Costs generally allowable.

Case Notes

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GENERAL

Recoupment of Costs Provided for Defense of Claims Outside Insurance Policy Coverage: Plaintiff defended claims from third parties against defendant, but the claims were subsequently determined to be barred by exclusionary language in defendant's policy. Plaintiff sought to recoup the costs expended on defendant's behalf, and the District Court awarded plaintiff's costs. On appeal, the Supreme Court affirmed the award. Plaintiff timely and explicitly reserved the right to recoup the defense costs by notifying defendant of plaintiff's reservation of rights prior to paying the costs and thus expressly reserved its right to recoup defense costs if a court determined that plaintiff had no duty to provide the costs. Defendant implicitly accepted plaintiff's reserved rights by posing no objection to the reservation. Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc., 2005 MT 50, 326 M 174, 108 P3d 469 (2005).

See also Grinnell Mut. Reins. Co. v. Shierk, 996 F. Supp. 836 (S.D. Ill. 1998), and United Nat'l Ins. Co. v. SST Fitness Corp., 309 F3d 914 (6th Cir. 2002).

Summary Judgment — Deposition Costs Recoverable if Deposition Used in Dispositive Manner: In summary judgment actions, deposition costs are recoverable when a deposition is used in a dispositive manner. Here, depositions were not necessary to decide defendant's summary judgment motion because the grant of summary judgment was based purely on statutory interpretation and undisputed facts not derived from the depositions, so defendant's motion for deposition costs was properly denied. Ritchie v. Ennis, 2004 MT 43, 320 M 94, 86 P3d 11 (2004). See also Roy v. Neibauer, 191 M 224, 623 P2d 555 (1981).

Failure of District Court to Reverse Judgment for Costs When Bill of Costs Not Timely Filed — Reversible Error: The District Court held that defendants were entitled to $822 in costs from plaintiff. However, defendants conceded that because they failed to file a timely bill of costs, they were not entitled to costs. Nevertheless, the District Court failed to reverse its judgment for costs, so plaintiff appealed. The Supreme Court held that in light of defendants' concession, the District Court abused its discretion by not reversing the judgment, so the Supreme Court reversed the judgment. Hawkins v. Harney, 2003 MT 58, 314 M 384, 66 P3d 305 (2003).

Costs for Court Reporter Services and Subpoena Services Improperly Disallowed — Costs for Computer Research Properly Disallowed: Defendants prevailed in a prescriptive easement case and sought costs for court reporter services, subpoena services, and Westlaw computer research. The District Court declined to award costs for any of the services, and defendants appealed. The Supreme Court agreed with defendants that transcripts were necessary to prepare posttrial findings and conclusions, so costs for court reporter services were reasonable. Subpoena services were necessary to compel witnesses to attend trial, so subpoena service costs were also reasonable. However, Westlaw computer research services primarily involve improving a law practice's efficiency and may be common in modern law practice, but are not necessary costs. The case was remanded for an award of transcript and subpoena service costs. Ray v. Nansel, 2002 MT 191, 311 M 135, 53 P3d 870 (2002).

Supreme Court Refuses to Expand Equitable Exception for Awarding Attorney Fees for False Claims: Summers purchased a homeowner's policy from American and 2 years later purchased an additional policy from National without canceling his first policy. The home was subsequently burned, and Summers filed a claim with American. When American learned of the policy with National, National filed an interpleader action with the District Court and deposited its policy limit of $77,000, to which both American and Summers claimed entitlement. The American policy contained explicit language that the policy terminated upon the purchase of the subsequent policy by Summers. Relying on the public policy enunciated in automobile insurance stacking cases, Summers argued that the "other insurance" clause in American's policy was void as a matter of public policy. See Bennett v. St. Farm Mut. Auto. Ins. Co., 261 M 386, 862 P2d 1146 (1993). The Supreme Court disagreed, holding that stacking automobile policies was allowed in order to ensure that victims receive adequate compensation but that in the case before it, Summers could not demonstrate that the compensation received from National did not fully cover his loss and therefore American did not have to pay the homeowner a second time for the loss and was only liable to Summers for the premiums collected after Summers obtained the National policy. American urged the court to expand the equitable exception for awarding attorney fees when no contract or statutory basis exists for awarding the fees to cover false claims as well as frivolous or malicious claims. The Supreme Court declined to adopt an interpleader exception that would allow the award of fees when a false claim is made because the underlying claim was neither frivolous nor malicious. Nat'l Cas. Co. v. Am. Bankers Ins. Co. of Fla., 2001 MT 28, 304 M 163, 19 P3d 223 (2001).

"Costs" Held Not to Include Expenses of Deposition for Perpetuation of Testimony Incurred After Offer of Judgment: The Valeos sued Tabish for damage to the Valeos' road allegedly caused by Tabish's trucks. Tabish answered alleging contributory negligence. Thereafter, Tabish made an offer of judgment that the Valeos did not accept and subsequently incurred $609.29 for cost of airfare, hotel, and car rental in the taking of a deposition for perpetuation of testimony. The jury returned a verdict for Tabish, and the District Court entered judgment to include the $609.29 claimed by Tabish in his memorandum of costs. The Supreme Court reversed the District Court's opinion and held that "costs", as used in Rule 68, M.R.Civ.P. (Title 25, ch. 20), should not be construed more broadly than the same word in this section and held that its previous opinion in Fisher v. St. Farm Ins. Co., 281 M 236, 934 P2d 163 (1997), supported that conclusion. The Supreme Court also rejected Tabish's argument that the word "costs", as used in Rule 68, must provide an independent right to receive costs other than as defined and provided in 25-10-101 and 25-10-102 or the rule would otherwise serve no independent purpose to encourage the

settlement of litigation. The Supreme Court noted that Tabish provided no authority for that argument and that the language of 25-10-101 and 25-10-102 is significantly different from the language of Rule 68. Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

Question Whether Maps and Aerial Photograph Prepared for Specific Use in Prescriptive Easement Action — Remand: There was confusion as to whether costs incurred in the preparation of maps and an aerial photograph related to expenses of creating them or copying them. The Supreme Court held that costs were allowable for copying the maps because the costs were a necessary disbursement incurred in the preparation of the summary judgment hearing in the case. However, the court was unable to make a similar determination regarding the aerial photograph and remanded for a determination of whether the photograph was an original or copy of the original prepared in furtherance of the case. Hitshew v. Butte/Silver Bow County, 1999 MT 26, 293 M 212, 974 P2d 650, 56 St. Rep. 111 (1999).

Costs Allowable in Summary Judgment Case — Remand: Springer prevailed in an action against a traffic control officer and the city of Bozeman to recover damages for destruction of a vehicle without notice. The District Court awarded Springer $1,500 in damages and $1,636.32 in costs. Citing Thayer v. Hicks, 243 M 138, 793 P2d 784 (1990), the city argued that the court abused its discretion in awarding costs because most of the identified costs did not fall within the purview of this section. Generally, a party that ultimately prevails on summary judgment is entitled to the same allowable costs as if the case had been disposed of at trial. On appeal, the Supreme Court reviewed the bill of costs; affirmed the award of filing fees; reversed the award for long-distance telephone calls pursuant to Thayer; and remanded for a determination of whether awards for photocopy costs, facsimile transmission expenses, postage costs, shipping charges, a service fee, counsel's mileage expenses, and deposition costs were allowable. Springer v. Becker, 284 M 267, 949 P2d 641, 54 St. Rep. 876 (1997).

Easement Dispute — Attorney Fees Improperly Awarded — Foy and Randono Distinguished — Costs Sustained: Smalls brought a quiet title action against Goods for determination of an easement. Goods counterclaimed to quiet title to an easement for themselves. The District Court found in favor of the Smalls on the easement issue and awarded Smalls $8,536 in attorney fees and $759 in costs. The Supreme Court reversed on the issue of attorney fees, holding that there was no applicable exception to the general rule that attorney fees cannot be awarded absent a contractual agreement or other special circumstances. The Supreme Court held that the District Court improperly relied upon Foy v. Anderson, 176 M 507, 580 P2d 114 (1978), and Martin v. Randono, 191 M 266, 623 P2d 959 (1981). The Supreme Court stated that the Randono case stands for the proposition that fees may not be awarded as costs and that Foy is distinguishable in that in Foy, fees were awarded to a person who had sought to avoid legal action, unlike the Smalls who initiated litigation in this case. Although expressing no opinion on the applicability of Rules 11 and 54(d), M.R.Civ.P. (Title 25, ch. 20), to the case before it, the Supreme Court also pointed out that fees could be awarded as a sanction under Rule 11 and that costs could be awarded pursuant to Rule 54(d). However, the Supreme Court did sustain the award of costs to Smalls, noting that the purposes for which costs were awarded by the District Court were of the type of costs allowable under this section. Small v. Good, 284 M 159, 943 P2d 1258, 54 St. Rep. 825 (1997).

Failure to File Bill of Costs Held Waiver of Recovery of Costs — Issue Addressed First Time on Appeal: Cenex, Inc., brought a declaratory judgment action against the Yellowstone County Board of Commissioners. Cenex, for the first time on appeal, raised an objection to the District Court's order that it pay the Board $852.75 in costs. The Supreme Court noted that while it generally does not address issues raised for the first time on appeal, the failure of the Board to file a bill of costs pursuant to this section deprived Cenex of its opportunity to object to the taxation of costs before the District Court. The Supreme Court therefore determined that Cenex cannot be considered to have waived its right to appeal the taxation of costs and held that the Board's failure to file the bill of costs constituted a waiver of its right to recover costs from Cenex. Cenex, Inc. v. Yellowstone County Bd. of Comm'rs, 283 M 330, 941 P2d 964, 54 St. Rep. 695 (1997).

Cost of Copy of Deposition, Original of Which Was Paid for by Other Party: The cost of a copy of a doctor's deposition obtained by plaintiff's counsel was properly awarded as a cost to be paid by defendant. The deposition was a practical necessity to prepare for trial and was read at trial. The inclusion as a cost was proper, even though the cost of the original transcript of the deposition was paid for by defendant. Liedle v. St. Farm Mut. Auto. Ins. Co., 283 M 129, 938 P2d 1379, 54 St. Rep. 528 (1997).

Taxation of Costs in Offer of Judgment — Disallowance of Deposition Expenses: Fisher sought to recover the costs of depositions taken in a case that was settled by offer of judgment pursuant to Rule 68, M.R.Civ.P. (Title 25, ch. 20), contending that costs should be allowable because they were necessary for the prosecution of the claim, even though it did not proceed to trial. Applying the definition of "costs" in this section, the Supreme Court noted that costs for depositions are allowed in only limited circumstances when the depositions are relied upon by the trial court or used in a trial setting. The court found that in the present case, acceptance of the offer of judgment averted a trial and that as a result, the depositions were not used as evidence, for purposes of impeachment, or in deciding a dispositive summary judgment motion. Denial of Fisher's request to recover deposition costs was proper. Fisher v. St. Farm Ins. Co., 281 M 236, 934 P2d 163, 54 St. Rep. 151 (1997), followed in Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999), and Idaho Asphalt Supply v. Dept. of Transportation, 2001 MT 27, 304 M 157, 18 P3d 1018 (2001).

Statute Not Applicable to Workers' Compensation Cases: Kloepfer appealed the Workers' Compensation Court's denial of her claim for $750 as cost for an expert medical witness. The Supreme Court held that this section does not apply to workers' compensation cases and that Kloepfer was entitled to recover her costs. Kloepfer v. Lumbermens Mut. Cas. Co., 272 M 78, 899 P2d 1081, 52 St. Rep. 663 (1995), overruling, as to the applicability of this section to workers' compensation cases, Baeta v. Don Tripp Trucking, 254 M 487, 839 P2d 566 (1992), and Stevens v. St. Fund, 268 M 460, 886 P2d 962 (1994).

Costs of Filed Depositions Recoverable: Expenses for taking depositions that are not used at trial and that are for the convenience of counsel are not recoverable costs. Expenses incurred in taking depositions that are filed with the District Court and that are used at trial are not for the convenience of the litigant and thus constitute recoverable costs under Rule 30(h)(5), M.R.Civ.P. (Title 25, ch. 20). Gilluly v. Miller, 270 M 272, 891 P2d 1147, 52 St. Rep. 178 (1995).

Costs for Workers' Compensation Investigator Properly Denied: Absent statutory authority or an applicable rule of court, the Workers' Compensation Court did not err in denying an award for the costs of hiring a private investigator to investigate a fraud claim related to a denial of benefits case because it was not within the course and practice of the court to make such an award and the parties did not stipulate to an award of those costs. Stevens v. St. Comp. Mut. Ins. Fund, 268 M 460, 886 P2d 962, 51 St. Rep. 1396 (1994), overruled, as to the applicability of this section to workers' compensation cases, by Kloepfer v. Lumbermens Mut. Cas. Co., 272 M 78, 899 P2d 1081, 52 St. Rep. 663 (1995).

Expenses of Investigation Not Recoverable as Costs — Exception for Money Paid by Undercover Agents: Defendants Richard and David Fertterer were convicted of felony criminal mischief for illegally killing game. They contended on appeal that they could not be required to pay the costs of the investigation incurred by the state prior to the filing of the information. Citing Masanovich v. School District No. 1, 178 M 138, 582 P2d 1234 (1978), and St. v. Haynes, 633 P2d 38 (Oreg. App. 1981), the Supreme Court held that the costs of investigation were not recoverable because there was no statutory authority for the charge, as there is for other costs. However, the court made an exception, recognized in another Oregon case, for money paid directly to defendants by undercover agents. In this case, the state was allowed to recover guide service fees and other expenses paid to the Fertterers. St. v. Fertterer, 255 M 73, 841 P2d 467, 49 St. Rep. 846 (1992).

Costs Limited to Those Incurred in Constructing Exhibits Admitted at Trial: The lower court awarded costs to the plaintiff for expenses incurred for videotape depositions, photographic exhibits, telephone calls, and expert witnesses' airfare and hotel bills. The Supreme Court held that only expenses expended on exhibits admitted at trial may be taxed to the losing party. The court specified that telephone calls, airfare, hotel bills, rental car expenses, and other incidental costs incurred in obtaining depositions are not recoverable. Thayer v. Hicks, 243 M 138, 793 P2d 784, 47 St. Rep. 1082 (1990), followed in Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

Cost of Photographs Used as Evidence — Not Necessary Expense: It is in the discretion of trial courts to permit jurors to view an accident site under consideration. Therefore, when the court denied a motion to allow viewing of the premises and the parties instead introduced photographic evidence of the site, the photographs were not a necessary expense within the meaning of this section. McGinley v. Ole's Country Stores, Inc., 241 M 248, 786 P2d 1156, 47 St. Rep. 181 (1990).

Recovery of Costs by Prevailing Party for Depositions Used at Trial: Costs may be allowed by the District Court against a losing party only for depositions used as evidence at the trial or for impeachment purposes during the trial. Semenza v. Leitzke, 232 M 15, 754 P2d 509, 45 St. Rep.

829 (1988), followed in McGinley v. Ole's Country Stores, Inc., 241 M 248, 786 P2d 1156, 47 St. Rep. 181 (1990).

Costs Allowed for Preparation of Maps, Surveys: The cost of preparation of maps and surveys is allowed when necessary to the jury's understanding of the facts in issue. Funk v. Robbin, 212 M 437, 689 P2d 1215, 41 St. Rep. 1848 (1984), followed in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Interest and Expenses Allowable: Plaintiff entered a buy-sell to purchase defendants' ranch. One of his major considerations was gaining investment tax credits. Defendants refused to perform, and plaintiff filed a breach of contract action. The District Court found for plaintiff and awarded him prejudgment interest at 10% on his state and federal income tax obligation, the earnest money, and his capital expenditures on the ranch. On appeal, the Supreme Court held that interest on the earnest money was all that should be allowed as prejudgment interest under 27-1-211. Prejudgment interest should be 6% under 31-1-106. Interest should then be allowed on the judgment according to 27-1-211 at the amount of 10% under 25-9-205. The expenses that are allowable to a plaintiff are found in 25-10-201, and 25-10-101 outlines when costs are allowed. The cost of depositions not used during trial is not allowed. Various travel expenditures would not have been chargeable to defendants if the contract had been performed. The portion of capital expenditures allowed should be only the loss plaintiff suffered as a result of expenditures from the time of signing the buy-sell to the time of breach. Ehly v. Cady, 212 M 82, 687 P2d 687, 41 St. Rep. 1611 (1984).

Broad Discretion for Taxing Costs: Defendant claimed that the trial court erred in awarding costs of two depositions and certain photographs to plaintiff. Deposition costs are allowable where the deposition is used at trial. The depositions in question were used to impeach witnesses; therefore, the costs were recoverable. As to the photographs, under this section, the trial court's broad authority for taxing costs permitted the taxing of the photography expense. Cash v. Otis Elevator Co., 210 M 319, 684 P2d 1041, 41 St. Rep. 1077 (1984), followed in Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994), and Daines v. Knight, 269 M 320, 888 P2d 904, 52 St. Rep. 8 (1995).

Contract Provision for Costs Enforced: Award of costs to defendant in action for breach of contract in which defendant counterclaimed would be affirmed where the contract expressly provided for costs in the event of a suit and plaintiff claimed error in the award but failed to present specific objections. Schmidt v. Colonial Terrace Associates, 202 M 46, 656 P2d 807, 39 St. Rep. 2318 (1982).

Cost Proper: Cost of filing fees, entry of judgment, depositions, stenographer's fee, and witness fees were proper costs allowed under 25-10-201. Miller v. Watkins, 200 M 455, 653 P2d 126, 39 St. Rep. 1867 (1982).

Mandamus — Litigation Expenses Awardable: In a prior decision, this case was remanded for a hearing on attorney fees. The District Court awarded fees, and plaintiffs appealed. Plaintiffs contended the District Court erred in refusing to award as damages, under 27-26-402, certain out-of-pocket litigation expenses. The District Court concluded that 27-26-402 does not contemplate the awarding of litigation expenses not itemized in 25-10-201. "Damages" is defined in 27-1-202, and "detriment" is defined in 27-1-201. The detriment suffered by plaintiffs with regard to these litigation expenses was caused by the Department of State Lands' (functions now transferred to Department of Environmental Quality) failure to perform a clear legal duty. Plaintiffs are entitled to be compensated for the reasonable litigation expenses related to the mandamus issue regardless of whether those expenses are awardable as "costs" within the meaning of 25-10-201. Kadillak v. Dept. of State Lands, 198 M 70, 643 P2d 1178, 39 St. Rep. 773 (1982).

Payment Out of "Common Fund": Private organization that won suit seeking to have state barred from denying certain state aid money to high school district was, under the "common fund" doctrine, entitled to recover attorney fees and costs from the common fund, that is, from the state aid money ordered to be paid. Under the common fund doctrine, if a party, through active litigation, creates or increases a fund, others sharing in the fund must bear a portion of the litigation costs, including reasonable attorney fees. Missoula High School Legal Defense Ass'n v. Supt. of Pub. Instruction, 196 M 106, 637 P2d 1188, 38 St. Rep. 2164 (1981).

Prima Facie Case for Costs: Verified memorandum of costs and disbursements of plaintiffs was prima facie evidence that the funds were necessarily expended and properly taxable to defendant unless, as a matter of law, they appeared otherwise on the face. Defendant had the burden of overcoming the prima facie case, and the award of costs was affirmed where defendant failed to carry its burden of showing the items of cost were not reasonable and necessary as found by the trial court. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Deposition of Witness — Partial Transcript of Trial: A deposition taken solely for a party's own convenience cannot be charged to the other party as part of the costs. Here, however, a copy was furnished to the other party and the other party used it at trial. The cost of the deposition is therefore properly includable in costs. A party cannot order a partial transcript of the trial for use at the trial and then charge it to the other party as part of the costs. Morrison-Maierle, Inc. v. Selsco, 186 M 180, 606 P2d 1085 (1980). See also Frigon v. Morrison-Maierle, Inc., 233 M 113, 760 P2d 57, 45 St. Rep. 1344 (1988), and Harrison v. Chance, 244 M 215, 797 P2d 200, 47 St. Rep. 1539 (1990).

Costs Allowed for Documents "Used in the Action": Since there is a distinction between documents used "in the action" and those used "on trial", the costs of preparation, filing, recording, and copying are allowable costs under this section if the court determines the documents were "necessarily used in the action", even if not introduced at trial. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

Expenses of Deposition for Defendant's Own Benefit Not Recoverable as Cost: Cost to defendant of taking plaintiff's depositions for convenience of defendant's counsel could not be included in bill of costs where never filed with the court and plaintiff had no practical means of securing a copy; it was obviously a discovery deposition for defendant's own benefit. Lovely v. Burroughs Corp., 165 M 209, 527 P2d 557 (1974); Johnson v. Furgeson, 158 M 170, 489 P2d 1032 (1971).

Depositions for Benefit of Parties — Expense Recoverable as Cost: In action contesting assessment of net proceeds tax of mining industry, Board of Equalization was properly assessed costs of contestant's expense of taking deposition of secretary of Board of Equalization where contestant prevailed and deposition was for the benefit of the court and both parties, having been introduced into evidence by agreement of both parties. Pfizer, Inc. v. Madison County, 161 M 261, 505 P2d 399 (1973).

Deposition Expenses Not Taxable as Costs: The cost of taking a party's deposition for himself is not properly taxable as costs against the other party. Davis v. Trobough, 139 M 322, 363 P2d 727 (1961); Isman v. Altenbrand, 42 M 188, 111 P 849 (1910).

Expense of Map as Cost — Burden of Proof: Where a map of the premises in question is reasonably necessary to explain the situation, the reasonable cost of making the map may be taxed as a cost. The original verified memorandum of the cost of the map is prima facie evidence that the amount charged was necessarily expended; and the burden is on the party objecting to the taxation thereof to overcome the same. Perkins v. Stephens, 131 M 138, 308 P2d 620 (1957); Kelly v. Butte, 44 M 115, 119 P 171 (1911).

Photographs Not "Necessary" Expense: Particular photographs were not "necessary expenses" within the meaning of the wording of this section. Broberg v. N. Pac. Ry., 120 M 280, 182 P2d 851 (1947).

Costs as Incidental Damages: Costs are said to be in the nature of incidental damages allowed to the successful party to indemnify him against the expense of asserting his rights in court, when the necessity for so doing was caused by the other's breach of a legal duty. Luebben v. Metlen, 110 M 350, 100 P2d 935 (1940).

Typewritten Brief as "Other Reasonable and Necessary Expense": Although not specifically allowable under this section, the expense of preparation of typewritten brief was properly recoverable as costs under provision "such other reasonable and necessary expenses as are taxable according to the course and practice of the court". Gahagan v. Gugler, 103 M 521, 63 P2d 145 (1936).

Physical Examination Expenses Not Costs: The costs of a doctor's examination and report of an injured workman's physical condition are not proper costs in an action to recover under the Workmen's Compensation Act. Lunardello v. Republic Coal Co., 101 M 94, 53 P2d 87 (1935), explained in Gahagan v. Gugler, 103 M 521, 63 P2d 145 (1936).

Expense of Jury View of Scene Not Taxable as Costs: In an action to impose upon a railroad company the duty of paying for livestock killed on its track, the expense of taking the jury out to view the scene of the occurrence is not taxable as costs, in the absence of a custom or rule of court authorizing it. Dewell v. N. Pac. Ry., 54 M 350, 170 P 753 (1918).

Appeal Costs Taxable: Only such items of disbursements as are provided by this section may be recovered by the successful party. Disbursements necessarily made to secure the review of a case are a part of the costs taxable. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 33 M 400, 84 P 706 (1905).

Adverse Mining Claim — Survey and Abstract Not Costs: Disbursements for filing an adverse claim to a mining location in the land office for surveying, the making of a plat, and for an

abstract of title for use in the land office were not taxable as costs under this section. Mares v. Dillon, 30 M 144, 75 P 969 (1904).

Survey Expenses: A finding that an inspection and survey was necessary to enable a party to properly present his case was an adjudication of costs attendant on procuring the order for the survey. King v. Allen, 29 M 5, 73 P 1107 (1903).

Adverse Mining Claim — Expenses of Models and Surveys Not Costs: Expenses paid for models, surveys, and for development work done in preparation for trial of an action to determine adverse claims to mining property cannot be taxed as costs. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 27 M 288, 70 P 1114 (1902), distinguished in Perkins v. Stephens, 131 M 138, 308 P2d 620 (1957).

Expenses of Judgment, Minute Entries, and Transcript as Costs: On the dismissal, at cost of relator, of a writ to review an order in a contempt proceeding, defendant is entitled to the fee paid by him for the judgment and minute entries included in his return and the expense of making the transcript, excepting certain pages consisting merely of recitals by defendant. State ex rel. Healy v. District Court, 26 M 224, 67 P 114, 68 P 470 (1902). See also In re Boyle, 26 M 365, 68 P 409 (1902).

STATUTORY BASIS FOR COSTS

Granting Witness Air Fare Costs Following Appeal: The filing of a notice of appeal did not deprive the District Court of jurisdiction to grant a pending bill for costs. However, the court properly disallowed as a cost the air fares for witnesses. Powers Mfg. Co. v. Leon Jacobs Enterprises, 216 M 407, 701 P2d 1377, 42 St. Rep. 906 (1985).

Mandamus — Litigation Expenses Awardable: In a prior decision, this case was remanded for a hearing on attorney fees. The District Court awarded fees, and plaintiffs appealed. Plaintiffs contended the District Court erred in refusing to award as damages, under 27-26-402, certain out-of-pocket litigation expenses. The District Court concluded that 27-26-402 does not contemplate the awarding of litigation expenses not itemized in 25-10-201. "Damages" is defined in 27-1-202, and "detriment" is defined in 27-1-201. The detriment suffered by plaintiffs with regard to these litigation expenses was caused by the Department of State Lands' (functions now transferred to Department of Environmental Quality) failure to perform a clear legal duty. Plaintiffs are entitled to be compensated for the reasonable litigation expenses related to the mandamus issue regardless of whether those expenses are awardable as "costs" within the meaning of 25-10-201. Kadillak v. Dept. of State Lands, 198 M 70, 643 P2d 1178, 39 St. Rep. 773 (1982).

Special Statute, Stipulation, or Rule: The list of items under this section is exclusive in respect to allowable costs except as to cases taken out of its operation by special statute, by stipulation of the parties, or by rule of court. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Disbursements to Be Covered by Statute: No item of disbursements may be recovered by successful party that does not come within the statute. Broberg v. N. Pac. Ry., 120 M 280, 182 P2d 851 (1947).

Section Exclusive: This section is exclusive except insofar as certain cases are taken out of its operation by special statutes. Gahagan v. Gugler, 100 M 599, 52 P2d 150 (1935).

ATTORNEY FEES

No Equitable Exception to American Rule for Parties Forced to Bring Suit to Determine Legal Rights Against Party Presenting Frivolous Defense in Bad Faith: Plaintiffs in a forcible detainer action contended that they should be granted attorney fees as an exception to the American Rule that a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory grant of those fees because plaintiffs were forced to bring a lawsuit to determine their legal property rights against a defendant who presented a frivolous defense asserted in bad faith. The District Court declined to award attorney fees, and on appeal, the Supreme Court affirmed, noting that a malicious or bad faith equitable exception to the American Rule has consistently been denied and that the exception in Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001), did not apply. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Attorney Fees Proper to Defend Untimely and Inappropriate Nonmeritorious Action: An award of attorney fees to plaintiff was within the District Court's discretion when plaintiff, as a wholly innocent party, was forced to employ counsel to defend a nonmeritorious motion that was both untimely and inappropriate. Connell v. Dept. of Social and Rehabilitation Services, 2003

MT 361, 319 M 69, 81 P3d 1279 (2003), following Foy v. Anderson, 176 M 507, 580 P2d 114 (1978).

Common Fund Doctrine Equitable Exception to American Rule Regarding Award of Attorney Fees Applicable to Medical Services Lien — Elements of Doctrine: Kilmer suffered severe injuries as a passenger in a vehicle driven by Hall. Kilmer received medical attention from a North Dakota hospital, which subsequently perfected a lien for the value of its services in the amount of $309,000. Hall had no insurance, but the co-owner of the vehicle had a $500,000 policy with Mountain West Farm Bureau (Mountain West). The policy had a step-down provision limiting Mountain West's liability to $25,000 for passengers other than the insured or a relative of the insured, so Mountain West initially found that Kilmer was entitled to only $25,000. However, after negotiating with Kilmer's attorney, Mountain West agreed to proffer the policy limit of $500,000, plus $30,000 in no-fault coverage. Mountain West then filed a complaint for interpleader, the hospital cross-claimed against Kilmer for satisfaction of its lien, and Kilmer cross-claimed against the hospital for a reduction in the hospital's recovery for a pro rata portion of Kilmer's attorney fees incurred in negotiating the settlement with Mountain West. The District Court applied Sisters of Charity of Providence of Mont. v. Nichols, 157 M 106, 483 P2d 279 (1971), and held that the hospital was not liable for a pro rata portion of Kilmer's attorney fees. Kilmer appealed, and the Supreme Court reversed. Under the 1999 version of 71-3-1114 applicable to this case, the hospital had a valid lien for its medical services; however, the statute was silent on the issue of attorney fee apportionment (see, however, 2001 amendments addressing a hospital's pro rata liability for an injured person's attorney fees). Generally, Montana follows the American rule that a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory grant of those fees. There are exceptions to the American rule, one of which is the common fund doctrine authorizing the spread of fees among the individuals who benefit from the litigation that created the common fund. The three elements necessary to establish a common fund, as set out in Means v. Mont. Power Co., 191 M 395, 625 P2d 32 (1981), and Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69 (1997), are: (1) one party, known as the active beneficiary, must create, reserve, or increase a common fund; (2) the active beneficiary must incur legal fees in establishing the common fund; and (3) the common fund must benefit ascertainable, nonparticipating beneficiaries. To the extent that there are inequities in the contributions of participating counsel, the court may then intervene to allocate fees accordingly. Because the common fund doctrine was not raised in Sisters of Charity of Providence of Mont. v. Nichols, the Supreme Court held that that case did not preclude application of the doctrine in the present case. Thus, the District Court erred as a matter of law in relying on Sisters of Charity of Providence of Mont. v. Nichols to grant the hospital's partial summary judgment. Although the Supreme Court declined to rule on the applicability of the common fund doctrine here because the parties did not present arguments in District Court as to whether Kilmer could satisfy the elements of the doctrine, the case was remanded to allow Kilmer to present arguments on the applicability of the common fund doctrine. Mtn. W. Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, 308 M 29, 38 P3d 825 (2001).

When Recovery of Deposition Expenses Allowed — Use of Deposition at Trial Required: The Bings argued that their costs associated with deposing Mularoni were associated with expenses related to a motion to compel discovery and were thus recoverable under Rule 37(d), M.R.Civ.P. (Title 25, ch. 20). The District Court declined to award deposition costs, and the Bings appealed. Pursuant to this section, a party to whom costs are awarded is entitled to include the costs of taking depositions. However, the Supreme Court has allowed deposition costs only in limited circumstances—when the deposition was relied on by the District Court or used in a trial setting as evidence or for impeachment or when the deposition is filed with the District Court and used by the court in a dispositive summary judgment motion. Deposition costs are not allowed when the purpose of the deposition is merely to assist the requesting party in compiling its case and is taken only for the convenience of counsel. A deposition that is not used at trial is considered to be for the convenience of counsel. In the present case, the deposition was not used at trial, nor was it used by the District Court in its ruling on the motion to compel, which was not a dispositive motion. Thus, the District Court did not err in declining to award deposition costs to the Bings. Mularoni v. Bing, 2001 MT 215, 306 M 405, 34 P3d 497 (2001). See also Fisher v. St. Farm Ins. Co., 281 M 236, 934 P2d 163 (1997).

Prevailing Party on Ditch Easement Claim Entitled to Attorney Fees and Costs Despite Loss of Separate Counterclaim Related to Road Easement: Espy sued for easement interference related to an underground irrigation system. Quinlan filed a permissive counterclaim, alleging that Espy had interfered with Quinlan's road easement over Espy's property. Following trial, the District Court concluded that: (1) Espy was successful on his claim because he had a valid

easement over Quinlan's property for use and maintenance of the irrigation system; (2) Quinlan was successful on her counterclaim because she had a valid road easement over Espy's property; (3) both parties were entitled to a permanent order restraining the other party from interfering with their respective easements; and (4) Espy was entitled to attorney fees and costs as the successful party under 70-17-112. Quinlan appealed the award of attorney fees, contending that because she prevailed on the counterclaim, neither party could be considered a prevailing party. However, Quinlan's counterclaim was not raised in the context of 70-17-112, but was instead related to a road easement. Because Espy successfully prevailed on all claims raised pursuant to 70-17-112, he was entitled to attorney fees and costs regardless of the fact that he was not the prevailing party on the counterclaim. Espy v. Quinlan, 2000 MT 193, 300 M 441, 4 P3d 1212, 57 St. Rep. 764 (2000), distinguishing Knudsen v. Taylor, 211 M 459, 685 P2d 354 (1984).

Award of Attorney Fees Under Foy Equitable Exception Limited to Defense of Frivolous Action: Absent contractual or statutory authority, attorney fees will generally not be awarded, but a court may, under its equity powers and pursuant to Foy v. Anderson, 176 M 507, 580 P2d 114, 35 St. Rep. 811 (1978), award attorney fees to make an injured party whole. However, the Foy equitable exception applies only to situations in which a party has been forced to defend against a wholly frivolous or malicious action and is not available for a party that initiates a legal action. Further, parties bringing actions for injunctive relief to protect their own rights are not entitled to attorney fees under the Foy exception. Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999), distinguishing Wilson v. Dept. of Natural Resources and Conservation, 199 M 189, 648 P2d 766, 39 St. Rep. 1294 (1982). See also Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999), Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004), and Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, 322 M 133, 95 P3d 671 (2004).

Bond for Costs on Appeal May Not Include Attorney Fees: When allowed by law, attorney fees that a party incurs on appeal may be recovered by that party if that party prevails on appeal. Section 39-2-915 provides that if a party in a wrongful discharge proceeding declines an offer to arbitrate and then loses in court, the party that offered to arbitrate is entitled to reasonable attorney fees incurred after the offer was made, including those incurred on appeal. However, for purposes of determining the amount of a bond or security under Rule 6, M.R.App.P. (Title 25, ch. 21), a District Court may not include anticipated attorney fees for the future defense of an appeal as part of the anticipated costs on appeal. Moore v. Imperial Hotels Corp., 285 M 188, 948 P2d 211, 54 St. Rep. 1104 (1997).

Attorney Fees Improperly Granted — Injunction Held Unlike Mandamus for Purposes of Fees: Wittmers purchased a manufactured home and moved it to a subdivision in Gallatin County. Newmans and others brought an action to restrain Wittmers from maintaining the home in the subdivision in violation of a restrictive covenant prohibiting mobile homes. The District Court issued the injunction and also awarded Newmans their fees and costs. The Supreme Court held that attorney fees were improperly granted because even though fees are awardable in a mandamus action, the remedy of injunction is unlike the remedy of mandamus. For that reason, no analogy can be made to mandamus cases awarding fees. Newman v. Wittmer, 277 M 1, 917 P2d 926, 53 St. Rep. 516 (1996).

Contract Overcharge and Negligence Claims Barred by Res Judicata When Other Party Had Already Sued for Failure to Pay: A trucker obtained default judgment in Justice's Court for the failure of Greenwood to pay the full amount that the trucker charged for hauling cattle. Greenwood had claimed that the amount charged was more than agreed upon and refused to pay the difference. He also deducted an amount for the trucker's alleged injury to two steers. Greenwood's later District Court action alleging that the contract was void for an overcharge and alleging the negligent injury of the two steers was barred by res judicata. The Supreme Court also ruled that the case was not one of those rare ones in which a court could use its equitable powers to award attorney fees, which were requested by the trucker. Greenwood v. Steve Nelson Trucking, Inc., 270 M 216, 890 P2d 765, 52 St. Rep. 151 (1995).

Attorney Fees Not Awardable on Affidavit of Counsel — Hearing Required: Even though a contract may provide for the award of reasonable attorney fees, it is improper to award attorney fees solely on the affidavit of counsel without holding an evidentiary hearing on the matter. Stark v. Borner, 234 M 254, 762 P2d 857, 45 St. Rep. 1885 (1988).

Attorney Fees as Element of Compensatory Damages — Limited to Contingent Fee Agreement: Jury awarded appellant attorney fees as an element of compensatory damages and deferred to the District Court to assess appropriate attorney fees and costs. The court arrived at a sum based on a contingent fee agreement entered into by appellant and his attorney rather than using a lodestar determination based on reasonable hours expended times a reasonable hourly fee.

Appellant contended on appeal that this was an incorrect method of calculation. The Supreme Court held that: (1) the provisions of the contingent fee agreement were controlling in computing the amount of attorney fees; (2) the contract fixed the damages appellant sustained; and (3) to allow appellant to recover attorney fees based on an hourly fee would change the issue from what amount would compensate him for actual damages he sustained in the form of attorney fees to what amount would reasonably compensate his attorney for services rendered. Morris v. Nationwide Ins. Co., 222 M 399, 722 P2d 628, 43 St. Rep. 1363 (1986).

Award of Attorney Fees by Judge Who Did Not Try Case — No Abuse of Discretion: Parties had 2 months following judgment and prior to a change in jurisdiction to bring the matter of attorney fees before the judge who presided over a lien foreclosure action. Neither side did, and jurisdiction of the action was transferred from the 13th to the 16th Judicial District. Defendant later claimed the new judge abused his discretion by awarding fees in a case he did not try because he could not know all of the circumstances surrounding the foreclosure action. The Supreme Court held that a judge's jurisdiction over a case is a matter of law and that while it is preferable that the presiding trial judge consider the matter of attorney fees, it is not mandatory. Finding no abuse of discretion, judgment was affirmed. Donnes v. Orlando, 221 M 356, 720 P2d 233, 43 St. Rep. 890 (1986).

Contempt Order — Costs Award Proper — Attorney Fees Award Improper: In reviewing a contempt order that arose out of a water rights dispute, the Supreme Court ruled that an award of costs to the irrigation district as the prevailing party was proper, but that an award of attorney fees to the district was not proper. The court reasoned that no applicable statute or contractual provision provided for attorney fees and that the case did not fit within the exceptions recognized in Foy v. Anderson, 176 M 507, 580 P2d 114, 35 St. Rep. 811 (1978). State ex rel. Foss v. District Court, 216 M 327, 701 P2d 342, 42 St. Rep. 845 (1985).

Attorney Fees Not Recoverable as Costs Under Offer of Judgment Rule: The "costs incurred" that may be awarded to an offeror under Rule 68, M.R.Civ.P. (Title 25, ch. 20), do not include attorney fees. Schillinger v. Brewer, 215 M 333, 697 P2d 919, 42 St. Rep. 408 (1985). The general rule that costs do not include attorney fees was distinguished with regard to attorney fees chargeable as costs under 39-3-214 in a wage protection case, Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

No Explicit Authority for Award of Attorney Fees in Disqualification Action: As there is no provision in 3-1-802 that allows a judge to award attorney fees to a party or damages to a nonparty, such award is improper. Unless a statute provides explicitly for an award of attorney fees to the prevailing party, a court cannot make such an award. In re Marriage of Gahr, 212 M 481, 689 P2d 257, 41 St. Rep. 1879 (1984).

Attorney Fees Not Included — List Exclusive: Attorney fees are not included in the 25-10-201 list of recoverable costs. This list of items is exclusive except for cases taken out of its operation by special statute, by stipulation of parties, or by rule of court. Masonovich v. School District & Teachers' Local 332, 178 M 138, 582 P2d 1234 (1978), followed in Glaspey v. Workman, 234 M 374, 763 P2d 666, 45 St. Rep. 1983 (1988); Kintner v. Harr, 146 M 461, 408 P2d 487 (1965); In re Mickich's Estate, 114 M 258, 136 P2d 223 (1943).

Attorney Fees — Not Included in Costs: There was substantial evidence to support the findings of the lower court in regard to award of attorney fees at the trial level. Furthermore, the wife was not entitled to attorney fees on appeal since they are not included in costs recoverable by the prevailing party on appeal. Allen v. Allen, 175 M 527, 575 P2d 74 (1978).

Fees Not Excessive: Attorney fees that amounted to only about 10% of the judgment recovered were not excessive or wrongfully awarded. Haggerty v. Selsco, 166 M 492, 534 P2d 874 (1975).

Divorce Action — No Fees on Execution: Attorney fees are not included as costs under this section, so that if such costs in a divorce action were not allowed under section 21-137, R.C.M. 1947 (since repealed), the wife was not entitled to them on execution under 25-10-503. State ex rel. Sowerwine v. District Court, 145 M 375, 401 P2d 568 (1965).

Unlawful Detainer: In an action by a landlord for unlawful detainer attorney's fees are not recoverable as damages or costs. Roseneau Foods, Inc. v. Coleman, 140 M 572, 374 P2d 87 (1962).

Condemnation Action: Attorney's fees incurred in the defense of a condemnation proceeding for a private road of necessity under 70-30-107 are not recoverable as an expense of such action under this section or 25-10-301. Tomten v. Thomas, 125 M 159, 232 P2d 723 (1951), overruled in Callant v. Fed. Land Bank of Spokane, 181 M 400, 593 P2d 1036 (1979).

Special Statute — No Stipulation: This section, enumerating the items which may be recovered as costs in an ordinary action, is exclusive except as to cases taken out of its operation by special statute, and in the absence of such statute, stipulation of the parties or rule of court,

attorney's fees are not so recoverable. McBride v. School District, 88 M 110, 290 P 252 (1930), distinguished in Britt v. Cotter Butte Mines, 108 M 174, 89 P2d 266 (1939).

No Pleading or Proof Required: In an action to recover wages due, the plaintiff, if successful, is entitled to a reasonable attorney's fee as a part of the costs under 39-3-214 without being required to either plead or prove such item. Gardiner v. Eclipse Grocery Co., 72 M 540, 234 P 490 (1925), explained in Britt v. Cotter Butte Mines, 108 M 174, 89 P2d 266 (1939).

Section Exclusive: Since this section is exclusive, except so far as certain cases are taken out of its operation by special statutes, and does not mention an attorney's fee as one of the items which may be recovered as costs in ordinary actions, it is not recoverable as costs, independently of rule of court or stipulation of parties. Bovee v. Helland, 52 M 151, 156 P 416 (1916).

Stipulation — Fees as Special Damages: A stipulation in a promissory note, allowing recovery of attorney's fees in case action has to be brought to enforce collection, is a provision for special damages, recoverable, in addition to the principal sum claimed, upon appropriate allegation and proof; it affords no basis for an item in the plaintiff's memorandum of costs. Bovee v. Helland, 52 M 151, 156 P 416 (1916), distinguished in In re Mickich's Estate, 114 M 258, 136 P2d 223 (1943).

WITNESS FEES

Statute Not Applicable to Workers' Compensation Cases: Kloepfer appealed the Workers' Compensation Court's denial of her claim for $750 as cost for an expert medical witness. The Supreme Court held that this section does not apply to workers' compensation cases and that Kloepfer was entitled to recover her costs. Kloepfer v. Lumbermens Mut. Cas. Co., 272 M 78, 899 P2d 1081, 52 St. Rep. 663 (1995), overruling, as to the applicability of this section to workers' compensation cases, Baeta v. Don Tripp Trucking, 254 M 487, 839 P2d 566 (1992), and Stevens v. St. Fund, 268 M 460, 886 P2d 962 (1994).

Witness Fees to Be Paid Only for Witnesses Actually Appearing at Trial: Kearney sued KXLF for wrongful discharge and for damages for uncompensated overtime. Witness fees of $20 were paid for John Mizelle and Pat Burns. However, the record showed that neither of them appeared at trial. The Supreme Court held that the purpose of subsection (1) of this section is to allow the prevailing party to tax fees paid to witnesses who actually appear at trial. The Supreme Court also noted that the District Court awarded costs for subpoenas served on Mizelle and Burns and on another witness who was neither listed nor called as a witness during trial. The Supreme Court held that it was error for the District Court to tax these costs. Kearney v. KXLF Communications, Inc., 263 M 407, 869 P2d 772, 51 St. Rep. 119 (1994).

Costs — Expert Witness Fees: A District Court cannot award costs in excess of $10 a day per witness as costs for expert witnesses. The statute specifically limiting expert witness fees to $10 a day controls the general statute authorizing a District Court to award costs in accordance with the course and practice of the court. Witty v. Pluid, 220 M 272, 714 P2d 169, 43 St. Rep. 354 (1986), followed in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Burden of Proof on Appeal: Where defendant objected to an item of awarded costs (witness fees), the ruling of the trial judge on the item did not indicate on which of two grounds it was based, and defendant's raising of questions was thus not sufficient to carry defendant's burden of showing the item was not reasonable and necessary, the Supreme Court could not say whether the item was properly allowed and must therefore sustain the trial court's ruling. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Parties Not Served as Witnesses: Persons named as defendants but who were not served with process and did not enter an appearance were not parties to the action, so were entitled to per diem and mileage for attendance as witnesses. Nelson v. Mont. Iron Min. Co., 140 M 331, 371 P2d 874 (1962).

Failure to Make Affidavit: The mere fact that witnesses of defendant entitled to his costs on dismissal of an action as to him failed to observe a rule of court requiring witnesses to make affidavit of attendance showing the per diem and mileage to which they were entitled did not affect his right to recover his necessary disbursements to them. Patterson v. Law, 78 M 221, 254 P 412 (1927).

Per Diem While Waiting: A material witness who resided outside the county in which the case was tried at a distance greater than 30 miles and voluntarily attended the trial at the request of the prevailing party and who after his arrival on the day set for trial had to wait for about a week before he was required to testify, on account of congestion of court business, was entitled to per diem for the whole time he was in attendance and not only for the day on which he gave his testimony, as well as to mileage, the service of a subpoena not being a prerequisite to their allowance. Helena Adjustment Co. v. Claflin, 75 M 317, 243 P 1063 (1926).

Dismissal Before Use of Witnesses: Where a nonsuit (abolished; for new provisions, see Rules 41(a) and 54(b) and (c), M.R.Civ.P.) is granted and defendant thus relieved of the necessity of placing his witnesses upon the stand, he is nevertheless entitled to their fees and mileage, under this section, as disbursements necessarily incurred in procuring their attendance. Berry v. Helena, 56 M 122, 182 P 117 (1919).

Travel Within State: The mileage of witnesses in civil actions allowed litigants under this section is limited to travel within the state. Chilcott v. Rea, 52 M 134, 155 P 1114 (1916).

Computation of Mileage: The mileage of his witnesses that a successful party to an action may recover, under this section and 26-2-501, is not limited to travel from and to their place of residence; whether the mileage shall be computed from the place of residence will depend upon the circumstances of each case. Lynes v. N. Pac. Ry., 43 M 317, 117 P 81 (1911).

Subpoena Unnecessary: A party to whom costs were awarded was entitled to mileage for witnesses who appeared and testified, regardless of whether they were legally subpoenaed. Lynes v. N. Pac. Ry., 43 M 317, 117 P 81 (1911); McGlauflin v. Wormser, 28 M 177, 72 P 428 (1903).

Types of Hearings: Fees paid a witness testifying on the hearing for an order of inspection and survey, fees paid a witness at the hearing of an order to show cause, fees for summoning such witness, and the expense of preparing a map, are prima facie proper items of costs. King v. Allen, 29 M 5, 73 P 1107 (1903).

STENOGRAPHIC FEES

Deposition of Witness — Partial Transcript of Trial: A deposition taken solely for a party's own convenience cannot be charged to the other party as part of the costs. Here, however, a copy was furnished to the other party and the other party used it at trial. The cost of the deposition is therefore properly includable in costs. A party cannot order a partial transcript of the trial for use at the trial and then charge it to the other party as part of the costs. Morrison-Maierle, Inc. v. Selsco, 186 M 180, 606 P2d 1085 (1980).

Exceptions: The cost of copies of stenographers' notes of the testimony, used in the preparation of bills of exceptions (abolished by Rules 46 and 7(c), M.R.Civ.P., and 25-31-503, now repealed), is a proper item of disbursements under this section, which the successful party may recover, even though such copies were procured from day to day during the progress of the trial and prior to final decision. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 33 M 400, 84 P 706 (1905).

"Per Diem" and "Copies" Defined: In the phrase "the legal fees paid stenographers for per diem or for copies", the "per diem" refers to the fee required to be paid by each party at the beginning of the trial, while the word "copies" refers not to the copies ordered by the parties from day to day to be used only as an aid in the examination of witnesses but to such as are furnished for the purpose of making up bills of exceptions, either during or after the close of the trial, or statements on motion for new trial. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 33 M 400, 84 P 706 (1905).

Official Stenographers: The provision of this section, authorizing the taxation of legal fees paid stenographers for per diem or for copies, is limited to fees paid official stenographers and does not authorize the taxation of such disbursements to private stenographers who attended the trial of an action in the place of the official stenographer by the consent of the parties and of the court. Mont. Ore Purchasing Co. v. Boston & Mont. Consol. Copper & Silver Min. Co., 27 M 288, 70 P 1114 (1902).

Dictation of Briefs: The fee paid stenographers for transcribing their notes into longhand is chargeable as part of the costs, but fees paid stenographers in taking dictation of briefs for the Supreme Court and typewriting them are not taxable to the defeated party. State ex rel. King v. District Court, 25 M 1, 63 P 402 (1901), explained in Gahagan v. Gugler, 103 M 521, 63 P2d 145 (1936).

PRINTING EXPENSES

Rate Charged: The going rate charged by the only printing establishments in Great Falls for printing the brief of a Great Falls lawyer, even though more than double other printing rates available in Helena, is not unreasonable. A. T. Klemens & Son v. Reber Plumbing & Heating Co., 139 M 433, 365 P2d 525 (1961).

Printing Appellate Briefs: The expense of printing briefs in the Supreme Court is chargeable as part of the costs. State ex rel. King v. District Court, 25 M 1, 63 P 402 (1900), explained in Gahagan v. Gugler, 103 M 521, 63 P2d 145 (1936); Waite v. Vinson, 18 M 410, 45 P 552 (1896); Ryan v. Maxey, 17 M 164, 42 P 760 (1895).

Briefs in Special Proceeding: The cost of printing briefs in a special proceeding in the Supreme Court, which was dismissed, will be allowed defendant on his application. State ex rel. Baker v. District Court, 24 M 425, 62 P 688 (1900).

Law Review Articles

Contract Damages in Montana—Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Collateral References

Costs *key* 146 through 194.

20 C.J.S. Costs §§94 through 124.

20 Am. Jur. 2d Costs §§43 through 75.

Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury. 68 ALR 4th 343.

Allowance of mileage or witness fees with respect to witnesses who were not called to testify or not permitted to do so when called. 22 ALR 3d 675.

Allowance as costs, of such items as maps, models, wall charts, photographs, and the like. 97 ALR 2d 138.

Amount of fees allowable to examiners of questioned documents or handwriting experts for serving and testifying. 86 ALR 2d 1283.

Taxation of costs and expenses in proceedings for discovery or inspection. 76 ALR 2d 953.

Allowance, as taxable costs, of witness fees and mileage of stockholders, directors, officers, and employees of corporate litigant. 57 ALR 2d 1243.

Power of court which appoints or employs expert witnesses to tax their fees as costs. 39 ALR 2d 1376.

Witness's and stenographer's fees, service of subpoenas, and depositions, as allowable items of costs in suit by beneficiary respecting trust. 9 ALR 2d 1280.

25-10-202. Costs of motion.

Compiler's Comments

1981 Amendment: Substituted "Whenever" for "In all cases where"; deleted "demurrer or" before "motion" in two places; made minor changes in grammar and phraseology.

Case Notes

Application to Voluntary Dismissal Before Demurrer: Where plaintiff dismissed case voluntarily before demurrer (abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) heard, his argument that motion for dismissal amounted to a confession of the demurrer and that defendant was therefore foreclosed from obtaining any costs other than as provided in this section was untenable because demurrer was never passed upon and neither sustained, overruled, or withdrawn. Graham v. Superior Mines, 100 M 427, 49 P2d 443 (1935).

Other Costs on Motions Precluded: This section, by providing that the losing party upon all motions must pay the other $10 "as costs", precludes the court from allowing any other costs. Colusa Parrot Min. & Smelting Co. v. Barnard, 28 M 11, 72 P 45 (1903).

Collateral References

Costs *key* 34 through 36, 153.

20 C.J.S. Costs §96.

25-10-203. Costs of postponement.

Case Notes

Continuance for Absence of Evidence: This section, when construed with 25-4-501 and 25-4-503, confers jurisdiction upon the trial court to impose costs as a condition for a continuance, upon the ground of absence of evidence as well as other grounds. State ex rel. Congdon v. District Court, 10 M 456, 26 P 182 (1891).

Collateral References

Continuance *key* 49.

17 C.J.S. Continuances §121.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party. 9 ALR 4th 1144.

25-10-204. Costs of transferring papers — change of venue.

Collateral References

Venue *key* 79.

92A C.J.S. Venue §§290 through 292, 300.

25-10-205. Costs of securing witnesses — substitution of judge.

Compiler's Comments

1981 Amendment: Substituted "Whenever a motion for substitution of a judge is filed" for "Where an affidavit is filed disqualifying a judge, as provided in [93-2906(4)]"; substituted "motion" for "same" after "party filing the"; substituted "motion" for "affidavit" before "was filed"; made minor changes in phraseology.

25-10-206. Secretary of state's fee for accepting service of process.

Compiler's Comments

1997 Amendment: Chapter 42 at beginning substituted "fee paid by the plaintiff" for "fee of $5 paid by the plaintiff"; and made minor changes in style. Amendment effective March 12, 1997.

Part 3
Attorney Fees

Part Case Notes

General Rule 297
Exception — Contract Providing Fees 301
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GENERAL RULE

No Equitable Exception to American Rule for Parties Forced to Bring Suit to Determine Legal Rights Against Party Presenting Frivolous Defense in Bad Faith: Plaintiffs in a forcible detainer action contended that they should be granted attorney fees as an exception to the American Rule that a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory grant of those fees because plaintiffs were forced to bring a lawsuit to determine their legal property rights against a defendant who presented a frivolous defense asserted in bad faith. The District Court declined to award attorney fees, and on appeal, the Supreme Court affirmed, noting that a malicious or bad faith equitable exception to the American Rule has consistently been denied and that the exception in Langemeier v. Kuehl, 2001 MT 306, 307 M 499, 40 P3d 343 (2001), did not apply. Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Insurer's Breach of Duty to Indemnify — Recovery of Attorney Fees by Injured Third-Party Claimant Who Prevails in Insurance Coverage Action Against Motor Vehicle Liability Insurer — Modification of Insurance Exception — Standard of Review of Question of Law: Following remand in Christensen v. Mtn. W. Farm Bureau Mut. Ins. Co., 2000 MT 378, 303 M 493, 22 P3d 624 (2000), the Christensens requested attorney fees incurred in the declaratory judgment action. The District Court denied the request, and the Christensens appealed. Generally, under the American rule, a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory provision, although equitable exceptions are recognized. Here, the parties agreed that there was no contractual authority to support an award of attorney fees, although the Supreme Court held in Trustees of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 M 210, 69 P3d 663 (2003), that 27-8-313 authorizes a District Court to award attorney fees when the court, in its discretion, considers such an award to be necessary or proper. The Christensens submitted that the defendant insurer was obligated to reimburse them based on the insurance exception rationale articulated in Home Ins. Co. v. Pinski Bros., Inc., 160 M 219, 500 P2d 945 (1972), which approved an award of attorney fees in cases in which an insurer breaches its obligation to defend an insured. The Supreme Court noted that the issue presented a question of law, so the standard of review was whether the District Court's interpretation of law was correct. The Supreme Court held that an insurer that breaches its duty to indemnify is liable for attorney fees when an insured is forced to assume the burden of legal action to obtain the full benefit of the insurance contract, regardless of whether the insurer's duty to defend is at issue. However, in this case, the Christensens were third-party beneficiaries, and the Supreme Court declined to extend the insurance exception to third-party claimants because that would sanction attorney fee awards for simply demonstrating the existence of any insurance contract from which a third-party claimant successfully established coverage, which would undermine the American rule. Thus, although the Christensens were precluded from recovering attorney fees under the obligatory insurance exception, the case was remanded for a determination of whether attorney

fees were necessary or proper under 27-8-313 and Trustees of Ind. Univ. v. Buxbaum. Mtn. W. Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, 315 M 231, 69 P3d 652 (2003), overruling Yovish v. United Serv. Auto. Ass'n, 243 M 284, 794 P2d 682 (1990).

No Waiver of Attorney Fees by Injured Third-Party Claimant Who Prevails in Insurance Coverage Action on Remand: Following remand in Christensen v. Mtn. W. Farm Bureau Mut. Ins. Co., 2000 MT 378, 303 M 493, 22 P3d 624 (2000), the Christensens requested attorney fees incurred in the declaratory judgment action. The District Court denied the request, and the Christensens appealed. Defendant insurer argued that because the Christensens never requested attorney fees in their motion for summary judgment or in their first appeal, their right to attorney fees was waived. Rule 8(a), M.R.Civ.P. (Title 25, ch. 20), requires that a party give notice of facts that the party expects to prove, and the facts must disclose the presence of all elements necessary to make out a claim. In this case, the defendant insurer had notice of the Christensens' desire to seek attorney fees because that relief was specifically prayed for in the initial petition for declaratory judgment, and defendant successfully defended against that request in District Court. However, the Christensens did not prevail until the case was remanded, so waiting to file a motion for attorney fees until prevailing on appeal was proper. Thus, the Christensens did not waive their entitlement to attorney fees. Mtn. W. Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, 315 M 231, 69 P3d 652 (2003), following Kunst v. Pass, 1998 M 71, 288 M 264, 957 P2d 1 (1998).

Attorney Fees Not Considered Costs — Declaratory Judgment Equitable Exception to Rule That Attorney Fees Not Awarded Absent Contractual or Statutory Provision: The District Court initially awarded costs and attorney fees to defendants for defending a declaratory judgment action. Plaintiff moved under Rule 59(g), M.R.Civ.P. (Title 25, ch. 20), to strike the award of attorney fees. The District Court then concluded that it lacked authority to award attorney fees because plaintiff did not force defendants to defend against a frivolous or malicious action, so the court struck the award of attorney fees, and defendants appealed. Generally, under the American rule, a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory provision, although equitable exceptions are recognized. Section 27-8-311 provides that in any proceeding under Title 27, ch. 8, equitable and just costs may be awarded, but attorney fees are not, in any proper sense, considered part of the costs in a case and thus are not allowed as costs under 27-8-311. However, 27-8-313 draws no distinction between declaratory judgment actions adjudicating the rights of an insured against an insurer and actions adjudicating rights outside the confines of an insurance policy, so a court may award attorney fees pursuant to 27-8-313 when the court, in its discretion, considers such an award necessary or proper. Therefore, after finding that the District Court erred in concluding that it lacked authority to award attorney fees, the Supreme Court reversed for a determination of whether an award of attorney fees was necessary or proper in this case. Trustees of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 M 210, 69 P3d 663 (2003), overruling State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), State ex rel. Dept. of Health and Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293 (1978), State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858 (1988), McKamey v. St., 268 M 137, 885 P2d 515 (1994), and Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121 (1998), to the extent that those cases hold that a District Court has no discretionary authority to award attorney fees in a declaratory judgment action.

Award of Attorney Fees Under Private Attorney General Doctrine Inapplicable to Legislative Actions: Plaintiffs, including several individuals and cities, prevailed in an action declaring as unconstitutional a statutory process for designating a county building code jurisdictional area and eliminating municipal jurisdictional areas by an election procedure limited to record owners of real property instead of the general constituency. Plaintiffs sought attorney fees from defendants, including several counties and the state, under the private attorney general doctrine exception established in Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800 (1999). The Supreme Court found that although it might be equitable to award attorney fees to plaintiffs under the doctrine, the inequity of imposing those fees against the defendant counties who neither fashioned nor passed the unconstitutional law was overriding. Thus, the only entity remaining against whom fees could be assessed was the state, for the actions of the Legislature, but under 2-9-111, the Legislature is immune from suit for any action or omission, so there was no avenue whereby attorney fees could be assessed, and the request for fees was denied. Finke v. State ex rel. McGrath, 2003 MT 48, 314 M 314, 65 P3d 576 (2003).

Prevailing on State Claim but Not on Federal Section 1983 Claim — No Attorney Fees Under Federal Law Rule for Section 1983 Claim: The city approved a preliminary application for plat approval, subject to 26 conditions imposed by the city, and the developer sued the city for

imposing the conditions. Although the developer prevailed on its claims under state law, it did not prevail on its federal section 1983 claim that the city acted arbitrarily and capriciously in imposing conditions when the city conditionally approved the preliminary plat application. Therefore, the developer was not entitled to attorney fees under the rule that a prevailing section 1983 plaintiff should ordinarily recover attorney fees unless special circumstances would render an award unjust. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

No Attorney Fees for Plaintiffs Whose State Constitutional Rights Local Peace Officers Violated: Brothers filed a civil action against the Sheriff and two deputies for damages for violation of the brothers' Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. The peace officers had used writs of execution upon judgments against one brother, who lived with the other brother, to enter the house that the other brother owned and to search for and seize personal property to satisfy the judgments. The court held that neither the writs nor the statutes that they were issued under authorized the entry, search, and seizure, that the three rights are self-executing, and that the brothers were entitled to damages. However, the brothers were not entitled to attorney fees because there was neither a contractual agreement nor a statute providing for payment of the fees. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Calculation of Attorney Fees Under Federal Fee-Shifting Law: In Ihler I, a class action suit by patients at the state hospital, the case was remanded for recomputation of the lodestar amount. On remand, the District Court eliminated the 50% enhancement for contingency, added fees for representation by the state-employed attorney, did not reassess hourly rates or compensable hours, and denied the request for attorney fees on appeal. On appeal, the Supreme Court held that the District Court erred in denying out-of-state hourly rates for out-of-state attorneys. A prevailing party in a section 1988 action does not have the burden of proving that resort to out-of-forum counsel was necessary; instead, a prevailing party has the burden of proving that resort to out-of-forum counsel was reasonable. The Supreme Court further held that: (1) the District Court erred in awarding certain in-state attorney fees that were below the lowest end of the prevailing range; (2) the District Court erred in reducing the patients' requested hours, stating that because it was reasonable to seek out-of-state representation, it also was reasonable to incur the extra expenses associated with out-of-state representation, including travel time; and (3) the District Court erred in denying the patients' attorney fees incurred on appeal. The Supreme Court held that the District Court did not err in refusing to enhance the lodestar figure for undesirability because that was subsumed in the lodestar figure. Ihler v. Chisholm, 2000 MT 37, 298 M 254, 995 P2d 439, 57 St. Rep. 163 (2000).

Guardian Entitled to Award of Attorney Fees for Appointment as Guardian — Award in Nonadversarial Proceeding Held Not to Violate General Rule for Award of Attorney Fees — Award Approved Though Not Requested in Original Petition for Appointment: Appellant contested the payment of $30,000 in legal fees from the estate of a ward to the attorney representing the guardian appointed by the District Court, arguing that the general rule is that attorney fees are not payable to a prevailing party without special statutory provisions to the contrary and that the original petition for appointment of the guardian did not include a request for payment of attorney fees. The Supreme Court affirmed the order of the District Court awarding the fees. The Supreme Court pointed out, citing opinions from other states, that the general rule regarding payment of fees applies to adversarial proceedings and that the appointment of a guardian is not an adversarial proceeding but is a proceeding in rem to promote the bests interests of the ward and to protect the ward's estate. The Supreme Court also held that under Rule 54(c), M.R.Civ.P. (Title 25, ch. 20), the District Court may grant relief to which a party is entitled regardless of whether the party has specifically requested the relief granted. The Supreme Court noted that the payment of the guardian's legal fees by the estate of the ward is relief to which the guardian would be entitled under 72-5-428(1) if the petition for appointment was brought in good faith and the appointment was in the bests interests of the ward. In re Estate of Bayers, 1999 MT 154, 295 M 89, 983 P2d 339, 56 St. Rep. 607 (1999).

Special Circumstances Precluding Award of Attorney Fees in Section 1983 Claim — Award Against Police Officers Fulfilling Statutory Duties Unjust: Police officers searched Dorwart's home pursuant to writs of execution and seized his personal property, but without Dorwart's permission or a search warrant. Dorwart brought a claim, pursuant to 42 U.S.C. 1983, against the county and the Sheriff. Qualified immunity was extended to the officers concerning their personal liability, but Dorwart prevailed on the claim that the county's action violated his right to be free from unreasonable search and seizure and sought attorney fees. Under Jackson v. Galan, 868 F2d 165 (5th Cir. 1989), a successful section 1983 claimant may be awarded attorney fees regardless of the fact that qualified immunity prevents liability for monetary damages.

However, in this case, special circumstances precluded the award because the officers were enforcing the public policy of Montana regarding postjudgment execution statutes, thereby effectuating state rather than county policy, and the award of attorney fees against the county would have been unjust. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998).

American Rule — No Entitlement to Attorney Fees Absent Contractual or Statutory Provision: Montana adheres to the "American Rule" regarding attorney fees, namely that a party in a civil action is generally not entitled to fees absent a specific contractual or statutory provision forming the basis for the award. First Nat'l Bank of Glasgow v. First Sec. Bank of Mont., 260 M 38, 857 P2d 726, 50 St. Rep. 931 (1993). See also In re Marriage of Hereford, 223 M 31, 723 P2d 960 (1986), Dept. of Fish, Wildlife, and Parks v. Mont. Stockgrowers Ass'n, Inc., 240 M 39, 782 P2d 898 (1989), and Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999).

No Enhancement of Attorney Fees for Contingency Under Federal Fee-Shifting Law: In adjusting the amount awarded for attorney fees, the District Court ordered an increase in the lodestar amount by 50% for risk of contingency. Following the order, the U.S. Supreme Court decided in City of Burlington v. Dague, 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638 (1992), that enhancement of attorney fee awards for contingency was not permitted under federal fee-shifting statutes. The change in law between the trial court decision and the appellate decision required the appellate court to apply the new law. Under Dague, the risk of contingency in a particular case depends on: (1) the legal and factual merits of the claim, which is not reflected in the lodestar and should play no part in the calculation of attorney fees; and (2) the difficulty in establishing the merits of the claim, which is ordinarily reflected in the lodestar, either in the higher number of hours expended to overcome the difficulty or in the higher hourly rate of the attorney skilled and experienced enough to do so. Taking into account the difficulty of the case again through contingency enhancement resulted in double counting. The case at bar was remanded for recomputation of the lodestar amount in light of the Dague principles. Ihler v. Chisholm, 259 M 240, 855 P2d 1009, 50 St. Rep. 775 (1993). On remand, the District Court eliminated the 50% enhancement for contingency and added the fees incurred by the patients while represented by the state-employed attorney. The court did not reassess the reasonable hourly rates or compensable hours and denied the patients' request for attorney fees incurred on appeal. The patients appealed, contending that the District Court erred by refusing to enhance the lodestar figure for undesirability. The Supreme Court held that the District Court did not abuse its discretion in refusing to enhance the lodestar figure for undesirability because the reluctance of Montana attorneys to represent these types of claims was subsumed in the lodestar figure. Ihler v. Chisholm, 2000 MT 37, 298 M 254, 995 P2d 439, 57 St. Rep. 163 (2000). See also Davis v. San Francisco, 976 F2d 1536 (9th Cir. 1992).

When Attorney Fees Payable in ERISA Action: Under 29 U.S.C. 1132(g) of the Employee Retirement Income Security Act of 1974 (ERISA), the award of attorney fees is discretionary in most actions. However, in actions by a fiduciary for or on behalf of a plan to collect delinquent contributions under 29 U.S.C. 1145, attorney fees are mandatory if judgment is awarded in favor of the plan. Audit Serv., Inc. v. Frontier-West, Inc., 252 M 142, 827 P2d 1242, 49 St. Rep. 186 (1992).

Award of Attorney Fees by Judge Who Did Not Try Case — No Abuse of Discretion: Parties had 2 months following judgment and prior to a change in jurisdiction to bring the matter of attorney fees before the judge who presided over a lien foreclosure action. Neither side did, and jurisdiction of the action was transferred from the 13th to the 16th Judicial District. Defendant later claimed the new judge abused his discretion by awarding fees in a case he did not try because he could not know all of the circumstances surrounding the foreclosure action. The Supreme Court held that a judge's jurisdiction over a case is a matter of law and that while it is preferable that the presiding trial judge consider the matter of attorney fees, it is not mandatory. Finding no abuse of discretion, judgment was affirmed. Donnes v. Orlando, 221 M 356, 720 P2d 233, 43 St. Rep. 890 (1986).

Attorney Fees in Divorce Actions — Contingency Fees Impermissible — Findings Required: The District Court order entered in a proceeding to enforce a decree of dissolution of marriage awarded attorney fees to the respondent. The court made findings as to the reasonableness of the amount of the award of attorney fees but made no findings as to the wife's need for the award. The court awarded the respondent $6,506 for maintenance arrearages and then found that one-third of the recovery, or $2,146, was a reasonable attorney fee. Noting that the Rules of Professional Conduct prohibit contingency fees in domestic relations actions, the Supreme Court vacated the award for attorney fees and remanded the case for reconsideration and entry of

findings by the District Court on the fee issue. In re Marriage of Jones, 218 M 441, 709 P2d 158, 42 St. Rep. 1722 (1985).

Liability Dispute Between Insurers — Costs and Fees: In a proceeding that was essentially between two insurers to determine which of two overlapping policies covered auto accident, the winner was not entitled to costs and attorney fees. Bill Atkin Volkswagen, Inc. v. McClafferty, 213 M 99, 689 P2d 1237, 41 St. Rep. 1981 (1984).

No Provision in Property Settlement for Attorney Fees — Fees Improperly Awarded: Where the parties to a dissolution proceeding agreed to a property settlement that did not provide for payment of attorney fees and the District Court later issued an order providing for the attorney fees to be paid by the husband if he did not comply with the agreement, the Supreme Court held that the District Court erred in issuing the order for the payment of fees by the husband. The property settlement agreement was approved by the District Court but never incorporated by reference into the decree and therefore has the status of a private contract, and the remedies for enforcement of a judgment are unavailable. Absent a statute or contractual provision, attorney fees are generally not recoverable, and since neither is involved here, there was no right to those fees. Lorge v. Lorge, 207 M 423, 675 P2d 115, 41 St. Rep. 50 (1984).

Release Applicable to Claims for Attorney Fees and Bad Faith in Settlement: Where the plaintiff retained counsel to force the defendant insurance company to settle an automobile liability claim and later signed a release of the company when it settled the claim, the District Court did not err in granting summary judgment to the insurance company on the issue of the company's liability for the plaintiff's attorney fees and bad faith in settlement of the claim. The plaintiff's obligation to pay the attorney fees arose prior to the signing of the release, and recovery is therefore precluded by the release. Moreover, while the plaintiff claims it was not his intent to release the company from his claim for bad faith, the release applies to all claims arising out of the occurrence and the plaintiff's intent, unknown to the defendant, therefore is not controlling. Richardson v. Safeco Ins. Co., 206 M 73, 669 P2d 1073, 40 St. Rep. 1515 (1983).

Tort of "Bad Faith" — No Attorney's Fees: Plaintiffs brought a "bad faith" tort action against their insurance company and requested attorney's fees. Because they failed to plead the existence of a contract provision or statutory grant allowing recovery of fees, their request was denied. Bostwick v. Foremost Ins. Co., 539 F. Supp. 517, 39 St. Rep. 980 (D.C. Mont. 1982).

Recovery of Fees Absent Contract or Statute: Attorney fees are not generally recoverable in the absence of a contractual or statutory provision for recovery. Sliter's v. Lee, 197 M 182, 641 P2d 475, 39 St. Rep. 453 (1982).

Fees Disallowed on Good Faith Appeal: Where the State Compensation Insurance Fund, in good faith, raised significant issues on appeal of a decision of the Workers' Compensation Court, attorney fees for the appellate proceedings would not be awarded to the claimant, who prevailed. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Attorney Fees Not Allowed Unless Final Judgment: The award of attorney fees in this case is premature as no final judgment has been entered on the merits of the underlying controversy in favor of respondents. No permanent injunction was awarded. No Writ of Mandate was issued. All other considerations aside, respondents are not entitled to a judgment for attorney fees without a final determination of the underlying controversy in their favor. Dreyer v. Bd. of Trustees of Mid-Rivers Tel. Co-op, Inc., 193 M 95, 630 P2d 226, 38 St. Rep. 972 (1981).

EXCEPTION — CONTRACT PROVIDING FEES

Suit Necessary to Obtain Delivery of Escrow Documents — Award of Attorney Fees Under Contract Proper: A section of a contractual stock sales agreement provided for payment of attorney fees to the prevailing party enforcing the agreement. The District Court awarded attorney fees to plaintiff, but defendants contested the award on grounds that plaintiff's declaratory judgment action was not initiated in an effort to enforce the terms of the agreement. However, plaintiff was forced to bring the action to obtain the delivery of the escrow documents when defendants refused to release the documents upon plaintiff's full payment of the sale amount. The action was thus undertaken to enforce a provision of the contract, so an award of attorney fees under the contract was not improper. The Supreme Court affirmed the award. Lewistown Propane Co. v. Moncur, 2002 MT 349, 313 M 368, 61 P3d 780 (2002).

Provision for Fees by Contract or Statute: Attorney fees are allowed when they are provided for by statute or contractual provision. Poulsen's, Inc. v. Wood, 232 M 411, 756 P2d 1162, 45 St. Rep. 1154 (1988), followed in Wise v. Sebena, 248 M 32, 808 P2d 494, 48 St. Rep. 309 (1991), and in Farm Credit Bank of Spokane v. Hill, 266 M 258, 879 P2d 1158, 50 St. Rep. 726 (1993).

Attorney Fees as Element of Compensatory Damages — Limited to Contingent Fee Agreement: Jury awarded appellant attorney fees as an element of compensatory damages and deferred to

the District Court to assess appropriate attorney fees and costs. The court arrived at a sum based on a contingent fee agreement entered into by appellant and his attorney rather than using a lodestar determination based on reasonable hours expended times a reasonable hourly fee. Appellant contended on appeal that this was an incorrect method of calculation. The Supreme Court held that: (1) the provisions of the contingent fee agreement were controlling in computing the amount of attorney fees; (2) the contract fixed the damages appellant sustained; and (3) to allow appellant to recover attorney fees based on an hourly fee would change the issue from what amount would compensate him for actual damages he sustained in the form of attorney fees to what amount would reasonably compensate his attorney for services rendered. Morris v. Nationwide Ins. Co., 222 M 399, 722 P2d 628, 43 St. Rep. 1363 (1986).

Award of Attorney Fees for Time Spent Obtaining Judgment for Specific Performance: Appellant claimed District Court erred in awarding attorney fees on respondent's counterclaim for specific performance of the parties' agreement concerning buy-out of respondent's interest in a business, contending that the court failed to award relief on the contract claim. The Supreme Court found substantial evidence that appellant failed to perform the required acts and that relief was awarded by way of specific performance. The District Court properly limited recovery to the number of hours spent by respondent's attorney in obtaining the judgment for specific performance. Proto v. Elliot, 222 M 393, 722 P2d 625, 43 St. Rep. 1358 (1986).

Costs of Suit Provided for in Subdivision Declaration of Restrictions: A declaration of restrictions governing subdivision tracts provided that costs of suit be awarded against a person found guilty of a breach of the provisions of the declaration. The trial court's conclusion that defendant unlawfully and unreasonably restricted plaintiff's right of access in derogation of the declaration meant that plaintiff was entitled to attorney fees under the contract. Shors v. Branch, 221 M 390, 720 P2d 239, 43 St. Rep. 919 (1986).

Attorney Fees — Not Costs — Timeliness: The defendants signed a contract to purchase a tract of land from plaintiffs. The contract provided for attorney fees to the prevailing party in an action commenced on the contract. Plaintiffs filed suit alleging that under the contract and various oral agreements, defendants had agreed to pay a real estate commission to plaintiffs. The trial court granted summary judgment to defendants, holding that written evidence of an agreement to pay a commission did not exist. No notice of entry of judgment was ever filed. Defendants later moved to set an attorney fee award. The trial court ruled that under Title 25, ch. 10, attorney fees were not recoverable costs and that the motion for costs was not timely, as it was not filed within 5 days of judgment. On appeal, the Supreme Court held that attorney fees were awardable under the contract and that defendants' motion was essentially a motion to amend judgment under Rule 59(g), M.R.Civ.P. The motion was timely made since no notice of entry of judgment was ever filed. Cook v. Harrington, 203 M 479, 661 P2d 1287, 40 St. Rep. 580 (1983), followed in In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999).

Persons Not Parties to Contract — Right to Attorney Fees Under Contract Granting Them: When suit is brought under a contract providing for attorney fees to the prevailing party, persons who are not parties to the contract are not entitled to attorney fees, either under the contract or a statutory attorney fees provision. Where persons who were not parties to a contract by which a business was sold guaranteed payment of the purchase price, a guarantee which they had no intention of honoring, it was error to award them attorney fees upon finding that they were not liable under the guarantee because they received no consideration from plaintiff seller of the business for their guarantee. Rudio v. Yellowstone Merchandising Corp., 200 M 537, 652 P2d 1163, 39 St. Rep. 1923 (1982).

EXCEPTION — FRIVOLOUS CASE

Attorney Fees Proper to Defend Untimely and Inappropriate Nonmeritorious Action: An award of attorney fees to plaintiff was within the District Court's discretion when plaintiff, as a wholly innocent party, was forced to employ counsel to defend a nonmeritorious motion that was both untimely and inappropriate. Connell v. Dept. of Social and Rehabilitation Services, 2003 MT 361, 319 M 69, 81 P3d 1279 (2003), following Foy v. Anderson, 176 M 507, 580 P2d 114 (1978).

Federal Civil Rights Claim Resulting From Clerical Error Considered Vexatious — Attorney Fees Awarded to Prevailing Party: Shepherd held an assignment of the tax sale certificate on real property in Red Lodge. A few days before the redemption period was to expire, the owner of record redeemed the property by paying $4,407.28, but the County Treasurer unintentionally overlooked an additional $56.30 in interest that had accrued between the date that notice was given that a tax deed would be issued and the date of redemption. Shepherd then filed a

complaint under 42 U.S.C. 1983, alleging that the county's failure to collect the statutorily required amount for redemption deprived him of a property interest without due process of law. Shepherd sought $250,000 in general damages, punitive damages, and attorney fees and costs. Shortly thereafter, the county tendered Shepherd $56.30 plus interest, but Shepherd rejected the money and added a negligence claim to the complaint, based on the County Treasurer's improper extinguishment of the lien. The District Court summarily dismissed the negligence claim, and the county sought attorney fees, citing Hughes v. Rowe, 449 US 5 (1980), for the proposition that the prevailing party in a section 1983 case is entitled to attorney fees if plaintiff continued to litigate after it became apparent that the action lacked factual or legal substance. The District Court found that Shepherd's action was not unreasonable or vexatious, and declined to award attorney fees to the county. On appeal, the Supreme Court concluded that Shepherd's civil rights claim, resulting from a clerical error amounting to $56.30 in damages, was groundless, meritless, and vexatious. Even when Shepherd was tendered the full amount owed, he proceeded to cavalierly engage in litigation that required the county to defend the meritless claim. The case was remanded for a determination of the amount to which the county was entitled in attorney fees and costs associated with the motion to dismiss the federal civil rights claim. Shepherd v. Carbon County Bd. of Comm'rs, 2002 MT 98, 309 M 391, 46 P3d 634 (2002).

Award of Attorney Fees Under Foy Equitable Exception Limited to Defense of Frivolous Action: Absent contractual or statutory authority, attorney fees will generally not be awarded, but a court may, under its equity powers and pursuant to Foy v. Anderson, 176 M 507, 580 P2d 114, 35 St. Rep. 811 (1978), award attorney fees to make an injured party whole. However, the Foy equitable exception applies only to situations in which a party has been forced to defend against a wholly frivolous or malicious action and is not available for a party that initiates a legal action. Further, parties bringing actions for injunctive relief to protect their own rights are not entitled to attorney fees under the Foy exception. Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999), distinguishing Wilson v. Dept. of Natural Resources and Conservation, 199 M 189, 648 P2d 766, 39 St. Rep. 1294 (1982). See also Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999), Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004), and Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, 322 M 133, 95 P3d 671 (2004).

Legitimate Disputes as to Law Not Within Exception to General Rule: Wilson brought an action against the defendant Department to prevent it from adjudicating his water rights as being subject to the prior existing right of Walton. The District Court erred in awarding attorney fees to be paid by Wilson to Walton on the theory that it was Wilson's unlawful appropriation which forced Walton to intervene in Wilson's legal action against the Department in order to protect his (Walton's) interest. Generally, attorney fees are not to be allowed absent statutory authorization or an agreement between the parties. The exception for frivolous legal action was inapplicable because a thorough examination of the basis for Wilson's claim to Walton's water rights shows that there was a legitimate basis for Wilson's claim, even though it was ultimately unsuccessful, and a legitimate dispute. Wilson v. Dept. of Natural Resources and Conservation, 199 M 189, 648 P2d 766, 39 St. Rep. 1294 (1982), distinguished in Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999). See also Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992), Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996), and Youderian Constr., Inc. v. Hall, 285 M 1, 945 P2d 909, 54 St. Rep. 1012 (1997).

Personal Defense of Frivolous Action Against Official: Justice of the Peace was properly granted attorney fees where, through no fault of her own, she was forced to personally defend a frivolous action seeking to hold her personally liable for action she took in her official capacity. Stickney v. St., 195 M 415, 636 P2d 860, 38 St. Rep. 1991 (1981).

EXCEPTION — COURT'S EQUITY POWER

Award of Attorney Fees Based on Party's Deception, Contradiction, and Fraud and Party's Attorney's Needless Protraction of Litigation: The appellant in a probate and guardianship case was found to have employed deception, contradiction, and fraud, resulting in the expenditure of considerable time, effort, and expense in the attempt to arrive at a reasonable understanding of the condition of the guardianship estate and the ownership of estate property. The appellant's attorney was found to have taken every opportunity to obstruct and avoid a resolution of the issues by filing questionable motions for dismissal and sanctions, taking positions that were not supported by law or facts, and failing to mediate in good faith, thereby protracting the litigation at considerable expense to the respondents. The District Court ordered appellant to pay 80% of the respondents' attorney fees and costs and ordered appellant's attorney to pay the remaining

20%. There was substantial evidence in the record to support the award, which the Supreme Court affirmed. The court declined to address the reasonableness of the award because appellant did not object to the bill of expenses when given the opportunity to challenge the amount, instead challenging the reasonableness of the award for the first time on appeal. In re Estate of McDermott, 2002 MT 164, 310 M 435, 51 P3d 486 (2002).

Doctrine of Private Attorney General Applied — Three-Part Test for Awarding Attorney Fees: The District Court concluded that under 25-10-711, attorney fees were not available to plaintiff in this case because the action involved "neither frivolous conduct, extreme conduct, nor bad faith by the State". Plaintiff argued that it was entitled to attorney fees under the doctrine of private attorney general, which is an equitable exception to the American rule that a party is not entitled to attorney fees absent a specific contractual or statutory provision. Under Serrano v. Priest, 569 P2d 1303 (Calif. 1977), there are three basic factors to be considered in awarding attorney fees based on the doctrine of private attorney general: (1) the strength or societal importance of the public policy vindicated by the litigation; (2) the necessity of private enforcement and the magnitude of the resultant burden on plaintiff; and (3) the number of people standing to benefit from the decision. Here, plaintiff prevailed in a challenge to the constitutionality of numerous statutes regarding the state's administration of school trust lands. The litigation involved important public policies grounded in the constitution, requiring private constitutional enforcement, and benefited a large class of citizens interested in Montana's public schools. The District Court ignored recognized principles in denying plaintiff's reasonable attorney fees, resulting in substantial injustice. The Supreme Court applied the Serrano test and reversed for an award of attorney fees to plaintiff under the doctrine of private attorney general. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following In re Porter, 156 M 190, 478 P2d 866 (1970), distinguishing School District v. St., 236 M 44, 769 P2d 684, 46 St. Rep. 169 (1989), and followed in Columbia Falls Elementary School District No. 6 v. St., 2005 MT 69, 326 M 304, 109 P3d 257 (2005).

State Conduct Not So Extreme as to Warrant Award of Costs and Attorney Fees: Weber contended that he was equitably entitled to costs and attorney fees because he had been constructively discharged by intolerable working conditions created by his state agency employers, claiming that he was harassed, treated unfairly, and finally demoted for his actions involving a fraudulent claim submitted to his Department, which he refused to pay. However, Weber failed to convince the trial court that the state's conduct was so extreme as to entitle him to costs and attorney fees or to provide evidence that the court abused its discretion in reaching that determination. Weber v. St., 253 M 148, 831 P2d 1359, 49 St. Rep. 397 (1992).

Exception to General Rule That Attorney Fees Not Recoverable: While the general rule in Montana is that attorney fees are not recoverable as costs by a successful litigant, absent a special agreement between the parties or statutory authorization, a narrow exception has been developed by the Supreme Court in cases in which the court has recognized the District Courts' general equity powers to make an injured party whole and the award will not be overturned absent a showing of abuse of discretion. Martin v. Randono, 191 M 266, 623 P2d 959 (1981). See also Small v. Good, 284 M 159, 943 P2d 1258, 54 St. Rep. 825 (1997); Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996); In re Support of K.F., 232 M 326, 756 P2d 460, 45 St. Rep. 1087 (1988); Wilson v. Dept. of Natural Resources and Conservation, 199 M 189, 648 P2d 766, 39 St. Rep. 1294 (1982); Stickney v. St., 195 M 415, 636 P2d 860 (1981); Joseph Russell Realty Co. v. Kenneally, 185 M 496, 605 P2d 1107 (1980); and Holmstrom Land Co. v. Hunter, 182 M 43, 595 P2d 360 (1979).

EXCEPTION — COMMON FUND

Authority of Workers' Compensation Court to Award Common Fund Attorney Fees: At the beginning of Schmill's workers' compensation claim, her attorneys pleaded for statutory attorney fees. However, following the decision in Schmill v. Liberty NW. Ins. Corp., 2003 MT 80, 315 M 51, 67 P3d 290 (2003) (Schmill I), Schmill's attorneys pleaded for, and the Workers' Compensation Court awarded, common fund attorney fees on remand. Defendant contended that the court did not have the authority to award common fund attorney fees because Schmill's attorneys failed to plead common fund attorney fees in their initial petition. The Supreme Court held that the timing for pleading common fund attorney fees was appropriate because the common fund did not arise until after the issuance of Schmill I, so it was appropriate for Schmill's attorneys to wait until postremand proceedings to request common fund attorney fees, and it was within the discretion of the Workers' Compensation Court to award the fees pursuant

to 39-71-2905. Schmill v. Liberty NW. Ins. Corp., 2005 MT 144, 327 M 293, 114 P3d 204 (2005). See also Kunst v. Pass, 1998 M 71, 288 M 264, 957 P2d 1 (1998).

American Rule, Rather Than Common Fund Rule, Applicable to Counsel Who Does Not Directly Create Common Fund: Intervenors in this case, who created the common fund at issue, filed suit on behalf of their individual clients and all others similarly situated. Ruhd was a similarly situated beneficiary and hired separate counsel, but rather than join the suit filed by the intervenors, Ruhd filed a separate suit, making the same statutory claims against Liberty Northwest Insurance Corporation (Liberty). The intervenors were ultimately successful in Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002), and were awarded common fund attorney fees from the State Fund. The Workers' Compensation Court subsequently ordered that Ruhd's attorney was entitled to common fund attorney fees with respect to all relevant impairment awards payable by Liberty. On appeal, the Supreme Court reversed. The intervenors were solely responsible for the creation of the Rausch common fund, and Ruhd's counsel was not entitled to attorney fees for work that did not contribute to that common fund. Rather, the court applied the American Rule, requiring Ruhd's counsel to look to Ruhd for remuneration. Ruhd v. Liberty NW. Ins. Corp., 2004 MT 236, 322 M 478, 97 P3d 561 (2004), followed in Schmill v. Liberty NW. Ins. Corp., 2005 MT 144, 327 M 293, 114 P3d 204 (2005).

State Fund Required to Bear Proportion of Attorney Fees of Claimant Who Recovers Social Security Disability Benefits — Applicability of Common Fund Doctrine: Flynn was diagnosed with an occupational disease, and the State Fund accepted liability and tendered medical and disability benefits. Flynn also sought Social Security disability benefits, but the claim was initially denied. The claim was later accepted, and Flynn was awarded retroactive Social Security benefits, at which point the State Fund notified Flynn that his biweekly benefits would be reduced and that it intended to recoup overpaid benefits by an additional offset against Flynn's state benefits. Flynn filed a petition requesting that the State Fund pay a proportionate share of the attorney fees incurred in recovering the Social Security benefits, but the Workers' Compensation Court denied the petition. On appeal, the Supreme Court found no statutory preemption on the issue of attorney fee apportionment following benefit recoupment and thus applied the common fund doctrine, which authorizes the assignment of responsibility for fees among those individuals who benefit from litigation that created the common fund. With the aid of counsel but without the assistance of the State Fund, Flynn recovered Social Security benefits that resulted in a reduction of Flynn's state benefits to the substantial benefit of the State Fund. Therefore, pursuant to the common fund doctrine, the State Fund was required to contribute to the cost of Flynn's litigation, including reasonable attorney fees, in proportion to the benefits that it actually received. The Workers' Compensation Court committed reversible error when it denied Flynn's request for reasonable apportionment of attorney fees. Flynn v. St. Comp. Ins. Fund, 2002 MT 279, 312 M 410, 60 P3d 397 (2002).

Workers' Compensation Claimants Entitled to Common Fund Attorney Fees: Attorneys for several workers' compensation claimants asserted that they were entitled to attorney fees pursuant to the common fund doctrine for all similarly situated permanently totally disabled claimants who were denied immediate impairment awards by the State Fund and who would now be able to obtain those benefits as a result of the decision in this case. The Supreme Court noted that to be awarded attorney fees based on the common fund doctrine, a party must satisfy three elements: (1) a party, typically referred to as the active beneficiary, must create, reserve, increase, or preserve a common fund; (2) the active beneficiary must incur legal fees in establishing the common fund; and (3) the common fund must benefit ascertainable nonparticipating beneficiaries. The attorneys in this case were entitled to common fund attorney fees because they engaged in litigation that preserved the benefit of immediate impairment awards to permanently totally disabled workers' compensation claimants and incurred legal costs and fees in the preservation of that right and because the common fund will benefit an ascertainable class of workers who were previously denied immediate payment of an impairment award that they were legally entitled to receive. Rausch v. St. Comp. Ins. Fund, 2002 MT 203, 311 M 210, 54 P3d 25 (2002), following Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69 (1997), and followed, to the extent that the Rausch common fund for attorneys includes fees culled from all claimants regardless of insurer, in Ruhd v. Liberty NW. Ins. Corp., 2004 MT 236, 322 M 478, 97 P3d 561 (2004). See also Mtn. W. Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, 308 M 29, 38 P3d 825 (2001).

Common Fund Doctrine Equitable Exception to American Rule Regarding Award of Attorney Fees Applicable to Medical Services Lien — Elements of Doctrine: Kilmer suffered severe injuries as a passenger in a vehicle driven by Hall. Kilmer received medical attention from a North

Dakota hospital, which subsequently perfected a lien for the value of its services in the amount of $309,000. Hall had no insurance, but the co-owner of the vehicle had a $500,000 policy with Mountain West Farm Bureau (Mountain West). The policy had a step-down provision limiting Mountain West's liability to $25,000 for passengers other than the insured or a relative of the insured, so Mountain West initially found that Kilmer was entitled to only $25,000. However, after negotiating with Kilmer's attorney, Mountain West agreed to proffer the policy limit of $500,000, plus $30,000 in no-fault coverage. Mountain West then filed a complaint for interpleader, the hospital cross-claimed against Kilmer for satisfaction of its lien, and Kilmer cross-claimed against the hospital for a reduction in the hospital's recovery for a pro rata portion of Kilmer's attorney fees incurred in negotiating the settlement with Mountain West. The District Court applied Sisters of Charity of Providence of Mont. v. Nichols, 157 M 106, 483 P2d 279 (1971), and held that the hospital was not liable for a pro rata portion of Kilmer's attorney fees. Kilmer appealed, and the Supreme Court reversed. Under the 1999 version of 71-3-1114 applicable to this case, the hospital had a valid lien for its medical services; however, the statute was silent on the issue of attorney fee apportionment (see, however, 2001 amendments addressing a hospital's pro rata liability for an injured person's attorney fees). Generally, Montana follows the American rule that a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory grant of those fees. There are exceptions to the American rule, one of which is the common fund doctrine authorizing the spread of fees among the individuals who benefit from the litigation that created the common fund. The three elements necessary to establish a common fund, as set out in Means v. Mont. Power Co., 191 M 395, 625 P2d 32 (1981), and Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69 (1997), are: (1) one party, known as the active beneficiary, must create, reserve, or increase a common fund; (2) the active beneficiary must incur legal fees in establishing the common fund; and (3) the common fund must benefit ascertainable, nonparticipating beneficiaries. To the extent that there are inequities in the contributions of participating counsel, the court may then intervene to allocate fees accordingly. Because the common fund doctrine was not raised in Sisters of Charity of Providence of Mont. v. Nichols, the Supreme Court held that that case did not preclude application of the doctrine in the present case. Thus, the District Court erred as a matter of law in relying on Sisters of Charity of Providence of Mont. v. Nichols to grant the hospital's partial summary judgment. Although the Supreme Court declined to rule on the applicability of the common fund doctrine here because the parties did not present arguments in District Court as to whether Kilmer could satisfy the elements of the doctrine, the case was remanded to allow Kilmer to present arguments on the applicability of the common fund doctrine. Mtn. W. Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, 308 M 29, 38 P3d 825 (2001).

Attorney Fees Not Allowable — No Common Fund Created or Benefits Derived: The District Court properly denied recovery of attorney fees under the common fund doctrine after finding that no common fund was created from which attorney fees and expert witness fees could be paid and that no substantial benefit resulted from the court's opinion. School District v. St., 236 M 44, 769 P2d 684, 46 St. Rep. 169 (1989), distinguishing Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981).

Payment Out of "Common Fund": Private organization that won suit seeking to have state barred from denying certain state aid money to high school district was, under the "common fund" doctrine, entitled to recover attorney fees and costs from the common fund, that is, from the state aid money ordered to be paid. Under the common fund doctrine, if a party, through active litigation, creates or increases a fund, others sharing in the fund must bear a portion of the litigation costs, including reasonable attorney fees. Missoula High School Legal Defense Ass'n v. Supt. of Pub. Instruction, 196 M 106, 637 P2d 1188, 38 St. Rep. 2164 (1981).

Duty of State Agency to Compensate Lead Counsel in Consolidated Cases Upheld: In an action against the defendant for damages caused by a range fire in which numerous cases were consolidated and lead counsel appointed for all consolidated cases, the District Court did not err in requiring the plaintiff state agency to compensate lead counsel. There is no basis, either in Disciplinary Rule 2-107 of the Canons of Professional Ethics or elsewhere, for treating the plaintiff differently from any other beneficiary of the litigation because payment for the litigation is founded upon principles of equity and equity demands that all parties receiving a benefit contribute to payment of the expenses. Disciplinary Rule 2-107, regarding the splitting of fees between two lawyers, has no application to court-appointed lead counsel who is paid under the supervision of the court. Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981).

Payment of Lead Counsel for Consolidated Cases — "Common Fund" Exception for Unequal Contributions: In an action against the defendant for damages caused by a range fire in which

numerous cases were consolidated and lead counsel appointed for all consolidated cases, the trial court did not err in requiring the plaintiff to compensate lead counsel even in the absence of any contract or statutory authority for the compensation. Where a party through active litigation creates a common fund shared by other parties, those parties must bear a portion of the litigation costs, including reasonable attorney fees, if their contribution to the litigation was unequal to the contribution of the active party. Because the record shows that the plaintiff contributed only half or less of the legal services necessary to the cases, the District Court properly ordered compensation. Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981), followed in Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69, 54 St. Rep. 566 (1997) (Murer III). See also Mtn. W. Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, 308 M 29, 38 P3d 825 (2001).

EXCEPTION — STATUTE AWARDING FEES TO PREVAILING PARTY

Recovery of Attorney Fees, Including Appeal Costs, Based on Indemnification Provision in Underlying Contract: Four people decided to start a business, but ultimately three decided to opt out and exchange their respective corporate shares of stock for cash. The release agreement also held the three harmless from all causes of action relating to the incorporation and provided an indemnification clause that held each party harmless from and against all liability, claim, loss, damage, or expense, including attorney fees, incurred or required to be paid by the other parties by reason of any breach or failure of observance or performance of any representation, warranty, or covenant or other provision of the agreement. Nevertheless, the corporation subsequently sued one of the three resigning members for breach of fiduciary duty, conversion, actual and constructive fraud, and negligent misrepresentation, seeking $110,000 in general damages and also punitive damages. Defendant counterclaimed that by filing a claim that was barred by the release agreement, the corporation had breached its contract. Following trial, the District Court awarded only $3,673.53 for constructive fraud, but also concluded that all claims based on the parties' contractual relationship were barred. Each party then requested attorney fees as the prevailing party pursuant to the indemnification clause, but the court denied the motions, holding that there was no prevailing party because each party had gained a victory but also suffered a loss. The corporation appealed, seeking attorney fees. The Supreme Court held that pursuant to the reciprocal right under 28-3-704, the corporation had the statutory right to recover attorney fees, but only the fees incurred in defending the breach of contract counterclaim as the prevailing party, pursuant to the contractual indemnification provision. Under the same reasoning, the Supreme Court awarded attorney fees for costs of appeal as well, remanding for a determination of fees. Transaction Network, Inc. v. Wellington Technologies, Inc., 2000 MT 223, 301 M 212, 7 P3d 409, 57 St. Rep. 920 (2000), followed in Peschel Family Trust v. Colonna, 2003 MT 216, 317 M 127, 75 P3d 793 (2003).

Prevailing Party on Ditch Easement Claim Entitled to Attorney Fees and Costs Despite Loss of Separate Counterclaim Related to Road Easement: Espy sued for easement interference related to an underground irrigation system. Quinlan filed a permissive counterclaim, alleging that Espy had interfered with Quinlan's road easement over Espy's property. Following trial, the District Court concluded that: (1) Espy was successful on his claim because he had a valid easement over Quinlan's property for use and maintenance of the irrigation system; (2) Quinlan was successful on her counterclaim because she had a valid road easement over Espy's property; (3) both parties were entitled to a permanent order restraining the other party from interfering with their respective easements; and (4) Espy was entitled to attorney fees and costs as the successful party under 70-17-112. Quinlan appealed the award of attorney fees, contending that because she prevailed on the counterclaim, neither party could be considered a prevailing party. However, Quinlan's counterclaim was not raised in the context of 70-17-112, but was instead related to a road easement. Because Espy successfully prevailed on all claims raised pursuant to 70-17-112, he was entitled to attorney fees and costs regardless of the fact that he was not the prevailing party on the counterclaim. Espy v. Quinlan, 2000 MT 193, 300 M 441, 4 P3d 1212, 57 St. Rep. 764 (2000), distinguishing Knudsen v. Taylor, 211 M 459, 685 P2d 354 (1984).

Calculation of Attorney Fees Under Federal Fee-Shifting Law: In Ihler I, a class action suit by patients at the state hospital, the case was remanded for recomputation of the lodestar amount. On remand, the District Court eliminated the 50% enhancement for contingency, added fees for representation by the state-employed attorney, did not reassess hourly rates or compensable hours, and denied the request for attorney fees on appeal. On appeal, the Supreme Court held that the District Court erred in denying out-of-state hourly rates for out-of-state attorneys. A prevailing party in a section 1988 action does not have the burden of proving that resort to out-of-forum counsel was necessary; instead, a prevailing party has the burden of proving that

resort to out-of-forum counsel was reasonable. The Supreme Court further held that: (1) the District Court erred in awarding certain in-state attorney fees that were below the lowest end of the prevailing range; (2) the District Court erred in reducing the patients' requested hours, stating that because it was reasonable to seek out-of-state representation, it also was reasonable to incur the extra expenses associated with out-of-state representation, including travel time; and (3) the District Court erred in denying the patients' attorney fees incurred on appeal. The Supreme Court held that the District Court did not err in refusing to enhance the lodestar figure for undesirability because that was subsumed in the lodestar figure. Ihler v. Chisholm, 2000 MT 37, 298 M 254, 995 P2d 439, 57 St. Rep. 163 (2000).

Award of Fees Under 42 U.S.C. 1988 Upheld — "Lodestar" Method of Fee Calculation Approved: Klock brought an action under 42 U.S.C. 1983 and 42 U.S.C. 1985 against various county, town, and bank officials for violating his civil rights. The defendants filed a motion for summary judgment and a request for attorney fees. The motion was granted, and attorney fees were awarded pursuant to 42 U.S.C. 1988. The Supreme Court upheld the grant of summary judgment, finding that Klock had the burden of responding to the motion with affidavits or other showing of a factual nature and did not meet his burden of proof. Therefore, the Supreme Court also affirmed the District Court on the issue of attorney fees because the lack of facts shown by Klock also showed his claims to be groundless and frivolous. Concerning the amount of the fees, the Supreme Court approved the "lodestar" method applied by the District Court and previously approved by the Supreme Court in Audit Serv., Inc. v. Frontier-West, Inc., 252 M 142, 827 P2d 1224 (1992), and awarded the defendants 25% of their total fees. Klock v. Cascade, 284 M 167, 943 P2d 1262, 54 St. Rep. 829 (1997).

Counterclaim — Party With Net Judgment Prevailing Party: While no one factor should be considered in determining the prevailing party, the party that survives an action involving a counterclaim with the net judgment should generally be considered the successful party. Rustics of Lindbergh Lake, Inc. v. Lease, 213 M 246, 690 P2d 440, 41 St. Rep. 2092 (1984).

"Prevailing Party" When Usury Penalty Assessed Against Party Exceeds That Party's Recovery: Appellants filed an action to recover money due on a promissory note that was usurious on its face. The District Court assessed a usury penalty against appellants which exceeded the balance due on the note. Thus, the net judgment was in favor of respondents. The court then assessed attorney fees against the appellants. On appeal, the Supreme Court affirmed, ruling that respondents had been properly found to be the prevailing party. E.C.A. Envtl. Management Serv., Inc. v. Toenyes, 208 M 336, 679 P2d 213, 41 St. Rep. 388 (1984), followed in Doig v. Cascaddan, 282 M 105, 935 P2d 268, 54 St. Rep. 263 (1997).

REASONABLENESS

Proper Calculation of Fractional Partnership Interest — Attorney Fees Based on Fractional Interest Affirmed: Six brothers had equal interests in a farming operation. Four of the brothers sought to buy out the interests of the other two. One brother, Marvin, refused to sell, but the other, Larry, agreed, so Larry's interest was divided between the four participating brothers, giving each an additional 4% ownership interest. The four then mortgaged the partnership's interest without Marvin's consent. In winding up the partnership, the District Court found that Marvin still had a one-sixth interest and that because he was aware of Larry's buyout but declined to participate, Marvin was not entitled to any portion of the buyout. Marvin appealed on grounds that the District Court miscalculated his fractional interest because mortgaging the partnership interest without his consent was a breach of duty and the partnership agreement, but the Supreme Court affirmed. Marvin could not demonstrate that he was damaged by the breach of duty and the partnership agreement. Marvin's interest was not mortgaged, nor did Marvin become obligated to Larry through the buyout. Thus, the District Court properly calculated Marvin's fractional partnership interest. Further, because Marvin retained a one-sixth interest, the District Court correctly charged Marvin with one-sixth of the attorney fees incurred in the dissolution. Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, 322 M 133, 95 P3d 671 (2004).

Attorney Fees in Excess of Damages — Not Unreasonable: In light of the complexity of the litigation and the time spent in preparing the case, the District Court did not err in awarding attorney fees in a contract case in an amount approximately four times the amount of damages recovered. Morning Star Enterprises, Inc. v. R.H. Grover, Inc., 247 M 105, 805 P2d 553, 48 St. Rep. 112 (1991).

No Clear Segregation of Time — Reasonable Fee: The Supreme Court, recalling its decision in St. Paul Fire & Marine Ins. Co. v. Cumiskey, 204 M 350, 665 P2d 223, 40 St. Rep. 891 (1983), held

that when an attorney's time cannot clearly be segregated, he is entitled to a reasonable fee for the entire case. Donnes v. Orlando, 221 M 356, 720 P2d 233, 43 St. Rep. 890 (1986).

Award of Fees Reasonable — Appeal to Clarify Alternative Judgment Not Frivolous: In an original judgment of October 31, 1979, plaintiffs were given the alternatives of either repairing a damaged irrigation ditch or paying damages of $5,500. The case was appealed to the Supreme Court, and in Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981), the court found substantial evidence to support the District Court's findings. This became the law of the case. The case was remanded for a determination of attorney fees to be awarded to defendant. On remand, attorneys for defendant requested fees of $11,000. The District Court awarded fees of $2,000 based on testimony received. The Supreme Court found that this finding was not clearly erroneous. The court also declined to award attorney fees for the appeal under Rule 32, M.R.App.P., because plaintiffs were justified in bringing the appeal to clarify the alternative judgment. Marta v. Smith, 200 M 414, 650 P2d 1387, 39 St. Rep. 1839 (1982).

Reasonableness of Attorney Fees for Lead Counsel in Consolidated Cases Upheld: In an action against the defendant for damages caused by a range fire in which numerous cases were consolidated and lead counsel appointed for the consolidated cases, the trial court did not err in awarding lead counsel $47,222.22 in attorney fees to be paid by the plaintiff. In determining the reasonableness of a fee, the Supreme Court, in First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976), established the guidelines to be considered by the trial court. The fee awarded was 11.1% of the plaintiff's recovery and was awarded only after extensive testimony relating to the guidelines to be considered. Under these circumstances, no abuse of discretion was found. Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981), followed in Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69, 54 St. Rep. 566 (1997) (Murer III).

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GENERAL

Proper Calculation of Fractional Partnership Interest — Attorney Fees Based on Fractional Interest Affirmed: Six brothers had equal interests in a farming operation. Four of the brothers sought to buy out the interests of the other two. One brother, Marvin, refused to sell, but the other, Larry, agreed, so Larry's interest was divided between the four participating brothers, giving each an additional 4% ownership interest. The four then mortgaged the partnership's interest without Marvin's consent. In winding up the partnership, the District Court found that Marvin still had a one-sixth interest and that because he was aware of Larry's buyout but declined to participate, Marvin was not entitled to any portion of the buyout. Marvin appealed on grounds that the District Court miscalculated his fractional interest because mortgaging the partnership interest without his consent was a breach of duty and the partnership agreement, but the Supreme Court affirmed. Marvin could not demonstrate that he was damaged by the breach of duty and the partnership agreement. Marvin's interest was not mortgaged, nor did Marvin become obligated to Larry through the buyout. Thus, the District Court properly calculated Marvin's fractional partnership interest. Further, because Marvin retained a one-sixth interest, the District Court correctly charged Marvin with one-sixth of the attorney fees incurred in the dissolution. Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, 322 M 133, 95 P3d 671 (2004).

Attorney Fees Proper to Defend Untimely and Inappropriate Nonmeritorious Action: An award of attorney fees to plaintiff was within the District Court's discretion when plaintiff, as a wholly innocent party, was forced to employ counsel to defend a nonmeritorious motion that was both untimely and inappropriate. Connell v. Dept. of Social and Rehabilitation Services, 2003 MT 361, 319 M 69, 81 P3d 1279 (2003), following Foy v. Anderson, 176 M 507, 580 P2d 114 (1978).

Pro Rata Calculation of Attorney Fees Based on Percentage of Plaintiff's Successful Claims Rejected: The District Court awarded plaintiff attorney fees for a breach of warranty claim against a siding installer and a siding manufacturer, which was the only theory based on

contract for which plaintiff received a verdict against both defendants. To calculate the award, the court allocated the total amount of time expended by plaintiff's attorneys among the seven claims that existed prior to summary judgment and the three claims that existed thereafter on a pro rata basis, awarding plaintiff one-seventh of the attorneys' time expended prior to summary judgment and one-third of their time after summary judgment. Plaintiff contended that the pro rata calculation was in error, and the Supreme Court agreed. A similar mathematical approach was rejected by the U.S. Supreme Court in Hensley v. Eckerhart, 461 US 424 (1983), as providing little aid in determining what is a reasonable fee in light of all relevant factors. The award was also inconsistent with the guidelines established in Swenson v. Janke, 274 M 354, 908 P2d 678 (1995), for determining a reasonable fee award, and because the District Court failed to consider the Swenson factors, the award was remanded for recalculation. Osterman v. Sears, Roebuck & Co., 2003 MT 327, 318 M 342, 80 P3d 435 (2003).

Insurer's Breach of Duty to Indemnify — Recovery of Attorney Fees by Injured Third-Party Claimant Who Prevails in Insurance Coverage Action Against Motor Vehicle Liability Insurer — Modification of Insurance Exception — Standard of Review of Question of Law: Following remand in Christensen v. Mtn. W. Farm Bureau Mut. Ins. Co., 2000 MT 378, 303 M 493, 22 P3d 624 (2000), the Christensens requested attorney fees incurred in the declaratory judgment action. The District Court denied the request, and the Christensens appealed. Generally, under the American rule, a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory provision, although equitable exceptions are recognized. Here, the parties agreed that there was no contractual authority to support an award of attorney fees, although the Supreme Court held in Trustees of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 M 210, 69 P3d 663 (2003), that 27-8-313 authorizes a District Court to award attorney fees when the court, in its discretion, considers such an award to be necessary or proper. The Christensens submitted that the defendant insurer was obligated to reimburse them based on the insurance exception rationale articulated in Home Ins. Co. v. Pinski Bros., Inc., 160 M 219, 500 P2d 945 (1972), which approved an award of attorney fees in cases in which an insurer breaches its obligation to defend an insured. The Supreme Court noted that the issue presented a question of law, so the standard of review was whether the District Court's interpretation of law was correct. The Supreme Court held that an insurer that breaches its duty to indemnify is liable for attorney fees when an insured is forced to assume the burden of legal action to obtain the full benefit of the insurance contract, regardless of whether the insurer's duty to defend is at issue. However, in this case, the Christensens were third-party beneficiaries, and the Supreme Court declined to extend the insurance exception to third-party claimants because that would sanction attorney fee awards for simply demonstrating the existence of any insurance contract from which a third-party claimant successfully established coverage, which would undermine the American rule. Thus, although the Christensens were precluded from recovering attorney fees under the obligatory insurance exception, the case was remanded for a determination of whether attorney fees were necessary or proper under 27-8-313 and Trustees of Ind. Univ. v. Buxbaum. Mtn. W. Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, 315 M 231, 69 P3d 652 (2003), overruling Yovish v. United Serv. Auto. Ass'n, 243 M 284, 794 P2d 682 (1990).

No Waiver of Attorney Fees by Injured Third-Party Claimant Who Prevails in Insurance Coverage Action on Remand: Following remand in Christensen v. Mtn. W. Farm Bureau Mut. Ins. Co., 2000 MT 378, 303 M 493, 22 P3d 624 (2000), the Christensens requested attorney fees incurred in the declaratory judgment action. The District Court denied the request, and the Christensens appealed. Defendant insurer argued that because the Christensens never requested attorney fees in their motion for summary judgment or in their first appeal, their right to attorney fees was waived. Rule 8(a), M.R.Civ.P. (Title 25, ch. 20), requires that a party give notice of facts that the party expects to prove, and the facts must disclose the presence of all elements necessary to make out a claim. In this case, the defendant insurer had notice of the Christensens' desire to seek attorney fees because that relief was specifically prayed for in the initial petition for declaratory judgment, and defendant successfully defended against that request in District Court. However, the Christensens did not prevail until the case was remanded, so waiting to file a motion for attorney fees until prevailing on appeal was proper. Thus, the Christensens did not waive their entitlement to attorney fees. Mtn. W. Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, 315 M 231, 69 P3d 652 (2003), following Kunst v. Pass, 1998 M 71, 288 M 264, 957 P2d 1 (1998).

Attorney Fees Not Considered Costs — Declaratory Judgment Equitable Exception to Rule That Attorney Fees Not Awarded Absent Contractual or Statutory Provision: The District Court initially awarded costs and attorney fees to defendants for defending a declaratory judgment action. Plaintiff moved under Rule 59(g), M.R.Civ.P. (Title 25, ch. 20), to strike the award of

attorney fees. The District Court then concluded that it lacked authority to award attorney fees because plaintiff did not force defendants to defend against a frivolous or malicious action, so the court struck the award of attorney fees, and defendants appealed. Generally, under the American rule, a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory provision, although equitable exceptions are recognized. Section 27-8-311 provides that in any proceeding under Title 27, ch. 8, equitable and just costs may be awarded, but attorney fees are not, in any proper sense, considered part of the costs in a case and thus are not allowed as costs under 27-8-311. However, 27-8-313 draws no distinction between declaratory judgment actions adjudicating the rights of an insured against an insurer and actions adjudicating rights outside the confines of an insurance policy, so a court may award attorney fees pursuant to 27-8-313 when the court, in its discretion, considers such an award necessary or proper. Therefore, after finding that the District Court erred in concluding that it lacked authority to award attorney fees, the Supreme Court reversed for a determination of whether an award of attorney fees was necessary or proper in this case. Trustees of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 M 210, 69 P3d 663 (2003), overruling State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), State ex rel. Dept. of Health and Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293 (1978), State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858 (1988), McKamey v. St., 268 M 137, 885 P2d 515 (1994), and Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121 (1998), to the extent that those cases hold that a District Court has no discretionary authority to award attorney fees in a declaratory judgment action.

Prevailing on State Claim but Not on Federal Section 1983 Claim — No Attorney Fees Under Federal Law Rule for Section 1983 Claim: The city approved a preliminary application for plat approval, subject to 26 conditions imposed by the city, and the developer sued the city for imposing the conditions. Although the developer prevailed on its claims under state law, it did not prevail on its federal section 1983 claim that the city acted arbitrarily and capriciously in imposing conditions when the city conditionally approved the preliminary plat application. Therefore, the developer was not entitled to attorney fees under the rule that a prevailing section 1983 plaintiff should ordinarily recover attorney fees unless special circumstances would render an award unjust. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

No Attorney Fees for Plaintiffs Whose State Constitutional Rights Local Peace Officers Violated: Brothers filed a civil action against the Sheriff and two deputies for damages for violation of the brothers' Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. The peace officers had used writs of execution upon judgments against one brother, who lived with the other brother, to enter the house that the other brother owned and to search for and seize personal property to satisfy the judgments. The court held that neither the writs nor the statutes that they were issued under authorized the entry, search, and seizure, that the three rights are self-executing, and that the brothers were entitled to damages. However, the brothers were not entitled to attorney fees because there was neither a contractual agreement nor a statute providing for payment of the fees. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

No Breach or Loss — Attorney Fees to Prevailing Party: Both parties claimed to be the prevailing party in a contract action and sought attorney fees. The District Court acknowledged that defendant was the net prevailing party by winning a counterclaim for breach of contract and an award of lost profits, but found that defendant was the initial breaching party and denied attorney fees to either party. Defendant appealed. The Supreme Court noted that in the underlying case, Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818 (1999), defendant did not receive either actual or constructive notice from plaintiff that defendant was in default on the agreement, so the 10-day period for defendant to cure the default did not commence. Therefore, the District Court erred in concluding that defendant was the initial breaching party by merely being in default on the agreement. Because defendant was not a breaching party and did not suffer a loss as a result of the litigation, the District Court did not have discretion to deny defendant attorney fees as the only prevailing party in the action. The case was remanded for an award of attorney fees to defendant. Grenfell v. Anderson, 2002 MT 225, 311 M 385, 56 P3d 326 (2002), distinguishing Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390 (1999).

Award of Attorney Fees Based on Party's Deception, Contradiction, and Fraud and Party's Attorney's Needless Protraction of Litigation: The appellant in a probate and guardianship case was found to have employed deception, contradiction, and fraud, resulting in the expenditure of considerable time, effort, and expense in the attempt to arrive at a reasonable understanding of the condition of the guardianship estate and the ownership of estate property. The appellant's attorney was found to have taken every opportunity to obstruct and avoid a resolution of the issues by filing questionable motions for dismissal and sanctions, taking positions that were not

supported by law or facts, and failing to mediate in good faith, thereby protracting the litigation at considerable expense to the respondents. The District Court ordered appellant to pay 80% of the respondents' attorney fees and costs and ordered appellant's attorney to pay the remaining 20%. There was substantial evidence in the record to support the award, which the Supreme Court affirmed. The court declined to address the reasonableness of the award because appellant did not object to the bill of expenses when given the opportunity to challenge the amount, instead challenging the reasonableness of the award for the first time on appeal. In re Estate of McDermott, 2002 MT 164, 310 M 435, 51 P3d 486 (2002).

Federal Civil Rights Claim Resulting From Clerical Error Considered Vexatious — Attorney Fees Awarded to Prevailing Party: Shepherd held an assignment of the tax sale certificate on real property in Red Lodge. A few days before the redemption period was to expire, the owner of record redeemed the property by paying $4,407.28, but the County Treasurer unintentionally overlooked an additional $56.30 in interest that had accrued between the date that notice was given that a tax deed would be issued and the date of redemption. Shepherd then filed a complaint under 42 U.S.C. 1983, alleging that the county's failure to collect the statutorily required amount for redemption deprived him of a property interest without due process of law. Shepherd sought $250,000 in general damages, punitive damages, and attorney fees and costs. Shortly thereafter, the county tendered Shepherd $56.30 plus interest, but Shepherd rejected the money and added a negligence claim to the complaint, based on the County Treasurer's improper extinguishment of the lien. The District Court summarily dismissed the negligence claim, and the county sought attorney fees, citing Hughes v. Rowe, 449 US 5 (1980), for the proposition that the prevailing party in a section 1983 case is entitled to attorney fees if plaintiff continued to litigate after it became apparent that the action lacked factual or legal substance. The District Court found that Shepherd's action was not unreasonable or vexatious, and declined to award attorney fees to the county. On appeal, the Supreme Court concluded that Shepherd's civil rights claim, resulting from a clerical error amounting to $56.30 in damages, was groundless, meritless, and vexatious. Even when Shepherd was tendered the full amount owed, he proceeded to cavalierly engage in litigation that required the county to defend the meritless claim. The case was remanded for a determination of the amount to which the county was entitled in attorney fees and costs associated with the motion to dismiss the federal civil rights claim. Shepherd v. Carbon County Bd. of Comm'rs, 2002 MT 98, 309 M 391, 46 P3d 634 (2002).

Test for Determining Prevailing Party in Mixed Motive Employment Discrimination Case: Laudert suffered liver failure while employed by the Richland County Sheriff's Department (RCSD) and had to resign. Following Laudert's full recovery, his former position came open again and he applied but was not rehired. He filed a discrimination charge on grounds of age and disability. The hearings examiner found that questions asked by the RCSD interview panel constituted direct evidence that RCSD had unlawfully considered Laudert's disability, but did not award damages because Laudert would not have been hired even in the absence of any unlawful consideration of his disability. The District Court held that Laudert was not entitled to attorney fees because he did not prevail on the ultimate basis for his petition. Laudert appealed the denial of attorney fees, asserting that because the hearings examiner found that his disability had been unlawfully considered and because affirmative relief was awarded against RCSD in the form of an injunctive order requiring RCSD to submit a written policy regarding hiring procedures, including guidelines regarding future inquiry into applicant disabilities, he was the prevailing party. The Supreme Court held that the District Court erred in applying the "central issue" and "primary relief sought" tests for determining the prevailing party, analyses expressly repudiated in Tex. St. Teachers Ass'n v. Garland Independent School District, 489 US 782 (1989). Requiring plaintiff to prevail on the ultimate basis for a petition is an inappropriate test for determining whether attorney fees should be awarded under 49-2-505. Under Farrar v. Hobby, 506 US 103 (1992), a plaintiff prevails when actual relief on the merits of the claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. Here, the order of affirmative injunctive relief clearly modified RCSD's behavior. However, the Supreme Court rejected the Farrar requirement that a plaintiff secure a direct benefit at the time of the judgment in order to be a prevailing party because that requirement would not further the purpose of awarding attorney fees under Title 49, ch. 2, commonly known as the Montana Human Rights Act. Complaints of civil rights abuses that successfully establish a finding of discrimination and an order of injunctive relief are the type of meritorious litigation that should be encouraged. The District Court's determination that Laudert did not prevail because RCSD proved it would have made the same hiring decision, despite its consideration of Laudert's disability, was reversible error. Laudert v. Richland County Sheriff's Dept., 2000 MT 218, 301 M 114, 7 P3d 386, 57 St. Rep. 872

(2000). Following remand for determination of a reasonable fee award under 49-2-505, the District Court noted that Laudert was the prevailing party in the 2000 case, even though Laudert's request for damages was denied, and awarded Laudert's counsel fees for all time expended. The RCSD appealed, but the Supreme Court affirmed. The Supreme Court cited Pa. v. Del. Valley Citizens' Council for Clean Air, 478 US 546 (1986), for the strong presumption, given the rationale behind fee-shifting provisions, that the lodestar amount is a reasonable fee, noting that fee-shifting statutes were not designed to be windfalls for attorneys or to replicate the amount that an attorney would receive in other types of litigation, but rather to enable private parties to retain the legal assistance necessary to seek redress when their rights are violated. The court also applied the two-step approach in Hensley v. Eckerhart, 461 US 424 (1983), to address other considerations that may lead to a fee adjustment in cases when attorney fees are recoverable by a partially prevailing plaintiff in pursuit of unsuccessful claims. Under Hensley, an attorney should receive fees for the full services provided when plaintiff has obtained excellent results, even if plaintiff does not prevail on every claim. In this case, Laudert achieved the level of success necessary to support the award of the full amount of fees claimed, and the District Court did not err in awarding the full amount. Laudert v. Richland County Sheriff's Dept., 2001 MT 287, 307 M 403, 38 P3d 790 (2001). See also Ihler v. Chisholm, 2000 MT 37, 298 M 254, 995 P2d 439 (2000). See also Dolan v. School District No. 10, 195 M 340, 636 P2d 825 (1981), and Wagner v. Empire Dev. Corp., 228 M 370, 743 P2d 586 (1987).

No Attorney Fees Awarded Absent Prevailing Party: H-D Irrigating, Inc., bought land and irrigation equipment from Hobble Diamond Cattle Company and Kimble Properties, Inc., respectively, then sued both companies for constructive fraud when the land eroded and caused damage to the irrigation system. The District Court held that neither party was the prevailing party and that each party was responsible for its own attorney fees and costs. The Supreme Court agreed. Generally, attorney fees are not recoverable absent a statutory or contractual provision. Here, both parties gained a victory but also suffered a loss, and the District Court did not abuse its discretion when it did not award attorney fees. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000). See also McCauley v. Thompson-Nistler, 2000 MT 215, 301 M 81, 10 P3d 794, 57 St. Rep. 855 (2000).

Payment for Attorney Who Voluntarily Withdraws From Contingent Fee Case Before Occurrence of Contingency Based on Good Cause for Withdrawal — Modern Majority Rule: Sullivan retained plaintiff Bell & Marra, pllc, to represent him in an employment termination case, entering a contingent fee agreement for payment. Plaintiff represented Sullivan through two trials and settlement negotiations, after which it sent Sullivan a letter stating that it could not continue under the written 40% contingent arrangement and demanding that, in order to continue representation, Sullivan deposit $2,000 to cover costs of appeal transcripts and agree to pay plaintiff a percentage of all settlement proceeds, judgment damages, and other consideration recovered from the employer in the amount of 50% for appeal and subsequent trial for discrimination or wrongful discharge and an additional 5% for each appeal thereafter. Sullivan declined the ultimatum and hired new counsel. Upon settlement of Sullivan's employment claim, plaintiff filed: (1) a lien foreclosure action for payment of fees involving the employment claim, including advanced costs plus 40% of the recovery or the quantum meruit value of the legal services performed computed on an hourly basis; (2) a contract action related to fees incurred during representation of Sullivan's dissolution proceedings; and (3) a claim against Sullivan's employer requesting that settlement proceeds be held or paid to plaintiff according to the lien against Sullivan. Sullivan asserted affirmative defenses, including fraud, unavailability of quantum meruit damages because of plaintiff's repudiation of the fee agreement, and breach of fiduciary duty, as well as counterclaims for breach of contract, conversion, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. The District Court concluded that whether plaintiff withdrew or was fired was irrelevant and that the parties simply terminated the attorney-client relationship. The court then denied Sullivan's motions and counterclaims and granted summary judgment to plaintiff on all issues, awarding plaintiff attorney fees for the employment-related litigation at the contract rate of 40% minus the amount in the fee arrangement with Sullivan's subsequent attorney; fees and costs incurred during Sullivan's dissolution action; outstanding costs for the employment litigation; prejudgment interest on the damage awards; and plaintiff's attorney fees and costs incurred in pursuing the foreclosure action. Sullivan appealed the summary judgment. In a case of first impression, the Supreme Court adopted the modern majority rule, which holds that an attorney who voluntarily withdraws from a contingency fee case without good cause forfeits recovery of compensation for services performed, but if withdrawal was for good cause or was justified, the attorney may recover based on quantum meruit. Whether good cause exists depends on the facts and

circumstances of each case. Good cause exists when a client has engaged in culpable conduct, when continued representation would violate an attorney's ethical obligations, or when an attorney lacks the resources to pursue litigation. However, a client's refusal to accept a settlement offer does not constitute good cause, nor is it justifiable for an attorney to withdraw if the attorney does not believe that the negotiated contract is sufficiently compensatory. In the present case, plaintiff withdrew because continued representation had become a financial burden, which is a good cause for withdrawal under the Montana Rules of Professional Conduct, but not necessarily one entitling an attorney to compensation. Faced with being forced to enter into a new and unacceptable fee agreement when the time for pursuing an appeal was running, Sullivan's decision to reject plaintiff's ultimatum resulted in plaintiff's voluntary withdrawal. In light of the modern majority rule, plaintiff did not have good cause to withdraw that would justify compensation, so the District Court's summary judgment was reversed. Bell & Marra, pllc v. Sullivan, 2000 MT 206, 300 M 530, 6 P3d 965, 57 St. Rep. 810 (2000), following Ausler v. Ramsey, 868 P2d 877 (Wash. Ct. App. 1994). See also Augustson v. Linea Aerea Nacional-Chile S.A., 76 F3d 658 (5th Cir. 1996).

Prevailing Party on Ditch Easement Claim Entitled to Attorney Fees and Costs Despite Loss of Separate Counterclaim Related to Road Easement: Espy sued for easement interference related to an underground irrigation system. Quinlan filed a permissive counterclaim, alleging that Espy had interfered with Quinlan's road easement over Espy's property. Following trial, the District Court concluded that: (1) Espy was successful on his claim because he had a valid easement over Quinlan's property for use and maintenance of the irrigation system; (2) Quinlan was successful on her counterclaim because she had a valid road easement over Espy's property; (3) both parties were entitled to a permanent order restraining the other party from interfering with their respective easements; and (4) Espy was entitled to attorney fees and costs as the successful party under 70-17-112. Quinlan appealed the award of attorney fees, contending that because she prevailed on the counterclaim, neither party could be considered a prevailing party. However, Quinlan's counterclaim was not raised in the context of 70-17-112, but was instead related to a road easement. Because Espy successfully prevailed on all claims raised pursuant to 70-17-112, he was entitled to attorney fees and costs regardless of the fact that he was not the prevailing party on the counterclaim. Espy v. Quinlan, 2000 MT 193, 300 M 441, 4 P3d 1212, 57 St. Rep. 764 (2000), distinguishing Knudsen v. Taylor, 211 M 459, 685 P2d 354 (1984).

Calculation of Attorney Fees Under Federal Fee-Shifting Law: In Ihler I, a class action suit by patients at the state hospital, the case was remanded for recomputation of the lodestar amount. On remand, the District Court eliminated the 50% enhancement for contingency, added fees for representation by the state-employed attorney, did not reassess hourly rates or compensable hours, and denied the request for attorney fees on appeal. On appeal, the Supreme Court held that the District Court erred in denying out-of-state hourly rates for out-of-state attorneys. A prevailing party in a section 1988 action does not have the burden of proving that resort to out-of-forum counsel was necessary; instead, a prevailing party has the burden of proving that resort to out-of-forum counsel was reasonable. The Supreme Court further held that: (1) the District Court erred in awarding certain in-state attorney fees that were below the lowest end of the prevailing range; (2) the District Court erred in reducing the patients' requested hours, stating that because it was reasonable to seek out-of-state representation, it also was reasonable to incur the extra expenses associated with out-of-state representation, including travel time; and (3) the District Court erred in denying the patients' attorney fees incurred on appeal. The Supreme Court held that the District Court did not err in refusing to enhance the lodestar figure for undesirability because that was subsumed in the lodestar figure. Ihler v. Chisholm, 2000 MT 37, 298 M 254, 995 P2d 439, 57 St. Rep. 163 (2000).

Payment Required by Contract Not Considered Loss — Attorney Fees and Costs to Prevailing Party: An agreement in a real property transaction provided for attorney fees to the prevailing party. Plaintiff brought an action to determine ownership of the property and was awarded summary judgment, part of which required plaintiff to pay one of the defendants $100,000 pursuant to a profit sweep provision of the agreement. Defendants cited Parcel v. Myers, 214 M 220, 697 P2d 89, 41 St. Rep. 2426 (1984), claiming that plaintiff could not be considered the prevailing party because plaintiff may have gained a victory but had also suffered a loss. However, the payment could not be considered a loss to plaintiff because it was an obligation required to satisfy the agreement, so attorney fees and costs should have been awarded plaintiff as prevailing party. Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Attorney Fees Not Generally Allowed: The general rule on attorney fees, adopted by the Supreme Court, is that in the absence of contractual agreement or specific statutory authority,

attorney fees are not recoverable as costs by the prevailing party. Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999); Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999); Simmons Oil Corp. v. Wells Fargo Bank, N.A., 1998 MT 129, 289 M 119, 960 P2d 291, 55 St. Rep. 508 (1998); Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996); Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992); Lane v. Smith, 255 M 218, 841 P2d 1143, 49 St. Rep. 974 (1992); Weber v. St., 253 M 148, 831 P2d 1359, 49 St. Rep. 397 (1992); Dept. of Fish, Wildlife, and Parks v. Mont. Stockgrowers Ass'n, Inc., 240 M 39, 782 P2d 898, 46 St. Rep. 1925 (1989); Selvidge v. McBeen, 230 M 237, 750 P2d 429, 45 St. Rep. 168 (1988); Roberts v. Mission Valley Concrete Indus., Inc., 222 M 268, 721 P2d 355, 43 St. Rep. 1254 (1986); Martin Dev. Co. v. Keeney Constr. Co., 216 M 212, 703 P2d 143, 42 St. Rep. 752 (1985); Ehly v. Cady, 212 M 82, 687 P2d 687, 41 St. Rep. 1611 (1984); Wilson v. Dept. of Natural Resources and Conservation, 199 M 189, 648 P2d 766, 39 St. Rep. 1294 (1982); Winer v. Tonal Corp., 169 M 247, 545 P2d 1094 (1976); Nikles v. Barnes, 153 M 113, 454 P2d 608 (1969); Stalcup v. Mont. Trailer Sales & Equipment Co., 146 M 494, 409 P2d 542 (1966); Kintner v. Harr, 146 M 461, 408 P2d 487 (1965); In re Mickich's Estate, 114 M 258, 136 P2d 223 (1943). Rule also discussed in Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981), St. v. District Court, 193 M 413, 632 P2d 318, 38 St. Rep. 1204 (1981), Thompkins v. Fuller, 205 M 168, 667 P2d 944, 40 St. Rep. 1192 (1983), and Terra W. Townhomes, L.L.C. v. Stu Henkel Realty, 2000 MT 43, 298 M 344, 996 P2d 866, 57 St. Rep. 207 (2000).

Award of Attorney Fees Under Foy Equitable Exception Limited to Defense of Frivolous Action: Absent contractual or statutory authority, attorney fees will generally not be awarded, but a court may, under its equity powers and pursuant to Foy v. Anderson, 176 M 507, 580 P2d 114, 35 St. Rep. 811 (1978), award attorney fees to make an injured party whole. However, the Foy equitable exception applies only to situations in which a party has been forced to defend against a wholly frivolous or malicious action and is not available for a party that initiates a legal action. Further, parties bringing actions for injunctive relief to protect their own rights are not entitled to attorney fees under the Foy exception. Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999), distinguishing Wilson v. Dept. of Natural Resources and Conservation, 199 M 189, 648 P2d 766, 39 St. Rep. 1294 (1982). See also Erker v. Kester, 1999 MT 231, 296 M 123, 988 P2d 1221, 56 St. Rep. 912 (1999), Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004), and Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, 322 M 133, 95 P3d 671 (2004)

Discharge of Attorney Not Breach of Contract — Quantum Meruit Recovery for Services Rendered: The discharge of an attorney by a client is not a breach of contract and does not give rise to contract damages. However, regardless of whether an attorney is discharged with or without cause, that attorney is entitled to a quantum meruit recovery for the reasonable value of services rendered to the time of discharge. In the present case, the District Court set forth 10 specific instances in the record evidencing the attorney's work prior to discharge and then applied those facts to the guidelines set out in First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976), in determining the amount to be awarded as reasonable attorney fees. The court did not act arbitrarily, exceed the bounds of reason, or ignore recognized principles in determining the amount, and the award was affirmed. Campbell v. Bozeman Investors of Duluth, 1998 MT 204, 290 M 374, 964 P2d 41, 55 St. Rep. 868 (1998), following Martin v. Camp, 114 NE 46 (N.Y. 1916), Rosenberg v. Levin, 409 S2d 1016 (Fla. 1982), and Olsen v Englewood, 889 P2d 673 (Colo. 1995). See also Bell & Marra, pllc v. Sullivan, 2000 MT 206, 300 M 530, 6 P3d 965, 57 St. Rep. 810 (2000), in which the voluntary withdrawal of an attorney without good cause precluded quantum meruit payment.

Special Circumstances Precluding Award of Attorney Fees in Section 1983 Claim — Award Against Police Officers Fulfilling Statutory Duties Unjust: Police officers searched Dorwart's home pursuant to writs of execution and seized his personal property, but without Dorwart's permission or a search warrant. Dorwart brought a claim, pursuant to 42 U.S.C. 1983, against the county and the Sheriff. Qualified immunity was extended to the officers concerning their personal liability, but Dorwart prevailed on the claim that the county's action violated his right to be free from unreasonable search and seizure and sought attorney fees. Under Jackson v. Galan, 868 F2d 165 (5th Cir. 1989), a successful section 1983 claimant may be awarded attorney fees regardless of the fact that qualified immunity prevents liability for monetary damages. However, in this case, special circumstances precluded the award because the officers were enforcing the public policy of Montana regarding postjudgment execution statutes, thereby effectuating state rather than county policy, and the award of attorney fees against the county would have been unjust. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998).

Attorney Fees Payable Under Clear Language of Contract — Costs Awarded as Matter of Course: It was error for the trial court to order the parties to pay their own attorney fees and costs when the clear and unambiguous language of the property sale contract in question provided that plaintiffs, as the successful party, were entitled to recover fees. Further, under 25-10-101, plaintiffs were entitled to the award of court costs, as a matter of course, by virtue of receiving judgment in their favor. Quigley v. Acker, 1998 MT 72, 288 M 190, 955 P2d 1377, 55 St. Rep. 295 (1998).

What Constitute Reasonable Attorney Fees: In determining what constitute reasonable attorney fees, the following factors should be used as guidelines: (1) the amount and character of the services rendered; (2) the labor, time, and trouble involved; (3) the character and importance of the litigation in which the services were rendered; (4) the amount of money or the value of the property to be affected; (5) the professional skill and experience called for; (6) the character and standing in their profession of the attorneys; and (7) the result secured by the services of the attorneys. Walker v. Higgins, 277 M 443, 922 P2d 1154, 53 St. Rep. 719 (1996); Chamberlin v. Puckett Constr., 277 M 198, 921 P2d 1237, 53 St. Rep. 593 (1996); Morning Star Enterprises, Inc. v. R.H. Grover, Inc., 247 M 105, 805 P2d 553, 48 St. Rep. 112 (1991); Majers v. The Shining Mtn., 230 M 373, 750 P2d 449, 45 St. Rep. 283 (1988); Carkeek v. Ayer, 188 M 345, 613 P2d 1013 (1980); First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976); Crncevich v. Georgetown Recreation Corp., 168 M 113, 541 P2d 56 (1975); Forrester & MacGinniss v. B. & M. Co., 29 M 397, 74 P 1088 (1904).

Attorney Fees Not Available if Action for Tort and Not Contract Breach: Saville, the seller, and her realtor were sued by the purchasers of her property. The suit was based on negligent misrepresentation of the boundaries of the property by the realtor. Saville cross-claimed for indemnification against the realtor for any judgment obtained against her by the plaintiffs and was awarded indemnification by the jury. However, she was denied attorney fees by the District Court Judge, even though Saville's buy-sell agreement with the realtor contained an attorney fee clause. The Supreme Court affirmed on the basis that Saville's action was based on the misrepresentation claim of the plaintiffs and was therefore necessarily based on the plaintiffs' claims that sounded in tort and not contract law. Cechovic v. Hardin & Associates, Inc., 273 M 104, 902 P2d 520, 52 St. Rep. 854 (1995).

Contract Overcharge and Negligence Claims Barred by Res Judicata When Other Party Had Already Sued for Failure to Pay: A trucker obtained default judgment in Justice's Court for the failure of Greenwood to pay the full amount that the trucker charged for hauling cattle. Greenwood had claimed that the amount charged was more than agreed upon and refused to pay the difference. He also deducted an amount for the trucker's alleged injury to two steers. Greenwood's later District Court action alleging that the contract was void for an overcharge and alleging the negligent injury of the two steers was barred by res judicata. The Supreme Court also ruled that the case was not one of those rare ones in which a court could use its equitable powers to award attorney fees, which were requested by the trucker. Greenwood v. Steve Nelson Trucking, Inc., 270 M 216, 890 P2d 765, 52 St. Rep. 151 (1995).

Denial of Attorney Fees for State-Employed Attorney Improper: Several patients at a state institution were represented by an attorney employed by the Montana Advocacy Program, which received a federally funded grant from the National Institute of Mental Health, which in turn was administered through the Montana Mental Disabilities Board of Visitors, a state agency. The patients prevailed, but the District Court denied award of attorney fees on the grounds that the attorney was a state employee and therefore not entitled to an award of fees from the state. Citing Shadis v. Beal, 685 F2d 824 (3d Cir. 1982), the Supreme Court noted that Congress contemplated that states and state officials would often be the targets of civil rights actions and intended that legal service programs receive fees under 42 U.S.C. 1988 and that attorney fees be collected from the funds of the state agency. The fact that the attorney's wages were disbursed through the state or paid by public funds was irrelevant in determining whether an award was proper. The District Court abused its discretion by inappropriately relying on the source of the attorney's wages in its decision to deny fees, and remand was proper. Ihler v. Chisholm, 259 M 240, 855 P2d 1009, 50 St. Rep. 775 (1993). On remand, the District Court awarded fees for the state attorney at $75 an hour, her historic rate. The patients appealed, requesting $80 an hour based on the state attorney's current rate of $100. The Supreme Court held that the District Court did not abuse its discretion by not awarding the current rate because direct evidence of that rate was not presented to the District Court. The Supreme Court instructed that the rate should be recomputed at $80 an hour, a rate at the very lowest end of the prevailing range, which reasonably reflects the inexperience of the attorney. Ihler v. Chisholm, 2000 MT 37, 298 M 254,

995 P2d 439, 57 St. Rep. 163 (2000). See also Dennis v. Chang, 611 F2d 1302 (9th Cir. 1980), and Leeds v. Watson, 630 F2d 674 (9th Cir. 1980).

No Enhancement of Attorney Fees for Contingency Under Federal Fee-Shifting Law: In adjusting the amount awarded for attorney fees, the District Court ordered an increase in the lodestar amount by 50% for risk of contingency. Following the order, the U.S. Supreme Court decided in City of Burlington v. Dague, 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638 (1992), that enhancement of attorney fee awards for contingency was not permitted under federal fee-shifting statutes. The change in law between the trial court decision and the appellate decision required the appellate court to apply the new law. Under Dague, the risk of contingency in a particular case depends on: (1) the legal and factual merits of the claim, which is not reflected in the lodestar and should play no part in the calculation of attorney fees; and (2) the difficulty in establishing the merits of the claim, which is ordinarily reflected in the lodestar, either in the higher number of hours expended to overcome the difficulty or in the higher hourly rate of the attorney skilled and experienced enough to do so. Taking into account the difficulty of the case again through contingency enhancement resulted in double counting. The case at bar was remanded for recomputation of the lodestar amount in light of the Dague principles. Ihler v. Chisholm, 259 M 240, 855 P2d 1009, 50 St. Rep. 775 (1993). On remand, the District Court eliminated the 50% enhancement for contingency and added the fees incurred by the patients while represented by the state-employed attorney. The court did not reassess the reasonable hourly rates or compensable hours and denied the patients' request for attorney fees incurred on appeal. The patients appealed, contending that the District Court erred by refusing to enhance the lodestar figure for undesirability. The Supreme Court held that the District Court did not abuse its discretion in refusing to enhance the lodestar figure for undesirability because the reluctance of Montana attorneys to represent these types of claims was subsumed in the lodestar figure. Ihler v. Chisholm, 2000 MT 37, 298 M 254, 995 P2d 439, 57 St. Rep. 163 (2000). See also Davis v. San Francisco, 976 F2d 1536 (9th Cir. 1992).

Determination of Amount of Attorney Fees Payable in ERISA Action — Lodestar/Multiplier Method: D'Emanuele v. Montgomery Ward & Co., Inc., 904 F2d 1379 (9th Cir. 1990), held that the correct method for calculating the amount of attorney fees under the Employee Retirement Income Security Act of 1974 (ERISA) is the lodestar/multiplier approach adopted in Hensley v. Eckerhart, 461 US 424, 76 L Ed 2d 40, 103 S Ct 1933 (1983). The approach contains essentially two parts. First, the court must determine a "lodestar" amount by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Factors the court should consider in determining the number of hours expended include the novelty and complexity of the issues, the special skills and experience of counsel, the quality of representation, the results obtained, the superior performance of counsel, and other factors appropriate under the circumstances. Once the number of hours has been set, the hourly rate is established by taking into consideration the experience, skill, and reputation of counsel in reference to the market rate in the community for similar services of lawyers of reasonably comparable skill, experience, and reputation. Once the lodestar amount has been determined, the second part of the approach allows the court to increase or decrease that amount based on the factors used in calculating the lodestar amount that are not subsumed in the initial calculation. However, the initial lodestar amount is presumed to constitute a reasonable fee, so adjustments to that amount are rare. Audit Serv., Inc. v. Frontier-West, Inc., 252 M 142, 827 P2d 1242, 49 St. Rep. 186 (1992), followed in Head v. Cent. Reserve Life of N. America Ins. Co., 256 M 188, 845 P2d 735, 50 St. Rep. 20 (1993), and followed, with regard to reduction for limited success but contingency enhancement denied, in Ihler v. Chisholm, 259 M 240, 855 P2d 1009, 50 St. Rep. 775 (1993), in conformity with City of Burlington v. Dague, 505 US 557, 120 L Ed 2d 449, 112 S Ct 2638 (1992), and Davis v. San Francisco, 976 F2d 1536 (9th Cir. 1992). Audit Serv., Inc. was also followed in Klock v. Cascade, 284 M 167, 943 P2d 1262, 54 St. Rep. 829 (1997).

Attorney Fees in Class Action: An attorney appealed from the District Court's order reducing its original award of attorney fees to him in a class action suit. The Supreme Court upheld the reduction, stating that attorney fees in a class action are contingent upon success and upon the existence of a fund from which the fees can be paid and that the fees must be fair and in the best interests of all affected. The court reiterated its disapproval of contingent and hourly fee agreements. Ass'n of Unit Owners of Deer Lodge Condominium, Inc. v. Big Sky of Mont., Inc., 242 M 358, 790 P2d 967, 47 St. Rep. 733 (1990).

Lessors Entitled to Attorney Fees: Under a lease agreement that specifically provided that either party could recover attorney fees incurred in connection with enforcing the agreement, the lessors are entitled to such fees incurred while pursuing their rights against the lessees in

bankruptcy court after the lessees filed for bankruptcy. Ruegsegger v. Welborn, 237 M 317, 773 P2d 305, 46 St. Rep. 833 (1989).

Attorney Fees Not Awardable on Affidavit of Counsel — Hearing Required: Even though a contract may provide for the award of reasonable attorney fees, it is improper to award attorney fees solely on the affidavit of counsel without holding an evidentiary hearing on the matter. Stark v. Borner, 234 M 254, 762 P2d 857, 45 St. Rep. 1885 (1988).

Costs Provided by Contract Allowable Despite Tortious Nature of Claim: In an action by plaintiff to rescind a contract for sale of real property because of alleged fraud, misrepresentation, undue influence, and unconscionability, the award of attorney fees and costs that the contract provided to the successful defendant, relating to his defense and counterclaim of wrongful occupation by the plaintiff, was proper notwithstanding the contention that the action sounded in tort and not in contract (citing Winer v. Jonal Corp., 169 M 247, 545 P2d 1094 (1976)). The underlying action was based on a contract dispute. Westlake v. Osborne, 230 M 364, 750 P2d 444, 45 St. Rep. 277 (1988).

Attorney Fees Awarded Under Equity Powers:

Because the wife's petition to hold the husband in contempt of court was so unfounded as to constitute harassment, the trial court awarded attorney fees to the husband. Although the provisions in the uniform marriage and divorce laws do not empower the court to award attorney fees, the trial court did not abuse its discretion by awarding the fees under general powers of equity. In re Marriage of Hereford, 223 M 31, 723 P2d 960, 43 St. Rep. 1508 (1986).

While a District Court may award attorney fees under its equity powers, such an award must be documented in the record. The Supreme Court reversed an award of attorney fees which was based on the theory that the award stemmed from the equity powers of the District Court since the record provided no language indicating that the award was based on equitable principles. Brueggemann v. Billings, 221 M 375, 719 P2d 768, 43 St. Rep. 905 (1986).

Attorney Fees as Element of Compensatory Damages — Limited to Contingent Fee Agreement: Jury awarded appellant attorney fees as an element of compensatory damages and deferred to the District Court to assess appropriate attorney fees and costs. The court arrived at a sum based on a contingent fee agreement entered into by appellant and his attorney rather than using a lodestar determination based on reasonable hours expended times a reasonable hourly fee. Appellant contended on appeal that this was an incorrect method of calculation. The Supreme Court held that: (1) the provisions of the contingent fee agreement were controlling in computing the amount of attorney fees; (2) the contract fixed the damages appellant sustained; and (3) to allow appellant to recover attorney fees based on an hourly fee would change the issue from what amount would compensate him for actual damages he sustained in the form of attorney fees to what amount would reasonably compensate his attorney for services rendered. Morris v. Nationwide Ins. Co., 222 M 399, 722 P2d 628, 43 St. Rep. 1363 (1986).

Award of Attorney Fees for Time Spent Obtaining Judgment for Specific Performance: Appellant claimed District Court erred in awarding attorney fees on respondent's counterclaim for specific performance of the parties' agreement concerning buy-out of respondent's interest in a business, contending that the court failed to award relief on the contract claim. The Supreme Court found substantial evidence that appellant failed to perform the required acts and that relief was awarded by way of specific performance. The District Court properly limited recovery to the number of hours spent by respondent's attorney in obtaining the judgment for specific performance. Proto v. Elliot, 222 M 393, 722 P2d 625, 43 St. Rep. 1358 (1986).

Attorney Fees for Time Spent Determining Attorney Fees: Defendant argued that District Court erred in awarding attorney fees for time spent collecting attorney fees. The Supreme Court noted that while this argument may be correct, it was not applicable here. The court previously held in Ring v. Hoselton, 197 M 414, 643 P2d 1165 (1982), that a judgment is not final until all issues, including determination of attorney fees, have been decided. In this case, 8 hours were spent by plaintiff's counsel at a hearing in determining attorney fees, not in collecting those fees. Time spent determining attorney fees is an integral part of a case, and the District Court did not abuse its discretion in awarding fees for the time so spent. Donnes v. Orlando, 221 M 356, 720 P2d 233, 43 St. Rep. 890 (1986).

Award of Attorney Fees by Judge Who Did Not Try Case — No Abuse of Discretion: Parties had 2 months following judgment and prior to a change in jurisdiction to bring the matter of attorney fees before the judge who presided over a lien foreclosure action. Neither side did, and jurisdiction of the action was transferred from the 13th to the 16th Judicial District. Defendant later claimed the new judge abused his discretion by awarding fees in a case he did not try because he could not know all of the circumstances surrounding the foreclosure action. The Supreme Court held that a judge's jurisdiction over a case is a matter of law and that while it is

preferable that the presiding trial judge consider the matter of attorney fees, it is not mandatory. Finding no abuse of discretion, judgment was affirmed. Donnes v. Orlando, 221 M 356, 720 P2d 233, 43 St. Rep. 890 (1986).

No Clear Segregation of Time — Reasonable Fee: The Supreme Court, recalling its decision in St. Paul Fire & Marine Ins. Co. v. Cumiskey, 204 M 350, 665 P2d 223, 40 St. Rep. 891 (1983), held that when an attorney's time cannot clearly be segregated, he is entitled to a reasonable fee for the entire case. Donnes v. Orlando, 221 M 356, 720 P2d 233, 43 St. Rep. 890 (1986).

Contract for Deed Providing for Attorney Fees:

When the written contract for deed provided for attorney fees to the prevailing party in a suit to enforce the terms of the contract, the trial court did not abuse its discretion in awarding attorney fees. Given the complex circumstances of the litigation, it was not unreasonable to award fees in excess of $21,000 when the purchase price of the real property was only $28,000. Krone v. McCann, 219 M 353, 711 P2d 1367, 43 St. Rep. 5 (1986).

Attorney fees were properly granted sellers under a contract for deed where buyer defaulted and the contract specifically provided for them. Hares v. Nelson, 195 M 463, 637 P2d 19, 38 St. Rep. 2036 (1981).

Summary Judgment Granting Attorneys Amount Billed Under Retainer Agreement: On appeal from summary judgment granting attorneys amount billed under retainer agreement, the Supreme Court held that when an attorney entered into a contingent fee arrangement based on a percentage of the judgment or award recovered by the client, there was no genuine issue of material fact as to the amount owing. The total amount recovered properly included interest, and the attorney was entitled not only to a percentage of the actual damages recovered but also to a percentage of the prejudgment and postjudgment interest recovered. Although the court agreed to treat appellants' counterclaim as an affirmative defense, it held that the affirmative defense did not foreclose a summary judgment determination of attorney fees. Smith v. Howery, 217 M 23, 701 P2d 1381, 42 St. Rep. 995 (1985).

Attorney Fees — General Rules for Determining Prevailing Party: No single factor solely determines the prevailing party for the purpose of attorney fees. The party awarded a money judgment is not necessarily the successful or prevailing party, though such a judgment is an important factor in deciding who prevailed. A party surviving an action involving a counterclaim, setoff, refund, or penalty and who has the net judgment should generally be considered the prevailing party. If a counterclaiming defendant receives only a portion of his requested relief, but the plaintiff's claim is totally denied, the defendant should receive his attorney fees. If plaintiff and defendant both seek relief and each is awarded part of the requested relief, the party prevailing on the main issue in controversy must be allowed attorney fees. Schmidt v. Colonial Terrace Associates, 215 M 62, 694 P2d 1340, 42 St. Rep. 182 (1985).

Reformation of Contract — No Prevailing Party — Denial of Costs and Attorney Fees: In suit for reformation of contract for deed and for negligent misrepresentation, the District Court reduced the sales contract by $1,500 but denied plaintiff's damage claims and refused to award plaintiff costs and attorney fees. The Supreme Court held that District Court did not abuse its discretion in denying costs and attorney fees in absence of a statute or contract provision. Plaintiff was not entitled to costs under 25-10-101 because the action did not involve title to property and plaintiff did not receive a "judgment in his favor". There is no prevailing party when both parties gain a victory but also suffer a loss. Parcel v. Myers, 214 M 220, 697 P2d 89, 41 St. Rep. 2426 (1984).

Contractual Attorney Fees — "At Fault" Party Offering to Pay Prior to Trial Prevailing on Appeal: The parties entered into a 5-year lease for office space. Defendant failed to make a monthly rental payment, and plaintiff sent a notice of default followed by a notice to quit. An unlawful detainer action followed. The lease contained a clause providing that in the event of breach, the party "at fault" was liable for the other party's reasonable costs and attorney fees. Defendant admitted fault and, on September 14, offered to pay back rent, interest, attorney fees, and costs. Plaintiff refused and proceeded to trial. Plaintiff prevailed at the District Court, but defendant prevailed on appeal to the extent that it was found entitled to access to the protective statutes. The Supreme Court held that under these circumstances, defendant was "at fault" only until September 14 and was liable only for attorney fees through that date. The Grand Co. v. Jim Slack & Assoc., Inc., 212 M 149, 687 P2d 683, 41 St. Rep. 1654 (1984).

Award of Attorney Fees in Contribution Action Held Unlawful: Where the plaintiff guarantors of a note brought an action against another guarantor for failing to contribute when the maker of the note defaulted, the District Court erred in awarding attorney fees to the plaintiffs. Absent statutory authority or an agreement among the parties, there was no authority

for the award of attorney fees. Bossard v. Sullivan, 206 M 392, 670 P2d 1389, 40 St. Rep. 1733 (1983).

Fees Awarded in Action for Rescission of Contract: Contention that contract provision allowing attorney fees and costs to the prevailing party applied only to actions to enforce the contract and not to the instant action for rescission of the contract lacked merit, particularly when parties making that claim amended their complaint to seek attorney fees and only objected to such an award after the other party prevailed in the action and was granted attorney fees and costs. Preston v. McDonnell, 203 M 64, 659 P2d 276, 40 St. Rep. 297 (1983).

Award of Fees to Insurance Beneficiary Reversed: Defendant insurer contested and appealed in good faith an action for larger life insurance benefit payment than that granted by insurer. The trial court awarded attorney fees to plaintiff, who prevailed on the merits. In the absence of a specific statute or insurance contract provision allowing beneficiary attorney fees, either as costs or as an element of damages in her suit, they were improperly awarded and their grant was reversed. Martin v. Crown Life Ins. Co., 202 M 461, 658 P2d 1099, 40 St. Rep. 216 (1983).

Error in Grant of Fees — Waiver of Claim Not Raised Below: Plaintiff waived the right to claim error in the procedure by which attorney fees for defendant were determined and awarded, since he did not submit the matter of attorney fees to the jury during trial. Plaintiff argued that as the case was tried to a jury, the jury, not the judge, should have determined the attorney fees. Schmidt v. Colonial Terrace Associates, 202 M 46, 656 P2d 807, 39 St. Rep. 2318 (1982).

Award of Costs and Attorney Fees — Use of Contingency Agreement: Defendants defaulted on a promissory note. The bank and defendants negotiated a new note and executed a security agreement. This note provided the debtor would be liable for collection costs, including reasonable attorney fees, upon default. Defendants defaulted, and the bank repossessed and sold the security. A deficiency remained. The bank retained an attorney under a contingency fee agreement to collect the deficiency, and suit was filed. Defendants' answer raised defenses necessitating research and investigation. The attorney discovered defendants owned unmortgaged land, which they were attempting to transfer. The bank attached the land and acted as its own surety and purchased a separate surety bond. The trial court included the bond in allowable costs and awarded $5,000 in attorney fees to the bank. The bond was required under 27-18-204, and under the note was clearly a cost of collection. The attorney estimated 50 hours of work. The trial court followed the guidelines of Crncevich v. Georgetown Recreation Corp., 168 M 113, 541 P2d 56 (1975), for awarding attorney fees and found that since he would be entitled to more under the contingency agreement, which was not binding on the court, the award was reasonable. The Supreme Court found that the trial court's findings and conclusions adequately supported the award. First Nat'l Bank v. Beckstrom, 200 M 323, 651 P2d 45, 39 St. Rep. 1778 (1982).

Award of Attorney Fees Under Promissory Note Provision: Where the plaintiff bank was given judgment on four promissory notes executed by the defendant, the District Court did not err in awarding the plaintiff 10% of the unpaid principal and interest of each note as attorney fees. This was the minimum amount agreed upon in each of the notes and was supported by an hourly documentation of attorney time by the plaintiff's counsel. The determination of reasonable attorney fees is within the sound discretion of the District Court. First Nat'l Bank & Trust of Wibaux v. Sec. Bank, 199 M 168, 648 P2d 1166, 39 St. Rep. 1270 (1982).

Legitimate Disputes as to Law Not Within "Frivolous Case" Exception to General Rule on Recovery of Attorney Fees: Wilson brought an action against the defendant Department to prevent it from adjudicating his water rights as being subject to the prior existing right of Walton. The District Court erred in awarding attorney fees to be paid by Wilson to Walton on the theory that it was Wilson's unlawful appropriation which forced Walton to intervene in Wilson's legal action against the Department in order to protect his (Walton's) interest. Generally, attorney fees are not to be allowed absent statutory authorization or an agreement between the parties. The exception for frivolous legal action was inapplicable because a thorough examination of the basis for Wilson's claim to Walton's water rights shows that there was a legitimate basis for Wilson's claim, even though it was ultimately unsuccessful, and a legitimate dispute. Wilson v. Dept. of Natural Resources and Conservation, 199 M 189, 648 P2d 766, 39 St. Rep. 1294 (1982), distinguished in Braach v. Graybeal, 1999 MT 234, 296 M 138, 988 P2d 761, 56 St. Rep. 919 (1999). See also Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992), Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996), and Youderian Constr., Inc. v. Hall, 285 M 1, 945 P2d 909, 54 St. Rep. 1012 (1997).

Tort of "Bad Faith" — Attorney's Fees: Plaintiffs brought a "bad faith" tort action against their insurance company and requested attorney's fees. Because they failed to plead the

existence of a contract provision or statutory grant allowing recovery of fees, their request was denied. Bostwick v. Foremost Ins. Co., 539 F. Supp. 517, 39 St. Rep. 980 (D.C. Mont. 1982).

Payee-Assignor's Right to Attorney Fees Provided for by Note: Maker gave payee a promissory note which provided that maker would pay reasonable attorney fees incurred in collection of the note. Payee assigned it to corporation which sued maker on the note, maker in turn filing a third-party complaint against payee-assignor for fraudulent inducement for the note, wrongful assignment of it, and lack of consideration for it. Payee-assignor had no right to attorney fees as against maker, either under the note or under 28-3-704, which provides that when a contract grants the right to recover attorney fees to one party to the contract, then all parties to the contract have that right in any action on the contract. He had assigned all his rights under the note, and the complaint against him was not a collection action under the note. Sliter's v. Lee, 197 M 182, 641 P2d 475, 39 St. Rep. 453 (1982).

Recovery of Fees Absent Contract or Statute: Attorney fees are not generally recoverable in the absence of a contractual or statutory provision for recovery. Sliter's v. Lee, 197 M 182, 641 P2d 475, 39 St. Rep. 453 (1982).

Exception to General Rule That Attorney Fees Not Recoverable: While the general rule in Montana is that attorney fees are not recoverable as costs by a successful litigant, absent a special agreement between the parties or statutory authorization, a narrow exception has been developed by the Supreme Court in cases in which the court has recognized the District Courts' general equity powers to make an injured party whole and the award will not be overturned absent a showing of abuse of discretion. Martin v. Randono, 191 M 266, 623 P2d 959 (1981). See also Small v. Good, 284 M 159, 943 P2d 1258, 54 St. Rep. 825 (1997); In re Support of K.F., 232 M 326, 756 P2d 460, 45 St. Rep. 1087 (1988); Wilson v. Dept. of Natural Resources and Conservation, 199 M 189, 648 P2d 766, 39 St. Rep. 1294 (1982); Stickney v. St., 195 M 415, 636 P2d 860 (1981); Joseph Russell Realty Co. v. Kenneally, 185 M 496, 605 P2d 1107 (1980); and Holmstrom Land Co. v. Hunter, 182 M 43, 595 P2d 360 (1979).

Attorney Fees Security Agreement Entered Into Long After Initiation of Attorney-Client Relationship: Attorney fees security arrangement, by which client executed quitclaim deed as security for fee and which was entered into long after initiation of attorney-client relationship, was fair and equitable. The per hour charge for attorney's services was established by earlier agreement, and papers executed before trial merely established method of payment. Matthews v. Berryman, 196 M 49, 637 P2d 822, 38 St. Rep. 2112 (1981).

Fees Made Necessary by Bad Faith Litigation Disallowed: On appeal in a breach of contract action, the seller argued that the buyer was not entitled to attorney fees. The buyer admitted that attorney fees could be granted only pursuant to express statutory or contractual provisions but argued that when a party acted in bad faith during litigation and discovery, attorney fees should have been awarded to cover the other party's unnecessary expenses in dealing with the bad faith. In his complaint the buyer sought damages for breach of contract. As there was no contract or statute authorizing attorney fees in this case, attorney fees could not be awarded. Miller v. Titeca, 192 M 357, 628 P2d 670, 38 St. Rep. 853 (1981).

Indemnity Suit — No Reciprocal Right to Attorney Fees: Section 28-3-704 grants a reciprocal right to attorney fees only when the party from whom one is requesting fees has an express right to attorney fees. Thus, where plaintiff in a suit for indemnity did not have an express right to attorney fees and no agreement existed between plaintiff and defendant, the alleged indemnitor, defendant, even though a successful party, has no right to recover attorney fees under 28-3-704. Town Pump v. Diteman, 191 M 98, 622 P2d 212, 38 St. Rep. 54 (1981).

Fees on Appeal — Judicial Discretion: When the defendant puts the plaintiff to the expense of an appeal and the judgment of the District Court is not reversed, the District Court may not deny the plaintiff's request for fees incurred by the appeal. Hollinger v. McMichael, 182 M 86, 594 P2d 1120 (1979).

Award of Attorneys' Fees — Spurious Litigation: If a suit to challenge water apportionment expenses is without merit, it is only proper that the costs should be borne by the water user instituting the action. Holmstrom Land Co., Inc. v. Hunter, 182 M 43, 595 P2d 360 (1979).

Award of Attorney Fees — Competent Evidence: The method used to substantiate the amount of the attorney fees awarded under 40-4-110 was not sufficient to uphold the award. The only evidence supporting the $1,000 fee was the wife's acknowledgment in testimony that a $1,000 fee was reasonable under the circumstances. Houtchens v. Houtchens, 181 M 70, 592 P2d 158 (1979).

Award Based on Affidavit Improper: To award attorney fees on the basis of an affidavit alone is improper. An award must be based on a hearing allowing for oral testimony, the introduction

of exhibits, and an opportunity to cross-examine in which the reasonableness of the attorney fees claimed is demonstrated. Audit Serv., Inc. v. Haugen, 181 M 9, 591 P2d 1105 (1979).

Reasonableness — Effect of Stipulation: The reasonableness of the attorney fee must be shown by evidence, and an award must be based on a hearing. A contingent fee contract is not controlling in demonstrating reasonableness. The parties may waive their right to introduce evidence through stipulation, but the Supreme Court is not thereby bound to accept the reasonableness of the fees awarded. Fillbach v. Inland Constr. Corp., 178 M 374, 584 P2d 1274 (1978).

Award of Attorney Fees Unsupported: There was a lack of evidence that would satisfy the requirements of Crncevich v. Georgetown Recreation Corp., 168 M 113, 541 P2d 56 (1975), and First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976), to support the award of attorney fees in the judgment. Barron v. Barron, 177 M 161, 580 P2d 936 (1978).

Rules Not Designed to Promote Litigation: When defendant in a personal injury accident attempted to compel a potential litigant to appear and bring suit by naming her a defendant in a third-party declaratory judgment action, the trial court properly dismissed the complaint since the third-party defendant was not an indispensable party or compelled to litigate a claim that she had no intention of pursuing. If equity was to be done in a situation such as this, attorney fees were properly awarded the third-party defendant. Foy v. Anderson, 176 M 507, 580 P2d 114 (1978), distinguished in Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996).

Appeal of Prior Issue — Dismissed: The Supreme Court dismissed an appeal raising the same issue of attorney fees that was addressed in a prior determination of the court that constituted a final adjudication. Belgrade St. Bank v. Swainson, 176 M 444, 578 P2d 1166 (1978).

Attorney Fees Award — Disposition: Attorney fees awarded on appeal of Fair Labor Standards Act claim must be paid into the Cascade County general fund and not given to the County Attorney as private attorney fees because Cascade County is in excess of 30,000 people, prohibiting profits by the County Attorney from private practice of law. St. v. Holman Aviation Co., 176 M 31, 575 P2d 919 (1978).

Attorney Fees — Not Included in Costs: There was substantial evidence to support the findings of the lower court in regard to award of attorney fees at the trial level. Furthermore, the wife was not entitled to attorney fees on appeal since they are not included in costs recoverable by the prevailing party on appeal. Allen v. Allen, 175 M 527, 575 P2d 74 (1978).

Award of Attorney Fees — Hearing to Be Held: An award of attorney fees must be based on a hearing allowing for oral testimony, the introduction of exhibits, and an opportunity to cross-examine in which the reasonableness of the attorney fees claimed is demonstrated. Such an award may not be based solely on a contingent fee contract between attorney and client. St. v. Marsh, 175 M 460, 575 P2d 38 (1978).

Attorney Fees — Vexatious Litigation: The Supreme Court affirmed a trial court award of attorney fees based on a finding that the modification of custody action was vexatious and constituted harassment. Easton v. Easton, 175 M 416, 574 P2d 989 (1978).

Guidelines for Award of Fees — Guidelines Not Followed: The court erred when it awarded plaintiff $1,500 in attorney fees after plaintiff's counsel submitted to the court an affidavit representing plaintiff's claim for attorney fees in the amount of $1,057. The criteria to be followed are set forth in First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976); Crncevich v. Georgetown Recreation Corp., 168 M 113, 541 P2d 56 (1975); and Forrester & MacGinniss v. Boston & Mont. Consol. Copper & Silver Min. Co., 29 M 397, 74 P 1088 (1904). Mont. Williams Double Diamond Corp. v. Hill, 175 M 248, 573 P2d 649 (1978). (First Sec. Bank followed in Talmage v. Gruss, 202 M 410, 658 P2d 419, 40 St. Rep. 176 (1983).)

Fee Agreement Negotiations — Effect: The result of the negotiations between an attorney and his client as to their fee agreement is not controlling in fixing a reasonable attorney fee to assess against the opposing party. Such an award must be determined in accordance with the guidelines enumerated in Crncevich v. Georgetown Recreation Corp., 168 M 113, 541 P2d 56 (1975). Olson v. Carter, 175 M 105, 572 P2d 1238 (1977); Engebretson v. Putnam, 174 M 409, 571 P2d 368 (1977).

Attorney Fees for Action to Collect Damages for Blocked Ditch: When plaintiffs built an apartment house on property through which ran an irrigation ditch to which defendants had a water right, the Supreme Court reversed the District Court and awarded attorney fees and damages to defendant for costs incurred in renting a sprinkler to compensate for the blocked ditch. Boz-Lew Builders v. Smith, 174 M 448, 571 P2d 389 (1977).

Amount of Award of Attorney Fees: When a senior member of the county bar association testified that fees in a breach of contract case should be from $15,000 to $27,000, the court's

award of $7,500, approximately 10% of the judgment, was proper, and $1,000 in attorney fees was allowed on appeal. Haggerty v. Selsco, 166 M 492, 534 P2d 874 (1975).

Condemnation Proceedings: Attorney's fees incurred in the defense of a condemnation proceeding for a private road of necessity under 70-30-107 are not recoverable as an expense of such action under this section or 25-10-201. Tomten v. Thomas, 125 M 159, 232 P2d 723 (1951), overruled in Callant v. Fed. Land Bank of Spokane, 181 M 400, 593 P2d 1036 (1979).

Contribution of Coparties for Fees Required: Where one of several litigants has borne the burden and expense of a successful litigation which has created and brought into court a fund in which the others share with him, it is only just and equitable that the latter should contribute to the payment of the services of the attorney whose labors resulted in the creation or preservation of such common fund. Hardware Mut. Cas. Co. v. Butler, 116 M 73, 148 P2d 563 (1944).

Attorney Fee Incurred Before Action for Breach of Contract: The general rule excluding attorney fees if not stipulated in contract does not apply to nominal amount incurred in attempt to gain possession of land under contract before action for breach of contract instigated. Such small amount is not for attorney fees in the sense in which that term is used in the above rule. It is but an amount paid out incidentally in plaintiff's attempt to get possession and under a proper showing is treated as one of the legal consequences of the original wrongful act. Smith v. Fergus Co., 98 M 377, 39 P2d 193 (1934), distinguished in Ehly v. Cady, 212 M 82, 687 P2d 687, 41 St. Rep. 1611 (1984), and in Martin Dev. Co. v. Keeney Constr. Co., 216 M 212, 703 P2d 143, 42 St. Rep. 752 (1985).

Contract for Fees — Attorney-Client Relationships: While under 37-61-420 and this section, an attorney may contract with his client freely as to his compensation before the fiduciary relation commences, as respects such a contract made after the relation began he has the burden of showing that the contract was fair and reasonable and entered into freely by the client, and that the latter fully knew and understood its provisions; in the absence of such allegations, the complaint is insufficient. Coleman v. Sisson, 71 M 435, 230 P 582 (1924).

PROBATE PROCEEDINGS

Obstructive Attorney — Additional Fees for Other Attorney: The attorney for the estate rendered extraordinary services in response to the objectors' obstreperous, obstructive, and groundless objections to all the steps and proceedings undertaken by the personal representative. Therefore, the attorney was entitled to an additional fee to be paid by the objectors, personally, and by their attorney because they were responsible for the detrimental objections to the progress of an ordinary estate. The personal representative of an estate may contract for an attorney's services, but the contract does not preclude the award of additional fees if the services rendered to the estate by the attorney are extraordinary and reasonably necessary for the good of the estate, as in this case. In re Estate of Barber, 239 M 129, 779 P2d 477, 46 St. Rep. 1565 (1989).

Will Contest: Attorneys' fees incurred by a devisee under a will to defend a contest thereof are not allowable as costs and disbursements within the purview of this chapter or under 72-10-111 and 72-12-206 out of the assets of the estate. In re Baxter's Estate, 94 M 257, 22 P2d 182 (1933), explained in In re Mickich's Estate, 114 M 258, 136 P2d 223 (1943).

Fees for Extra Services: An attorney who makes claim to compensation for extra services has the burden of showing that the allowance of fees by the court under its rules does not provide adequate compensation for all services rendered the estate, particularly so where the services for which compensation was allowed required a minimum of effort and time and the claim for extra compensation was not advanced, by way of amended petition, until after the administratrix had dispensed with the attorney's services. In re Culver's Estate, 91 M 475, 8 P2d 662 (1932).

Time of Allowance of Fees: The statute not providing otherwise, there appears no valid reason why, where an estate is in condition to be closed, the District Court may not allow the fees of the estate's attorney after his dismissal from further service and before final settlement, for the services rendered by him prior to his discharge. In re Culver's Estate, 91 M 475, 8 P2d 662 (1932).

Notice Prior to Fixing of Fees: Persons interested in an estate are entitled to notice before the court fixes the compensation of the administrator or his attorney's fees so they may object if they desire to do so; therefore where such fees were not included in the administrator's final account of the hearing of which the heirs had notice but were fixed without notice to them, the court committed error. In re Jennings' Estate, 74 M 468, 241 P 655 (1925).

Attorney's Claim Against Estate: Under this section, the jurisdiction of the court was enlarged to the extent of empowering it to determine and fix the amount due an attorney for services rendered an administrator and order that the amount so fixed be set apart out of the funds of the estate for his use, the effect of the amendment being to constitute the attorney a

"person interested in the estate" and to make his claim for reasonable compensation a legal debt against the estate to be paid as a part of the necessary expenses of administration. In re McLure's Estate, 68 M 556, 220 P 527 (1923).

Fees for Probate Proceedings — Constitutionality: The provision authorizing the District Court sitting in probate to fix and allow the compensation of attorneys representing executors, administrators, etc., is not unconstitutional as denying a jury trial. In re McLure's Estate, 68 M 556, 220 P 527 (1923).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

Collateral References

Attorney and Client *key* 130, et seq.; Costs *key* 1, et seq.; Courts *key* 202(1).

7A C.J.S. Attorney and Client §344, et seq.; 20 C.J.S. Costs §§125 through 133.

Compensation of attorneys generally, see 7 Am. Jur. 2d Attorneys at Law §254, et seq.; 20 Am. Jur. 2d Costs §§56 through 68.

Excessiveness or inadequacy of attorney's fees in matters involving commercial and general business activities. 23 ALR 5th 241.

Excessiveness or adequacy of attorneys' fees in domestic relations cases. 17 ALR 5th 366.

Excessiveness or adequacy of attorneys' fees in matters involving real estate—modern cases. 10 ALR 5th 448.

Attorneys' liability under state law for opposing party's counsel fees. 56 ALR 4th 486.

Court appointment of attorney to represent, without compensation indigent in civil action. 52 ALR 4th 1063.

Attorneys' fees: obduracy as basis for state-court award. 49 ALR 4th 825.

Attorneys' fees as recoverable in fraud action. 44 ALR 4th 776.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts. 35 ALR 4th 12.

Allowance of attorneys' fees in mandamus proceedings. 34 ALR 4th 457.

Validity, construction, and effect of contract providing for contingent fee to defendant's attorney. 9 ALR 4th 191.

Validity and construction of state statute or court rule fixing maximum fees for attorney appointed to represent indigent. 3 ALR 4th 576.

Amount of attorneys' compensation in proceedings involving wills and administration of decedents' estates. 58 ALR 3d 317.

Amount of attorneys' fees in tort actions. 57 ALR 3d 584, §5 superseded by 86 ALR Fed. 866.

Amount of attorneys' compensation in matters involving guardianship and trusts. 57 ALR 3d 550.

Amount of attorneys' compensation in absence of contract or statute fixing amount. 57 ALR 3d 475.

Allowance of attorneys' fees in litigation involving cy pres doctrine. 89 ALR 2d 691.

Contractual provision for attorneys' fees as including allowance for services rendered upon appellate review. 52 ALR 2d 863.

Right to allowance out of estate of attorneys' fees incurred in attempt to establish or defeat will. 40 ALR 2d 1407.

Attorneys' fees in action for removal of trustee of voting trust. 34 ALR 2d 1142.

Allowance of attorney's fee out of estate of alleged incompetent for services in connection with inquisition into sanity. 22 ALR 2d 1438.

Beneficiary's litigation respecting trust, allowance of attorneys' fees in. 9 ALR 2d 1150.

25-10-302. Inclusion of attorney's fees in bill of costs.

Compiler's Comments

1999 Amendment: Chapter 305 substituted "30-9-607" (renumbered 30-9A-607) for "30-9-511"; and made minor changes in style. Amendment effective July 1, 2001.

1981 Amendment: Inserted "and 25-10-303" after "71-3-124" near the middle of the section.

Case Notes

Issue of Whether Attorney Fees Are "Costs" Not Addressed by Statute: This statute does not say attorney fees are costs, only that fees may be excluded from the bill of costs if made a part of the judgment in specified actions in which attorney fees are allowed. Schillinger v. Brewer, 215 M 333, 697 P2d 919, 42 St. Rep. 408 (1985), followed in In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999). The general rule that costs do not include attorney

fees was distinguished with regard to attorney fees chargeable as costs under 39-3-214 in a wage protection case, Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

Collateral References

Costs *key* 203, 204.
20 C.J.S. Costs §§125 through 133.
20 Am. Jur. 2d Costs §§56 through 68.

25-10-303. Attorney's fees — motor vehicle claim.

Case Notes

No Reciprocal Right to Attorney Fees: The Valeos sued Tabish for damage to the Valeos' road allegedly caused by Tabish's trucks. Tabish answered, alleging contributory negligence and requesting attorney fees pursuant to this section. The Valeos moved for partial summary judgment on the issue of fees, and the District Court denied the motion. The jury returned a verdict for Tabish, and the District Court awarded Tabish attorney fees. The Supreme Court held that there is no reciprocal right to attorney fees under this section because that statute grants only a plaintiff the right to attorney fees. Granting fees to a defendant pursuant to this section would require the Supreme Court to insert language into that statute that isn't there, an act prohibited by 1-2-101. The Supreme Court dismissed Tabish's argument that fees are authorized by 25-10-101 and 25-10-102, pointing out that those statutes authorize the payment of only costs, not attorney fees. The Supreme Court also analyzed numerous cases cited by Tabish as authority for his claim that the payment of fees is reciprocal, holding that in each previous Supreme Court opinion cited by Tabish, the Supreme Court relied upon a different statute other than this section. For that reason, those cases were inapplicable to the issue before the Supreme Court. The Supreme Court therefore reversed the District Court and denied the defendant payment of his attorney fees. Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

Purpose: The purpose of this section is to encourage good faith negotiation. It acts, when property damages only are involved, as an additional remedy to remedies resulting from violation of obligations owed under 33-18-201. If no judgment has been obtained in the underlying case, this section has no application. Fode v. Farmers Ins. Exch., 221 M 282, 719 P2d 414, 43 St. Rep. 814 (1986), followed in Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999), and distinguished in Peris v. Safeco Ins. Co., 276 M 486, 916 P2d 780, 53 St. Rep. 481 (1996).

Recovery Sought Only for Damages to Motor Vehicle: The award to plaintiff of attorney fees under this statute was proper as the only issues presented in the bench trial were those of the recovery of damages arising out of ownership of a motor vehicle. Round v. Reikofski, 216 M 54, 699 P2d 72, 42 St. Rep. 634 (1985).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

Part 4
Officers' Fees, Prepayment

25-10-401. Itemization of officer's fees.

Collateral References

Officers *key* 97.
20 C.J.S. Costs §118; 67 C.J.S. Officers §99.
20 Am. Jur. 2d Costs §40.

25-10-402. No charge for copies furnished by party.

Collateral References

Clerks of Courts *key* 23, et seq; Sheriffs and Constables *key* 58.
80 C.J.S. Sheriffs and Constables §245.

25-10-403. Prepayment of fees.

Case Notes

Clerk's Refusal to File Until Fee Paid: It was proper for the Clerk of the District Court to hold proffered answer in suspense and not file it until the officially required filing fee had been paid. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Collateral References

Officers *key* 94, 97.

25-10-404. Poor persons not required to prepay fees — definition.

Compiler's Comments

1997 Amendment: Chapter 475 at end of exception clause in first and second sentence in (1) inserted reference to subsection (6); inserted (5) requiring prisoner who files complaint or appeal without prepaying fees to submit trust fund account statement with affidavit; inserted (6) requiring prisoner to pay partial or total cost of filing fee; inserted (7) allowing prisoner to file complaint or appeal despite lack of assets to pay partial fee, but requiring court to dismiss action if fee not paid; inserted (8) defining prisoner; and made minor changes in style. Amendment effective May 1, 1997.

Severability: Section 6, Ch. 475, L. 1997, was a severability clause.

1993 Amendment: Chapter 447 at beginning of first sentence of (1) inserted exception clause and near beginning, after "person", substituted "may request a waiver of fees by filing an affidavit, supported by a financial statement" for "who will file an affidavit" and at beginning of second sentence inserted "Except as provided in subsection (2), upon issuance of an order of the court or administrative tribunal approving a request for waiver of fees, the person"; inserted (2) regarding waiver or payment of fees under certain circumstances; inserted (3) precluding filing of the financial statement by a person represented by an entity that provides free legal services; inserted (4) regarding the form of the financial statement; and made minor changes in style.

1993 Statement of Intent: The statement of intent attached to Ch. 447, L. 1993, provided: "A statement of intent is required for this bill because 25-10-404 authorizes the department of justice to adopt a form for a financial statement by rule. It is the intent of the legislature that the form require sufficient information regarding income and assets to allow a reasonable determination of indigence. The department may, in developing the rules, use the affidavit form currently used by Lewis and Clark County as a model."

Administrative Rules

ARM 23.2.301 Affidavit of indigence.

Case Notes

No Duty to Disclose Statute's Existence — Failure to Disclose Not Denial of Opportunity to Defend: The only express duty found in this section requires the clerk of court to perform all services requested once a party files the proper affidavit. Nothing in the section expressly imposes a duty upon the clerk to disclose the existence of the statute or to disclose how to file an answer without paying the fee. Therefore, failure of a clerk to inform of the necessity of filing an affidavit in order to proceed in forma pauperis did not deny defendants of the opportunity to defend. NW. Farm Credit Serv., ACA v. Lund, 255 M 114, 841 P2d 490, 49 St. Rep. 910 (1992).

Attorney General's Opinions

Appearance Fee Required of URESA Respondent — Affidavit Excusing Payment: The respondent in a URESA action is required to pay a $40 appearance fee. However, the respondent may be excused from payment upon filing an affidavit in accordance with this section. 43 A.G. Op. 3 (1989).

Collateral References

Costs *key* 127 through 133.

20 Am. Jur. 2d Costs §§97 through 101.

Right of indigent defendant in criminal case to aid of state as regards new trial or appeal. 55 ALR 2d 1072.

Right to sue in forma pauperis as dependent on showing of financial disability of attorney or other nonparty or nonapplicant. 11 ALR 2d 607.

Financial circumstances which will enable one to sue in forma pauperis. 6 ALR 1281.

25-10-405. Governmental entities not required to prepay fees — exceptions.

Compiler's Comments

1993 Amendment: Chapter 570 near end, after "handling", inserted "certifications". Amendment effective July 1, 1993.

1991 Amendment: At end, after "judge", inserted "and all fees for photocopies, postage and handling, authentications, and record searches".

1987 Amendment: At end of section inserted exception clause referring to fee for filing motion for substitution of judge.

Case Notes

Costs or Fees in Mandamus Action: The provision for taxing costs or damages against the state, county, or municipality is applicable generally to all forms of action, other than mandamus; as to the latter, 27-26-403, being a special statute, is controlling. State ex rel. O'Connor v. McCarthy, 86 M 100, 282 P 1045 (1929).

Type of Appearance: There is no difference between an officer who appears "in behalf" of the state, county, or municipality and one who "represents" such a body in a court action; hence in either event he is exempt from personal liability for damages or costs in an action prosecuted or defended by him in his official capacity under this section or in a mandamus proceeding resulting adversely to him under 27-26-403. State ex rel. O'Connor v. McCarthy, 86 M 100, 282 P 1045 (1929).

Stenographic Fees: Where the Attorney General, conducting a proceeding on behalf of the state, demanded of the court stenographer a transcript of his notes taken therein, it was the stenographer's ministerial duty to deliver them without demanding his fees in advance. State ex rel. Donovan v. Ledwidge, 27 M 197, 70 P 511 (1902).

Attorney General's Opinions

District Court Clerk Not Authorized to Charge Nonparty State Agency for Copies and Certification of Public Records: Access to and fees for copying public court records are not absolute and are controlled by state law. Fees allowed by law are enumerated in 25-1-201, and the collection of those fees is mandatory. Fees for preparing copies and for certification of documents are also specified in that section. This section clarifies that fees are collectible from state agencies that are a party to an action but has no effect in cases in which the agency is not a litigant. In those cases, the rule in 7-4-2516 applies, exempting agencies of state and county government from paying official fees. Therefore, a Clerk of District Court may not charge a nonparty state agency for copies and certification of public District Court records. 47 A.G. Op. 3 (1997).

Collateral References

Costs *key* 109(3).

20 Am. Jur. 2d Costs §§34 through 40.

Liability of state, or its agency or board, for costs in civil action to which it is a party. 72 ALR 2d 1379.

Parties liable for storage or similar caretaking charges as taxable costs in proceedings to forfeit personal property. 60 ALR 2d 816.

25-10-406. Collection of clerk's and sheriff's costs after judgment.

Collateral References

Costs *key* 279.

Part 5
Claiming Costs

Part Case Notes

Fees for Posttrial Work and Appeal Denied in Light of Generous Award of Attorney Fees at Trial: The Slacks accepted a Department of Transportation offer to pay $168,069, plus interest and necessary litigation expenses, in a property condemnation case, but the amount of litigation expenses was disputed and was not settled by the District Court until some years later. The Department appealed the award, and the Slacks cross-appealed, seeking attorney fees for posttrial work and for responding to the appeal. The Supreme Court noted that although the District Court's findings justifying its award of necessary litigation expenses were not clearly erroneous, the District Court's attorney fee award was clearly generous and that Slack's attorney was granted everything that he requested despite two witnesses for the Department who testified that the attorney's claims were excessive and duplicative. The Supreme Court declined to award additional attorney fees for posttrial work and the appeal. State ex rel. Dept. of Transportation v. Slack, 2001 MT 137, 305 M 488, 29 P3d 503 (2001).

25-10-501. Bill of costs.

Case Notes

General 328
Service of Memorandum 330
Time for Filing Memorandum 330
Failure to File Memorandum 332

GENERAL

Costs of Contested Employment Discrimination Administrative Hearing Not Allowed Absent Adoption of Rules of Civil Procedure by Agency: The Department of Labor and Industry conducted an administrative hearing to address plaintiff's employment discrimination claim. Defendants made an offer of judgment that plaintiff refused, but defendants ultimately prevailed and then contended that plaintiff was responsible for the costs of the hearing under Rule 68, M.R.Civ.P. (Title 25, ch. 20), 49-2-505, and this section. The Department determined that the general legislative mandate to follow the Montana Rules of Civil Procedure did not empower the agency to award costs in a contested case hearing. The District Court agreed, and on appeal, the Supreme Court affirmed. Under 49-2-505, the Montana Rules of Civil Procedure apply only in agency hearings to the extent that the rules are adopted by the agency. Rule 68, M.R.Civ.P., which allows recovery of costs after a judgment, has not been adopted by the Department to apply in agency-conducted administrative hearings related to employment discrimination. Absent a statutory basis, the award of costs was not proper. Pannoni v. Browning School District No. 9 Bd. of Trustees, 2004 MT 130, 321 M 311, 90 P3d 438 (2004).

Five-Day Filing Requirement for Claiming Costs Not Applicable to Attorney Fees: Following the resolution of a will contest, the personal representatives claimed attorney fees and costs pursuant to 72-12-206. The will contestants argued that under this section and pursuant to Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1, 51 St. Rep. 268 (1994), a party claiming attorney fees and costs must file a bill of costs within 5 days of the verdict or notice of the court's decision, which the personal representatives did not do. The District Court concluded that this section did not apply and that attorney fees and costs were not waived by the failure to file a timely memorandum. The Supreme Court disagreed in part, overruling Craver, and held that under the plain language of this section and pursuant to Cook v. Harrington, 203 M 479, 661 P2d 1287, 40 St. Rep. 580 (1983), and Schillinger v. Brewer, 215 M 333, 697 P2d 919, 42 St. Rep. 408 (1985), the 5-day filing requirement for filing a memorandum of costs does not apply to attorney fees to which a party is entitled by statute. However, the filing requirement does apply to the personal representatives' claim for costs. As a result, the case was remanded for modification of judgment to delete costs awarded in error. In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999).

Deposition and Transcript Costs Allowed: In a case involving a dispute over a commercial lease, the defendant argued that the lower court had erred in allowing the plaintiffs to recover costs for a deposition and for portions of a transcript of hearing prior to the trial. The Supreme Court held that both the deposition and the transcript were used in the trial and therefore the lower court was within its discretion to allow the plaintiffs to recover those costs. Sage v. Rogers, 257 M 229, 848 P2d 1034, 50 St. Rep. 244 (1993).

Costs — Expert Witness Fees: A District Court cannot award costs in excess of $10 a day per witness as costs for expert witnesses. The statute specifically limiting expert witness fees to $10 a day controls the general statute authorizing a District Court to award costs in accordance with the course and practice of the court. Witty v. Pluid, 220 M 272, 714 P2d 169, 43 St. Rep. 354 (1986), followed in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Lease Providing for Costs — Statutory Costs Awarded: Defendant breached a lease and, following judgment for plaintiff, plaintiff applied under this section for statutory costs and requested the court to award his expenses and disbursements pursuant to a section of the lease. The court awarded only the costs recoverable under statute. Plaintiff elected to claim his costs through a cost bill, and the court correctly limited him to statutory costs. Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985).

Granting Witness Air Fare Costs Following Appeal: The filing of a notice of appeal did not deprive the District Court of jurisdiction to grant a pending bill for costs. However, the court properly disallowed as a cost the air fares for witnesses. Powers Mfg. Co. v. Leon Jacobs Enterprises, 216 M 407, 701 P2d 1377, 42 St. Rep. 906 (1985).

Issue of Whether Attorney Fees Are "Costs" Not Addressed by Statute: This statute does not say attorney fees are costs, only that fees may be excluded from the bill of costs if made a part of the judgment in specified actions in which attorney fees are allowed. Schillinger v. Brewer, 215 M 333, 697 P2d 919, 42 St. Rep. 408 (1985), followed in In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999). The general rule that costs do not include attorney fees was distinguished with regard to attorney fees chargeable as costs under 39-3-214 in a wage protection case, Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

Costs Awarded to Defendant — Timely Filing: The mandatory language of 25-10-102 required the award of costs to a defendant who prevailed in a suit intended to enjoin him from

further trespassing on a road that the lower court declared defendant had a prescriptive easement over since timely application for costs was made pursuant to 25-10-501. St. v. Cronin, 179 M 481, 587 P2d 395 (1978).

Timely Filing: Because plaintiff filed his memorandum of costs and disbursements prior to entry of judgment, although 12 days expired from the day the verdict for plaintiff was announced and filed, the memorandum was timely filed. Poeppel v. Fisher, 175 M 136, 572 P2d 912 (1977).

Burden of Proof: Verified memorandum is prima facie evidence of correctness of items of disbursements and the burden of overcoming such prima facie case rests on the adverse party, the party filing the memorandum being required to furnish further proof only in rebuttal. Letz v. Letz, 123 M 494, 215 P2d 534 (1950).

Execution for Costs: Where the provisions of this section with reference to a bill for appeal costs are followed and no notice of motion to tax costs is served and filed within time or it is abandoned, it would appear that execution, immediate right to which is given the successful appellant under 25-10-503 without regard to a subsequent retrial, should be good; if this section is not followed, the Writ of Execution would seem to be void. State ex rel. Vaughn v. District Court, 111 M 552, 111 P2d 810 (1941).

Application to Original Supreme Court Proceedings: This section applies not only to matters arising in the District Court but as well to original proceedings commenced in the Supreme Court. Time begins to run from notice of the decision, i.e., when the opinion, which was the judgment, was filed and notice thereof given. The subsequent writ was not the decree or judgment but merely the court process issued for enforcement thereof. State ex rel. Clark v. District Court, 103 M 145, 61 P2d 836 (1936).

Costs Reviewable on Appeal From Judgment: Section 93-8003, R.C.M. 1947 (superseded by Rules 1 and 4 through 6, M.R.Civ.P.), does not provide for appeal from order taxing costs, but the order is an important part of judgment and is reviewable on appeal from the judgment, even though the matter of costs be the only question presented on the appeal. Gahagan v. Gugler, 100 M 599, 52 P2d 150 (1935).

Notice to Tax — Specificity: The notice to tax costs may not be held insufficient for failure to specify the items of costs to be attacked on the motion to retax them. Gahagan v. Gugler, 100 M 599, 52 P2d 150 (1935).

"Decision" as Constituting Judgment: The provision that the successful party must within 5 days after "notice of the decision of the court" serve upon the adverse party a memorandum of costs means a notice of such a decision as amounts to a rendition of judgment. Shull v. Lewis & Clark County, 93 M 408, 19 P2d 901 (1933).

Notice of Filing of Memorandum: The party against whom court costs are claimed must have notice of the filing of the memorandum with the Clerk of Court; the notice need not be given in any prescribed way; it may be given by a service of the copy of the memorandum filed, showing the date of filing or by letter transmitting the memorandum stating the date when the original was filed with the Clerk. However, the opposing party may waive notice. State ex rel. Bullard v. District Court, 86 M 358, 284 P 125 (1930).

Review of Cost Proceedings — Exceptions: Where costs were allowed plaintiff without service on defendant of the memorandum required by this section, error in this regard cannot be reviewed in the absence of a bill of exceptions (exceptions abolished by Rules 7(c) and 46, M.R.Civ.P., and 25-31-503, now repealed) preserving the proceedings. McAboy v. Junk, 68 M 198, 216 P 1111 (1923).

"Decision" of Court: The "decision" is the findings of fact and conclusions of law, signed by the court and filed with the clerk. McDonnell v. Huffine, 44 M 411, 120 P 792 (1912), distinguished in Pattyn v. Favers, 133 M 560, 327 P2d 818 (1958).

Affidavit to Memorandum — Substantial Compliance: An affidavit to a memorandum of costs made by one of defendant's attorneys, stating that the memorandum was true and correct and the items were reasonable and necessarily incurred in defense of the cause, to the best of his knowledge and belief, substantially complies with this section. Hoskins v. N. Pac. Ry., 39 M 394, 102 P 988 (1909).

Statutory Basis for Costs: The recovery of costs as such is regulated by statute, and the method therein pointed out for their collection must be pursued. State ex rel. Riddell v. District Court, 33 M 529, 85 P 367 (1905); Orr v. Haskell, 2 M 350 (1875).

Omissions From Memorandum: After an allowance by the District Court for necessary costs and disbursements has been made to a party, with a particular item inadvertently or intentionally omitted from the judgment, the proper remedy is an application to the court at the time to have the omission corrected or an appeal from the judgment to have the error thus

committed reviewed; otherwise the party becomes bound by the judgment. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 32 M 20, 79 P 410 (1905).

SERVICE OF MEMORANDUM

Award Reversed for Failure to Serve Memorandum: Award of costs to prevailing party was improper and was reversed where prevailing party did not serve other party with the memorandum of costs required by this section. Lemley v. Allen, 203 M 37, 659 P2d 262, 40 St. Rep. 279 (1983); following Riddell v. District Court, 33 M 529, 85 P2d 367 (1906).

Costs on Appeal — Error to Strike: Construing this section and 25-10-503, referring to cost bills on appeal but making no provision for service, together the order of filing and service is immaterial and therefore the court erred in striking a memorandum of costs on appeal from the files because it was served before filing. State ex rel. Bullard v. District Court, 86 M 358, 284 P 125 (1930), overruling Berry v. Helena, 56 M 122, 182 P 117 (1919).

Serving and Filing Contemporaneous: Where a memorandum of costs was served and filed upon the same day, the serving and filing will be treated as contemporaneous acts and held proof against the contention that under this section filing must precede service. Berry v. Helena, 56 M 122, 182 P 117 (1919).

Costs on Appeal: The provisions of this section, with reference to service upon the adverse party of memorandum of the items of costs and disbursements claimed by the party in whose favor judgment is rendered, are applicable to proceedings under 25-10-503 for costs on appeal. State ex rel. Riddell v. District Court, 33 M 529, 85 P 367 (1905).

Service on Adverse Party: Though the statute does not require service of the memorandum of costs on the adverse party, by analogy such service should be made and disputes settled as provided by this section. State ex rel. Hurley v. District Court, 27 M 40, 69 P 244 (1902).

TIME FOR FILING MEMORANDUM

Five-Day Filing Requirement for Claiming Costs Not Applicable to Attorney Fees: Following the resolution of a will contest, the personal representatives claimed attorney fees and costs pursuant to 72-12-206. The will contestants argued that under this section and pursuant to Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1, 51 St. Rep. 268 (1994), a party claiming attorney fees and costs must file a bill of costs within 5 days of the verdict or notice of the court's decision, which the personal representatives did not do. The District Court concluded that this section did not apply and that attorney fees and costs were not waived by the failure to file a timely memorandum. The Supreme Court disagreed in part, overruling Craver, and held that under the plain language of this section and pursuant to Cook v. Harrington, 203 M 479, 661 P2d 1287, 40 St. Rep. 580 (1983), and Schillinger v. Brewer, 215 M 333, 697 P2d 919, 42 St. Rep. 408 (1985), the 5-day filing requirement for filing a memorandum of costs does not apply to attorney fees to which a party is entitled by statute. However, the filing requirement does apply to the personal representatives' claim for costs. As a result, the case was remanded for modification of judgment to delete costs awarded in error. In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999).

Attorney Fees in Wage Protection Case Treated as Costs — Filing of Memorandum of Costs Subject to Statutory Time Limit: A party in a wage protection case seeking attorney fees pursuant to 39-3-214 must comply with statutes governing the taxing of costs, including this section, which requires that a memorandum of costs be filed within 5 days after the return of a jury verdict. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), distinguishing Schillinger v. Brewer, 215 M 333, 697 P2d 919 (1985).

Time for Filing Memorandum After Jury Trial — No Record of Extension — Bench and Jury Trials Compared — Directed Verdict No Basis for Distinction: Kunst and Erpenbach were granted a directed verdict as to liability in their suit against Pass, the landlord in a building in which Kunst and Erpenbach were poisoned by carbon monoxide. On August 22, the jury returned a damages verdict against Pass, and on September 10, plaintiffs filed a posttrial motion for attorney fees and costs. The District Court denied the motion as to costs as untimely, and the Supreme Court affirmed, noting that even allowing 2 additional days for the weekend and 3 additional days for mailing, the motion was still untimely. Regarding plaintiffs' argument that an extension was granted by the former judge in the case, who had since retired, the Supreme Court pointed out that there was nothing in the record showing that an extension had been granted, notwithstanding a statement by the former judge that the alleged extension "sounds like something the Court would do". The Supreme Court held that the 5-day time limit provided for in this section is mandatory. Responding to another argument by plaintiffs, the Supreme Court also pointed out the differences between a bench trial and a jury trial. In a jury trial, the

time limit for a motion for costs and fees begins to run on the day after the jury's verdict is entered. Additionally, the Supreme Court noted that it made no difference for the purposes of its opinion that a directed verdict was granted to plaintiffs on the issue of liability. Kunst v. Pass, 1998 M 71, 288 M 264, 957 P2d 1, 55 St. Rep. 289 (1998).

Issues Regarding Amount and Form of Judgment Unresolved — Failure to Timely Submit Memorandum of Costs: Two weeks after the jury's verdict in a tort action was signed and filed, the plaintiffs filed a memorandum of costs. The defendants objected to the filing of the memorandum as untimely, and it was stricken by the District Court. The Supreme Court noted that although the District Court stated in the record that there were issues of the amount and form of the judgment left to be decided, the District Court did not issue an order staying the entry of the judgment. Therefore, the plaintiffs had 5 days from the date of the jury verdict to file and serve their memorandum of costs upon the defendants. The Supreme Court held that failure to file the memorandum within that time properly resulted in the memorandum being stricken. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Notice of Yet-to-Be-Determined Attorney Fees Sent Within Statutory Time Limit: Plaintiffs filed their memorandum of costs, detailing costs and stating that attorney fees would follow in a separate affidavit. The notice of taxing attorney fees, the amount of which had yet to be fixed by the court after hearing, was sent well within the statutory limit set in this section and was thus properly ordered by the trial court. Craver v. Waste Management Partners of Bozeman, 265 M 37, 874 P2d 1, 51 St. Rep. 268 (1994), overruled, to the extent that attorney fees are not considered costs subject to the 5-day filing requirement, in In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999).

Entry of Judgment — Final Decision: Whether the date of entry of judgment will be the trigger date for computation of the 5-day requirement for filing depends on when the court's decision is final. In this case, the time for filing the memorandum of costs began to run on the date of entry of judgment because that was the date on which the decision was final. There was no jury involved, and under the computation of time provided for in Rule 6(a), M.R.Civ.P. (Title 25, ch. 20), the memorandum was timely. Karell v. Am. Cancer Soc'y, 239 M 168, 779 P2d 506, 46 St. Rep. 1593 (1989).

Bill Untimely: Plaintiff's bill of costs that was filed more than 10 days after the date of the jury verdict was untimely. R.H. Grover, Inc. v. Flynn Ins. Co., 238 M 278, 777 P2d 338, 46 St. Rep. 1266 (1989), followed in Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997), and Kunst v. Pass, 1998 MT 71, 288 M 264, 957 P2d 1, 55 St. Rep. 289 (1998).

Timeliness of Motion for Necessary Litigation Costs — Weekends Exempted — Additional Time for Mailing: Defendant/respondent filed a motion for determination of necessary expenses of litigation under 70-30-306. He filed the motion 11 calendar days after a jury verdict was rendered in his favor. Plaintiff filed a motion to retax costs on the ground that respondent's motion was untimely filed under the "5 days after the verdict" clause of 25-10-501. Held, Rule 6(a) and (e) of the M.R.Civ.P., eliminating Saturdays and Sundays and granting 3 business days must be given effect since defendant was required to take some "action by virtue of papers served upon him by mail" and since defendant was served by mail, defendant's motion was timely filed. St. v. Helehan, 189 M 339, 615 P2d 925, 37 St. Rep. 1516 (1980).

First Day Excluded: Where judgment of nonsuit (abolished; for new provisions, see Rules 41(a) and 54(b) and (c), M.R.Civ.P.) was entered by defendant on May 31, memorandum of costs, served by mail pursuant to section 93-8504, R.C.M. 1947 (superseded by Rules 5 and 6(e), M.R.Civ.P.), postmarked June 5, met the requirements of this section since June 5 was the fifth day. In the computation of the time, the first day is excluded as prescribed by 1-1-306. Davis v. Trobough, 139 M 322, 363 P2d 727 (1961), followed in Funk v. Robbin, 212 M 437, 689 P2d 1215, 41 St. Rep. 1848 (1984).

Oral Announcement Immaterial: The 5-day period prescribed by this section is computed from the day the court enters judgment, not from the day the court orally announces its decision. Davis v. Trobough, 139 M 322, 363 P2d 727 (1961).

Motion to Strike Properly Denied — Particular Times: Motion to strike plaintiff's memorandum of costs was properly denied where findings of fact and conclusions of law were signed on August 25, 1955, and filed on August 26; judgment was filed September 15; cost bill was served on counsel on September 16, and filed September 19; and notice of entry of judgment was served on September 15, reciting that judgment was entered on that day. Pattyn v. Favers, 133 M 560, 327 P2d 818 (1958).

Filing Valid — Particular Times: A cost bill was filed in time where the court made findings of fact and conclusions of law on April 18 and filed them on April 21, the judgment was signed April 28 and filed April 29, and plaintiff filed his memorandum of costs on April 29. Ballenger v. Tillman, 133 M 369, 324 P2d 1045 (1958).

Second Judgment Invalid: Where, after the Clerk of the District Court had entered a valid judgment as directed by the Supreme Court on appeal, the party entitled to costs, considering the judgment invalid, obtained a second judgment signed by the judge, the latter judgment was unauthorized and hence did not extend the time for filing the cost bill. Lasby v. Burgess, 93 M 349, 18 P2d 1104 (1933).

"Notice" as Notice in Fact: Where counsel for the successful party on the day judgment was rendered had knowledge thereof but did not file his memorandum of costs until 7 days thereafter, the trial court erred in refusing to strike it from the files, the provision of this section that the memorandum shall be filed with the clerk within 5 days after "notice" of the decision meaning after knowledge thereof and not after service of formal notice. Miles v. Miles, 76 M 375, 247 P 328 (1926).

Computation of Five Days: The 5 days must be computed from the date upon which the court's written findings and conclusions of law were filed and not from the day on which the court orally announced its decision. McDonnell v. Huffine, 44 M 411, 120 P 792 (1912), distinguished in Pattyn v. Favers, 133 M 560, 327 P2d 818 (1958).

Eight-Day Delay: Where plaintiff did not serve a memorandum of costs until 8 days after a decision in his favor and the records did not show that he did not have notice of the decision until within 5 days prior to such service, defendant's motion to strike out the memorandum should be sustained. Reins v. King, 27 M 511, 71 P 763 (1903).

FAILURE TO FILE MEMORANDUM

Judgment Alone Insufficient:

A party was not entitled to the costs of an appeal when she did not claim them in the manner provided in 25-10-503 by a bill of costs prepared under 25-10-501. In re Marriage of Carlson, 220 M 204, 714 P2d 116, 43 St. Rep. 295 (1986).

The recovery of costs, as such, is regulated by statute, and the method therein pointed out must be followed in order to claim them; hence where plaintiff had judgment but failed to file his memorandum and serve a copy thereof on his opponent within 5 days after the decision, he was not entitled to them. First St. Bank v. Larsen, 72 M 400, 233 P 960 (1925).

Failure to Comply as Waiver: Costs are recoverable only by virtue of the statute, and in order to recover them, the party making the claim must comply with its provisions; therefore, failure to file the memorandum required by this section operates as a waiver and justifies the court in striking the cost bill. Gervais v. Rolfe, 57 M 209, 187 P 899 (1920).

Costs in Default: Where plaintiff did not file with the clerk and serve upon defendant his claim for costs in a verified bill, he was not entitled to recover them, even though defendant, because of failure to appear, may not have been entitled to notice of proceedings had thereafter. Barrick v. Porter, 56 M 247, 184 P 217 (1919).

Compliance to Be Shown: A litigant who does not claim his costs as provided in this section is not entitled to them. A court cannot award costs without a showing that this section has been complied with. Butte N. Copper Co. v. Radmilovich, 39 M 157, 101 P 1078 (1909).

Statute Exclusive: Where the party claiming costs has failed to claim them as directed by the statute, his right to them has not attached and the court has no power in the premises other than to strike out and disallow them on motion of the adverse party. State ex rel. Riddell v. District Court, 33 M 529, 85 P 367 (1905).

Collateral References

Costs *key* 195, et seq., 203 through 205.

20 C.J.S. Costs §148.

20 Am. Jur. 2d Costs §90.

Subsequent proceedings or course of the action in the lower court as affecting retaxation of costs awarded by an appellate court. 116 ALR 1152.

Statute relating to costs at commencement or at termination of action as controlling. 96 ALR 1428.

Right to injunction or stay against enforcement of judgment for cost pending final determination of case. 78 ALR 359.

25-10-502. Procedure upon objection to bill of costs.

Case Notes

Motion Objecting to Costs — No Suspension of Time for Filing Notice of Appeal: On October 9, 1981, 1 day after the entry of judgment against the plaintiff in a quiet title action, the plaintiff filed a motion objecting to the defendant's memorandum of costs, which motion was noticed for hearing but the hearing was never held. Following the filing of a notice of appeal by the plaintiff on January 26, 1982, the Supreme Court held it did not have jurisdiction of the appeal because the 30-day period for the filing of the notice of appeal is not suspended by the filing of a motion objecting to costs. Time for appeal therefore expired on November 9, 1981. O'Connell v. Heisdorf, 202 M 89, 656 P2d 199, 39 St. Rep. 2347 (1982).

Appeal of Prior Issue — Dismissed: The Supreme Court dismissed an appeal raising the same issue of attorney fees that was addressed in a prior determination of the court that constituted a final adjudication. Belgrade St. Bank v. Swainson, 176 M 444, 578 P2d 1166 (1978).

Burden of Proof: Verified memorandum is prima facie evidence of correctness of items of disbursements, and the burden of overcoming such prima facie case rests on the adverse party, the party filing the memorandum being required to furnish further proof only in rebuttal. Letz v. Letz, 123 M 494, 215 P2d 534 (1950).

Time for Filing Objections: Entry of judgment for costs in favor of the prevailing party without giving the losing party 5 days to object to the cost bill constitutes error. Girson v. Girson, 112 M 183, 114 P2d 274 (1941).

Motion to Retax Costs: A "motion" to retax costs may be made by filing a writing or by word of mouth; it must specifically show in what respects taxation is claimed erroneous and point out the items objected to, giving opposing counsel opportunity of presence and opposition to it. Gahagan v. Gugler, 100 M 599, 52 P2d 150 (1935).

Collateral References

Costs *key* 195, et seq., 203 through 205.

20 C.J.S. Costs §148.

20 Am. Jur. 2d Costs §91.

Subsequent proceedings or course of the action in the lower court as affecting retaxation of costs awarded by an appellate court. 116 ALR 1152.

25-10-503. How costs on appeal claimed.

Case Notes

Right to Costs on Appeal — Effect of Failure to File Memorandum:

A party was not entitled to the costs of an appeal when she did not claim them in the manner provided in 25-10-503 by a bill of costs prepared under 25-10-501. In re Marriage of Carlson, 220 M 204, 714 P2d 116, 43 St. Rep. 295 (1986).

The successful party is entitled to his costs on appeal, whether or not a formal order to that effect is made by the Supreme Court, if he files a memorandum of his costs with the Clerk of the District Court within 30 days after the remittitur is filed with that officer; failure to do so deprives him of his right to have them included in the judgment in his favor on a subsequent trial. First St. Bank v. Larsen, 72 M 400, 233 P 960 (1925).

Inclusion of Costs Not Approved by Court — Execution Void: In divorce proceeding, inclusion in memorandum of both allowable statutory costs under section 21-137, R.C.M. 1947 (since repealed), and attorney's fee, to which the wife was not entitled because of failure to file motion on appeal, constituted noncompliance with this section and made the execution void. State ex rel. Sowerwine v. District Court, 145 M 375, 401 P2d 568 (1965).

Execution for Costs Without Regard to Retrial: The order taxing appeal costs becomes a part of the judgment ordered by the remittitur and not a part of the judgment upon the retrial, for this section gives the successful appellant the immediate right to a Writ of Execution without regard to a subsequent retrial of the cause. It thus becomes in effect a part of the judgment of the Supreme Court, over which the District Court has no jurisdiction except to enforce it or to determine disputed items. State ex rel. Vaughn v. District Court, 111 M 552, 111 P2d 810 (1941).

Review of Cost Proceedings: Since the order taxing appeal costs is appealable when judgment is affirmed, because it is an order made after final judgment, but on a reversal there is no judgment in existence, hence such order is not appealable, it would seem that in either case such order relates to the judgment of the Supreme Court, and no appeal lying therefrom, such an order or one striking an appeal cost bill should be reviewable by special proceeding, the same being true of a District Court order taxing costs, coming too late for review with the judgment. State ex rel. Vaughn v. District Court, 111 M 552, 111 P2d 810 (1941).

Original Proceedings in Supreme Court: When original proceedings for a Writ of Supervisory Control are instituted in the Supreme Court, the 5-day rule applicable to matters arising in the District Court under 25-10-501 applies, as no remittitur is issued or filed. State ex rel. Clark v. District Court, 103 M 145, 61 P2d 836 (1936).

Time for Filing Memorandum: One claiming his costs awarded by the Supreme Court on appeal must, under this section, deliver his memorandum, verified as provided by 25-10-501, to the Clerk of the District Court within 30 days after the remittitur has been filed. Lasby v. Burgess, 93 M 349, 18 P2d 1104 (1933).

Service of Memorandum: The provisions of 25-10-501 with reference to service are applicable to costs awarded by an appellate court under this section. State ex rel. Riddell v. District Court, 33 M 529, 85 P 367 (1905).

Effect of Memorandum as Judgment — Jurisdiction of Court: Subject to a motion to strike out disputed items, the filing of the memorandum has the same effect as a formal entry of judgment, and the trial court had no further function to perform after execution thereon than it has in case of an execution on a final judgment. State ex rel. Hurley v. District Court, 27 M 40, 69 P 244 (1902). See also State ex rel. Coffey v. District Court, 74 M 355, 240 P 667 (1926).

Failure to Object to Items — Waiver of Objections: Where a party to whom the costs of an appeal were awarded erroneously included in the memorandum thereof, filed and served pursuant to this section, items of costs on the trial below, the adverse party, by failing to make a seasonable motion to strike out such items and by moving to quash on other grounds the execution issued on such memorandum, waived objection to the erroneous items. State ex rel. Hurley v. District Court, 27 M 40, 69 P 244 (1902).

Execution for Costs Upon Demand: When a party to whom costs are awarded has complied with the statute, the clerk must issue execution for his costs whenever he demands it. State ex rel. Hurley v. District Court, 27 M 40, 69 P 244 (1902).

Collateral References

Costs *key* 264.

20 C.J.S. Costs §§344, 345, 349, 403.

5 Am. Jur. 2d Appellate Review §§923, 927.

25-10-504. Clerk to include costs in judgment.

Case Notes

Review of Costs: Although the order taxing costs follows the entry of judgment in point of time, it is in theory an intermediate order, and when taxed, the costs are inserted in the blank left in the judgment as originally entered and become a part of the judgment theretofore entered, without changing the date of entry of judgment. For that reason it was not "a special order made after final judgment" within the meaning of subsection (2), section 93-8003, R.C.M. 1947 (superseded by Rules 1 and 4 through 6, M.R.Civ.P.), and can be reviewed only on appeal from the judgment, and the time for appeal runs from the date of judgment. State ex rel. Vaughn v. District Court, 111 M 552, 111 P2d 810 (1941).

Supreme Court Judgments: This section may very well be construed as applying to judgments rendered or ordered by an appellate court. At any rate, it should be so applied as to make it the duty of the clerk below, in the absence of specific directions as to interest, to include in the judgment interest from the date of the order of the Supreme Court to the time of entry of the judgment. State ex rel Dolenty v. Reece, 43 M 291, 115 P 681 (1911).

Clerk's Duty as Ministerial Act: The Clerk of the District Court, in carrying out the provisions of this section relative to the insertion of costs in the judgment where the same have been taxed or ascertained, acts in a ministerial capacity. Butte N. Copper Co. v. Radmilovich, 39 M 157, 101 P 1078 (1909); Orr v. Haskell, 2 M 350 (1876), distinguished in Ryan v. Maxey, 15 M 100, 38 P 228 (1894).

Collateral References

Judgment *key* 223, 224.

49 C.J.S. Judgments §78.

Part 6
Security for Costs

25-10-601. Security for costs from nonresident plaintiff.

Case Notes

Purpose of Statute — Application to Will Contests: The purpose of the provision that security for costs may be demanded of a nonresident plaintiff is to prevent one from starting a groundless

action and escaping the consequences of costs by reason of nonresidence, and it applies to will contests, such contests being included in the term "action". State ex rel. Langan v. District Court, 111 M 178, 107 P2d 880 (1940).

Multiple Defendants — No Stay of Proceedings: Demand upon a foreign corporation for security for costs made by one of two defendants pursuant to this section did not operate to stay proceedings between plaintiff and the nondemanding defendant. Middle States Oil Corp. v. Tanner-Jones Drilling Co., 73 M 180, 235 P 770 (1925).

Waiver of Security: The provision for requiring security of a nonresident plaintiff confers a personal privilege upon the defendant that may be waived and was waived by defendant's failure to make the motion until after the cause had been remanded by the Supreme Court for a new trial. State ex rel. Chilcott v. District Court, 68 M 57, 216 P 790 (1923).

Necessity of Notice of Demand for Security: This section and 25-10-602 clearly contemplate that the right to demand security for costs from a nonresident is merely a privilege, which the defendant may insist upon; but the demand, if made, must be made upon notice given to the plaintiff. Brazell v. Cohn, 32 M 556, 81 P 339 (1905).

Time of Demand for Security: Where defendant did not apply for an order requiring plaintiff, a nonresident of the state, to give security for costs until the day on which the cause was set for trial and where no previous notice of such demand had been given, the District Court was justified in denying a stay until the cost bond was given, on the ground that the application was made too late. Brazell v. Cohn, 32 M 556, 81 P 339 (1905).

Collateral References

Costs *key* 105 through 137.

20 C.J.S. Costs §125, et seq.

20 Am. Jur. 2d Costs §§77 through 86.

Nonresident's duty to furnish security for costs as affected by joinder or addition of resident. 158 ALR 737.

Assignment of judgment as carrying right of assignor as to cost bond. 63 ALR 292.

Leave of court as prerequisite to action on bond for costs. 2 ALR 575.

25-10-602. Dismissal when security not given.

Collateral References

Costs *key* 137.

20 C.J.S. Costs §§171, 173 through 175.

20 Am. Jur. 2d Costs §84.

Dismissal of taxpayers' action for noncompliance with statute requiring bond or security for costs and expenses. 89 ALR 2d 340.

Part 7
Payment of Costs by Governmental Entities

25-10-701. Public officers not to be personally taxed.

Case Notes

No Opportunity for Parties to Address Issues — Award of Attorney Fees Premature: An award of attorney fees based on this section is premature unless and until an appropriate record is created and the parties have a full and fair opportunity to address the issues. Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

Mandamus — Special Statute: The provision for taxing costs or damages against the state, county, or municipality is applicable generally to all forms of action, other than mandamus; as to the latter, 27-26-403, being a special statute, is controlling. State ex rel. O'Connor v. McCarthy, 86 M 100, 282 P 1045 (1929).

Officer Not Personally Liable: There is no difference between an officer who appears "in behalf" of the state, county, or municipality and one who "represents" such a body in a court action; hence in either event he is exempt from personal liability for damages or costs in an action prosecuted or defended by him in his official capacity under this section or in a mandamus proceeding resulting adversely to him under 27-26-403. State ex rel. O'Connor v. McCarthy, 86 M 100, 282 P 1045 (1929).

Forfeiture Proceedings — Costs Awarded: In a proceeding for the forfeiture of intoxicating liquors and property used in violation of the prohibition law (since repealed), which is neither a criminal nor a civil action but is special in its nature, costs may be awarded the claimant against the State when it is the losing party. St. v. Rouleau, 68 M 529, 219 P 1096 (1923).

Judge as Respondent — Cost as Against County: In view of this section, it would seem that the county represented by respondent judge in a special proceeding before the Supreme Court is properly chargeable with the costs upon judgment in favor of relator. State ex rel. Loundagin v. Tattan, 56 M 211, 181 P 984 (1919).

Stenographic Fees for Transcript Furnished to Attorney General: Where the Attorney General, conducting a proceeding on behalf of the State, demanded of the court stenographer a transcript of his notes taken therein, it was the stenographer's ministerial duty to deliver them without demanding his fees in advance. State ex rel. Donovan v. Ledwidge, 27 M 197, 70 P 511 (1902).

Collateral References

Costs *key* 109(3).

20 C.J.S. Costs §127.

20 Am. Jur. 2d Costs §40.

Liability of state, or its agency or board, for costs in civil action to which it is a party. 72 ALR 2d 1379.

Parties liable for storage or similar caretaking charges as taxable costs in proceedings to forfeit personal property. 60 ALR 2d 816.

25-10-702. Payment of costs by state.

Case Notes

Forfeiture Proceedings — Costs as Against State: In a proceeding for the forfeiture of intoxicating liquors and property used in violation of the prohibition law (since repealed), which is neither a criminal nor a civil action but is special in its nature, costs may be awarded the defendant against the State when it is the losing party. St. v. Rouleau, 68 M 529, 219 P 1096 (1923).

Collateral References

States *key* 215.

81A C.J.S. States §234.

20 Am. Jur. 2d Costs §§36, 37.

Liability of state, or its agency or board, for costs in civil action to which it is a party. 72 ALR 2d 1379.

25-10-703. Payment of costs by county.

Collateral References

Counties *key* 228.

20 Am. Jur. 2d Costs §38.

25-10-711. Award of costs against governmental entity when suit or defense is frivolous or pursued in bad faith.

Case Notes

Challenge to Driver's License Suspension Considered Special Proceeding — Successful Defendant Entitled to Costs: Neal's driver's license was suspended for failure to take a breath test. Neal challenged the suspension, claiming that he did not refuse to take a breath test, and the District Court agreed. Neal's license was reinstated and Neal was granted costs. The state objected to the award of costs, and the District Court amended the original order and denied costs, so Neal appealed. Neal contended that as the prevailing party, an award of costs was proper under 25-10-101(2) because the license was valued at more than $50 or under 25-10-101(4) because the petition to reinstate the license was a special proceeding. The state contended that the particular provisions of this section prevailed over the general provisions of 25-10-101, so 25-10-101 did not apply. The Supreme Court disagreed, finding no inconsistency between the statutes. This section applies to actions in which a party prevails against a government entity and can establish that the government's claim or defense was frivolous or pursued in bad faith, but no such finding is required for recovery of costs under 25-10-101. The court went on to find that Neal's claim that costs were proper based on the license value was unfounded, because no finding of valuation was ever determined. However, the court concluded that a challenge to a driver's license suspension or revocation was a special proceeding pursuant to 27-1-102, and that as the prevailing party in the action, Neal was entitled to costs pursuant to 25-10-101. Neal v. St., 2003 MT 53, 314 M 357, 66 P3d 280 (2003).

Improper Award of Attorney Fees Incurred in Proving Attorney Fees: About 2 ½ years after settling a condemnation case, the Department of Transportation offered the Slacks $26,000 to settle their claim for litigation expenses. The next day, the Slacks filed a supplemental

memorandum of litigation expenses requesting an additional $50,407.84 for expenses incurred in the action for fees. The District Court concluded that the Department had pursued litigation over the appropriate amount of litigation expenses in bad faith and awarded the Slacks $62,547 for expenses incurred in the fee litigation. The Department appealed the award of fees in the fee action. The Supreme Court examined the fees awarded for the fee litigation, applying St. v. McGuckin, 242 M 81, 788 P2d 926 (1990), for the proposition that the District Court has the authority to award attorney fees as a rare exception in which extraordinary circumstances justify the award of attorney fees incurred in proving the amount of attorney fees incurred in the underlying litigation. However, this was not one of those extraordinary circumstances that arises when the state's objection to the condemnee's fee claim is unreasonable. Here, the Department presented testimony from two experts who asserted that the attorney fees claimed in the fee litigation were excessive and duplicative, and although the District Court did not find the testimony compelling enough to grant a reduction in fees, the Department's claim could not be characterized as unreasonable. The District Court abused its discretion in awarding the Slacks attorney fees incurred in proving attorney fees, and that award was reversed. State ex rel. Dept. of Transportation v. Slack, 2001 MT 137, 305 M 488, 29 P3d 503 (2001).

Doctrine of Private Attorney General Applied — Three-Part Test for Awarding Attorney Fees: The District Court concluded that under this section, attorney fees were not available to plaintiff in this case because the action involved "neither frivolous conduct, extreme conduct, nor bad faith by the State". Plaintiff argued that it was entitled to attorney fees under the doctrine of private attorney general, which is an equitable exception to the American rule that a party is not entitled to attorney fees absent a specific contractual or statutory provision. Under Serrano v. Priest, 569 P2d 1303 (Calif. 1977), there are three basic factors to be considered in awarding attorney fees based on the doctrine of private attorney general: (1) the strength or societal importance of the public policy vindicated by the litigation; (2) the necessity of private enforcement and the magnitude of the resultant burden on plaintiff; and (3) the number of people standing to benefit from the decision. Here, plaintiff prevailed in a challenge to the constitutionality of numerous statutes regarding the state's administration of school trust lands. The litigation involved important public policies grounded in the constitution, requiring private constitutional enforcement, and benefited a large class of citizens interested in Montana's public schools. The District Court ignored recognized principles in denying plaintiff's reasonable attorney fees, resulting in substantial injustice. The Supreme Court applied the Serrano test and reversed for an award of attorney fees to plaintiff under the doctrine of private attorney general. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following In re Porter, 156 M 190, 478 P2d 866 (1970), distinguishing School District v. St., 236 M 44, 769 P2d 684, 46 St. Rep. 169 (1989), and followed in Columbia Falls Elementary School District No. 6 v. St., 2005 MT 69, 326 M 304, 109 P3d 257 (2005).

Unsuccessful Defense to State's Requirement That Firefighters at Airport Belong to National Guard — Costs and Attorney Fees Denied: Because the state's defense to a firefighter's petition for judgment declaring it unconstitutional for the state to require Air National Guard membership of its firefighters protecting National Guard aircraft was not frivolous or in bad faith, it was not an abuse of discretion to refuse costs and attorney fees to the prevailing firefighter. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Attorney Fees Not to Be Awarded Unless Requested by Party: The District Court ruled that the Department of Revenue had acted in bad faith and thus awarded DeVoe attorney fees in a tax protest case. The Supreme Court held that the actions of the Department warranted an award but that DeVoe had not requested attorney fees and that the award could not be made when the Department had been given no opportunity to defend against a claim for fees. DeVoe v. Dept. of Revenue, 263 M 100, 866 P2d 228, 50 St. Rep. 1731 (1993).

No Attorney Fees Absent Showing of Frivolous or Bad Faith Defense: As part of its defense, the state maintained the legitimacy of its insurance claim, represented that the government's improprieties were harmless, and attacked Weber's job performance while a state employee. Although Weber prevailed in his wrongful discharge claim against the state, attorney fees were not awardable to him under this section absent a showing that the defense of the state was either frivolous or pursued in bad faith. Weber v. St., 253 M 148, 831 P2d 1359, 49 St. Rep. 397 (1992).

Private Attorney General Doctrine Inapplicable to Case in Which Recovery Sought for Personal Losses for Wrongful Discharge: As part of his wrongful discharge claim, Weber sought to apply the private attorney general doctrine, which allows the prevailing party to receive an award of costs and attorney fees when the government fails to enforce interests significant to its citizens. In seeking to apply the doctrine, Weber focused on the egregious conduct surrounding

an inflated agency claim, which he was ordered by his superiors to pay, rather than on the conduct that led to his wrongful discharge. The Supreme Court held that the private attorney general exception did not apply because Weber's claim was brought to reimburse him for losses due to his wrongful discharge rather than as a vehicle to reimburse the state for fraudulent claims. Weber v. St., 253 M 148, 831 P2d 1359, 49 St. Rep. 397 (1992).

No Bad Faith When State Required to Defend: The plaintiffs argued that they were entitled to attorney fees because the state's defense in a tax assessment case was frivolous or made in bad faith. The Supreme Court ruled that the state had a statutory duty to defend against all claims that a tax assessment was erroneous and that therefore the state's action could not be frivolous or in bad faith. The court also pointed out that the plaintiffs had not met the other requirement for obtaining attorney fees because the state had won the case. Kruse v. Cascade County, 244 M 126, 796 P2d 568, 47 St. Rep. 1445 (1990).

Failure to Prevail or Establish Frivolous Defense — Costs Disallowed: The trial court's conclusion that plaintiff had not prevailed in an action and that each party acted in good faith in bringing and defending the lawsuit was sufficient to preclude the award of fees and costs under this section and under the court's exercise of its equity power. Myers v. Dept. of Agriculture, 232 M 286, 756 P2d 1144, 45 St. Rep. 1056 (1988).

Attorney Fees as Element of Costs Granted Against Governmental Entity: In a case where the Department of Revenue sought back child support, received and cashed a check from defendant in an accord and satisfaction, then 1 year later levied execution on defendant's accrued and future wages and, although under a restraining order not to attempt collection or enforcement of a distraint warrant, intercepted defendant's federal and state income tax refunds, the District Court properly awarded costs to the defendant in the form of attorney fees under 25-10-711. The Supreme Court affirmed, citing the holding in State ex rel. Florence-Carlton Consol. School District v. District Court, 193 M 413, 632 P2d 318, 38 St. Rep. 1204 (1981), that if, under all the circumstances of a case, justice would require the imposition of costs, equity can further provide in extreme cases to allow attorney fees as an element of those costs. St. v. Frank, 226 M 283, 735 P2d 290, 44 St. Rep. 657 (1987), distinguished, in the absence of proof of extreme state conduct, in Weber v. St., 253 M 148, 831 P2d 1359, 49 St. Rep. 397 (1992).

State's Tax Appeal — Costs and Attorney Fees Denied Taxpayer — Appeal Not Frivolous or in Bad Faith: There was substantial evidence to support trial court's determination that Department of Revenue's appeal was neither frivolous nor in bad faith and that taxpayer thus was not entitled to costs and attorney fees under 25-10-711. An issue raised by the Department was retroactive application to a prior landowner of the tax-exempt status granted taxpayer. This issue was well within the bounds of legitimate argument on a substantial issue on which there was a bona fide difference of opinion, and the Department prevailed on the issue. Taxpayer's contention that the appeal was in bad faith because the Department challenged existing law in a prior case was unfounded, since the prior case was 20 years old. The law is not static. Furthermore, there was an issue not resolved by the prior case. Dept. of Revenue v. New Life Fellowship of Mont., Inc., 217 M 192, 703 P2d 860, 42 St. Rep. 1129 (1985). See also Harris v. Bauer, 230 M 207, 749 P2d 1068, 45 St. Rep. 147 (1988), Armstrong v. St., 250 M 468, 820 P2d 1273, 48 St. Rep. 995 (1991), Mont. Health Care Ass'n v. St. Fund, 256 M 146, 845 P2d 113, 50 St. Rep. 1 (1993), Jones v. Billings, 279 M 341, 927 P2d 9, 53 St. Rep. 1178 (1996), and Ostergren v. Dept. of Revenue, 2004 MT 30, 319 M 405, 85 P3d 738 (2004).

Contractual Liability for Attorney Fees — Fees Not "Costs" Absent Bad Faith: Where the State executed a 6-year lease of certain communications equipment with the plaintiff by a lease providing that the State would pay the lessor for "legal expenses" incurred as a result of any default by the State and unilaterally terminated the lease 3 years later, the trial court did not err in holding the State liable for attorney fees under the indemnity provisions in the lease. A reading of the applicable statutes indicates that liability for attorney fees can arise from contract but cannot be awarded as "costs" absent bad faith on the State's part. Leaseamerica Corp. of Wisc. v. St., 191 M 462, 625 P2d 68, 38 St. Rep. 398 (1981).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

CHAPTER 11
NEW TRIAL

Part 1
General Provisions

25-11-101. New trial defined.

Case Notes

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GENERAL

Parties Restored to Original Position: The granting of a motion for a new trial restores the parties to the positions they occupied before the trial and the action is commenced anew with the parties limited to their original pleadings but unbound by previous evidence and testimony except as held by existing rules of evidence. Waite v. Waite, 143 M 248, 389 P2d 181 (1964), followed in Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160, 55 St. Rep. 198 (1998).

Erroneous Findings of Fact as Grounds for Motion: A motion for a new trial lies where an issue of fact was wrongfully or erroneously determined by the jury or by direction of the court. Buckhouse v. Parsons, 60 M 156, 198 P 444 (1921).

New Trial for Improperly Tried Causes of Action: Where the issue or issues in one cause of action have been properly tried and those in another cause of action in the same suit have been improperly tried, a new trial should be granted only as to those issues that have been improperly tried, if it can be done without confusion resulting upon the retrial. Hamilton v. Nelson, 22 M 539, 57 P 146 (1899); Ramsdell v. Clark, 20 M 103, 49 P 591 (1897).

New Trial for Distinct Causes of Action: A new trial can be granted as to one or more of several causes of action included and tried in the same suit, where the issues have not been blended, and each cause of action remains distinguishable and separable even after verdict. Ramsdell v. Clark, 20 M 103, 49 P 591 (1897).

"ISSUE OF FACT"

Ruling on Motion Not Included — How Reviewed: The term "issue of fact" as used in this section refers only to issues arising under the pleadings, hence a motion for new trial does not lie from a ruling on a motion, the ruling being reviewable on appeal from the judgment. Davis v. Bell Boy Gold Min. Co., 101 M 534, 54 P2d 563 (1936).

Assessment of Damages Not Trial: The court's action in ordering the damages to be assessed by a jury, in actions ex delicto, where the defendant has failed to answer or the plaintiff to reply, is not the trial of an issue of fact raised by the pleadings. State ex rel. Culbertson Ferry Co. v. District Court, 49 M 595, 144 P 159 (1914).

Controversies Excluded: Controversies that do not arise upon written pleadings authorized or required by statute do not fall within the purview of this section. State ex rel. Culbertson Ferry Co. v. District Court, 49 M 595, 144 P 159 (1914); In re Antonioli's Estate, 42 M 219, 111 P 1033 (1910), distinguished in In re Stinger Estate, 61 M 173, 201 P 693 (1921).

No New Trial If No Issue: There can be no new trial where there is no issue of fact presented by the pleadings to be reexamined. State ex rel. Culbertson Ferry Co. v. District Court, 49 M 595, 144 P 159 (1914).

Other Circumstances Excluded: A new trial lies for the reexamination of an issue of fact created on the pleadings, but not under any other circumstances. State ex rel. Culbertson Ferry Co. v. District Court, 49 M 595, 144 P 159 (1914).

Sense in Which Term Used: The expression "issue of fact", used in its broader sense, would include every issue of fact, whether arising upon formal pleadings or upon a motion. As used here, however, it refers only to issues of fact raised by formal pleadings. State ex rel. Culbertson Ferry Co. v. District Court, 49 M 595, 144 P 159 (1914); In re Antonioli's Estate, 42 M 219, 111 P 1033 (1910); State ex rel. Heinze v. District Court, 28 M 227, 72 P 613 (1903).

Raised by Pleadings: An issue of fact on which a new trial can be granted is raised by the pleadings, and a statement on motion for new trial is confined to such issues. A new trial of a motion is not authorized. Beach v. Spokane Ranch & Water Co., 21 M 7, 52 P 560 (1898).

Collateral References

New Trial *key* ½.

66 C.J.S. New Trial §§1 through 16.
58 Am. Jur. 2d New Trial §1.

25-11-102. Grounds for new trial.

Compiler's Comments

1981 Amendment: Deleted "(8) that the right to have a bill of exceptions has been lost, either through the death or incapacity of the court reporter or in any manner that was not the fault of the losing party."

Bill of Exceptions — Statute Superseded: Former sections 93-5504 through 93-5509, R.C.M. 1947, defining and establishing the use of a bill of exceptions, have been superseded by Rules 9, 10, and 25, M.R.App.P. The use of exceptions was also abolished by Rules 7(c) and 46, M.R.Civ.P., and 25-31-503 (now repealed). The reference to the bill of exceptions, which was contained in subsection (8) of this section prior to the 1981 amendment, is therefore obsolete.

Case Notes

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GENERAL

Counsel's Comments on Employee Handbook Implying Employment At Will Cured by Court Admonishment — No Grounds for New Trial: During closing arguments, defense counsel showed the jury a page from defendant's employee handbook that implied that plaintiff could be fired at will. Plaintiff contended that counsel's comments deprived her of a fair trial because Montana is not an at-will employment state. The Supreme Court disagreed. The handbook was entered into evidence by stipulation, and the jury had been shown the page during both direct and cross-examination without objection. Further, when plaintiff objected to presentation of the page during closing, the trial court cured any error by admonishing the jury to disregard the paragraph in question because it did not reflect Montana law. Denial of plaintiff's motion for a new trial based on counsel's comments was therefore not an abuse of discretion. Bailey v. Beartooth Communications Co., 2004 MT 128, 321 M 305, 92 P3d 1 (2004), distinguishing Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

No Requirement That Trial Court Articulate That Conscientious Judgment Made on Motion for New Trial: Plaintiff moved for a new trial on grounds of juror misconduct and misstatements by defense counsel. The motions were denied. On appeal, plaintiff argued that under Simmons Oil Corp. v. Wells Fargo Bank, N.A., 1998 MT 129, 289 M 119, 960 P2d 291 (1998), an abuse of discretion is defined as an arbitrary act without conscientious judgment, so the District Court was required to make an affirmative showing that it acted conscientiously in rendering its decision in response to a motion for a new trial and that failure of the court to articulate any reason for denying a new trial was therefore an abuse of discretion. The Supreme Court disagreed. The language in Simmons Oil is merely a definition of an abuse of discretion and does not require or even suggest the necessity of an affirmative articulation by a trial court that it make a conscientious judgment in ruling on a motion for a new trial. Here, the trial court stated that the arguments for a new trial had been considered, and plaintiff failed to establish that anything more was required. Absent an abuse of discretion, judgment was affirmed. Bailey v. Beartooth Communications Co., 2004 MT 128, 321 M 305, 92 P3d 1 (2004).

Sufficient Evidence That Group Home Not Negligent in Failing to Control Resident: Plaintiff was employed by a vocational day-care program that took developmentally disabled persons on

day outings. Plaintiff was assaulted by a developmentally disabled person from a group home managed by defendant corporation and sued the corporation for negligence for failing to control the assailant. Before trial, the District Court granted plaintiffs' motion to exclude any evidence of negligence by plaintiff's employer and ruled that defendant had a special relationship of custody and control over the disabled person and thus had a legal duty of care to those placed within the foreseeable zone of risk created by any breach of that duty. Nevertheless, the jury found for defendant, and plaintiffs' motion for a new trial was denied. On appeal, plaintiffs contended that the jury's finding was not supported by sufficient evidence, but the Supreme Court disagreed. Credible evidence was presented that defendant followed protocols regarding the assailant's behavioral medication and behavioral modification program, that it adequately communicated information on the assailant's condition through incident reports, daily logs, and a 24-hour call system, and that the state monitoring agency had no issues with the way defendant conducted business. The evidence was sufficient for the jury to find that defendant did not breach the duty of care, and the Supreme Court declined to disturb the verdict. Papich v. Quality Life Concepts, Inc., 2004 MT 116, 321 M 156, 91 P3d 553 (2004).

Assurance of Coverage Made by Agent — Coverage Not Extended Beyond Policy Terms:

Defendant insurer claimed that plaintiffs' claims in a 2002 action were barred by collateral estoppel and res judicata because of the prior holding in Lee v. USAA Cas. Ins. Co., 2001 MT 59, 304 M 356, 22 P3d 631 (2001). Applying the test in Haines Pipeline Constr., Inc. v. Mont. Power Co., 265 M 282, 876 P2d 632 (1994), for determining whether collateral estoppel barred the present action because it might be a relitigation of the 2001 case, the Supreme Court disagreed with defendant's assertion. Plaintiffs had not previously litigated whether defendant had a duty to defend and a duty to indemnify Hoss because that issue did not arise until defendant refused to indemnify Hoss and Hoss confessed judgment. Also, the issue of whether defendant had a duty to defend and a duty to indemnify Hoss was different from the issue in the 2001 case, which concerned whether Lee was a named insured under Hoss's policy, thereby entitling Lee to underinsured motorist benefits. Because the present issue was never litigated, there was never a final judgment on the merits, so defendant's collateral estoppel and res judicata arguments were inapplicable. Lee v. USAA Cas. Ins. Co., 2004 MT 54, 320 M 174, 86 P3d 562 (2004).

Lee was injured in an accident in Louisiana while in a taxi and filed an underinsured motorist (UIM) claim pursuant to coverage provided by USAA Casualty Insurance Co. (USAA) on two vehicles that she jointly owned, with Hoss contending that she was entitled to stack coverage under the policies. Although USAA initially indicated that Lee would be entitled to UIM coverage because she was a co-owner of the vehicles, the insurer later changed its position and denied coverage on grounds that because Lee was not a named insured and as a matter of law not a "covered person" under the relevant policy provisions, USAA had no obligation to treat her as such. The District Court granted summary judgment for USAA, concluding that Lee was not an insured for purposes of UIM coverage under the express language of Hoss's policy and that Lee could not benefit from a policy to which she was not a party. On appeal, Lee contended that she was entitled to a new trial because USAA's claim adjuster initially indicated that Lee would be covered, USAA should be bound by that admission of coverage, and USAA's first answer should be a binding judicial admission as a matter of law. The Supreme Court relied on DeJonge v. Mut. of Enumclaw, 843 P2d 914 (Oreg. 1992), and Shows v. Pemberton, 868 P2d 164 (Wash. Ct. App. 1994), in holding that an assurance made by an insurance agent that a particular coverage exists, in the absence of an ambiguity, does not create or extend coverage beyond the covered risks expressly identified or excluded in the policy. Assurances or representations made as a result of confusion and misfeasance by an insurance agent do not render an otherwise unambiguous policy ambiguous as a matter of law. As a general rule, the agent's conduct may be offered to demonstrate that an ambiguity exists, particularly from the perspective of a reasonable insurance consumer. Nevertheless, in some limited instances, an assurance of coverage by an agent that conflicts with an unambiguous policy may afford an insured relief under the theories of waiver or equitable estoppel. Lee pursued the theory of estoppel in this case, but failed to prove that she relied on the agent's representation of coverage to her detriment. A judicial admission is not binding unless it is an unequivocal statement of fact, rather than a conclusion of law or the expression of an opinion. USAA admitted no material fact of consequence to the case. Thus, neither the agent's representations that coverage existed nor the first answer admitting that Lee was covered served as sufficient grounds for enforcing the policy in her favor or for estopping USAA from denying coverage. Lee v. USAA Cas. Ins. Co., 2001 MT 59, 304 M 356, 22 P3d 631 (2001), distinguishing Dion v. Nationwide Mut. Ins. Co., 22 Mont. Fed. Rep. 225 (D.C. Mont. 1997), and Boyle v. Nationwide Mut. Ins. Co., 25 Mont. Fed. Rep. 446 (D.C. Mont. 1999).

Informal Witness Discovery Process Compromising Ability to Formulate Trial Strategy — Irregularities Constituting Abuse of Discretion Preventing Fair Trial — New Trial Warranted: If a District Court acts arbitrarily or without conscientious judgment or exceeds the bounds of reason in denying a new trial, it constitutes an abuse of discretion so significant as to materially affect the substantial rights of a complaining party. In the present case, the District Court devised a late hour informal expert witness discovery process that provided no opportunity for plaintiffs to obtain information exclusively in possession of defendants' expert prior to trial. Although the control of discovery activities, including the use of interrogatories, is within the discretion of the District Court, each party has a duty to supplement or amend answers to interrogatories in a timely manner, in order to make all relevant facts available to parties in advance of trial and to reduce the possibility of surprise or unfair advantage. Here, plaintiffs' lack of opportunity to depose defendants' expert, in the face of an inadequate discovery response, materially affected plaintiffs' substantial rights. The District Court's informal discovery process compromised plaintiffs' ability to formulate an effective trial strategy and to prepare adequately for witness cross-examination, which placed plaintiffs at a serious disadvantage. The discovery irregularities constituted an abuse of discretion that materially affected plaintiffs' substantial rights, entitling plaintiffs to a new trial, and the District Court's denial of a new trial motion was therefore reversed. Perdue v. Gagnon Farms, Inc., 2003 MT 47, 314 M 303, 65 P3d 570 (2003).

Improper Grant of New Trial After Time to Move for New Trial Expired: A substitute District Court Judge assumed jurisdiction of a marriage dissolution case 1 day after the husband moved for reconsideration or a new trial. The motion for a new trial was granted 76 days later. The wife contended that the court exceeded its jurisdiction because the motion was granted more than 60 days after being filed, in violation of Rules 52(d) and 59(d), M.R.Civ.P. (Title 25, ch. 20). The husband argued that an equitable exception to the rules should be granted because the presiding judge was substituted between the time when the motion was filed and when it was ruled upon. The Supreme Court declined to make an exception, reiterating that the time and procedural limitations for motions subsequent to judgment are mandatory and strictly enforced. The District Court exceeded its jurisdiction in ordering a new trial after the time to rule on the motion had expired, so the order was reversed. In re Marriage of Richards, 2001 MT 183, 306 M 212, 31 P3d 1002 (2001).

Introduction of Evidence of Acts Not Referred to in Pretrial Order — Not Grounds for New Trial: As a result of a dispute, the relationship between neighbors Lopez, Monroe, and Josephson deteriorated until assault charges were filed against Josephson. The operative contentions in the pretrial order were that Josephson assaulted Lopez by pointing a firearm at Lopez's face and assaulted Monroe verbally and fired a weapon toward Monroe's property. The District Court found it impossible to determine from the allegations the dates, times, and places that the alleged assaults took place, but the court concluded that the pretrial order nevertheless placed Josephson on notice that he was being accused of assault on multiple occasions over an unspecified period of time. Josephson moved for a new trial on grounds that plaintiffs were improperly allowed to introduce evidence of acts not referred to in the pretrial order, evidence of bad character, and evidence of other crimes, wrongs, or acts. However, because Josephson waited until the day of trial to clarify which assaults formed the basis of the case against him, rather than using available pretrial motions and rules of discovery, the District Court was not found to have abused its discretion in giving plaintiffs latitude in their proof of the various assaults at trial, including allowing evidence of bad character to impeach Josephson's testimony. The District Court did properly preclude evidence of assaults by Josephson on nonparty persons. Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Pervasive Misconduct of Plaintiffs' Counsel Preventing Fair Trial on Merits: At Josephson's trial for assault, plaintiffs' counsel attempted to put inadmissible matters before the jury by repeatedly asking objectionable questions and raising impermissible inferences. Although the trial court repeatedly admonished plaintiffs' counsel not to bolster with inadmissible evidence, attempt to introduce inadmissible hearsay, and ignore the court's rulings on certain issues, plaintiff's counsel blithely proceeded to do what he knew he should not. As set out in St. v. Eklund, 264 M 420, 872 P2d 323 (1994), the repeated asking of questions that are clearly intended to keep the assumption of damaging facts that cannot be proved before the jury, in order to impress upon their minds the probability of the existence of the assumed facts upon which the questions are based, constitutes gross misconduct. In this case, despite the trial court's attempts to eliminate the prejudicial impact of the conduct with admonitions and curative instructions, the conduct of plaintiffs' counsel was so pervasive that it prevented Josephson from receiving a fair trial on the merits, raising the presumption of prejudice and warranting reversal

of Josephson's conviction and a new trial. Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001). See also Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160 (1998).

Scope of Appellate Review: On appeal, Supreme Court review of a District Court's denial of a motion for new trial, on grounds that the jury's verdict was not supported by substantial evidence, is limited. If there is conflicting evidence on an issue, it is an abuse of the District Court's discretion to grant a new trial on that issue on the basis that there is insufficient evidence to justify the jury's verdict. Resolving conflicts in the evidence, judging the credibility of witnesses, and finding the facts are uniquely within the province of the jury. The Supreme Court does not retry the case to determine whether it agrees or disagrees with the jury's verdict. The question is not what the Supreme Court would have awarded after reviewing the evidence, but whether substantial evidence, even though conflicting, exists to support the jury's verdict. The decision to grant or deny a new trial is in the sound discretion of the District Court Judge and will not be overturned absent a showing that the judge manifestly abused that discretion. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), distinguishing Tappan v. Higgins, 240 M 158, 783 P2d 396 (1989). See also Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994), Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996), McGillen v. Plum Creek Timber Co., 1998 MT 193, 290 M 264, 964 P2d 18, 55 St. Rep. 808 (1998), Moore v. Imperial Hotels Corp., 1998 MT 248, 291 M 164, 967 P2d 382, 55 St. Rep. 1023 (1998), and Schuff v. Jackson, 2002 MT 215, 311 M 312, 55 P3d 387 (2002).

Prejudicial Effect of Misconduct of Defense Counsel — New Trial Properly Granted: Even though defendant may have presented sufficient evidence to prevail against plaintiff's motion for judgment as a matter of law, the District Court nevertheless properly granted plaintiff's motion for a new trial after finding that the defense counsel's misconduct prejudiced plaintiff's right to a fair hearing and resolution of the case. The trial judge is in the best position to determine the prejudicial effect of an attorney's conduct. Even when there is substantial evidence supporting a jury's verdict, the trial court has an overriding duty to prevent a miscarriage of justice by granting a new trial if the misconduct of counsel prevents an opposing litigant from having a fair trial on the merits. Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160, 55 St. Rep. 198 (1998).

Defendant's Statements at Trial Not Binding Judicial Admission — New Trial Not Warranted: The defendant's testimony at trial that the automobile accident was all the defendant's fault was either a legal conclusion based on the defendant's understanding of the facts as the defendant knew them or was the expression of the defendant's personal opinion. Therefore, the statements were not statements of fact and were not judicial admissions. The District Court did not err in denying the plaintiff's alternative motions for judgment notwithstanding the verdict and new trial. DeMars v. Carlstrom, 285 M 334, 948 P2d 246, 54 St. Rep. 1178 (1997), followed in Papich v. Quality Life Concepts, Inc., 2004 MT 116, 321 M 156, 91 P3d 553 (2004).

New Trial Based on Excessive Punitive Damages — Abuse of Discretion Warranting Reversal: The District Court vacated a jury award of $1 million in punitive damages against an employer and $75,000 against an employee, concluding that the awards were excessive. The Supreme Court reversed, noting that the award against the employer was not excessive when compared with the employer's overall financial condition and that the employee's financial condition was improperly valued. The employee failed to produce evidence that his net worth could not support the punitive damage award, so vacation of the jury award was a manifest abuse of discretion warranting reversal. Maurer v. Clausen Distrib. Co., 275 M 229, 912 P2d 195, 53 St. Rep. 78 (1996), followed in Thompson v. Bozeman, 284 M 440, 945 P2d 48, 54 St. Rep. 957 (1997), and distinguished in Anderson v. Werner Enterprises, Inc., 1998 MT 333, 292 M 284, 972 P2d 806, 55 St. Rep. 1350 (1998).

Unreasonable Compensatory Award for Loss of Established Course of Life — New Trial Proper: Maurer produced evidence to support an award of $90,000 for loss of established course of life. Instead, the jury awarded him $500,000, which was not supported in the record. The District Court did not err in ordering a new trial on compensatory damages. A reduction in a compensatory award is justified when the award substantially exceeds what the evidence can sustain. Maurer v. Clausen Distrib. Co., 275 M 229, 912 P2d 195, 53 St. Rep. 78 (1996), followed in Thompson v. Bozeman, 284 M 440, 945 P2d 48, 54 St. Rep. 957 (1997).

Allegedly Improper Remarks of Court Insufficiently Prejudicial to Warrant New Trial: During the lengthy trial of a civil action over the death of a person in a Sheriff's mental health soft cell, the District Court Judge made several comments that indicated that he may have felt the trial was lengthy or even too lengthy. Citing Barrett v. ASARCO, Inc., 245 M 196, 799 P2d 1078 (1990), the Supreme Court noted that the appellant failed to object at trial to the judge's

comments that were now objectionable on appeal. Citing St. v. Stafford, 208 M 324, 678 P2d 644 (1984), the Supreme Court held that there was nothing in the District Court's comments that indicated that the court was directing a defense verdict or in any way abandoning the court's proper role. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Comments by Counsel Not Prejudicial to Warrant New Trial: During a lengthy trial over the death of a man in a mental health holding cell in Flathead County, counsel for one of the parties made comments such as "I am sure after three days of deposition and all this questioning, you are probably getting tired of lawyers questioning you" and "Doctor, you can characterize it any way you want, but I want to talk about the facts" and, Buhr contended, made various appeals to hometown loyalties. Buhr argued that the cumulative effect of these comments was to prejudice the jury against him and to deny him a fair trial and that the District Court's failure to grant a new trial because of those comments was error. The Supreme Court held that because of the limited number of comments and because appropriate measures, such as sustaining of objections and curative instructions, were used during trial, Buhr's right to a fair trial was not denied. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Evidence of Defense Witness's Prior Criminal History Not Admissible — Conviction Overturned: In a prosecution for accountability for aggravated kidnapping, the District Court allowed the state to cross-examine the defendant's witness as to the witness's prior criminal history. The Supreme Court found this to be reversible error on the grounds that there is a reasonable possibility that the inherently prejudicial and inadmissible evidence of the witness's criminal history might have contributed to the defendant's conviction. St. v. Bristow, 267 M 170, 882 P2d 1041, 51 St. Rep. 1010 (1994).

Prejudice Through Inadmissible Evidence — Fair Trial Denied: Generally, character evidence is inadmissible to prove conduct. The prosecution is allowed to rebut the accused's offer of a pertinent trait of character; however, the prosecution must present legitimate and relevant character evidence. An accused's entire life should not be searched in an effort to convict. In this case, the trial court improperly allowed cross-examination of Eklund's character witness regarding Eklund's prior murder charges when the witness was called to rebut the nonviolent character evidence. The danger of unfair prejudice of evidence of charges, not a conviction, clearly outweighed the probative value. After considering the totality of the circumstances, the Supreme Court determined that there was a reasonable possibility that the inadmissible evidence of Eklund's murder charge denied him a fair and impartial trial and remanded for a new trial. St. v. Eklund, 264 M 420, 872 P2d 323, 51 St. Rep. 335 (1994).

Closing Argument Improper When Counsel Comments on Existence of Evidence That Counsel Moved to Exclude: Defense counsel, in a motor vehicle accident case, obtained an order excluding testimony concerning the issuance of a citation and then, during his closing, argued that if such evidence had existed it would have been admitted. The Supreme Court remanded the case on other grounds, with instructions that improper legal maneuvering be eliminated during retrial. Hall v. Big Sky Lumber & Supply, Inc., 261 M 328, 863 P2d 389, 50 St. Rep. 1345 (1993).

Statements of Counsel as Binding on Client — New Trial Warranted: In closing arguments during a negligence trial that resulted in a jury finding of no negligence on behalf of defendant, defense counsel made unequivocal statements which, when taken in full context with the rest of his closing argument, constituted judicial admissions on the issue of negligence of his client that had the effect of a confessory pleading. Noting that the admissions of counsel are binding on the client, the Supreme Court granted a new trial, notwithstanding counsel's assertion that the statements were merely suggestions on the theory of the case. Kohne v. Yost, 250 M 109, 818 P2d 360, 48 St. Rep. 886 (1991), distinguished in DeMars v. Carlstrom, 285 M 334, 948 P2d 246, 54 St. Rep. 1178 (1997).

Bailiff's Misconduct in Communicating With Jury — New Trial Warranted: During deliberations, the jury had a question regarding application of the comparative negligence statute and payment of damages. The jury notified the bailiff that it wanted to ask the question. The bailiff said that he did not know the answer and that all the attorneys and court personnel would have to be called back into court to properly respond, a process that would take about as long as it takes "for hell to freeze over". Other jurors overheard the remark and decided to resolve the issue on their own. The bailiff's communication with the jury rather than conducting the jury into court for resolution of its question was a violation of 25-7-403 and 25-7-405 that affected the right to a fair trial. Affidavits from eight jurors that they were not influenced by the bailiff's conduct failed as proof of a fair trial when weighed against the bailiff's actions. The District Court did not abuse its discretion in granting a new trial. Henrichs v. Todd, 245 M 286, 800 P2d 710, 47 St. Rep. 2112 (1990).

Grant of Request by Workers' Compensation Insurer for Rehearing — Insurer Not to Claim Error: A workers' compensation insurer filed a petition for rehearing, claiming that the decision by the trial court was in error and that the insurer was entitled to a rehearing or amendment of the decision. Claimant did not respond to the petition. The court found that it had no alternative but to grant the petition and move the case forward because the claimant's lack of response led to the conclusion that the petition had merit. Having filed the petition in the first place, the insurer was in no position to later argue that claimant had no grounds for a new trial or that the court erred in granting the motion. Winchell v. G&B Motors, Inc., 246 M 320, 805 P2d 1323, 47 St. Rep. 2070 (1990).

Inconsistent Jury Findings — New Trial Granted: The District Court did not err in granting a new trial after finding that the jury was confused, that jury findings were inconsistent or in disregard of the court's instructions, and that it was too difficult to speculate as to how the jury arrived at its conclusions. Mont. Bank of Red Lodge v. Lightfield, 237 M 41, 771 P2d 571, 46 St. Rep. 605 (1989).

Irregularities in Jury Proceedings — Juror Affidavit — New Trial Denied: To support their motion for a new trial in District Court, plaintiffs submitted an affidavit of one juror, alleging that certain statements made by the bailiff during jury deliberations misled the jury and prevented clarification of the issue of proximate cause. Juror affidavits are admissible to show grounds upon which a new trial may be granted when a juror has personal knowledge of an alleged irregularity in the proceedings and the only other individual who has personal knowledge of the facts surrounding the irregularity is the individual who committed the alleged infraction. Only the facts upon which the alleged irregularities are based are admissible. Any allegations regarding the inner workings of the jury deliberations are inadmissible. The Supreme Court will not overrule the District Court's refusal to grant a new trial unless the evidence is clear and convincing that the trial court erred. Ahmann v. Am. Fed. S&L Ass'n, 235 M 184, 766 P2d 853, 45 St. Rep. 2305 (1988), distinguished in Henrichs v. Todd, 245 M 286, 800 P2d 710, 47 St. Rep. 2112 (1990), and overruled as to standard of review in Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995). See also Greytak v. RegO Co., 257 M 147, 848 P2d 483, 50 St. Rep. 204 (1993).

Motion for Mistrial — Evidence of Erroneous Ruling Required: The Supreme Court cited Schmoyer v. Bourdeau, 148 M 340, 420 P2d 316 (1966), in holding that in order to reverse a lower court ruling on a motion for mistrial, evidence must be presented that is clear, convincing, and practically free from doubt that the trial court's ruling was erroneous. St. v. Dawson, 233 M 345, 761 P2d 352, 45 St. Rep. 1542 (1988). See also St. v. Sullivan, 266 M 313, 880 P2d 829, 51 St. Rep. 827 (1994), St. v. Gambrel, 246 M 84, 803 P2d 1071, 47 St. Rep. 2270 (1990), and St. v. Counts, 209 M 242, 679 P2d 1245 (1984).

Court Discretion to Order New Trial or Reopen Case — Jurisdiction to Amend Findings and Conclusions: Upon dissolution of a marriage, the District Court retained jurisdiction to determine the division of marital property. Following a 4-day trial, the court divided the property, whereupon both parties filed motions to amend the findings. A hearing was held. Subsequently, the court ordered the parties to appear for the limited purpose of testifying to the respective proposals for handling certain real estate, and the court then issued amended findings of fact and conclusions of law. Appellant contended that the District Court lacked jurisdiction to issue the amended findings because it failed to rule on the motions to amend within 45 days, pursuant to Rules 52(b) and 59(d), M.R.Civ.P. (see Title 25, ch. 20). The Supreme Court disagreed, holding that the order to appear for limited testimony was essentially an order for a new trial and that under Rule 59(e), M.R.Civ.P., and 25-11-102, the District Court had jurisdiction to order a new trial on its own initiative or to reopen the case and thus had jurisdiction to amend the findings and conclusions. In re Marriage of Kink, 226 M 313, 735 P2d 311, 44 St. Rep. 681 (1987).

Evidence of Prejudice Required: Defendant alleged a remark by the prosecutor during voir dire was prejudicial. Defense counsel objected to the statement, fearing the jury would be misled. The trial court admonished the prosecutor to correct himself, which he did. The court also instructed the jury to disregard the statement. When a prosecutor's improper statement is disclaimed or corrected, there is no error. The controlling question is the good faith of counsel in saying what he said and the likelihood the defendant was unfairly prejudiced by the statement. Defendant offered no evidence of prejudice, and the jury's verdict did not indicate prejudice. The Supreme Court refused to reverse the trial court on the mere ground of a corrected misstatement when there was no evidence of either bad faith on the part of the prosecutor or prejudice to the defendant. St. v. Walton, 222 M 340, 722 P2d 1145, 43 St. Rep. 1312 (1986).

Prosecutor's Statement Not Warranting New Trial: Defendant contended that the prosecutor's statement before the jury that an armed deputy was "in charge and keeping the defendant" warranted a new trial. During cross-examination, defense counsel drew the jury's attention to the fact that the officer guarding the defendant was armed in order to demonstrate that the witness had limited powers of observation. A short time later, the prosecutor made the statement which defendant complained prejudiced him before the jury and which he claimed should have been the subject of a cautionary instruction. The court found that defense counsel obviously had drawn the jury's attention to the armed officer, and that if defendant thought a cautionary instruction was necessary he should have offered one. The defendant failed to show any error affecting his substantial rights or resulting in prejudice. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Prejudicial Closing Argument Made by Attorney for One of Several Defendants — Plaintiff Entitled to New Trial Against All Defendants: In a wrongful death action involving several defendants, a new trial was ordered because of several improper statements made in his closing argument by one defendant's attorney. Counsel made reference to: (1) matters withdrawn from the record by instruction to the jury; (2) matters withdrawn from the record by order in limine; (3) facts never entered into the record; and (4) facts irrelevant to the legal issues involved in the case. The Supreme Court held that the plaintiff was entitled to a new trial with respect to all of the defendants because it was impossible to separate the defendants in considering the effect of the prejudice created by the argument of the lawyer for one of the defendants. Kuhnke v. Fisher, 210 M 114, 683 P2d 916, 41 St. Rep. 952 (1984), followed in Rieger v. Coldwell, 254 M 507, 839 P2d 1257, 49 St. Rep. 768 (1992), Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160, 55 St. Rep. 198 (1998), Benson v. Heritage Inn, Inc., 1998 MT 330, 292 M 268, 971 P2d 1227, 55 St. Rep. 1341 (1998), and Federated Mut. Ins. Co. v. Anderson, 1999 MT 288, 297 M 33, 991 P2d 915, 56 St. Rep. 1152 (1999). Despite repeated attorney misconduct warranting sanction on retrial, the District Court ruled that the misconduct was not of the magnitude of that found in Kuhnke I, supra, and that viewed in the context of the entire trial, the improper conduct did not impact the jury to such an extent as to require a new trial. The Supreme Court found substantial credible evidence to support the verdict reached by two juries on two separate occasions hearing the same facts and noted that it was unlikely a third trial before a third jury would produce a different result. Kuhnke v. Fisher, 227 M 62, 740 P2d 625, 44 St. Rep. 895 (1987).

Misconduct by Bailiff as Grounds for New Trial: When the bailiff gave gratuitous legal advice to members of the jury by telling them not to "get hung up" on the instructions; gave advice on working around a minority group of jurors; gave his opinion on a written question on an instruction; and engaged in other similar conduct, there may have been grounds for mistrial had the losing counsel brought the matter immediately to the attention of the trial court. Kuiper v. Goodyear Tire & Rubber Co., 207 M 37, 673 P2d 1208, 40 St. Rep. 1861 (1983).

Habitual Traffic Offender — Proper Foundation Required: In an action arising out of an automobile accident, the District Court advised counsel for the plaintiff that testimony regarding defendant's bad driving record would not be admitted unless a foundation was laid establishing a clear connection between defendant operating his vehicle as an unlicensed habitual traffic offender and plaintiff's injuries. No such foundation was laid, and the evidence was not admitted. This ruling was proper since the evidence was highly prejudicial and was relevant only to an issue of competency and could not be used to prove any specific act of negligence at issue in the case. It was error to grant a new trial on the basis that this evidence was excluded. Nelson v. Hartman, 199 M 295, 648 P2d 1176, 39 St. Rep. 1409 (1982).

Motion Properly Denied — Standard Not Pleaded or Proved: The motion for new trial was properly denied since the standard contained in 25-11-102 has not been pleaded or proved in the record. Maberry v. Maberry, 183 M 219, 598 P2d 1115 (1979).

Error in Granting New Trial Where Objectionable Exhibit Never Admitted: In an action for damages for injuries suffered from an auto accident, the lower court erred in granting a new trial to the state since its substantial rights were not affected by plaintiff's offer of an exhibit in the form of a petition signed by residents protesting conditions of the highway of the accident. No prejudice existed because the offered exhibit was never admitted as evidence. Giles v. Flint Valley Forest Prod., 179 M 382, 588 P2d 535 (1979).

Proximate Cause — New Trial Proper to Consider Damage Award: While the jury could have considered other factors as going to the issue of "proximate cause", they would not explain the inadequacy and inconsistency of the verdict in the light of uncontradicted testimony. Thus, the Supreme Court found no abuse of discretion by the lower court in awarding a new trial but declined plaintiffs' invitation to simply make a mathematical recalculation of damages when several issues remained that were within the province of a jury. Ferguson v. Town Pump, Inc.,

177 M 122, 580 P2d 915 (1978), overruled on other grounds in Bohrer v. Clark, 180 M 233, 590 P2d 117 (1978).

Cumulative Error Doctrine Rejected: Although defendant set forth 25 specifications of error, a 514-page brief and an 800-page appendix, the Supreme Court found no merit to the argument that a new trial should be granted because of "cumulative error". St. v. McKenzie, 171 M 278, 557 P2d 1023 (1976).

Statement of Grounds Required: Rule 7(b)(1), M.R.Civ.P., requires that a motion state the grounds with particularity, and it was error to grant a new trial based on a motion that merely recited the grounds in the words of subsections (1), (6), and (7) of this section without more particularity. Halsey v. Uithof, 166 M 319, 532 P2d 686 (1975).

Inadmissibility of Evidence: Although the plaintiff presented other evidence of negligence, the introduction of hearsay report showing slight malfunctioning of a ski lift was reversible error. Pessl v. Bridger Bowl, 164 M 389, 524 P2d 1101 (1974).

Failure to Poll Jury — New Trial Improperly Granted: Court abused discretion in granting new trial based solely on ground that it had erred in refusing request for poll of jury; error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that in response to question by judge, foreman of jury advised him they had agreed upon verdict and that following reading of verdict, signed by foreman, judge inquired of jury if it was true verdict of at least eight of them and jury answered in affirmative. Martello v. Darlow, 151 M 232, 441 P2d 175 (1968).

Conditions on Denial Improper: The trial court had no power in a condemnation case to condition its denial of a new trial on acceptance by the Highway Commission (now Transportation Commission) of a higher award. St. Highway Comm'n v. Schmidt, 143 M 505, 391 P2d 692 (1964).

Irregularities in Proceedings — Appearance of Defendant Pro Se: Where defendant appeared on his own behalf at trial and proceeded to question witnesses in a manner in which he, the defendant, testified numerous times while conducting the questioning and where the defendant violated other rules of evidence, the court did not abuse its discretion in granting the defendant a new trial to rectify these errors, under subsection (1) of this section. Waite v. Waite, 143 M 248, 389 P2d 181 (1964).

Sound Basis for Failure to Object at Trial — No Waiver of Grounds for New Trial: If plaintiff is unable to expose the misconduct of the defendant because of a reasonably based fear for the safety of a witness, then failure to do so is not a waiver of the irregularity in the proceedings of the court. Herren v. Hawks, 139 M 440, 365 P2d 641 (1961).

Irregularity in Proceedings — Receipt of Evidence and Findings of Fact: Where, in an action upon an account stated, the court admitted testimony of the parties, subject to an objection, indicating it would take the objection under advisement and later ruled on all of the objections so taken under advisement all at once, and where the court made no findings of fact, although none were required, granting the defendant's motion for a new trial was an abuse of discretion as none of the irregularities were such as to deprive the defendant of a fair trial. Kynett v. New Mine Sapphire Synd., 137 M 82, 350 P2d 361 (1960).

Mistrial Motion: Whenever it appears that there has been such misconduct in a trial or that prejudicial matter has been allowed to go to the jury, without opportunity to object in advance and the effect of which cannot be removed by an admonition on the part of the court, the aggrieved party may move for a mistrial and, failing in that, he will be considered to have taken his chances with the jury. Hayward v. Richardson Constr. Co., 136 M 241, 347 P2d 475 (1959), overruling Robinson v. F. W. Woolworth Co., 80 M 431, 261 P 253 (1927).

Failure to Rule on Motion: Under the provisions of section 93-5606, R.C.M. 1947 (superseded by Rule 59(d), M.R.Civ.P.), where the trial judge failed and omitted to allow or grant plaintiff's motion for a new trial, the motion is considered denied. Seibel v. Byers, 136 M 39, 344 P2d 129 (1959).

Separation of Issues for New Trial — Single Cause of Action: This section does not permit the piecemeal granting of the motion for a new trial. A motion for a new trial must be granted in whole or not at all where the complaint set forth but a single count or single cause of action, and the verdict which determines such controversy is a single entity which must stand or fall as a whole. Seibel v. Byers, 136 M 39, 344 P2d 129 (1959).

Separation of Issues for New Trial: Court has authority to grant a motion for new trial as to part of the items sued on and to deny it as to other items. State ex rel. Tripp v. District Court, 130 M 574, 305 P2d 1101 (1957).

Motion Based on Death of Judge — Waiver of Right: Where the trial judge died before making findings of fact, his successor is without authority to make findings of fact and conclusions of law

without the consent of the parties involved, either of which can insist upon a new trial; however, a party may waive such right and consent that the successor decide the case on the record made before the trial judge without waiving the right to question the weight to be given to the findings of the successor. Worden v. Alexander, 108 M 208, 90 P2d 160 (1939).

Right to Bill of Exceptions Lost — Implied Repeal: Subsection (8) of this section (now deleted) applies in all cases where the facts come within it, and insofar as it conflicts therewith, 25-11-103 must be considered repealed by implication, under the rule that if two acts on the same subject are so repugnant as to be irreconcilable or if the later act is inconsistent with the first and the Legislature intended it should be the only law on the subject, the prior statute is repealed by it. State ex rel. Jackson v. District Court, 107 M 30, 79 P2d 665 (1938).

Lack of Objection at Trial — Waiver of Grounds for New Trial: Where counsel without objection or exception acquiesced in an order limiting the time for argument to the jury, they were precluded from urging as a ground of motion for new trial undue limitation thereof, thereby depriving them of a fair trial. Norton v. Great N. Ry., 78 M 273, 254 P 165 (1927). See also Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Time of Motion for New Trial: A motion for a new trial may be made before or after entry of judgment, the motion not being directed against the judgment but against the verdict or decision on which a judgment might be based; hence the contention made on appeal from a judgment rendered on a retrial that respondent's motion should not have been made until after entry of judgment has no merit. Brunnabend v. Tibbles, 76 M 288, 246 P 536 (1926).

Lack of Specificity of Notice of Motion — New Trial Properly Denied: A Trial Court cannot be put in error for denying a motion for new trial on a matter not brought to its attention in the notice of motion. Gardiner v. Eclipse Grocery Co., 72 M 540, 234 P 490 (1925).

Equity Cases — Court Trials: In an equity case and in one tried by the court without a jury, the insufficiency of the evidence to justify the decision and errors at law occurring at the trial are not available as grounds for a new trial. Davenport v. Davenport, 69 M 405, 222 P 422 (1924).

Denial of Jurisdiction in Probate Proceedings — Motion Properly Made: Where a guardian petitioned the court in a probate proceeding for an order directing an administrator to pay certain claims allowed against the estate as due his wards to himself personally, on the ground that he had become subrogated to their rights, to which petition objections in the nature of answers were filed, petitioner filed replies raising issues of fact, and the court denied the petition for lack of jurisdiction to determine the equitable claim of subrogation, a motion for new trial lay. In re Stinger Estate, 61 M 173, 201 P 693 (1921).

Incorrect Findings of Fact: A motion for a new trial lies where an issue of fact was wrongfully or erroneously determined by the jury or by direction of the court. Buckhouse v. Parsons, 60 M 156, 198 P 444 (1921).

Sufficiency of Pleadings — No Challenge at Trial: Where the sufficiency of the complaint was not challenged during the trial and there was no ruling in reference to it, there is nothing, as to that matter, which can be regarded as an "error of law occurring during the trial", upon which a motion for a new trial might be made; in such a case, the sufficiency of the complaint can be examined only on appeal from the judgment. O'Rourke v. Grand Opera House Co., 47 M 459, 133 P 965 (1913); Campbell v. Great Falls, 27 M 37, 69 P 114 (1902); Schatzlein Paint Co. v. Passmore, 26 M 500, 68 P 1113 (1902).

Remarks by Court During Trial: Remarks made by the court during a trial, if errors at all, fall within subsection (1) of this section; they do not constitute errors of law within the meaning of subsection (7). Hopkins v. Kitts, 37 M 26, 94 P 201 (1908).

Sufficiency of Pleadings — Appeal of Order Denying New Trial: The review on appeal from an order denying a new trial, being limited to the consideration of such matter as may be presented to the trial court as grounds for a new trial under the provisions of this section, among which are "errors of law occurring at the trial and excepted to by the party making the application", the question whether the complaint states a cause of action cannot be considered on such an appeal where it does not appear from the record that its sufficiency was questioned during the trial. Campbell v. Great Falls, 27 M 37, 69 P 114 (1902). See also Ayotte v. Nadeau, 32 M 498, 81 P 145 (1905); Leggat v. Gerrick, 35 M 91, 88 P 788 (1907); Murray v. Butte, 35 M 161, 88 P 789 (1907); Glendenning v. Slayton, 55 M 586, 179 P 817 (1919).

Transcript Lost — Motion Not to Be Granted: The fact that a referee had absconded and failed to return the transcript of the evidence was not ground for a new trial. Ogle v. Potter, 24 M 501, 62 P 920 (1900).

STATUTORY BASIS FOR NEW TRIAL

Improper Denial of Challenge for Cause Based on Debtor-Creditor and Attorney-Client Relationships — Erroneous Ruling on Challenge for Cause Prejudicial as Matter of Law — New Trial Warranted: During voir dire, prospective juror Derrig revealed that he was president of a bank that was represented by plaintiff's trial counsel, that he had worked with plaintiff in the past in his position as bank president, and that the bank was one of plaintiff's creditors. Defendant twice challenged Derrig for cause, based on the debtor-creditor relationship between plaintiff and the bank and because of the potential for bias arising from Derrig's attorney-client relationship with plaintiff's attorney. Both challenges were denied, so defendant ultimately used a peremptory challenge to remove Derrig from the jury panel. Defendant claimed that denial of its challenge for cause was improper. Because defendant was forced to use a peremptory challenge to remove Derrig, and in fact used all its peremptory challenges, defendant maintained that it was denied an equal number of peremptory challenges and was thus entitled to a new trial. The Supreme Court agreed. Pursuant to 25-7-223, there is no substantive difference between the chief executive officer of a creditor who is responsible for the creditor's success and the creditor itself when it comes to impartiality and jury duty. Further, an ongoing attorney-client relationship between a prospective juror and trial counsel represents the strong possibility of bias in favor of the party represented by that attorney. Under the rule in King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038 (1993), and St. v. Williams, 262 M 530, 866 P2d 1099 (1993), when a District Court erroneously denies a challenge for cause, it is the substantive equivalent of granting more peremptory challenges to one side than to the other, which is prejudicial as a matter of law, warranting reversal and a new trial. Reff-Conlin's, Inc. v. Fireman's Fund Ins. Co., 2002 MT 60, 309 M 142, 45 P3d 863 (2002).

Cumulative Errors Inapplicable in Civil Cases — New Trial Not Warranted: In a wrongful termination action, the District Court erroneously granted a motion for a new trial to the employer based on the cumulative effect of six alleged errors. On appeal, the Supreme Court reversed, ruling that the doctrine of cumulative error, while applied in criminal cases, is not extended to civil cases. Because none of the errors considered individually warranted a new trial, the lower court erred in ordering a new trial on the cumulative effect of six errors. Baxter v. Archie Cochrane Motors, Inc., 271 M 286, 895 P2d 631, 52 St. Rep. 444 (1995).

Motion Properly Denied — Standard Not Pleaded or Proved: The motion for new trial was properly denied since the standard contained in 25-11-102 has not been pleaded or proved in the record. Maberry v. Maberry, 183 M 219, 598 P2d 1115 (1979).

Motion Inadequate: Defendants' motion for new trial was inadequate and defective in its essential elements because it merely recited the statutory language of 25-11-102 without stating with particularity the precise facts or circumstances being relied upon in support of their motion. Mont. Williams Double Diamond Corp. v. Hill, 175 M 248, 573 P2d 649 (1978). See also C. Haydon Ltd. v. Mont. Min. Properties, Inc., 286 M 138, 951 P2d 46, 54 St. Rep. 1341 (1997), affirming the denial of a new trial.

Motion for New Trial: When a motion for a new trial merely copied statutory language and did not state with particularity the grounds for granting a new trial under this statute, the motion was defective in its essential respects in that it failed to meet recognized statutory requirements. Halsey v. Uithof, 166 M 319, 532 P2d 686 (1975).

Remedy Exclusive: A motion for a new trial is a statutory remedy and can only be invoked in the manner, within the time, and upon the grounds provided for in the statutes. State ex rel. Smith v. District Court, 55 M 602, 179 P 831 (1919); Evans v. Oreg. Short Line R.R., 51 M 107, 149 P 715 (1915); State ex rel. Jones v. District Court, 50 M 1, 144 P 564 (1914); State ex rel. Culbertson Ferry Co. v. District Court, 49 M 595, 144 P 159 (1914); Canning v. Fried, 48 M 560, 139 P 448 (1914); Jackway v. Hymer, 42 M 168, 111 P 720 (1910); Harrington v. Butte, Anaconda & Pac. Ry., 36 M 478, 93 P 640 (1907); Vreeland v. Edens, 35 M 413, 89 P 735 (1907); Wright v. Matthews, 28 M 442, 72 P 820 (1903); State ex rel. Stromberg-Mullins Co. v. District Court, 28 M 123, 72 P 412 (1903); Ogle v. Potter, 24 M 501, 62 P 920 (1900); Whitbeck v. Mont. Cent. Ry. & Great N. Ry., 21 M 102, 52 P 1098 (1898).

Statutory Ground Exclusive: A new trial cannot be granted upon any other ground than one named in this section. Canning v. Fried, 48 M 560, 139 P 448 (1914).

Law and Equity Cases: The rule that a motion for a new trial is a statutory remedy and can only be invoked in the manner, within the time, and upon the grounds provided for in the statutes applies equally to law and equity cases. Ogle v. Potter, 24 M 501, 62 P 920 (1900).

JURY MISCONDUCT

Failure of Juror to Relate Prior Meeting of Plaintiff's Husband Not Sufficiently Adversarial to Constitute Juror Misconduct to Warrant New Trial: During voir dire, counsel for both parties asked potential jurors if they knew any of the parties or witnesses but received no affirmative response. Plaintiff's husband was not in the courtroom during voir dire, but was present during trial. After plaintiff had rested, a juror informed the court that she recognized plaintiff's husband from a brief meeting 8 or 10 years earlier when he had borrowed some tools from the juror's husband but reaffirmed her belief that she could be impartial. Without objection, the judge ruled that the juror's statement did not require removal from the panel. After the jury found for defendant, plaintiff moved for a new trial on grounds that the juror had not revealed past contact with plaintiff, including the parties' participation on opposite sides of a subdivision legal dispute. The motion was denied, and on appeal, the Supreme Court affirmed. Plaintiff failed to establish a prior relationship that rose to the level of adversarial, and the trial court did not abuse its discretion in denying a new trial on grounds of juror misconduct. Bailey v. Beartooth Communications Co., 2004 MT 128, 321 M 305, 92 P3d 1 (2004).

Claim of Juror to Be Psychic Not Violative of Due Process Rights: On the second day of jury deliberations, two jurors brought forward concerns that another juror with strong opinions in the case claimed to be a psychic. With counsel present, the trial court questioned the jury foreman as to whether that particular juror would be able to base a decision on the law and the evidence. The court and counsel ultimately determined that no problem existed, and deliberations continued. On appeal, DuBray argued that allowing a psychic juror constituted a due process violation. The Supreme Court noted that DuBray's counsel helped formulate the response to the situation and, finding nothing in the record to indicate that the juror's strong opinions were based on psychic powers or that the juror would not be able to lay aside the opinions and render a fair verdict, held that DuBray's right to a fair and impartial jury was not violated. St. v. DuBray, 2003 MT 255, 317 M 377, 77 P3d 247 (2003). See also St. v. McMahon, 271 M 75, 894 P2d 313 (1995).

Comments by Prospective Juror Not So Egregious as to Be Incurable — Denial of New Trial Proper: Wright was charged with felony possession of and intent to sell drugs. Wright's attorney had been granted a motion in limine excluding all references regarding the defendant's criminal history. A prospective juror, in response to a question by the judge, responded that he knew the defendant and was aware of a past trial involving the defendant and based on the same kind of charges as the present case. The judge dismissed the prospective juror but refused to dismiss the entire panel. The defendant was convicted on three counts, and the trial judge refused to grant a new trial based on the possible prejudicial effect of the comments by the proposed juror. The Supreme Court held that the lower court had properly denied a new trial because the comments by the prospective juror were not so egregious as to be incurable by the District Court's admonishment to the jury to decide the case based only on the evidence presented during trial. St. v. Wright, 2002 MT 275, 312 M 352, 59 P3d 432 (2002).

Juror's Affidavit of Juror Misconduct — Inadmissible Under Ahmann Exception — No Evidence of External Influence — Right to Fair and Impartial Jury Not Violated: Berg argued that he was entitled to a new trial because of jury misconduct and attached to his motion the affidavit of juror Flinders stating that juror Carroll said at one point during the trial, in regard to witness testimony: "That's it; that's all I need to hear; it's all over." The affidavit also stated that juror Carroll pointed to another juror and said in regard to the juror, "That's one we'll have to convince." The Supreme Court noted that although affidavits are usually used to prove juror misconduct under subsection (2) of this section, they may also, under the exception rationale used in Ahmann v. Am. Fed. S&L Ass'n, 235 M 184, 766 P2d 853 (1988), be used pursuant to subsection (1) when the only two people with knowledge of the infraction are a juror and another person. However, the Supreme Court found that the Ahmann exception did not apply when the communication was between jurors. The Supreme Court also discussed the applicability of Rule 606(b), M.R.Ev. (Title 26, ch. 10), and determined that the comments made by juror Carroll were not an external influence upon the jury and therefore did not fall within the exception to the general prohibition against use of juror affidavits to impeach a jury contained in Rule 606(b). Regarding Berg's final argument that the jury misconduct violated the District Court's instructions and Berg's right to a fair and impartial jury, the Supreme Court reviewed California case law raised by Berg and concluded that it was inapplicable in Montana. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Jury's Use of Dictionary Definitions Conflicting With Instructions: The jury used an ordinary dictionary and a legal dictionary, improperly given to the jury by the bailiff at the jury's request, to look up the terms "proximate cause" and "prudent". The definitions relating to causation did not contain the foreseeability element that was contained in an instruction given to the jury. The

jury's conduct constituted improper independent research on extraneous material that redefined the critical element of causation by effectively eliminating from the instruction any reference to foreseeability. This was sufficient to demonstrate probable prejudice and potential injury to defendant, against whom the jury returned a verdict in this action. At the very least, there was a reasonable probability that the jury's misconduct influenced its decision, and as a consequence, defendant's substantial rights were compromised, along with his right to a fair trial. The trial judge's denial of a new trial was reversed, and the case was remanded. Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995).

Improper Comments by Prospective Jurors During Voir Dire — Prejudicial Effect Warranting Reversal: Comments made in the presence of the entire jury panel indicating that certain potential jurors not only knew the defendant but also were aware of the defendant's high propensity for violence were prejudicial, thereby poisoning the perspective of the entire jury panel in such a way that the court could not rectify the problem through admonishment or curative jury instructions and constituting reversible error. This opinion was narrowly drawn and reserved only for the most egregious and prejudicial juror comments—comments that indicate a bias that the juror cannot lay aside or comments that, when made in the presence of other prospective jurors, amount to inadmissible opinions about the defendant's character or propensities. The Supreme Court suggested that District Courts advise prospective jurors, before voir dire commences, not to volunteer the substance of any comments or opinions that they may have about the parties but rather to notify the court that they have information or an opinion about a party. The trial judge can then explore the substance of that information in camera and avoid any taint to the entire jury panel. St. v. McMahon, 271 M 75, 894 P2d 313, 52 St. Rep. 353 (1995), following principles established in Putro v. Baker, 147 M 139, 410 P2d 717 (1966), and followed in St. v. Hardaway, 1998 MT 224, 290 M 516, 966 P2d 125, 55 St. Rep. 936 (1998).

Juror Outburst — Court's Removal of Child Witness From Stand — No Prejudice to Defendant: A juror's request to be dismissed when defense counsel persisted in questioning a 9-year-old witness who repeatedly broke down in tears at a certain point in questioning and the court's removal of the witness from the stand did not warrant a mistrial. There was no showing that the juror's outburst resulted in prejudice to defendant, and removal of the witness did not deprive defendant of the right to confront and cross-examine witnesses when the court gave defense counsel the option to resume questioning at a later time. St. v. McNatt, 257 M 468, 849 P2d 1050, 50 St. Rep. 365 (1993), followed in St. v. Gollehon, 262 M 293, 864 P2d 1257, 50 St. Rep. 1564 (1993), and cited in St. v. Brandon, 264 M 231, 870 P2d 734, 51 St. Rep. 244 (1994).

Grant of New Trial for Jury Irregularity Inapplicable to Defendants Granted Directed Verdict: King sued the Montana Power Company and two wholly owned subsidiaries, Entech, Inc., and Special Resource Management, Inc. (SRM), for wrongful discharge. At trial, the District Court erroneously granted eight peremptory challenges to the three codefendants and granted King a new trial against SRM. Citing O'Brien v. Great N. RR Co., 148 M 429, 421 P2d 710 (1966), King claimed that because all three codefendants had an interest in the case, he is entitled to a new trial against all three. The Supreme Court distinguished O'Brien because this case involved multiple parties governed by different rules of law. The ruling in favor of SRM was reversed because of the District Court's error in allowing additional peremptory challenges. In regards to the other defendants, the case never reached the jury, so King's rights were not affected. The jury irregularity did not apply to the directed verdicts for failure to pierce the corporate veil. King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038, 50 St. Rep. 117 (1993).

Juror's Independent Research as Misconduct Warranting New Trial: Defendant presented expert testimony regarding the theory of kinematics and motion theory in relation to the location of a highway construction flasher board at the time of an automobile accident. The jury foreman, who had taken physics in college, went to a local library to research the theories presented at trial and related to at least one juror that it clarified the expert testimony. The location of the flasher board was at the heart of the case, and the juror's independent alleged confirmation constituted misconduct that resulted in probable prejudice to plaintiff's case. The juror was in effect made a witness as to any jurors to whom he mentioned his research. A new trial was warranted. Brockie v. Omo Constr., Inc., 255 M 495, 844 P2d 61, 49 St. Rep. 1092 (1992).

Verdict Growing Out of Quotient Process Invalid: Generally, if the amount of the verdict is not exactly the quotient sum but is adopted as a result of the quotient process and grows out of that process, the verdict is invalid. The mere fact that the amount of the quotient and the amount of the final verdict differ is not conclusive of whether the jurors were in fact bound by a prior agreement to adopt a quotient verdict. Stanhope v. Lawrence, 241 M 468, 787 P2d 1226, 47 St.

Rep. 438 (1990), followed in Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991). See also Guertin v. Moody's Market, Inc., 265 M 61, 874 P2d 710, 51 St. Rep. 407 (1994).

Verdict Rendered in Twenty-Five Minutes — No Error: Defendant claimed that the fact that less than 25 minutes elapsed between the time a case was submitted to the jury and the time the jury brought in a verdict demonstrated that the jury failed to consider or read the jury instructions, consider the evidence, or follow its charge. However, in light of overwhelming substantial evidence and a lack of error of law in the record, the verdict was affirmed. St. v. Seaman, 236 M 466, 771 P2d 950, 46 St. Rep. 512 (1989).

Irregularities in Jury Proceedings — Juror Affidavit — New Trial Denied: To support their motion for a new trial in District Court, plaintiffs submitted an affidavit of one juror, alleging that certain statements made by the bailiff during jury deliberations misled the jury and prevented clarification of the issue of proximate cause. Juror affidavits are admissible to show grounds upon which a new trial may be granted when a juror has personal knowledge of an alleged irregularity in the proceedings and the only other individual who has personal knowledge of the facts surrounding the irregularity is the individual who committed the alleged infraction. Only the facts upon which the alleged irregularities are based are admissible. Any allegations regarding the inner workings of the jury deliberations are inadmissible. The Supreme Court will not overrule the District Court's refusal to grant a new trial unless the evidence is clear and convincing that the trial court erred. Ahmann v. Am. Fed. S&L Ass'n, 235 M 184, 766 P2d 853, 45 St. Rep. 2305 (1988), overruled as to standard of review in Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995), and distinguished in State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Attempt by Jury Foreman to Convey Information on Defendant's Criminal Record to Jury — Remand for New Trial: The jury foreman heard in a third-party conversation that "defendant had a criminal record as long as your arm" and attempted to convey the information to the rest of the jury. Although the jury declined to hear the offered information, the injury to defendant had already occurred when the foreman heard the prejudicial comments and informed the remaining jurors that he had reliable information from the Sheriff's office. The District Court denied a motion for mistrial after examining three jurors, but the Supreme Court would not assume that the entire panel was safeguarded from contamination. In remanding for a new trial, the Supreme Court held that the presumption of prejudice that was created when uncontroverted evidence established that prejudicial statements reached one or more jurors was not rebutted when no evidence existed to rebut the presumption other than testimony of three of the jurors. St. v. DeGraw, 235 M 53, 764 P2d 1290, 45 St. Rep. 2154 (1988), distinguishing St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987), St. v. Counts, 209 M 242, 679 P2d 1245 (1984), and St. v. Gillham, 206 M 169, 670 P2d 544 (1983).

Juror's Alleged Reading of Related Newspaper Article Not Grounds for New Trial: Defendant's attorney submitted an affidavit from his secretary in which she claimed to have heard a juror admit to reading newspaper articles about the trial during the trial, and he contended defendant was therefore entitled to a new trial on grounds of jury misconduct. The argument failed because defendant did not identify the juror or submit an affidavit from that juror. Further, defendant failed to show that the juror was induced to assent in the verdict or that any rights were materially affected. St. v. Crazy Boy, 232 M 398, 757 P2d 341, 45 St. Rep. 1145 (1988).

Mistrial Denied Despite Juror Misconduct — No Error: A juror disregarded trial court instructions by talking with a County Attorney, who assisted in the prosecution, about the propriety of allowing evidence of child abuse in open court. Another juror was seen entering Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) offices after evidence was allowed showing the agency was peripherally involved in the case, and there was evidence the juror discussed the defendant and her children during a conversation at a restaurant. Arguably, the jury misconduct tended to injure the defendant, and therefore prejudice should be presumed; however, the trial judge could determine that there was sufficient evidence to rebut the presumption. Since there was not clear and convincing evidence of error in denying a motion for mistrial, the ruling was affirmed. St. v. Murray, 228 M 125, 741 P2d 759, 44 St. Rep. 1394 (1987).

Conduct Not Prejudicial: There was no prejudicial jury misconduct to merit a new trial when some jurors in a trial stemming from an automobile accident inadvertently saw defendant's car during noon recess where it was parked outside the courthouse. Erickson v. Perrett, 175 M 87, 572 P2d 518 (1977).

Improper Use of Affidavits: Trial court's granting of new trial on grounds of jury misconduct was reversible error where such motion was made under subsection (1) of this section and

supported by jury affidavits, since use of jury affidavits under this section is confined to motions made under subsection (2). Rasmussen v. Sibert, 153 M 286, 456 P2d 835 (1969), followed in Rieger v. Coldwell, 254 M 507, 839 P2d 1257, 49 St. Rep. 768 (1992), and State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Lack of Prejudice: Trial court did not err in denying plaintiff's motion for a new trial, on the ground of misconduct of the jury during its deliberations, supported by affidavits of four jurors indicating that the irregularity was not on a material matter in dispute, where plaintiff was probably not prejudiced by juror's misconduct in improperly referring to prior litigation in which plaintiff had been involved, the poll of the jury showing an eight to four verdict for the plaintiff. Schmoyer v. Bourdeau, 148 M 340, 420 P2d 316 (1966), followed in Easterday v. Canty, 219 M 420, 712 P2d 1305, 43 St. Rep. 60 (1986) (overruled on other grounds by adoption of Rule 5 Uniform District Court Rules), and overruled as to standard of review in Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995). (See official comment.)

Investigation by Jury Foreman: New trial was properly granted where foreman of jury made his own investigation at the scene of the accident after hearing testimony and informed the other members of the jury, during their deliberation, of the results of his investigation. The foreman was guilty of misconduct upon which verdict could be impeached by affidavits of jurors. Goff v. Kinzle, 148 M 61, 417 P2d 105 (1966), distinguished in Rasmussen v. Sibert, 153 M 286, 456 P2d 835 (1969) and Charlie v. Foos, 160 M 403, 503 P2d 538 (1972).

Newspaper Seen by Jurors: In a condemnation proceeding, affidavits from jurors showing that a newspaper cartoon having to do with condemnation cases in general had been viewed by some members of the jury during the trial could not be used to support the motion for a new trial in the absence of a showing that the verdict was reached in a manner other than by a fair expression of opinion by the jurors. St. Highway Comm'n v. Manry, 143 M 382, 390 P2d 97 (1964), distinguished in Goff v. Kinzle, 148 M 61, 417 P2d 105 (1966) and Rasmussen v. Sibert, 153 M 286, 456 P2d 835 (1969).

Resort to Chance Not Found: Where, after a judgment of damages was given against the defendant, the defendant and plaintiff each submitted affidavits by the jurors tending to prove or disprove jury misconduct by the resort to a "quotient verdict", the court did not abuse its discretion in denying the defendant's motion for a new trial on the grounds of jury misconduct, even though a mathematical formula may have been implied at some point to arrive at a figure, the affidavits failed to show that the jurors agreed to be bound by the results of the formula. Teesdale v. Anschutz Drilling Co., 138 M 427, 357 P2d 4 (1960).

Misconduct Not Shown: In a flood case involving alleged negligence of a railway company, affidavit in support of plaintiff's motion for new trial did not show misconduct of the jury or depriving plaintiff of a fair trial under subsections (1) and (2) of this section. Wibaux Realty Co. v. N. Pac. Ry., 101 M 126, 54 P2d 1175 (1935).

Participation by Jurors: To vitiate a verdict arrived at by chance, it is not necessary that all of the jurors joining in it or a majority of them must have been induced to assent to the method employed in arriving at the verdict, it being sufficient under this section if any one of them assented thereto. Benjamin v. Helena Light & Ry., 79 M 144, 255 P 20 (1927).

"Quotient Verdict" Defined: A quotient verdict, rendition of which constitutes misconduct of the jury and is ground for a new trial, is one arrived at by adding the amounts each juror thinks should be awarded and dividing the sum by twelve, with the agreement in advance to return a verdict for the quotient so found. Benjamin v. Helena Light & Ry., 79 M 144, 255 P 20 (1927), followed in Stanhope v. Lawrence, 241 M 468, 787 P2d 1226, 47 St. Rep. 438 (1990).

Demonstration to Jurors During Trial: Where in an action for personal injuries sustained in a collision between a streetcar and a railway train, the operation of air brakes on a streetcar was not involved, the fact that a motorman demonstrated its operation to two of the jurors in the case while the trial was in progress was insufficient to warrant the granting of a new trial on the ground of misconduct of the jurors. Norton v. Great N. Ry., 78 M 273, 254 P 165 (1927).

Quotient Verdict as Valid: A verdict arrived at by taking the aggregate of the amounts representing the views of the jurors and dividing that sum by the number of jurors as a means for further consideration is valid, unless the jurors agree in advance that the quotient thus obtained shall constitute the amount of their verdict, and such agreement is carried into effect. Great N. Ry. v. Benjamin, 51 M 167, 149 P 968 (1915).

Court Instruction on Chance Verdict: Where, upon the polling of the jury in a personal injury case, the court inquires whether the verdict for the plaintiff has been reached by chance, and, several of the jurors answering in the affirmative, the court then directs them to retire and find a verdict by "deliberation and reasoning" and to exclude the element of chance, the action of the court is unauthorized; the verdict returned should have been received subject to be set aside only

upon an application under this section. Harrington v. Butte, Anaconda & Pac. Ry., 36 M 478, 93 P 640 (1907).

Construction of Evidence Not Subject to Review: In the absence of a statute and in order to secure freedom of thought, thorough discussion, and independence of action, as well as to prevent undue influence and fraud, the construction or weight given by the jury to evidence submitted to it is not subject of inquiry upon a motion for a new trial. Subsection (2) of this section does not change this rule. Spencer v. Spencer, 31 M 631, 79 P 320 (1905).

Quotient Verdict as Resort to Chance: An agreement by a jury to return a "quotient verdict" whereby each member was to indicate the amount for which he thought the verdict should be and the sum of such amounts divided by 12 should be the verdict, with an agreement to abide by such quotient, shown by the affidavits of jurymen who were induced to assent to a verdict so reached on account of such agreement, is a resort to the determination of chance and within subsection (2) of this section, allowing a new trial for such misconduct on the part of the jury. Gordon v. Trevarthan, 13 M 387, 34 P 185 (1892).

IMPEACHMENT OF VERDICT

Use of Juror Affidavits to Impeach Verdict — Limited to Showing of External Influences: Appellants sought a new trial on the grounds that posttrial juror affidavits proved that not all of the potential jurors were being truthful during voir dire, resulting in denial of the right to a fair trial. However, under Rule 606(b), M.R.Ev. (Title 26, ch. 10), the use of juror affidavits to impeach a jury verdict is limited to showing external influences on the jury. Absent the presence of any exceptions listed in Rule 606, M.R.Ev., it was not an abuse of discretion for the trial court to deny a motion for new trial on grounds of juror misconduct. Estate of Spicher v. Miller, 260 M 504, 861 P2d 183, 50 St. Rep. 1180 (1993).

Amending Special Verdict Form Several Hours After Jury Deliberations Began — Error: After several hours of deliberation, the jury returned with questions. In response to those questions, it was error for the court to amend the special verdict forms to include a determination by the jury as to whether a party acted willfully or wantonly. Although the instruction would not have been error if given at the proper time, the late inclusion denied the party the right to argue his case and properly present it before the jury. White v. Phillips, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

New Trial — Use of Juror Affidavit Disallowed: Plaintiff, mother and mother-in-law of defendants, broke her ankle by falling into a trench on a construction project in defendants' backyard. The jury found damages of $15,000, but found plaintiff 85% negligent. The District Court granted plaintiff's motion for a new trial based on irregularity in the jury proceedings, and defendant appealed. Plaintiff's motion was supported by an affidavit of the jury foreman stating the jury did not understand the instructions on contributory negligence, comparative negligence, and mitigation of damages. Cases on use of juror affidavits in granting a new trial involve either external or internal influence on the jury. This case falls into the internal influence category. The District Court abused its discretion in granting a new trial on the basis of a juror affidavit purporting to impeach the verdict by delving into the thought processes of the jurors. Harry v. Elderkin, 196 M 1, 637 P2d 809, 38 St. Rep. 2076 (1981), followed in McGillen v. Plum Creek Timber Co., 1998 MT 193, 290 M 264, 964 P2d 18, 55 St. Rep. 808 (1998).

Affidavits Limited: Jurors may not impeach their verdict by affidavit in support of a motion for a new trial except where it was reached by resort to chance. Schaff v. Shaules, 137 M 357, 352 P2d 265 (1960).

Mistake Not Provable: Affidavits of jurors will not be received to prove any mistake of the evidence or misapprehension of the law on the part of the jury, and the verdict in which they all concur must be the "best evidence" of their belief, both as to the fact and the law, and therefore conclusive. Bateman v. Donovan, 131 F2d 759 (1942).

Knowledge of Plaintiff's Action: Under this section, jurors may not impeach their verdict by affidavit in support of a motion for new trial except where it was reached by a "resort to chance"; hence the court properly denied a new trial the motion for which was based on the affidavits of four jurors that another juror, after retirement to the jury room, had stated that he knew plaintiff, was conversant with one phase of the transaction giving rise to the suit, and that the only proper thing to do was to find for him. Hough v. Shishkowsky, 99 M 28, 43 P2d 247 (1935).

Affidavits Properly Ignored: Under this section, the jury can impeach their verdict only when arrived at by resort to chance; hence affidavits by six jurors filed in support of a motion for new trial to the effect that two-thirds of the jury were in favor of denying plaintiff the relief sought and would have found in favor of defendant if they had been advised as to a fact the defendant

proposed to establish if a new trial was granted were properly ignored by the trial court. Komposh v. Powers, 75 M 493, 244 P 298 (1926), affirmed 275 US 504 (1927).

Exception for Verdict by Chance: Jurors should not be heard to impeach their own verdict, and the single exception, found in subsection (2) of this section, that they may do so where the verdict has been reached by a resort to chance, is the only one in which it will be permitted; this express exception, under the rule "expressio unius est exclusio alterius", seems to exclude all other exceptions. St. v. Lewis, 52 M 495, 159 P 415 (1916); Chenoweth v. Great N. Ry., 50 M 481, 148 P 330 (1915); Sutton v. Lowry, 39 M 462, 104 P 545 (1909); St. v. Beesskove, 34 M 41, 85 P 376 (1906).

Provision Exclusive: The provision of this section, that the affidavits of jurors may be used to impeach a verdict only when it was reached by resort to chance, is exclusive; hence, an affidavit of a juror, relating to a conversation had with another juror touching the latter's misconduct, was incompetent, as was also that of one, not a juror, as to the contents of an affidavit of the offending juror, for the same and the additional reason that it was hearsay. Sutton v. Lowry, 39 M 462, 104 P 545 (1909). See also Snyder v. Chinook, 48 M 484, 138 P 1090 (1914).

INSTRUCTIONS TO JURY

Disallowance of Jury Instruction Regarding Heightened Standard of Care of Driver in Vicinity of Children: Fifteen-year-old Hanson was struck by Edwards's car while crossing an intersection near a school. The intersection had no sidewalks, curbs, or painted lines delineating a crosswalk. Hanson sought a jury instruction that a motorist operating in an area in which children are known to likely be present has a heightened standard of care, relying on Okland v. Wolf, 258 M 35, 850 P2d 302 (1993). The instruction was denied. On appeal, the Supreme Court noted that a person's duty of care varies depending on the circumstances at the time and place in question, so in this case, as in Okland, the standard negligence instruction permitted Hanson to argue that the circumstances required a heightened standard and was thus considered adequate. Hanson v. Edwards, 2000 MT 221, 301 M 185, 7 P3d 419, 57 St. Rep. 907 (2000).

Disallowance of Jury Instruction Regarding Motorist's Affirmative Duty to Ascertain Whether Intersection Clear and to Anticipate Presence of Pedestrians: Hanson was struck by Edwards's car while crossing an intersection that had no sidewalks, curbs, or painted lines delineating a crosswalk. Hanson sought a jury instruction that a motorist has an affirmative duty to ascertain whether an intersection is clear before proceeding and a duty to anticipate that pedestrians may be present in the intersection. The instruction was denied. On appeal, the Supreme Court held that the instruction that was given, which clarified a driver's obligation to yield the right-of-way to a pedestrian in a crosswalk and a pedestrian's obligation to avoid moving into the path of a vehicle that is too close for the driver to yield, was a proper statement of law under 61-8-504 and that the trial court did not err in refusing to give Hanson's proposed instruction regarding a driver's affirmative duties. Hanson v. Edwards, 2000 MT 221, 301 M 185, 7 P3d 419, 57 St. Rep. 907 (2000).

Unmarked Crosswalk at Every Intersection: Hanson was struck by Edwards's car while crossing an intersection that had no sidewalks, curbs, or painted lines delineating a crosswalk. Hanson moved for a directed verdict on grounds that because he was in an unmarked crosswalk, which gave him the right-of-way, Edwards was negligent as a matter of law. The motion was denied, and the trial court refused to instruct the jury that an unmarked crosswalk exists at every intersection pursuant to 61-1-209 (now repealed). The Supreme Court examined legislative intent and, reading 61-1-209 (now repealed) in pari materia with 61-8-502, concluded that Montana law provides for a crosswalk on any portion of a roadway at an intersection. The jury should have been so instructed, and failure to do so was reversible error. Hanson v. Edwards, 2000 MT 221, 301 M 185, 7 P3d 419, 57 St. Rep. 907 (2000).

Failure to Instruct Jury Regarding Instrument of Revocation — Validity of Will — New Trial Proper: A new trial was warranted in an estate case when the District Court failed to instruct the jury regarding an instrument of revocation. Because the instrument of revocation and the will itself were executed so closely in time, the validity of both documents was inextricably intertwined and it was necessary that the same factfinder adjudicate the validity of both documents. Therefore, a new trial on the validity of the will was also proper. In re Estate of DeCock, 278 M 437, 925 P2d 488, 53 St. Rep. 992 (1996).

Brief Jury Deliberation of Complex Legal Issues — Streamlining and Clarification by Verdict Form — No Error: Walker contended that the jury's brief 40-minute deliberations, in conjunction with the relative complexity of the legal issues and the weight of the evidence in the case, supported his position that the trial court abused its discretion in refusing to set aside the verdict. Generally, shortness of time taken by a jury in reaching its verdict has no effect on the

validity of the verdict. Only when the brief jury deliberation is coupled with a verdict that is contrary to the great weight of the evidence should the verdict be set aside. In this case, the relative complexity of the legal issues had been narrowed and clarified by the court and counsel by the time that the jury instructions were given, and the verdict form contained only seven questions, not all of which the jury had to answer. Based on the streamlining of the issues and the Supreme Court's consideration of the issues that remained, the verdict was not contrary to the weight of the evidence and the trial court did not err in refusing to set the verdict aside. Walker v. Mont. Power Co., 278 M 344, 924 P2d 1339, 53 St. Rep. 943 (1996), following Loppe v. Blocker, 220 NW 2d 570 (Iowa 1974), and Kearns v. Keystone Shipping Co., 863 F2d 177 (1st Cir. 1988).

Instruction Using "Matter of Law" Rather Than "Per Se" — Grounds for Reversal: Hall, in a motor vehicle accident case, argued that the District Court erred in allowing defendant's jury instruction that stated that violation of a statute in an emergency situation beyond a person's control is not negligence "as a matter of law". The Supreme Court ruled that while it was true that "as a matter of law" could be construed as the equivalent of "per se", a jury instruction that uses "as a matter of law" wording is basically misleading and is grounds for reversal. Hall v. Big Sky Lumber & Supply, Inc., 261 M 328, 863 P2d 389, 50 St. Rep. 1345 (1993).

Failure to Object to Court Solution for Improper Jury Instruction — New Trial Precluded: During settlement of jury instructions, plaintiff withdrew an objectionable instruction, but the instruction was inadvertently read to the jury anyway. The court reported to the jury that the attorneys had stipulated that the instruction should be removed, the correct instruction was given, and the erroneous instruction was not sent to the jury room. Defendant argued that because the inadvertent instruction was a misstatement of law, he was prejudiced and therefore entitled to a new trial. The Supreme Court followed Rasmussen v. Sibert, 153 M 286, 456 P2d 835 (1969), in holding that even if defendant objected to the reading of the incorrect instruction, there was no objection made to the solution used by the trial court in dealing with the mistake. Because defendant did not move for mistrial or other corrective action, choosing instead to submit the case to the jury based on the posture that it was in, he was precluded from requesting relief in the nature of a mistrial for the first time on appeal after receiving a verdict he considered adverse. The same rationale applied to defendant's complaint regarding an allegedly improper closing argument by plaintiff's attorney. Okland v. Wolf, 258 M 35, 850 P2d 302, 50 St. Rep. 412 (1993).

Jury Instructions Not Founded in Evidence or Misstatement of Law — New Trial Denied: Plaintiffs sought a new trial on grounds that the trial court improperly refused to give plaintiffs' proffered instructions on termination of power of attorney, warranty, and fraudulent conveyance. However, the instructions were correctly refused because: (1) there were undefined legal terms in the instructions on termination of power of attorney that rendered the instructions ambiguous or unintelligible; (2) the giving of non-Uniform Commercial Code warranty instructions in a Uniform Commercial Code case was a technical defect and did not constitute a misstatement of law affecting the plaintiffs' rights; and (3) there was no evidence of fraudulent conveyance, rendering that instruction improper. Boyd v. St. Medical Oxygen & Supply, Inc., 246 M 247, 805 P2d 1282, 47 St. Rep. 1923 (1990).

Instructions Based on Out-of-State Supreme Court Decision Rather Than Appellate Court Decision — No Error: Plaintiff complained that the District Court erred in refusing to give three jury instructions based on a Washington appellate court decision and in giving instead an instruction taken from the Washington Supreme Court appeal of the same case, which modified the appellate court decision. The District Court did not err in refusing to give instructions based on a theory of law rejected by the Washington Supreme Court. Larson v. K-Mart Corp., 241 M 428, 787 P2d 361, 47 St. Rep. 415 (1990).

Instruction Stating Applicable Law: In a case in which the plaintiff's proposed instruction had no basis in Montana law and other instructions adequately presented the applicable law, the plaintiff could not claim reversible error as to the giving or denying of certain instructions. Feller v. Fox, 237 M 150, 772 P2d 842, 46 St. Rep. 694 (1989).

"Cline Instruction" Improper Statement of Law Regarding DUI: A jury instruction approved by the Supreme Court in St. v. Cline, 135 M 372, 339 P2d 657 (1959), stating that a violation of 61-8-401 occurred if a person drove while impaired by alcohol to the "slightest degree", was held to no longer be a proper statement of the law in light of subsequent legislative amendments which specifically spell out the extent of the influence of intoxicants necessary for conviction. The court held that the instruction must be either revised or abandoned to conform with 61-8-401 and remanded for a new trial. Helena v. Davis, 222 M 492, 723 P2d 224, 43 St. Rep. 1447 (1986).

No Objection to Jury View — New Trial Not Granted: Plaintiff contended that District Court erred in not granting a new trial when the jury was allowed to view the property prior to the time the plaintiff rested her case and in not giving a cautionary instruction. However, the record showed that plaintiff's counsel made no objection to the jury view and did not request a cautionary instruction. The Supreme Court found no District Court error for a procedure to which plaintiff did not object. Bushnell v. Cook, 221 M 296, 718 P2d 665, 43 St. Rep. 825 (1986).

Amending Special Verdict Form Several Hours After Jury Deliberations Began — Error: After several hours of deliberation, the jury returned with questions. In response to those questions, it was error for the court to amend the special verdict forms to include a determination by the jury as to whether a party acted willfully or wantonly. Although the instruction would not have been error if given at the proper time, the late inclusion denied the party the right to argue his case and properly present it before the jury. White v. Phillips, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Assumption of Risk: Where trial court erred in its instruction on assumption of risk in pedestrian injury case, trial court did not abuse its discretion by granting new trial pursuant to this section. Jankovich v. Neill, 153 M 337, 457 P2d 475 (1969).

Form of Instruction Not Chance: Long form quotient verdict instruction from Jury Instruction Guide is not "a resort to the determination of chance" within meaning of statute, in absence of showing that jurors agreed in advance that quotient thus obtained should constitute amount of verdict and adhered to that agreement. Thomas v. Whiteside, 148 M 394, 421 P2d 449 (1966).

Misconception of Law by Court: Where District Court acted under a misconception of law and granted a motion for a new trial on all of the issues, although it had the power to grant the new trial upon part of the issues only, the Supreme Court under its supervisory powers may grant complete relief and set aside the order for the new trial as to the issue on which the District Court felt new trial should not be granted. State ex rel. Tripp v. District Court, 130 M 574, 305 P2d 1101 (1957).

Irreconcilable Instructions: Where two instructions are given on the same point and there is an irreconcilable conflict between them, it is not material whether either instruction is correct as applied to the record and objection to the second instruction should have been sustained. Bennett v. Dodgson, 129 M 228, 284 P2d 990 (1955).

Error in Law as Instructions: Subsection (7) of this section embraces error in instructions. Maki v. Murray Hosp., 91 M 251, 7 P2d 228 (1932); Kleinschmidt v. McDermott, 12 M 309, 30 P 393 (1892).

Misapplication of Law to Facts: Under this section, a new trial, a reexamination of the facts, lies where an error of law has been committed by reason of misapplication of law to the facts. In re Stinger Estate, 61 M 173, 201 P 693 (1921).

ACCIDENT OR SURPRISE

Failure to File Final Pretrial Order — New Trial Not Warranted on Grounds of Irregularity, Accident, or Surprise: In a minute entry from a pretrial conference, the District Court ordered the parties to present the final pretrial order by February 25, 2002, or the trial date would be vacated. The parties failed to present a final pretrial order by that date, but the case proceeded to trial as scheduled, despite denial of defendant's motion for a continuance. Defendant failed to appear at trial, and the District Court granted summary judgment to plaintiff. Defendant moved for a new trial because of an irregularity in the proceedings or because of accident or surprise. The motion was denied, and defendant appealed, but the Supreme Court affirmed. Defendant knew that it was obligated to file a formal motion seeking a continuance if the trial date was to be vacated. When defendant filed the continuance motion, it was denied, so it was not plausible that defendant believed that the trial date had been vacated by the parties' failure to file a final pretrial order. Thus, the District Court did not abuse its discretion in denying the motion for a new trial because defendant was not deprived of its substantive rights by either an irregularity in the proceedings or an accident or surprise. Westmark Int'l Corp. v. Gold Hill Placers, Inc., 2003 MT 119, 315 M 492, 70 P3d 731 (2003).

Improper Admission of Testimony of Expert — Reference to Unintroduced Exhibit — No Surprise: During his testimony, defendants' expert referred to a document that was not listed during discovery as one of the documents upon which he based his opinion and that was not a document to which he had access prior to deposition. Plaintiffs alleged surprise as grounds for a new trial, asserting defendants should have supplemented the expert's responses to his deposition, consistent with Rule 26(e), M.R.Civ.P. (Title 25, ch. 20), to reveal that the expert had gained access to the report subsequent to deposition. However, the expert also testified that he

had formed his opinion prior to receipt of the report and that the report did not affect his analysis or conclusion. Because plaintiffs were unable to show that the surprise had a material bearing on the case or that the result of a new trial would probably be different, they were not entitled to a new trial because of improper admission of the expert's testimony. Boyd v. St. Medical Oxygen & Supply, Inc., 246 M 247, 805 P2d 1282, 47 St. Rep. 1923 (1990), followed in Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Use of Juror Affidavits in Attempt to Prove Irregularity or Accident Improper: In moving for a new trial, plaintiffs submitted juror affidavits as evidence that the jury was misled in its duties, asserting that constituted an irregularity or accident preventing plaintiffs from receiving a fair trial. However, this tactic was an attempt to use juror affidavits to impeach the jury's own verdict. If a motion for a new trial is to be granted, an irregularity or accident in jury proceedings must exist independent of juror affidavits. Use of juror affidavits to prove irregularity or accident is clearly improper. The alleged misunderstanding of the jurors in this case did not fit any of the exceptions enumerated in Rule 606(b), M.R.Ev. (Title 26, ch. 10). Motion for a new trial was properly denied. Boyd v. St. Medical Oxygen & Supply, Inc., 246 M 247, 805 P2d 1282, 47 St. Rep. 1923 (1990).

Accident or Surprise — Change of Key Witness' Testimony: The ultimate issue in motor vehicle accident case was what caused tractor-trailer combination to overturn and slide into the other lane. Plaintiff introduced an accident scene diagram drawn by a state engineer from figures obtained by the investigating highway patrolmen. It placed the tractor-trailer's skid marks in the early part of the curve in which the overturn occurred, where the curve's radius was less than it was later in the curve, thus buttressing plaintiff's theory of the case. At trial, defendants recalled a highway patrolman, who testified that the patrolmen had incorrectly placed the skid marks on the diagram and that they should be placed farther into the curve, where the radius of the curve was sharper. The placement of the skid marks and the sharpness of the curve at the point of the skid were essential to resolution of the ultimate issue. Plaintiff was properly granted a new trial on the ground of accident or surprise which ordinary prudence could not have guarded against because: (1) it was clearly shown that he was actually surprised; (2) the facts causing the surprise had a material bearing on the case; (3) the verdict or decision resulted mainly from those facts; (4) the surprise did not result from plaintiff's inattention or negligence; (5) plaintiff acted promptly and claimed relief at the earliest opportunity; (6) plaintiff used every means reasonably available at the time of the surprise to remedy it; and (7) the result of a new trial without the surprise would probably be different. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984), followed in In re Adoption of S.E., 232 M 31, 755 P2d 27, 45 St. Rep. 843 (1988), Donovan v. Graff, 231 M 456, 753 P2d 878, 45 St. Rep. 758 (1988), and in Boyd v. St. Medical Oxygen & Supply, Inc., 246 M 247, 805 P2d 1282, 47 St. Rep. 1923 (1990). See also Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Surprise When Damages Based on Fixed Contract Price Rather Than Estimated Price of Repair: Where the estimated cost of repairing damage sustained by a home under an implied warranty of habitability was $65,000, but the contractor later indicated that, because of the unknown contingencies which might be encountered, he would not bid the job for less than $97,500, the District Court allowed damages of $97,500. The Supreme Court determined there was no surprise sufficient to grant a new trial since there were references in the record sufficient to alert defendant to the fact that a fixed-price contract would be different from the estimate and would be relied on by the plaintiff. Chandler v. Madsen, 197 M 234, 642 P2d 1028, 39 St. Rep. 508 (1982).

Accident or Surprise — Prior Notice: Introduction in midtrial in negligence action against county for death of exhibitor's horses in barn fire of evidence tending to show that care, custody, and control of horses was in county was not surprise creating ground for new trial because of county's representation by insurers' counsel where county had been warned by insurer almost 2 ½ years before trial that policy might not cover loss because of policy exclusion of property in care, custody, and control of the insured; refusal to admit into evidence county's premium book containing rules and regulations applicable to exhibitors as well as exculpatory disclaimers of liability for loss of exhibitor's livestock did not create surprise. Haynes v. Missoula County, 163 M 270, 517 P2d 370 (1973).

Surprise — Reversal of Ruling by Trial Court: Where a trial court found certain counterclaims to have been sufficiently pleaded and defaulted the plaintiff as to the same, on failure to reply, relying on which default defendant introduced no evidence, on reference of the case, to prove the counterclaims, and the court adopted the findings of the referee but declared that only part of the counterclaims were sufficiently pleaded, a new trial was properly granted to

defendant, as such action of the court was surprise and accident which ordinary prudence could not have guarded against. Porter v. Indus. Printing Co., 26 M 170, 66 P 839, 67 P 67 (1901).

NEWLY DISCOVERED EVIDENCE

New Trial to Lift Injunction on Water Use Properly Denied: As a result of defendant's negligent operation of an irrigation ditch and the risk associated with high volume flow in the ditch, the District Court enjoined defendant from a flow of more than 400 miner's inches through the ditch until defendant could prove that the ditch could safely transport more. Defendant sought a new trial to lift the injunction on grounds that new evidence stemming from the successful operation of the ditch since the trial could not have been presented earlier. The motion for a new trial was denied, and on appeal, the Supreme Court affirmed. Although the evidence was new, the fact remained that varying flows when combined with other variables could still produce damaging results, so the evidence was insufficient to warrant a new trial. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

Valuation of Marital Estate — Evidence of Cash Value of Life Insurance Policy Discovered After Trial Insufficient to Warrant New Trial: The trial court awarded wife a $10,000 life insurance policy as a portion of the marital estate, but she was unable to cash the policy because the company was in rehabilitation, a fact she claimed she was not notified of until after trial. Wife asserted that this newly discovered evidence constituted grounds for a new trial. Although there was ambiguous testimony at trial as to whether she was actually notified of the rehabilitation before or after trial, her knowledge of the rehabilitation would not have changed the outcome of the court's distribution because the policy was not worthless; therefore, a retrial based on newly discovered evidence was not appropriate. In re Marriage of Neal, 267 M 455, 884 P2d 789, 51 St. Rep. 1109 (1994), followed in Groves v. Clark, 1999 MT 117, 294 M 417, 982 P2d 446, 56 St. Rep. 490 (1999).

No Statutory Authority for Setting Aside Workers' Compensation Court Judgment — Equitable Relief: Although under some circumstances the Workers' Compensation Court may have inherent equitable power to set aside its judgment, as in cases under Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), requiring equitable relief because of extrinsic fraud, in a case in which findings established at most intrinsic fraud, it was error for the court to set aside its judgment based on a petition filed more than 60 days after it was entered. The Supreme Court further declined to apply the civil procedure in this section to an untimely motion to set aside a judgment based on newly discovered evidence in a workers' compensation case. St. Comp. Ins. Fund v. Chapman, 267 M 484, 885 P2d 407, 51 St. Rep. 1070 (1994).

Newly Discovered Evidence of Stock Ownership — Judgment Affirmed by Finding Evidence Would Not Change Result of Trial: Cowles brought an action against Sheeline to quiet title to a Montana mining claim. Evidence at trial consisted of confusing and incomplete evidence of stock transactions. Following a judgment for Cowles, Sheeline moved for relief from judgment on the basis of newly discovered evidence consisting of stock records found in an unlikely place upon moving from her home in Boston. The District Court found a lack of due diligence and that the new evidence would not have changed the result of trial and denied the motion after expiration of the 45-day limit provided in Rule 59(d), M.R.Civ.P. (Title 25, ch. 20). The Supreme Court determined that the District Court should have found due diligence but after a review of the new evidence, concurred with the District Court that although some of the evidence was not produced at trial, it was cumulative and duplicative with introduced evidence and would not have altered the outcome of the trial. Cowles v. Sheeline, 259 M 1, 855 P2d 93, 50 St. Rep. 653 (1993).

Statements Regarding Value of Partnership Assets No Barrier to Presentation of Evidence — New Trial Denied: Wife argued for a new trial based on conflicting information compiled after trial regarding the value of the marital estate. With the exercise of reasonable diligence, the evidence could have been discovered prior to trial. Husband's trial statements concerning partnership assets did not materially thwart wife's ability to present her case, indicating lack of fraud, so a new trial was unwarranted. In re Marriage of Barnes, 251 M 334, 825 P2d 201, 49 St. Rep. 67 (1992).

New Trial Denied — Lack of Diligence: The defendants sought a new trial on the basis of newly discovered evidence indicating that the valuation of real property reached by the trial court was $13,000 too high. The Supreme Court affirmed the lower court's denial of the motion, holding that the defendants had not demonstrated that the evidence could not have been discovered in time for the trial with exercise of due diligence on their part. Brunner v. LaCasse, 241 M 102, 785 P2d 210, 47 St. Rep. 117 (1990).

Medical Possibility Evidence: In claimant's appeal of a Workers' Compensation Court order dismissing his petition for a rehearing, he asserted that the standard for reopening a Workers'

Compensation Act claim under 25-11-102 is that it was medically possible that an occupational injury aggravated a preexisting condition. The Supreme Court affirmed the order, stating that medical possibility evidence alone does not mandate a conclusion that the claimant has met his burden of proof under the Act; rather, medical possibility is to be weighed just as any other evidence. If supported by other independent evidence, it is acceptable for use by the court in making its determination. Wheeler v. Ins. Co. of N. Amer., 217 M 254, 704 P2d 49, 42 St. Rep. 1177 (1985). See also Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Workers' Compensation — Results Not Changed by Newly Discovered Evidence — New Trial Denied: Moen suffered a heart attack and died. His wife filed a claim for workers' compensation that was unsuccessful because she failed to prove her husband's death was the result of a "tangible happening of a traumatic nature from an unexpected cause or unusual strain". In a related case involving Moen's death, one of the witnesses changed his testimony and Moen's wife sought a new trial in the Workers' Compensation Court based on the newly discovered testimony. The court found substantial evidence to support the conclusion that the new evidence would not have changed the result and therefore declined to set aside the lower court's denial of a new trial. Moen v. Peter Kiewit & Sons' Co., 201 M 425, 655 P2d 482, 39 St. Rep. 2209 (1982).

Crucial Witness — Lack of Diligence: Plaintiff who knew witness was crucial and could have learned the location of the witness by questioning his other witnesses was not entitled to a new trial on the ground of newly discovered evidence consisting of the fact that plaintiff located the witness after the trial. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982).

Prior Knowledge:

Buyer looked at horse for sale, suggested it had a navicular disease, called seller later in the day to say he would take the horse, and the sale was concluded 2 days later. Upon discovering that the horse would not perform as advertised by seller, buyer returned the horse and sued for the purchase price. Defendant received a jury verdict, and buyer moved for a new trial on ground of newly discovered evidence consisting of a veterinarian's finding, after buyer retrieved the horse after the trial, that the horse had a navicular disease and should not be ridden. Denial of a new trial was proper. Buyer initially suspected the disease existed, yet did not have the horse inspected. Fordyce v. Hansen, 198 M 344, 646 P2d 519, 39 St. Rep. 1043 (1982).

The party moving for a new trial on the ground of newly discovered evidence must show by his own affidavit that the new evidence was not known to him at the time of the trial, and the affidavits of other persons on that question are not sufficient. Roberts v. Oechsli, 54 M 589, 172 P 1037 (1918); Spencer v. Spencer, 31 M 631, 79 P 320 (1905); Smith v. Shook, 30 M 30, 75 P 513 (1904).

Newly Discovered Evidence — No Abuse of Discretion in Denial of Motion: Where, following a decree of divorce of the parties, appellant wife produced evidence that part of the marital property claimed to have been previously sold by the respondent had not been sold as claimed and moved for a new trial, it was not an abuse of discretion for the District Court to deny the new trial, as while the evidence was conflicting, the denial is supported by credible evidence. Fredericksen v. Fredericksen, 186 M 548, 605 P2d 1135 (1980).

Substantial Evidence: Substantial credible evidence existed to support findings of fact and conclusions of law and were unaffected by alleged "newly discovered" evidence which, at best, was merely cumulative. Furthermore, because the "new evidence" was at all times in the exclusive possession of appellants, motion for new trial was denied. Kartes v. Kartes, 175 M 210, 573 P2d 191 (1977). See also Walter v. Evans Products Co., 207 M 26, 672 P2d 613, 40 St. Rep. 1844 (1983), and In re Marriage of Burner, 246 M 394, 803 P2d 1099, 48 St. Rep. 7 (1991).

Showing Required — Contents of Affidavit:

A party moving for a new trial on the ground of newly discovered evidence must show (1) that such evidence came to applicant's knowledge since the trial; (2) that it was not through want of diligence that it was not discovered earlier; (3) that it is so material that it would probably produce a different result upon retrial; (4) that it is not cumulative merely; (5) application must be supported by the affidavit of the witness whose evidence is alleged to have been newly discovered, or its absence accounted for; and (6) it must be made apparent that the evidence is not such as will tend only to impeach the character or credit of a witness. Kerrigan v. Kerrigan, 115 M 136, 139 P2d 533 (1943), followed in Schilke v. Bean, 232 M 125, 755 P2d 565, 45 St. Rep. 930 (1988), and in Donovan v. Graff, 231 M 456, 753 P2d 878, 45 St. Rep. 758 (1988).

On the ground of newly discovered evidence, one must show that such evidence came to his knowledge since the trial; that it was not through want of diligence it was not discovered earlier; that its materiality will probably produce a different result on retrial; and that it is not merely cumulative or only tending to impeach. St. v. Estep, 103 M 78, 61 P2d 830 (1936). See also Walter

v. Evans Products Co., 207 M 26, 672 P2d 613, 40 St. Rep. 1844 (1983), and Bushnell v. Cook, 221 M 296, 718 P2d 665, 43 St. Rep. 825 (1986).

One moving for a new trial on the ground of newly discovered evidence must show by affidavit that the evidence is material to him, that it could not, with reasonable diligence, have been discovered and produced at the trial, and that it was not known to affiant at the time the trial was had. Sutton v. Masterson, 86 M 530, 284 P 264 (1930).

Cumulative Evidence — Foreclosure of Lien: In actions to foreclose materialmen's liens in which defendant contended that there was no privity of contract between himself and the plaintiff materialmen but judgment went for lienors, the trial court committed error in granting defendant a new trial on ground of newly discovered evidence because the affidavits filed in support of the motion presented only cumulative evidence. Apostel Constr. & Lumber Co. v. Radulovich, 115 M 43, 139 P2d 234 (1943).

Child Custody: Where plaintiff wife was granted a decree of divorce as well as custody of a 6-year-old child and the defendant asked for a new trial on the ground that he was in possession of evidence that plaintiff was not a proper person to have such custody but admitted that he had knowledge of such fact at the time of trial but did not offer proof thereof out of deference to his wife and child, the new trial was properly denied, the statute not providing for a new trial on such ground. The decree is always subject to modification upon a proper showing of unfitness because the child is a ward of the court. Wolz v. Wolz, 110 M 458, 102 P2d 22 (1940).

Abuse of Discretion: In an action for debt alleged by defendant to have resulted from gambling between the parties and in which defendant had judgment, the trial court abused its discretion in denying a new trial, asked for on the ground of newly discovered evidence tending to show that plaintiff was at his place of business at the time the game was said to have been played and could not have been at the place of its occurrence, it being evident that one or the other testified to a falsehood, each swearing to matters diametrically opposed to those testified to by the other, the new evidence thus being of the utmost importance to court and jury in determining the credibility of these witnesses and meting out justice. Gould v. Lynn, 88 M 501, 293 P 968 (1930).

Showing Required — Change in Ruling Probable: To warrant the granting of a new trial on the ground of newly discovered evidence, it must appear to the court that there is reasonable probability that upon a retrial the evidence proposed will change the result. Gould v. Lynn, 88 M 501, 293 P 968 (1930).

Cumulative Evidence — No Diligence to Produce Witness: Alleged newly discovered evidence which is cumulative only does not warrant the granting of a new trial; nor may the court be put in error for refusing a retrial on that ground where movant made no attempt to show due diligence on his part to produce the newly discovered witness on the trial of his case. St. v. Gies, 77 M 62, 249 P 573 (1926).

Diligence — Insufficient Excuse: A new trial on the ground of newly discovered evidence was properly denied where the only excuse offered by movant was that while he knew of the alleged new evidence prior to and at the time of the trial, he thought that the fact sought to be brought out on retrial had been sufficiently covered by the testimony given and considered it unnecessary to introduce it. Komposh v. Powers, 75 M 493, 244 P 298 (1926), affirmed 275 US 504 (1927).

Cumulative Evidence — Rescission of Contract: Where defendant himself had testified to a conversation had between himself and plaintiff with respect to the matter in controversy in an action for rescission of contract, evidence on the same subject which would be given by a witness who was absent at the trial, if a new trial were granted, was cumulative and therefore did not warrant the granting of the motion. Ebaugh v. Burns, 65 M 15, 210 P 892 (1922).

Diligence — Prior Knowledge — No Continuance Sought: Where respondent knew of the testimony an absent witness would give and should have known that his whereabouts was unknown but did not ask for a continuance, he was in no position to urge his evidence as newly discovered. Ebaugh v. Burns, 65 M 15, 210 P 892 (1922).

Cumulative Evidence No Basis for Motion: Newly discovered evidence that is a mere repetition of testimony of another witness is cumulative and furnishes no basis for a motion for new trial. Jenkins v. Kitsen, 62 M 515, 205 P 243 (1922).

Showing Required — Immaterial Evidence: For evidence to be produced by a new witness which, if offered, would be irrelevant and immaterial, a new trial may not be granted. Jenkins v. Kitsen, 62 M 515, 205 P 243 (1922).

Offer of Compromise as Newly Discovered Evidence — Admissibility: An offer of compromise not being admissible in evidence against the party making it, it cannot be regarded as material within the requirement of the statute authorizing the granting of a new trial on the ground of newly discovered evidence. Huffine v. Lincoln, 53 M 474, 164 P 888 (1917).

Diligence — Particular Facts to Be Shown: Every presumption will be indulged that the movant for a new trial on the ground of newly discovered evidence could have secured the testimony for the former trial, and he must negative any negligence on his part. Affidavits filed in support of a motion for a new trial on this ground should state with particularity what was done toward obtaining the new evidence and how and when it was discovered, so as to give the adverse party an opportunity to traverse the statements made in the affidavits. In re Colbert's Estate, 31 M 461, 80 P 248 (1904). See also Bushnell v. Cook, 221 M 296, 718 P2d 665, 43 St. Rep. 825 (1986).

Diligence Not Shown: Affidavit in support of a motion for a new trial, on the ground of newly discovered evidence, was examined and held insufficient to show diligence required by this section. Nicholson v. Metcalf, 31 M 276, 78 P 483 (1904).

SUPPRESSION OF EVIDENCE

Failure to Provide Trial Record Precluding Review of Trial Court Evidentiary Rulings: In an employment discrimination case, Rolison moved for a new trial in District Court on grounds that he was denied a fair trial when the employer did not disclose certain exhibits before trial and the trial court made an evidentiary ruling refusing any evidence of discrimination following Rolison's complaint to the Commission on Human Rights. The District Court denied the motion for a new trial, and on appeal, the Supreme Court affirmed. Rolison did not mention the District Court's reasoning for denying the motion and did not provide a trial transcript or record for review on appeal. Absent an adequate record, the Supreme Court could not discern the substance of the anticipated testimony or whether any prejudice resulted from its exclusion. Absent a showing of a manifest abuse of discretion, denial of the new trial motion was affirmed. Rolison v. Bozeman Deaconess Health Serv., Inc., 2005 MT 95, 326 M 491, 111 P3d 202 (2005).

No Violation of Pretrial Order Precluding Evidence of Negligence by Plaintiff's Employer — New Trial Properly Denied: Plaintiff was employed by a vocational day-care program that took developmentally disabled persons on day outings. Plaintiff was assaulted by a developmentally disabled person from a group home managed by defendant corporation and sued the corporation for negligence for failing to control the assailant. Before trial, the District Court granted plaintiffs' motion to exclude any evidence of negligence by plaintiff's employer and ruled that defendant had a special relationship of custody and control over the disabled person and thus had a legal duty of care to those placed within the foreseeable zone of risk created by any breach of that duty. Nevertheless, the jury found for defendant, and plaintiffs' motion for a new trial was denied. On appeal, plaintiffs contended that when defense counsel repeatedly referred to the individual planning process for the assailant, in which plaintiff's employer was a partner, blame for the injury was thereby shifted to plaintiff's employer in violation of the pretrial order and prevented plaintiffs from receiving a fair trial. The Supreme Court disagreed, pointing out that plaintiffs opened the door by presenting evidence regarding the individual planning process in questioning plaintiffs' first witness and that both parties subsequently presented evidence about the process. Further, evidence regarding the individual planning process was relevant to a limit on defendant's ability to monitor the assailant and did not equate to evidence of negligence by plaintiff's employer, nor did defense counsel ever attempt to establish that any breach of legal duty by the employer led to plaintiff's injury. Thus, the District Court did not manifestly abuse its discretion in denying plaintiffs' motion for a new trial, and the verdict was affirmed. Papich v. Quality Life Concepts, Inc., 2004 MT 116, 321 M 156, 91 P3d 553 (2004), distinguishing Cech v. St., 183 M 75, 598 P2d 584 (1979), Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160 (1998), St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103 (1998), Unmack v. Deaconess Medical Center, 1998 MT 262, 291 M 280, 967 P2d 783 (1998), and Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Irrelevant and Prejudicial Evidence of Consumption of Alcohol by Plaintiff: Violette pulled out of a store's parking lot in front of Havens, and the two collided. Havens sued the state, claiming negligent failure to place a stoplight at the parking lot entrance. It was not error to deny Havens' motion to exclude evidence of his alcohol consumption before the accident when the state opposed the motion by stating that it would show that the consumption was a cause of the accident. However, this forced Havens to introduce evidence of, and to address, his alcohol consumption. In addition, the state offered no evidence that Havens' alcohol consumption helped cause the accident and the state's medical expert and a law enforcement officer both testified that Havens was not negligent. Evidence of the alcohol consumption prejudiced the whole trial. It was reversible error to deny a motion for a new trial. Havens v. St., 285 M 195, 945 P2d 941, 54 St. Rep. 1108 (1997), followed in St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

Withholding of Major Evidence Until Trial as Grounds for New Trial: Defense counsel denied the existence of a critical piece of evidence during discovery, then produced it during trial after the close of plaintiff's case. The defense thus prevented plaintiff from receiving a fair trial and created unfair surprise, warranting a grant of a new trial on grounds of irregularity of proceedings. Tigart v. Thompson, 237 M 468, 774 P2d 401, 46 St. Rep. 974 (1989).

Threatening Witness: When a party to a lawsuit threatens a witness, there has been an irregularity in the proceedings of the court that prevents a fair trial. Herren v. Hawks, 139 M 440, 365 P2d 641 (1961).

Threats to Witness — Fear of Disclosure: The District Court did not abuse its discretion in granting a new trial because of threats of defendant to plaintiff's witness just prior to the witness's testimony where the affidavit of the plaintiff alleged that misconduct of defendant could not be exposed at the trial because of a reasonably based fear for the safety of the witness. Herren v. Hawks, 139 M 440, 365 P2d 641 (1961).

Hiding of Witness: The action of a party in secreting and forcibly keeping in hiding a witness of his adversary until the trial was concluded, and thus suppressing material testimony, constituted misconduct or irregularity for which a new trial should be granted. Buntin v. Chicago, Milwaukee & St. Paul Ry., 54 M 495, 172 P 330 (1918).

EXCESSIVE DAMAGES — PASSION AND PREJUDICE

New Trial Properly Denied: The District Court did not err in denying the defendant's motion for a new trial based on insufficient evidence or excessive damages when the plaintiff presented sufficient evidence to establish the existence of a partnership and the defendant did not assert and could not establish that the jury awarded excessive damages under the influence of passion or prejudice. Barrett v. Larsen, 256 M 330, 846 P2d 1012, 50 St. Rep. 96 (1993).

Conscionable Damages — Basis for Overturning Award: Plaintiffs owned a family home and a restaurant located on the same lot in Livingston. Strong odors of gasoline were detected in the basement of the restaurant. Fire officials investigated and ordered the closure of the restaurant. Testing showed concentrations of gasoline fumes constituting a health hazard. The home was also contaminated, but plaintiffs' financial situation was such that they were unable to move. The gasoline contamination was caused by leakage of defendant's storage tanks. Plaintiffs brought suit based on nuisance, negligence, and trespass theories. The jury awarded plaintiffs damages for diminution of the value of the property, lost income, pain, and mental, physical, and emotional distress. Defendant contended the damages were excessive and awarded under the influence of passion and prejudice. The court cited the rule found in Ashley v. Safeway Stores, Inc., 100 M 312, 47 P2d 53 (1935), that a jury award of damages will not be overturned unless it shocks the conscience of the court. The court found no evidence of unconscionability. French v. Ralph E. Moore, Inc., 203 M 327, 661 P2d 844, 40 St. Rep. 481 (1983).

No Basis for Verdict: Where the record on appeal in a false imprisonment case showed little or nothing upon which to base a verdict of $6,000 in favor of plaintiff other than attacks made by counsel upon defendant Sheriff and other law officers in pleadings and argument to the jury, the verdict was given under the influence of passion and prejudice of the jury, entitling defendant to a new trial under this section. Cline v. Tait, 113 M 475, 129 P2d 89 (1942).

Slander Action — Slight Damages: In a slander case, where plaintiff's evidence as to actual damages sustained consisted of no more than the statement that she was made sick by the alleged slander and that she was ashamed to meet her friends but the only person present at the time was her mother, an award of $10,000 was so excessive as to show passion or prejudice, misconception, or mistake on the part of the jury and to warrant setting it aside and ordering a new trial. Keller v. Safeway Stores, Inc., 111 M 28, 108 P2d 605 (1940).

Verdict for More Than Requested: Where plaintiff sought to recover a balance of $570.80 due upon a building contract, defendant interposing a counterclaim for $429.21, and the jury returned a verdict in favor of the defendant in the exact amount asked for by plaintiff and $141.60 more than defendant claimed was due him, the verdict could be accounted for only on the theory of passion and prejudice on the part of the jury, entitling plaintiff to a new trial as a matter of right. Blessing v. Angell, 66 M 482, 214 P 71 (1923), distinguished in Mosher v. Sanford-Evans Co., 68 M 64, 216 P 811 (1923), Hinton v. Peterson, 118 M 574, 169 P2d 333 (1946), and Miller v. Emerson, 120 M 380, 186 P2d 220 (1947).

Conflict in Evidence: Where in an action in claim and delivery the complaint had fixed the value of the property in question at $2,195 and the evidence of plaintiff established it at $1,983 but the jury fixed it at $2,686.20, an order granting a new trial asked for on the ground, among others, of excessive damages appearing to have been given under the influence of passion and prejudice will not be disturbed on appeal. Wilber v. Wilber, 63 M 587, 207 P 1002 (1922).

Excessiveness Alone Insufficient: A new trial will not be granted on the ground that damages awarded appear to be excessive unless it further appears that they were given under the influence of passion or prejudice. Kelley v. John R. Daily Co., 56 M 63, 181 P 326 (1919).

Grounds for New Trial: In an action for personal injuries, the court has power to grant a new trial where excessive damages have been awarded if they appear to have been given under the influence of passion or prejudice. Chenoweth v. Great N. Ry., 50 M 481, 148 P 330 (1915). See also Conway v. Monidah Trust, 51 M 113, 149 P 711 (1915), and Werre v. David, 275 M 376, 913 P2d 625, 53 St. Rep. 187 (1996).

Passion or Prejudice Presumed: Since a new trial may be ordered when it appears that the jury has acted under the influence of passion and prejudice, it follows that when the award is so large that it cannot be accounted for on any other theory and is wholly out of proportion to the wrong done and the cause of it, the conclusion is irresistible that it was measured by the passion and prejudice of the jury, rather than by an estimate made in the exercise of their discretion, and it becomes the duty of the court to set it aside. De Celles v. Casey, 48 M 568, 139 P 586 (1914).

Miscalculation: Where an amount awarded by the jury for personal injuries, claimed by defendant to have been so excessive as to amount to an abuse of discretion lodged in it, may have been the result of a miscalculation or based upon a wrong standard, the award cannot be said to have been the result of passion or prejudice so as to entitle the defendant to a new trial under subsection (5) of this section. Lewis v. N. Pac. Ry., 36 M 207, 92 P 469 (1907).

EXCESSIVE DAMAGES — PERSONAL INJURIES

Case by Case Determination: There is no measuring stick by which to determine the amount of damages to be awarded in personal injury actions, other than the intelligence of a fair and impartial jury governed by a sense of justice, and each case depends on its own peculiar facts. Thompson v. Yellowstone Livestock Comm'n, 133 M 403, 324 P2d 412 (1958).

Eye Injury by Power Drill: In an action by an underground miner, 58 years of age, for damages for a personal injury caused, while he was operating a power drill, by a small particle of steel striking and imbedding itself in his right eye, practically destroying the sight thereof, a verdict for $26,000 as prayed for in the complaint was so excessive as to indicate passion and prejudice on part of the jury and to warrant reversal of the judgment with direction to grant defendant a new trial. Vesel v. Jardine Min. Co., 116 M 56, 147 P2d 906 (1944).

Loss of Earnings — Pain and Suffering: Verdict for $9,500 in favor of plaintiff in a personal injury action arising out of an automobile collision, attacked as excessive and based on alleged passion and prejudice of the jury, was supported by evidence in loss of usual occupation, loss of earnings prior to trial, pain and suffering were great, general health required continued treatment, doctor bills, and damage to automobile. The trial court did not abuse its discretion in denying motion for new trial. Pfau v. Stokke, 110 M 471, 103 P2d 673 (1940).

Sprained Ankle: Verdict for $3,500 for sprained ankle suffered by widow, mother of three children, who testified she was rendered incapable of doing her housework or engaging in custom sewing by which she had supported herself and family, was not so excessive as to require reversal on ground of passion or prejudice. McCartan v. Park Butte Theater Co., 103 M 342, 62 P2d 338 (1936).

Eye Injury: Verdict for $5,000 for injuries sustained by a boy 16 years of age in an automobile collision resulting in a permanent injury to an eye, scarring the iris and thus preventing normal contraction of the pupil, which in the course of years may weaken the other, a cut on the cheek requiring eight stitches which injured the lacrimal duct, leaving a stricture causing tears to flow in excessive light or on excessive use of the eye, and laceration of the lower lid, causing it to gap open, was properly reduced by the trial court to $3,800, with $200 for doctor and hospital expenses, and as so reduced was affirmed on appeal, the Supreme Court assuming that the trial court, with superior knowledge of the injuries sustained, made the proper reduction to meet the ends of justice. Simpson v. Miller, 97 M 328, 34 P2d 528 (1934).

Verdict That Shocks the Conscience: In personal injury actions, where the amount of compensation cannot be arrived at by mere calculation, determination as to the amount of the verdict rests in the sound discretion of the jury and its verdict, attacked as excessive, is conclusive unless it is such as to shock the conscience and understanding, in which event the trial court, as well as the Supreme Court, may order a new trial unless the plaintiff shall consent to a scaling of the verdict to an amount considered just and reasonable. Simpson v. Miller, 97 M 328, 34 P2d 528 (1934).

EXCESSIVE DAMAGES — REMITTITUR

Options Unwarranted: While, under this section, the trial court may remit a portion of a verdict on condition that unless the remission be accepted by the successful party a new trial would be granted, such practice is unwarranted where the verdict was influenced by passion and prejudice; the same rule being applicable, under like circumstances, where the successful party makes voluntary remission of all damages awarded him. Blessing v. Angell, 66 M 482, 214 P 71 (1923), distinguished in Mosher v. Sanford-Evans Co., 68 M 64, 216 P 811 (1923), Hinton v. Peterson, 118 M 574, 169 P2d 333 (1946), and Miller v. Emerson, 120 M 380, 186 P2d 220 (1947).

Right of Remittitur: Where, in a personal injury case, excessive damages have been awarded, the defeated party has the right to insist that the amount of the verdict be reduced by the court. Chenoweth v. Great N. Ry., 50 M 481, 148 P 330 (1915). See also Conway v. Monidah Trust, 51 M 113, 149 P 711 (1915).

Options for Plaintiff: Where, in an action for conversion, the trial court regards the verdict as in excess of the value of the property, it is not error to give the plaintiff the option of remitting the excess, and, if he does so, to order the verdict to stand for the residue, instead of granting a new trial absolutely, under subsection (6) of this section. Chicago Title & Trust Co. v. O'Marr, 25 M 242, 64 P 506 (1901).

EXCESSIVE DAMAGES — APPELLATE REVIEW

Specification of Error Required: Where defendant unsuccessfully moved for a new trial on ground of excessive damages, the question could properly be presented on appeal only on a specification based on error in denying the new trial and not on specification reiterating the claim of excessive damages. Sullivan v. Butte, 117 M 215, 157 P2d 479 (1945).

Passion or Prejudice Required: In personal injury actions, each case must of necessity, so far as damages recoverable are concerned, depend upon its own peculiar facts; there is no measuring stick by which to determine the amount to be awarded other than the intelligence of a fair and impartial jury governed by a sense of justice, and a wide latitude is allowed for the exercise of its judgment. It is only when excessive damages appear to have been given under the influence of passion or prejudice that a new trial may be awarded, and unless it appears that the amount is so grossly out of all proportion to the injury received as to shock the conscience, the Supreme Court on appeal will not substitute its judgment for that of the jury. McCartan v. Park Butte Theater Co., 103 M 342, 62 P2d 338 (1936); Sullivan v. Butte, 87 M 98, 285 P 184 (1930).

Motion as Prerequisite for Appellate Review: Where defendant in a personal injury action fails to incorporate in his motion for new trial the ground of excessive damages having been given under the influence of passion or prejudice and thus deprives the Trial Court of an opportunity to pass upon the question, the Supreme Court on appeal will not entertain an assignment of error based upon that ground. Lesage v. Largey Lumber Co., 99 M 372, 43 P2d 896 (1935). See also Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986), citing Mitchell v. Thomas, 91 M 370, 8 P2d 639 (1932).

INADEQUATE DAMAGES

Evidence Supporting Jury's Verdict of Zero Damages for Lost Earning Capacity Resulting From Automobile Accident: Magart was injured in a collision with Schank, who admitted negligently causing the accident. The case proceeded to jury trial on the issue of damages, and the jury awarded damages for everything except Magart's claim for lost earning capacity. Magart appealed, arguing that that portion of the verdict was not supported by substantial evidence and that the jury was required to find a loss of earning capacity because uncontroverted expert testimony at trial established that Magart suffered continuing shoulder problems because of his job duties that rendered him unable to continue his employment as a result of the injury. As a general rule, a jury may not disregard uncontradicted, credible nonopinion evidence, but this rule applies only to nonopinion lay witness testimony, and a jury may disregard expert testimony if it finds the testimony unpersuasive. In this case, the jury could reasonably have determined that future deterioration of Magart's shoulder, together with a concomitant inability to perform his job, was not reasonably certain to occur. Further, lay testimony from Magart's former employers implied that the shoulder injury did not impair the ability to perform the job and that Magart left employment not because of the injury but rather to accept different employment. This evidence, coupled with Schank's 23-minute videotape of Magart performing his current job without apparent difficulties, was sufficient to support the jury's verdict of zero damages for loss of earning capacity with regard to past and present employment. Magart v. Schank, 2000 MT 279, 302 M 151, 13 P3d 390, 57 St. Rep. 1167 (2000), distinguishing Tappan v. Higgins, 240 M 158, 783 P2d 396 (1989).

Insufficient Evidence to Support Jury Verdict Limiting Damages to Past Medical Expenses but Not Pain and Suffering: Renville was injured as a passenger in an automobile accident in 1995, and liability was not contested. Evidence was uncontroverted that Renville had subsequently experienced pain and suffering as a result of the accident. The jury was instructed to award damages for past and future medical expenses, loss of earnings and earning capacity, pain and suffering, and loss of the ability to pursue an occupation and an established course of life. However, the jury limited its verdict to only past medical expenses, so Renville sought a new trial on grounds of insufficient evidence to support the award and irregularities in the proceedings. On review, the Supreme Court noted that a jury may not disregard uncontradicted, credible, nonopinion evidence. The court applied Thompson v. Bozeman, 284 M 440, 945 P2d 48 (1997), in holding that if a jury fails to award damages when the only evidence of record supports an award, that verdict is not supported by substantial evidence and may be set aside. Renville was entitled to some award for damages for proved pain and suffering, and the Supreme Court remanded for new trial limited to the issue of damages. Renville v. Taylor, 2000 MT 217, 301 M 99, 7 P3d 400, 57 St. Rep. 864 (2000). On remand, the District Court concluded that factual issues still existed as to the amount of Renville's past medical expanses and that the issues must be determined by a jury on retrial. The court found that the effect of the decision in Renville I, id., was to remand the entire issue of damages for a new trial. The Supreme Court disagreed. The decision in Renville I clearly stated that the award was limited to Renville's past medical expenses, which had been proved and awarded. Therefore, the law of the case precluded the District Court from revisiting the issue of Renville's past medical expenses on remand. It was an abuse of discretion for the District Court to deny Renville's motion for summary judgment and request for declaratory judgment on the issue of past medical expenses. Renville v. Farmers Ins. Exch., 2003 MT 103, 315 M 295, 69 P3d 217 (2003). See also St. v. Gilder, 2001 MT 121, 305 M 362, 28 P3d 488 (2001).

Damages Substantially Lower Than Defendant's Experts' Figures Not Supported by Evidence: In a personal injury case, the jury returned a verdict that provided for damages for past wage loss, past medical expenses, pain and suffering, and future wage loss in amounts substantially lower than even the figures given by the defendant's experts. The Supreme Court affirmed the lower court's grant of a new trial on the basis that the verdict was not supported by the evidence. Tappan v. Higgins, 240 M 158, 783 P2d 396, 46 St. Rep. 2020 (1989), followed in Newville v. St., 267 M 237, 883 P2d 793, 51 St. Rep. 758 (1994), and distinguished in Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999), in which conflicting evidence as to the amount of unpaid wages, when substantial enough to justify the jury verdict, did not justify a new trial.

Substantial Evidence Supporting Personal Injury Award: Plaintiff, who turned down a $20,000 settlement offer and recovered only $7,800 from the jury, moved for a new trial on the basis that the verdict was contrary to the evidence presented at trial. The lower court's finding that substantial evidence existed to support the award (thereby exhausting its discretion to grant a new trial) was affirmed on appeal. Feller v. Fox, 237 M 150, 772 P2d 842, 46 St. Rep. 694 (1989).

Motion for New Trial Erroneously Granted: A statement by defense counsel to jury in closing argument suggesting that "a fair verdict would be $30,000" was not a statement against interest setting lower limits of a verdict at $30,000. The District Court erred in granting a new trial on grounds that the $25,000 jury award to the plaintiff constituted inadequate damages when there was substantial credible evidence to support the verdict of the jury. Brown v. Markve, 216 M 145, 700 P2d 602, 42 St. Rep. 708 (1985). See also White v. Ford, Bacon & Davis Tex., Inc., 256 M 9, 843 P2d 787, 49 St. Rep. 1117 (1992).

Substantial Evidence Supporting Award — Error to Grant New Trial: District Court committed error when it granted a new trial based on inadequacy of damages when jury awarded plaintiff $2,000 of which no more than $700 was for pain and suffering caused by injuries received in automobile accident. In reversing the grant of new trial and ordering entry of judgment on the jury's verdict, the Supreme Court stated that the jury is not compelled to believe plaintiff's testimony and that to allow the District Court to simply substitute its judgment for that of the jury when there is substantial evidence to support the jury award would "create a bench supremacy and sap the vitality of jury verdicts". Maykuth v. Eaton, 212 M 370, 687 P2d 726, 41 St. Rep. 1800 (1984), distinguished in Thompson v. Bozeman, 284 M 440, 945 P2d 48, 54 St. Rep. 957 (1997).

No Evidence as to Earnings: Granting of new trial on ground that award of $4,000 was inadequate, damages for death of high school sophomore whose funeral expenses were $1,605 was an abuse of discretion under the circumstances, including fact that plaintiff father received

no earnings from son and gave no indication of need. Davis v. Smith, 152 M 170, 448 P2d 133 (1968).

Conflict in Evidence: Court abused its discretion in granting new trial upon grounds of insufficiency of evidence to justify verdict in that "verdict awarded by the jury to the plaintiff is wholly inadequate" where there was conflict in evidence and where it was question for jury whether injuries suffered by passenger were caused by grossly negligent operation of car or whether passenger assumed risk of going into car driven by man who had several drinks. Heen v. Tiddy, 151 M 265, 442 P2d 434 (1968).

Condemnation Proceedings: In condemnation proceeding, where State appraised land at $18,000, condemnee appraised it at $95,000 and jury awarded condemnee $21,000, granting of new trial because award was inadequate was not such an abuse of trial judge's discretion as to warrant reversal in spite of fact that there was no rebuttal of State's only expert witness. St. Highway Comm'n v. Greenfield, 145 M 164, 399 P2d 989 (1965).

Insufficiency of Evidence: One who has recovered a verdict in his favor in a sum less than he considers himself entitled to under the evidence may, under subsection (6) of this section, ask for a new trial on the ground of insufficiency of the evidence to sustain the verdict. Flaherty v. Butte Elec. Ry., 42 M 89, 111 P 348 (1911).

INSUFFICIENCY OF EVIDENCE

Negligence Per Se — New Trial Granted When Evidence Insufficient to Justify Jury Verdict: Chambers was injured after falling into a pit at the Helena garbage transfer station. The District Court found the city to be negligent per se and submitted the issues of causation and damages to the jury. The jury found that the city's negligence was not the cause of the accident. The District Court held that the verdict was based on insufficient evidence because the city was negligent per se and that Chambers fell over an edge that was required to have a fall protection device, so Chambers was granted a new trial on causation. The city appealed, but the Supreme Court affirmed. Chambers met the burden of showing that the city's negligence was a substantial factor in the accident, and there was insufficient evidence for the jury to find otherwise, so a new trial on causation was proper. Chambers v. Helena, 2002 MT 142, 310 M 241, 49 P3d 587 (2002). See also Brockie v. Omo Constr., Inc., 255 M 495, 844 P2d 61 (1992).

Award of Punitive Damages Not Automatic on Finding of Fraud — New Trial Not Required — Standard of Review: In a case in which the jury found that the defendants had engaged in fraudulent conduct and did not award punitive damages, the trial court did not err in denying a new trial when the evidence that would have supported an award of punitive damages was contradicted and the jury's decision to not award punitive damages was supported by substantial evidence. All elements of a claim for punitive damages must be proved by clear and convincing evidence. An appellate court will review a jury's verdict to award or not to award punitive damages under the substantial evidence rule. It is in the province of a jury to find that there is sufficient evidence of proof of fraud, yet not the quantum of evidence necessary to support an award of punitive damages. Sandman v. Farmers Ins. Exch., 1998 MT 286, 291 M 456, 969 P2d 277, 55 St. Rep. 1165 (1998).

Evidence of Existence of Pain and Suffering Uncontroverted by Evidence of Causation and Evidence of Extent of Damages: Thompson's automobile was rear-ended by a Bozeman police car, and Thompson filed suit against the city. The city admitted negligence and causation, and the action went to trial on the issues of whether Thompson suffered damages and the amount of those damages. The jury returned a verdict of $2,800 in damages for medical expenses and lost wages but awarded no damages for pain and suffering, loss of ability to pursue an occupation, loss of future wages, loss of ability to pursue an established course of life, and future medical expenses. Thompson moved for a new trial, arguing that there was insufficient evidence for the jury to award no damages, and the District Court granted the motion. The Supreme Court noted that it had addressed the issue of zero damage awards in light of uncontroverted evidence in Gehnert v. Cullinan, 211 M 435, 685 P2d 352 (1984), and Brockie v. Omo Constr., 268 M 519, 887 P2d 167 (1994). In those cases, the Supreme Court explained that it had held that the jury did not have any choice but to award some damages when the evidence was uncontroverted that the plaintiff had suffered some damages. It is only when the evidence of the existence of damages is controverted, the Supreme Court said, should a court defer to the judgment of the jury in refusing to award any damages at all. The Supreme Court then reviewed the testimony offered by the city and held that the evidence presented addressed the issue of the extent of damages and not whether any damages at all were caused. The Supreme Court analyzed the case of Maykuth v. Eaton, 212 M 370, 687 P2d 726 (1984), relied on by the city, and noted that the case stood for the proposition that when a jury awards at least some damages based upon its assessment of

conflicting evidence, a court may not substitute its judgment for the jury's judgment based upon the court's view of what evidence is most believable. In the case before it, the Supreme Court noted that the city did not controvert Thompson's evidence that at least some pain and suffering occurred and it was therefore correct for the District Court to grant a new trial when the jury awarded no damages other than medical expenses and lost wages. Thompson v. Bozeman, 284 M 440, 945 P2d 48, 54 St. Rep. 957 (1997).

Trial Court Error in Not Granting New Trial: In reviewing an appeal of a wrongful death action, the Supreme Court found that the jury's failure to grant survivorship damages was totally inconsistent and contrary to the mandates of the law. The Supreme Court held that the lower court had erred in not granting a new trial since there was insufficient evidence to justify the jury's verdict regarding survivorship damages. Brockie v. Omo Constr., Inc., 268 M 519, 887 P2d 167, 51 St. Rep. 1322 (1994), distinguished in Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996). Brockie and Barnes were followed in Thompson v. Bozeman, 284 M 440, 945 P2d 48, 54 St. Rep. 957 (1997).

Jury Finding of Lack of Negligence Not Overturned on Grounds of Passion or Prejudice: Joshua Lloyd suffered a seizure and died after being held by the Flathead County Sheriff for emergency detention. Buhr, Joshua's personal representative, sued the county, the Sheriff, and others, alleging negligence. The jury found that there was no negligence. Buhr argued that despite the jury's interpretation of the evidence, the verdict was the result of passion or prejudice. The Supreme Court noted that it must view the evidence in the light most favorable to the prevailing party. The Supreme Court held that its role was not to retry a case based upon one party's view of the evidence and that it was within the jury's province to adopt testimony presented by one party to the exclusion of testimony presented by another. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Claim That Damage Award Not Supported by Evidence — New Trial Not Granted: Appellants claimed that a new trial was warranted because evidence offered at trial did not substantiate the amount of damages awarded by the jury. However, the damage estimates were based on assumptions about the future, and it was within the province of the properly instructed jury to determine the weight to be given to the estimates and arrive at the amount of damage award to be granted. Refusal to grant a new trial was not an abuse of discretion. Estate of Spicher v. Miller, 260 M 504, 861 P2d 183, 50 St. Rep. 1180 (1993).

New Trial Properly Denied: The District Court did not err in denying the defendant's motion for a new trial based on insufficient evidence or excessive damages when the plaintiff presented sufficient evidence to establish the existence of a partnership and the defendant did not assert and could not establish that the jury awarded excessive damages under the influence of passion or prejudice. Barrett v. Larsen, 256 M 330, 846 P2d 1012, 50 St. Rep. 96 (1993).

General Standard of Review of Holdings on Admissibility of Evidence: Rulings on the admissibility of evidence are within the sound discretion of the District Court and will not be overturned on appeal absent an abuse of discretion by the trial court. St. v. Mayes, 251 M 358, 825 P2d 1196, 49 St. Rep. 75 (1992).

Substantial Evidence Concerning Credibility: Buskirk appealed the jury's verdict denying him any damages for an injury sustained while installing a garage door for the defendant. The Supreme Court held that there was sufficient evidence to support the jury's conclusion that Buskirk's testimony lacked credibility. Buskirk v. Nelson, 250 M 92, 818 P2d 375, 48 St. Rep. 864 (1991).

Finding of Negligence Not Necessary in Every Accident: Plaintiff was a passenger in a truck involved in a collision in which each driver claimed the other was negligent, but the jury attributed negligence to neither. Plaintiff cited Aemisegger v. Herman, 215 M 347, 697 P2d 925 (1985), in claiming he was entitled to a new trial because that kind of accident cannot happen absent negligence and because a violation of basic traffic rules constitutes negligence per se. The Supreme Court distinguished Aemisegger because in that case, there was clear evidence of fault. The Supreme Court noted that simply because there is an accident does not mean someone must be negligent. The trial court did not err in refusing plaintiff's motion for a new trial on the basis that defendants were negligent as a matter of law. Brookings v. Thompson, 248 M 249, 811 P2d 64, 48 St. Rep. 418 (1991).

Intentional Trespass Due to Flooding: Although conflicting testimony was submitted, there was substantial evidence to support the jury's finding that defendants were not liable for flood damage to plaintiffs' property. The Supreme Court ruled that when there is substantial evidence supporting the court or the jury verdict, such findings or verdict is conclusive on appeal. Guenther v. Finley, 236 M 422, 769 P2d 717, 46 St. Rep. 477 (1989).

Forged Check — Plaintiffs' Contribution to Damages — Bank Not Liable: When there was substantial credible evidence that plaintiffs' actions contributed to their damages, the jury verdict in favor of defendant bank would not be overturned. When the complaint alleged negligence and bad faith on the part of the bank but not breach of a fiduciary duty, the Supreme Court refused to consider whether it was error to submit the issue of comparative negligence to the jury. Ahmann v. Am. Fed. S&L Ass'n, 235 M 184, 766 P2d 853, 45 St. Rep. 2305 (1988).

Substantial Evidence to Support Verdict — New Trial Inappropriate: When a jury verdict is appealed, the appellate court's function is to determine whether there is substantial credible evidence to support the verdict. The lower court's discretion to grant a new trial for insufficiency of the evidence is exhausted when it finds substantial evidence to support the verdict. The court may not grant a new trial only on the basis that it chose to believe one line of testimony different from that which the jury believed. Tope v. Taylor, 235 M 124, 768 P2d 845, 45 St. Rep. 2242 (1988).

Substantial Evidence Supporting Jury Verdict: Although the evidence was conflicting, the record shows substantial evidence to support the jury verdict against plaintiff. Thus, the verdict and judgment with regard to sufficiency of the evidence are affirmed. The credibility and weight of the evidence are the province of the jury. Funk v. Robbin, 212 M 437, 689 P2d 1215, 41 St. Rep. 1848 (1984). See also Nelson v. Fairmont Hot Springs Resort, Inc., 234 M 452, 763 P2d 1135, 45 St. Rep. 2042 (1988), Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991), Head v. Cent. Reserve Life of N. America Ins. Co., 256 M 188, 845 P2d 735, 50 St. Rep. 20 (1993), Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994), and Cameron v. Mercer, 1998 MT 134, 289 M 172, 960 P2d 302, 55 St. Rep. 531 (1998).

Substantial Evidence Supporting Verdict — Error to Grant New Trial: McFadden, a Deputy Sheriff, stopped a vehicle after observing erratic driving. He gave the driver a coordination test and later a test on a Breathalyzer that was brought out from town. The driver was taken into custody. McFadden offered to have a legal intern drive the car to town, but the driver said he wanted Moran to drive. Both officers at the scene talked to and checked Moran and felt he was not intoxicated and could drive. While proceeding into town, Moran ran off the road, killing Lindquist. The jury ruled in favor of McFadden and the county. The trial court granted a new trial based on insufficiency of the evidence to justify the verdict. On appeal, the Supreme Court said all the testimony of the law officers, the legal intern, and an EMT responding to the accident upheld the verdict. Also, the car was being driven well while they observed it. There was substantial evidence to support the verdict, and it was error to grant a new trial. Lindquist v. Moran, 203 M 268, 662 P2d 281, 40 St. Rep. 439 (1983), distinguished, where officers had no ability to control tortfeasor's operation of a motor vehicle, in Phillips v. Billings, 233 M 249, 758 P2d 772, 45 St. Rep. 1463 (1988), and followed in Nelson v. Fairmont Hot Springs Resort, Inc., 234 M 452, 763 P2d 1135, 45 St. Rep. 2042 (1988), and in Gass v. Hilson, 240 M 459, 784 P2d 931, 47 St. Rep. 28 (1990). Gass v. Hilson was followed in Thompson v. Bozeman, 284 M 440, 945 P2d 48, 54 St. Rep. 957 (1997).

Sufficiency of Evidence — Airplane Crash: In a negligence action for wrongful death resulting from an airplane crash, the plaintiff's expert witness set forth a theory on how the crash occurred. The defendant submitted proof inconsistent with the plaintiff's theory and set forth his own theory. Because there was sufficient evidence to uphold a jury verdict in favor of either of the parties, the verdict for the defendant was not contrary to the weight of the evidence. Tompkins v. NW. Union Trust Co. of Helena, 198 M 170, 645 P2d 402, 39 St. Rep. 845 (1982).

Effect of Inflation on Damages Improperly Considered: Where evidence of the effect of inflation on damages arising from defects in a modular home purchased from defendant consisted of testimony that as inflation made the value of the house go up it also increased the discrepancy in value caused by the defects, and there was no testimony on the percentage rate of inflation, the jury must have considered the effects of inflation since it reached a $9,000 verdict in the face of evidence of a $3,000 cost of repairs and a $5,000 diminution in value as of 1979, approximately 2 years before trial. There was insufficient evidence on which inflation could be considered, and error occurred. Little v. Grizzly Mfg., 195 M 419, 636 P2d 839, 38 St. Rep. 1994 (1981).

Conflicting Evidence:

Although the testimony of witnesses conflicted, substantial credible testimony elicited from on-the-scene witnesses corroborated defendant's version of a collision with the deceased pedestrian. The lower court erred when it granted plaintiffs' motion for new trial and to set aside the verdict of the jury because the judge relied on a line of conflicting testimony different than the testimony relied on by the jury. Yerkich v. Opsta, 176 M 272, 577 P2d 857 (1978). See also Nelson v. Hartman, 199 M 295, 648 P2d 1176, 39 St. Rep. 1409 (1982).

In the District Court is lodged a sound legal discretion to grant or refuse a new trial in a case where the evidence is conflicting, and its action will not be disturbed on appeal except for a manifest abuse of discretion. Gardiner v. Eclipse Grocery Co., 72 M 540, 234 P 490 (1925).

Sufficient Evidence: There was an abundance of substantial evidence supporting the findings in an action to recover for the loss of cattle resulting from a carrier's negligence. Brown v. Webb, 173 M 275, 567 P2d 450 (1977).

Negligence Verdict — Sufficient Evidence: The power company has no duty to supply an explanation for every fire that occurs on private property to which it supplies electricity, and where the company presented evidence from which reasonable men could conclude that it was free from negligence, this was sufficient to support jury verdict in favor of the power company. Hash v. Mont. Power Co., 164 M 493, 524 P2d 1092 (1974).

Easement: Plaintiff was not entitled to an easement by necessity where there was evidence of other possible routes and no evidence of necessity. Wilson v. Chestnut, 164 M 484, 525 P2d 24 (1974).

Eminent Domain: Verdict for $30,000 for compensation for land taken in condemnation action was supported by substantial evidence where two appraisers had valued the land at $19,650 and $22,873, respectively, plaintiff's expert valued the land at $64,000 and plaintiff testified that his compensation should be $78,000; trial court erred in granting new trial on ground that evidence was insufficient to justify the verdict. St. Highway Comm'n v. Arms, 163 M 487, 518 P2d 35 (1974).

Abuse of Discretion Required for Reversal: Determination by the trial court of motion for new trial based upon insufficiency of the evidence, which involves the exercise of judicial discretion, may not lawfully be disturbed on review by the Supreme Court unless it is clearly shown that the trial court abused its discretion. St. v. Barovich, 142 M 191, 382 P2d 917 (1963).

Weight of Evidence Not Subject for Inquiry: The construction or weight given to evidence by a jury is not a subject for inquiry upon a motion for a new trial. Schaff v. Schaules, 137 M 357, 352 P2d 265 (1960).

Rule of Appellate Noninterference: A rule that the Supreme Court will not interfere with the exercise of discretion by the trial court is particularly applicable where questions of fact are involved, insufficiency of the evidence is urged as a ground for the motion for a new trial, and it appears that the evidence is conflicting. Seibel v. Byers, 136 M 39, 344 P2d 129 (1959).

Other Motions Not Required: Failure to make timely motion for nonsuit or directed verdict did not deprive litigant of right to have question of insufficiency of evidence to sustain verdict determined by trial court on motion for a new trial and reviewed on appeal from an adverse ruling. Adami v. Murphy, 118 M 172, 164 P2d 150 (1945).

Rule to Be Followed: As to motion for new trial based upon insufficiency of the evidence, the settled rule "that a case should not be taken from the jury unless it follows as a matter of law that the plaintiff cannot recover upon any view of the evidence, including the legitimate inferences to be drawn from it" is applicable. Chancellor v. Hines Motor Supply Co., 104 M 603, 69 P2d 764 (1937).

Court to Weigh Evidence: In passing upon a motion for new trial on the ground of insufficiency of the evidence to justify the verdict, the trial court must weigh the evidence and, if not sufficient, a new trial should be ordered; if not ordered, the Supreme Court on appeal must then determine the same question, and if there be not substantial evidence to support the verdict, order a retrial. West v. Wilson, 90 M 522, 4 P2d 469 (1931).

Improbable Testimony: The advantageous position occupied by the jury and the lower court in weighing the testimony of witnesses who appear before them in a personal injury action does not prevent a reversal of the order denying a new trial on the ground of insufficiency of the evidence, where the testimony supporting the verdict is highly improbable or incredible or is inherently impossible in view of the physical facts. Casey v. N. Pac. Ry., 60 M 56, 198 P 141 (1921), distinguished in Currie v. Langston, 92 M 570, 16 P2d 708 (1932), Benema v. Union Cent. Life Ins. Co., 94 M 138, 21 P2d 69 (1933), McGonigal v. Prudential Ins. Co., 100 M 203, 46 P2d 687 (1935), Welch v. Thomas, 102 M 591, 61 P2d 404 (1936), Hill v. Haller, 108 M 251, 90 P2d 977 (1939), Westergard v. Peterson, 117 M 550, 159 P2d 518 (1945), Batchoff v. Craney, 119 M 157, 172 P2d 308 (1946), Hage v. Horton, 119 M 419, 175 P2d 174 (1946), Lake v. Webber, 120 M 534, 188 P2d 416 (1948), Reynolds v. Reynolds, 132 M 303, 317 P2d 856 (1957), and Stroop v. Carberry, 139 M 6, 359 P2d 504 (1961).

Sufficiency — Court to Exercise Judgment: In civil actions, where a new trial may be granted under this section for "insufficiency of the evidence to justify the verdict", the court is required to grant a new trial if, in its judgment, the weight of the evidence does not justify the verdict. St. v. Schoenborn, 55 M 517, 179 P 294 (1919).

Notice Sufficient: A notice of intention to move for a new trial on the ground that the evidence was insufficient "to justify the findings and judgment" is sufficient. Since the words "and judgment" serve no purpose, they may be rejected, and so far as the question of the insufficiency of the evidence to justify the decision is ground for new trial, the word "findings" is equivalent to the word "decision". Cobban v. Hecklen, 27 M 245, 70 P 805 (1902).

DECISION AGAINST LAW

Double Analysis of Foreseeability in Dispute Over Intervening Act of Third Party — Duty of Police to Protect Hospital Worker From Intoxicated Person in Voluntary Custody: Havre police received a report of two girls fighting downtown. They responded and found two intoxicated women fighting, one of whom appeared to require medical treatment. LaTray was working as a nurse at a hospital emergency room when police officers delivered the woman for treatment, accompanied by her sister. The injured woman was placed in protective custody, but neither woman was arrested. When attempting to administer medical care to the injured woman, LaTray was intentionally assaulted and injured by the sister, and LaTray filed an action against the city police officers for negligently failing to exercise proper control over the sister. The District Court found that because the intentional assault was not reasonably foreseeable as a matter of law, there was no duty owed LaTray by the city, and summary judgment was granted to the city. The Supreme Court held that intervening criminal acts of third persons are not automatically unforeseeable as a matter of law, but rather must be addressed in the foreseeability context on a case-by-case basis (see Starkenburg v. St., 282 M 1, 934 P2d 1018 (1997)). Although foreseeability is ordinarily analyzed only under the duty element of negligence, in a dispute over intervening criminal acts of a third party, foreseeability must be analyzed twice: first with regard to the existence of a legal duty and, second, with regard to proximate causation (see Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999)). The city relied on Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), arguing that because LaTray did not claim the existence of a special relationship or otherwise show that the officers owed LaTray a greater duty of care than that owed to the general public, the city owed LaTray no duty of care. The Supreme Court noted that Phillips has been clarified in Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999), which stated that a duty to protect third persons arises only when a police officer actually makes an arrest or otherwise takes possession or custody of an individual. Although the officers did not actually arrest the sister or otherwise have a basis for taking her into custody in this case, the officers voluntarily undertook possession or custody in transporting her to the hospital and consequently harbored the ability to control her actions and prevent an unreasonable risk of harm to third persons like LaTray, who falls within the scope of the risk that negligent supervision would foreseeably entail. Thus, the Supreme Court held that, as a matter of law, the city owed a duty of reasonable care to adequately supervise the sister so as to prevent harm to a third person who would foreseeably be placed within the scope of risk arising from negligent supervision. Whether the city breached that duty is an issue for the jury because the causal issue of intervening acts of third parties normally involves questions of fact. Viewed in the light most favorable to LaTray, there was sufficient evidence of the sister's irascible conduct to raise a jury question as to whether she posed a danger to those around her on the day in question, and reasonable jurors could differ as to whether she presented a foreseeable risk of injury to persons in her immediate vicinity. These contested issues of material fact precluded a grant of summary judgment as a matter of law, and the case was reversed and remanded for a new trial. LaTray v. Havre, 2000 MT 119, 299 M 449, 999 P2d 1010, 57 St. Rep. 497 (2000). See also Morrow v. FBS Ins. Montana-Hoiness LaBar, Inc., 230 M 262, 749 P2d 1073 (1988), and Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

Jury Verdict Internally Inconsistent: The Supreme Court will not disturb a trial court's ruling regarding a motion for a new trial in the absence of a showing of an abuse of discretion. In a nuisance action filed by home owners residing near a city dump, it was proper to order a new trial; the jury found that the city dump was the proximate cause of the nuisance but then found the home owners 90% comparatively negligent. Wilhelm v. Great Falls, 211 M 430, 685 P2d 350, 41 St. Rep. 1471 (1984). A later appeal of a District Court ruling that the City of Great Falls was not negligent was affirmed in Wilhelm v. Great Falls, 225 M 251, 732 P2d 1315, 44 St. Rep. 211 (1987).

Findings and Conclusions: The trial of a matter before the court, without a jury, resulting in findings of fact warranted by the evidence, conclusions of law based upon the findings, and a judgment following both, presents no example of "a verdict or other decision" that is "against law". In re Riley's Estate, 54 M 17, 165 P 1105 (1917).

Verdict Contrary to Law of the Case: A verdict is "against law", within the meaning of this section, only when it is contrary to the law of the case as given to the jury in the instructions. Bush v. Baker, 51 M 326, 152 P 750 (1915).

Verdict Contrary to Instructions: The instructions are the law of the case and binding upon the jury; a verdict contrary thereto is a verdict contrary to law, which, under subsection (6) of this section, justifies a new trial. Lynes v. N. Pac. Ry., 43 M 317, 117 P 81 (1911).

Grounds Not Sufficiently Stated: Under subsection (6) of this section, no ground for a new trial is specified in a notice of motion which recites that "the judgment is contrary to law". Froman v. Patterson, 10 M 107, 24 P 692 (1890). See also St. v. Gawith, 19 M 48, 47 P 207 (1896); Hamilton v. Murray, 29 M 80, 74 P 75 (1903).

STANDARD OF APPELLATE REVIEW

Jury Award Based on Contested Expenses — Sufficient Evidence to Support Verdict: Plaintiffs asserted that a new trial was warranted because the jury in a personal injury case returned a verdict of $9,873, which amounted to significantly less than plaintiffs' evidence of past and future medical expenses, loss of past and future wages, and pain and suffering. However, the District Court denied a new trial, and the Supreme Court affirmed, noting that if a jury award is insufficient to cover uncontested expenses, then it is not supported by substantial evidence, but that was not the case here. Evidence presented by both parties revealed a significant dispute in the nature, cause, and severity of the injury, the need for future treatment, the existence and amount of past and future wage loss, and pain and suffering. Based on the record of disputed expenses, there was substantial evidence to support the jury award, and the Supreme Court declined to retry the case or disturb the judgment, especially when the District Court had already upheld the sufficiency of the evidence on motion for a new trial. Jenks v. Bertelsen, 2004 MT 50, 320 M 139, 86 P3d 24 (2004).

Award of Punitive Damages Not Automatic on Finding of Fraud — New Trial Not Required — Standard of Review: In a case in which the jury found that the defendants had engaged in fraudulent conduct and did not award punitive damages, the trial court did not err in denying a new trial when the evidence that would have supported an award of punitive damages was contradicted and the jury's decision to not award punitive damages was supported by substantial evidence. All elements of a claim for punitive damages must be proved by clear and convincing evidence. An appellate court will review a jury's verdict to award or not to award punitive damages under the substantial evidence rule. It is in the province of a jury to find that there is sufficient evidence of proof of fraud, yet not the quantum of evidence necessary to support an award of punitive damages. Sandman v. Farmers Ins. Exch., 1998 MT 286, 291 M 456, 969 P2d 277, 55 St. Rep. 1165 (1998).

Standard of Review of Grant or Denial of New Trial — Jury or Bailiff Misconduct: In the two most recent cases in which jury or bailiff misconduct was the basis for granting or denying a new trial, the Supreme Court stated that the standard is that the decision is within the sound discretion of the trial judge, whose decision will not be disturbed absent a showing of manifest abuse of that discretion. The Supreme Court reaffirmed this standard and overruled those cases with a different standard. Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995).

Showing of Manifest Abuse of Discretion Required to Overturn Grant of New Trial: The decision to grant a new trial is within the sound discretion of the trial judge, and for the Supreme Court to reverse the trial court, it must be found that either the trial court's findings of fact are not supported by substantial evidence and thus are clearly erroneous or that in applying the law to the facts, there is a manifest abuse of discretion. The trial judge's findings will not be disturbed when they are based on substantial though conflicting evidence. Stanhope v. Lawrence, 241 M 468, 787 P2d 1226, 47 St. Rep. 438 (1990), followed in Henrichs v. Todd, 245 M 286, 800 P2d 710, 47 St. Rep. 2112 (1990). See also C. Haydon Ltd. v. Mont. Min. Properties, Inc., 286 M 138, 951 P2d 46, 54 St. Rep. 1341 (1997), affirming the denial of a new trial, McGillen v. Plum Creek Timber Co., 1998 MT 193, 290 M 264, 964 P2d 18, 55 St. Rep. 808 (1998), and Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

Standard of Review of Denial of Motion for Directed Verdict: When reviewing the denial of a motion for directed verdict, only substantial evidence in the record supporting the jury's finding is required. The conviction cannot be overturned if evidence, when viewed in a light most favorable to the prosecution, would allow a rational trier of fact to find essential elements of the crime beyond a reasonable doubt. The weight of evidence and credibility of witnesses are exclusively within the province of the jury. St. v. Laverdure, 241 M 135, 785 P2d 718, 47 St. Rep. 142 (1990), followed in Nelson v. Flathead Valley Transit, 251 M 269, 824 P2d 263, 49 St. Rep. 58 (1992), and in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992). The Nelson

standard was applied in Okland v. Wolf, 258 M 35, 850 P2d 302, 50 St. Rep. 412 (1993). See also St. v. Allen, 278 M 326, 925 P2d 470, 53 St. Rep. 935 (1996), and C. Haydon Ltd. v. Mont. Min. Properties, Inc., 286 M 138, 951 P2d 46, 54 St. Rep. 1341 (1997).

False and Conflicting Testimony: Where jury's verdict was based on conflicting and probably false testimony, refusal of new trial by trial court was sufficient abuse of discretion to require Supreme Court to reverse trial court and order new trial. Morris v. Corcoran Pulpwood Co., 154 M 468, 465 P2d 827 (1970).

Substantial Evidence — Discretion Exhausted: Although new trial for insufficiency of evidence is discretionary with trial court and will not be disturbed except for abuse, the discretion is exhausted when court finds substantial evidence to support verdict; evidence from which it could be found that drive-in restaurant owner had no reasonable cause to anticipate "spur of the moment" unprovoked assault upon patron supported verdict for owner in action for injuries so that granting of new trial was abuse of discretion. Kincheloe v. Rygg, 152 M 187, 448 P2d 140 (1968), followed in Nelson v. Fairmont Hot Springs Resort, Inc., 234 M 452, 763 P2d 1135, 45 St. Rep. 2042 (1988).

Burden of Proof — Prima Facie Case: Aggrieved party has burden of proving that District Court manifestly abused its discretion by granting new trial; prima facie case of manifest abuse of discretion may be made by discrediting grounds specified for granting new trial or showing that existing error did not materially affect substantial rights of moving party. Tigh v. College Park Realty Co., 149 M 358, 427 P2d 57 (1967).

Abuse of Discretion Required: The determination by a trial court of plaintiff's motion for a new trial involved the exercise of judicial discretion and may not lawfully be disturbed on review by the Supreme Court unless it is clearly shown that in pursuing the course it did, the trial court abused its discretion. Seibel v. Byers, 136 M 39, 344 P2d 129 (1959). See also Estate of Spicher v. Miller, 260 M 504, 861 P2d 183, 50 St. Rep. 1180 (1993).

Which Basis for New Trial: Where motion is based on all the grounds enumerated in this section and trial court grants new trial in a general order, the Supreme Court on appeal, after finding that all grounds but one have no merit, will presume that the trial court in its discretion granted the motion on the meritorious ground. Brennan v. Mayo, 100 M 439, 50 P2d 245 (1935).

IRREGULARITIES IN ORDER GRANTING NEW TRIAL

Abuse of Discretion in Granting New Trial Allowing Assertion of Defense Not Raised at First Trial: During the first trial on Rasmussen's workers' compensation injury claim, State Fund's counsel stated several times that it was Rasmussen's credibility rather than fraud that was at issue and once specifically stated that fraud was not being asserted, leading Rasmussen to believe that the issue of fraud was not before the court. Nevertheless, the Workers' Compensation Court granted State Fund a new trial, including the opportunity to raise a fraud defense, after a judgment was rendered in Rasmussen's favor. The Supreme Court concluded, based on principles of estoppel and judicial admissions, that State Fund was bound by its counsel's statements during trial that it was not relying on a fraud defense and that it was an abuse of discretion for a new trial to be granted allowing the introduction of a theory that was not an issue at the first trial. Rasmussen v. St. Comp. Mut. Ins. Fund, 270 M 492, 893 P2d 337, 52 St. Rep. 317 (1995), distinguished in DeMars v. Carlstrom, 285 M 334, 948 P2d 246, 54 St. Rep. 1178 (1997).

Other Grounds Excluded: Where a new trial was asked for on several grounds, among them newly discovered evidence in support of which affidavits have been filed, and the order granting it recited that the motion "came on for hearing upon the affidavits filed by the respective parties", the order was based upon the ground of newly discovered evidence alone, excluding the other grounds specified. Ebaugh v. Burns, 65 M 15, 210 P 892 (1922).

Wrong Reason but Correct Conclusion: Where a new trial was properly granted on one of the grounds stated in the motion but not upon the one specified by the court, the order granting it will not be disturbed on appeal, since a wrong reason for a correct conclusion will not invalidate it. Ebaugh v. Burns, 65 M 15, 210 P 892 (1922).

All Grounds Specified: Where the notice of intention to move for a new trial specified all but one of the statutory grounds, the order granting it in general terms will be sustained on appeal if it can be upon any one of the grounds mentioned in the notice. McVey v. Jemison, 63 M 435, 207 P 633 (1922).

Misstatement by Court: Though the ground on which a new trial had been asked was stated by the judge to have been that the evidence failed to support the judgment and such ground is not one of those enumerated in this section, yet where the appellants in their brief made the statutory assignment that the evidence was insufficient to justify the court's decision and

counsel for respondent argued the assignment on its merits, the Supreme Court will assume that the trial judge intended to state that the matter was properly submitted to him. Foster v. Winstanley, 39 M 314, 102 P 574 (1909).

Collateral References

New Trial *key* 13, et seq.

66 C.J.S. New Trial §§17 through 144.

58 Am. Jur. 2d New Trial §39, et seq.

Inattention of juror from sleepiness or other cause as ground for reversal or new trial. 59 ALR 5th 1.

Prejudicial effect of trial judge's remarks, during civil jury trial, disparaging litigants witnesses, or subject matter of litigation—modern cases. 35 ALR 5th 1.

Effect of juror's false or erroneous answer on voir dire regarding previous claims or actions against himself or his family. 66 ALR 4th 509.

Court reporter's death or disability prior to transcribing notes as grounds for reversal or new trial. 57 ALR 4th 1049.

Validity of verdict awarding medical expenses to personal injury plaintiff, but failing to award damages for pain and suffering. 55 ALR 4th 186.

Deafness of juror as ground for impeaching verdict, or securing new trial or reversal on appeal. 38 ALR 4th 1170.

Effect of juror's false or erroneous answer on voir dire in personal injury or death action as to previous claims or actions for damages by himself or his family. 38 ALR 4th 267.

Disruptive conduct of spectators in presence of jury during criminal trial as basis for reversal, new trial, or mistrial. 29 ALR 4th 659.

Validity of verdict or verdicts by same jury in personal injury action awarding damages to injured spouse but denying recovery to other spouse seeking collateral damages, or vice versa. 66 ALR 3d 472.

Hasty verdict as ground for new trial in civil case. 91 ALR 2d 1231.

New trial on ground of confusion of name or identity in drawing, summoning, calling, impaneling, or examining juror in civil case. 89 ALR 2d 1243.

Indoctrination by court of persons summoned for jury service as ground for new trial. 89 ALR 2d 256.

New trial on ground of counsel's use, in relation to damages in personal injury or wrongful death case, of blackboard, chart, diagram, or placard not introduced in evidence. 86 ALR 2d 239.

Juror's relationship to witness in civil case as ground for new trial. 85 ALR 2d 851.

Coaching of witness by spectator at trial as prejudicial error requiring new trial. 81 ALR 2d 1142.

New trial on ground of separation or dispersal of jury in civil case after submission. 77 ALR 2d 1086.

New trial for denial of right to poll jury in civil case. 71 ALR 2d 652, 676.

New trial in civil case on ground of counsel's argument urging jurors to place themselves in position of litigant or to allow such recovery as they would wish if in the same position. 70 ALR 2d 935.

Manifestation of emotion by party during civil trial as ground for new trial. 69 ALR 2d 954.

New trial on ground of comment, in argument of civil case, on adversary's failure to call employee as witness. 68 ALR 2d 1081.

New trial for refusal of continuance of civil case because of illness or death of party. 68 ALR 2d 470.

Contact or communication between juror and outsider during trial of civil case as ground for new trial. 64 ALR 2d 158.

Contact or communication between juror and party or counsel during trial of civil case as ground for new trial. 62 ALR 2d 298.

New trial on ground of admission, in personal injury action, of evidence as to financial or domestic circumstances of plaintiff. 59 ALR 2d 371.

Jury in civil case taking depositions to jury room during deliberations as ground for new trial. 57 ALR 2d 1011.

New trial on ground of appearance of additional counsel in civil case after impaneling jury. 56 ALR 2d 971.

Cost of annuity as factor for consideration in determining excessiveness or inadequacy of damages in personal injury or death action, asserted as ground for new trial. 53 ALR 2d 1454.

Facts or evidence forgotten at trial as newly discovered evidence which will warrant grant of new trial in civil case. 50 ALR 2d 994.

New trial on ground of reading or refusing to read reporter's notes to jury. 50 ALR 2d 176.

Counsel's appeal in civil case to wealth or poverty of litigants as ground for new trial. 32 ALR 2d 9.

Evidence as to physical condition after trial as affecting right to new trial. 31 ALR 2d 1236.

Constitutional or statutory provision forbidding re-examination of facts tried by jury as affecting power to reduce or set aside verdict because of inadequacy. 11 ALR 2d 1217.

Statements of witness in civil action secured after trial inconsistent with his testimony as basis for a new trial on ground of newly discovered evidence. 10 ALR 2d 381.

Voluntary statements damaging to accused, not proper subject of testimony, ordered by a testifying police or peace officer, as ground for granting new trial. 8 ALR 2d 1013.

25-11-103. Grounds after trial by the court.

Compiler's Comments

1981 Amendment: Substituted "may" for "shall"; deleted "in equity cases or" after "be granted".

Case Notes

Grant of Request by Workers' Compensation Insurer for Rehearing — Insurer Not to Claim Error: A workers' compensation insurer filed a petition for rehearing, claiming that the decision by the trial court was in error and that the insurer was entitled to a rehearing or amendment of the decision. Claimant did not respond to the petition. The court found that it had no alternative but to grant the petition and move the case forward because the claimant's lack of response led to the conclusion that the petition had merit. Having filed the petition in the first place, the insurer was in no position to later argue that claimant had no grounds for a new trial or that the court erred in granting the motion. Winchell v. G&B Motors, Inc., 246 M 320, 805 P2d 1323, 47 St. Rep. 2070 (1990).

Grant or Denial of New Trial in Discretion of Court: Granting or refusing of a motion for a new trial rests in the trial court's discretion. Under Rule 61, M.R.Civ.P. (Title 25, ch. 20), the court must determine whether refusal to grant a motion would appear inconsistent with substantial justice. The Supreme Court will not overturn denial of a motion for a new trial absent a showing of manifest abuse of discretion. Hanzel v. Marler, 237 M 521, 774 P2d 426, 46 St. Rep. 1020 (1989).

Motion Properly Denied — Standard Not Pleaded or Proved: The motion for new trial was properly denied since the standard contained in 25-11-102 has not been pleaded or proved in the record. Maberry v. Maberry, 183 M 219, 598 P2d 1115 (1979).

Property Valuation — Testimony Required: Denial of motion for new trial was abuse of discretion in that testimony on the value of real and personal property should have been required to enable the court to make an equal distribution of marital assets and provide for support of the minor children. Berthiaume v. Berthiaume, 173 M 421, 567 P2d 1388 (1977).

Irregularity in Proceedings: In an action for specific performance where plaintiff who had no knowledge of law or procedure acted as his own counsel and, though he received some assistance from the trial judge, many errors in the proceedings were shown in the record, it was within the discretion of the judge to grant defendant's motion for a new trial. Waite v. Waite, 143 M 248, 389 P2d 181 (1964).

Repeal by Implication: This section is repealed by implication by subsection (8) of 25-11-102, in all cases where the facts come within that subsection, under the rule that if two acts on the same subject are so repugnant as to be irreconcilable or if the later act is inconsistent with the first and the Legislature intended it should be the only law on the subject, the prior statute is repealed by it. State ex rel. Jackson v. District Court, 107 M 30, 79 P2d 665 (1938).

Law and Equity Cases — Notice of Appeal: While the fact that the notice of appeal in an equity case did not contain any of the grounds mentioned in this section for which a new trial may be granted in such a case but did contain grounds for which a new trial may be granted in a law case, such an omission could be the basis for denial of the motion for a new trial but it did not deprive the trial court of jurisdiction to settle a bill of exceptions (exceptions abolished by Rules 7(c) and 46, M.R.Civ.P., and 25-31-503, now repealed). Pincus v. Davis, 95 M 375, 26 P2d 986 (1933).

Insufficiency of Evidence in Equity Case — Standard of Review: Since under this section, a motion for a new trial on the ground of insufficiency of the evidence does not lie in an equity suit, the rule that the Supreme Court, in the absence of such a motion, will go no further than to determine whether there is any substantial evidence to sustain the decision of the court does not apply. Shepherd & Pierson Co. v. Baker, 81 M 185, 262 P 887 (1927).

Equity Cases: In an equity case tried by the court without a jury, the insufficiency of the evidence to justify the decision and errors at law occurring at the trial are not available as grounds for a new trial. Davenport v. Davenport, 69 M 405, 222 P 422 (1924).

Collateral References

New Trial *key* 2, et seq.
66 C.J.S. New Trial §§17 through 144.
58 Am. Jur. 2d New Trial §§20, 29, et seq.

25-11-104. How motion for new trial made.

Compiler's Comments

1981 Amendment: In (1)(b), deleted reference to subsection (8) and made minor changes in phraseology.

Case Notes

General 376
Minutes of Court 377

GENERAL

New Trial to Lift Injunction on Water Use Properly Denied: As a result of defendant's negligent operation of an irrigation ditch and the risk associated with high volume flow in the ditch, the District Court enjoined defendant from a flow of more than 400 miner's inches through the ditch until defendant could prove that the ditch could safely transport more. Defendant sought a new trial to lift the injunction on grounds that new evidence stemming from the successful operation of the ditch since the trial could not have been presented earlier. The motion for a new trial was denied, and on appeal, the Supreme Court affirmed. Although the evidence was new, the fact remained that varying flows when combined with other variables could still produce damaging results, so the evidence was insufficient to warrant a new trial. Graveley Simmental Ranch Co. v. Quigley, 2003 MT 34, 314 M 226, 65 P3d 225 (2003).

Juror's Affidavit of Juror Misconduct — Inadmissible Under Ahmann Exception — No Evidence of External Influence — Right to Fair and Impartial Jury Not Violated: Berg argued that he was entitled to a new trial because of jury misconduct and attached to his motion the affidavit of juror Flinders stating that juror Carroll said at one point during the trial, in regard to witness testimony: "That's it; that's all I need to hear; it's all over." The affidavit also stated that juror Carroll pointed to another juror and said in regard to the juror, "That's one we'll have to convince." The Supreme Court noted that although affidavits are usually used to prove juror misconduct under 25-11-102(2), they may also, under the exception rationale used in Ahmann v. Am. Fed. Sav. & Loan Ass'n, 235 M 184, 766 P2d 853 (1988), be used pursuant to 25-11-102(1) when the only two people with knowledge of the infraction are a juror and another person. However, the Supreme Court found that the Ahmann exception did not apply when the communication was between jurors. The Supreme Court also discussed the applicability of Rule 606(b), M.R.Ev. (Title 26, ch. 10), and determined that the comments made by juror Carroll were not an external influence upon the jury and therefore did not fall within the exception to the general prohibition against use of juror affidavits to impeach a jury contained in Rule 606(b). Regarding Berg's final argument that the jury misconduct violated the District Court's instructions and Berg's right to a fair and impartial jury, the Supreme Court reviewed California case law raised by Berg and concluded that it was inapplicable in Montana. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Time for Filing — Provisions Mandatory: Provisions relating to the time for filing a motion for a new trial and for the hearing on a motion for new trial are mandatory. Seibel v. Byers, 136 M 39, 344 P2d 129 (1959).

Alternative Methods of Proceeding:

The moving party may employ in the same motion all the modes specified in this section in making his motion for a new trial. Sell v. Sell, 58 M 329, 193 P 561 (1920).

The party desiring a new trial may not designate the minutes of the court and affidavits to be thereafter filed as moving papers, then secure an extension of time in which to prepare them, afterward abandon the affidavits by failing to prepare them within the time allowed, and then insist that the motion should be heard on the minutes of the court. Sell v. Sell, 58 M 329, 193 P 561 (1920), distinguished in Russell v. Sunburst Ref. Co., 83 M 452, 272 P 998 (1928).

One intending to move for a new trial upon any ground other than those mentioned in the first four subsections of 25-11-102 may, under this section, do so either upon the minutes of the court or by a bill of exceptions (exceptions abolished by Rules 7(c) and 46, M.R.Civ.P., and 25-31-503, now repealed); if he has several grounds, he may select one method for one ground of

his motion and another for the remaining ground or grounds. Moore v. Butte Elec. Ry., 47 M 214, 131 P 635 (1913).

Exclusive Provisions: The statute prescribes the course of proceedings to be observed on motion for new trial, and its provisions are exclusive. Evans v. Oreg. Short Line R.R., 51 M 107, 149 P 715 (1915).

Irregularity in Proceedings: A motion for a new trial on the ground of irregularity in the proceedings of the court, jury, or adverse party may be made either upon affidavit or bill of exceptions (exceptions abolished by Rules 7(c) and 46, M.R.Civ.P., and 25-31-503, now repealed), or both. Bliss v. Wolcott, 40 M 491, 107 P 423 (1910).

Statement of Case as Basis for New Trial Motion: Since the passage of Ch. 41, L. 1907, there has been no provision in the Code authorizing a statement of the case to be used as the basis of a motion for a new trial. Robinson v. Helena Light & Ry., 38 M 222, 99 P 837 (1909).

MINUTES OF COURT

Notice Sufficient: A notice of intention to move for a new trial was not rendered abortive by the statement that the motion would be based "upon the minutes of said cause" instead of "upon the minutes of the court", the former phrase, so far as imparting the information intended by this section to be given to the opposing party is concerned, being substantially equivalent to the latter. Moore v. Butte Elec. Ry., 47 M 214, 131 P 635 (1913).

All Pleadings Presumed Considered: Where an application for a new trial is made on the minutes of the court, the trial court is presumed, in the absence of a bill of exceptions (exceptions abolished by Rules 7(c) and 46, M.R.Civ.P., and 25-31-503, now repealed), to have considered all of the pleadings, records, minute entries, and the evidence offered at the trial and to have determined the motion on the case thus presented. Sanden v. N. Pac. Ry., 39 M 209, 102 P 145 (1909). See also Sutton v. Lowry, 39 M 462, 104 P 545 (1909); Cummings v. Reins Copper Co., 40 M 599, 107 P 904 (1910).

Transcription Not Required: The District Court may, upon a motion for a new trial made "upon the minutes of the court", take into consideration all the pleadings, records, minute entries, and the evidence offered at the trial and, from the entire case thus presented, determine the motion; and if the judge can remember the evidence and proceedings sufficiently to enable him to pass upon the motion, it is not necessary that the stenographer's notes of the trial proceedings be transcribed. State ex rel. Cohn v. District Court, 38 M 119, 99 P 139 (1908).

Collateral References

New Trial *key* 124, et seq.
66 C.J.S. New Trial §§177 through 193.
58 Am. Jur. 2d New Trial §470, et seq.

CHAPTER 12
APPEAL TO SUPREME COURT

Chapter Law Review Articles

Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs, Margolis, 62 Mont. L. Rev. 59 (2001).

Cost of Appeal, Davis, 27 Mont. L. Rev. 49 (1965).

Part 1
General Provisions

25-12-101. Exclusive method of review.

Compiler's Comments

Statutes Superseded by Rules — Cases Decided Under Statutes: Section 93-8001, R.C.M. 1947, upon which this section is based, provided: "A judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed in sections 93-7901 to 93-7908 and 93-8001 to 93-8023, and not otherwise." By order of the Supreme Court, dated January 1, 1966, the Montana Rules of Appellate Procedure (M.R.App.P.; see Title 25, ch. 21) superseded, in whole or in part, sections 93-8001 through 93-8023, R.C.M. 1947. Sections 93-7901 through 93-7908, R.C.M. 1947, concerning appeals from Justices' Courts were subsequently recodified into Title 25, ch. 33 (see Table of Corresponding Code Sections for appropriate MCA section numbers). Because the provisions of all or a portion of sections 93-8001 through 93-8023, R.C.M. 1947, may be similar to the corresponding rule or rules of the

M.R.App.P., all cases decided under section 93-8001, R.C.M. 1947, prior to January 1, 1966, have been included as case notes annotated below, for whatever assistance they may be to the researcher. For a designation of superseding rules, see Tables B and C, printed as a compiler's comment to Rule 43 (now Rule 53), M.R.App.P.

Case Notes

Justice's Court Appeals — No Direct Review by Supreme Court: The Supreme Court does not have jurisdiction to review directly the judgments or orders of the Justices' Courts of this state. State ex rel. Estes v. Justice Court, 129 M 136, 284 P2d 249 (1955).

Jurisdictional Limitations: This statute is both prohibitory and jurisdictional, and it prohibits an appeal after expiration of the time prescribed by Title 93, ch. 80, R.C.M. 1947 (most provisions superseded by the M.R.App.P.). McVay v. McVay, 128 M 31, 270 P2d 393 (1954).

Right of Appeal as Statutory — Judgment or Order Required: The right of appeal is purely statutory and is not available for review of findings and conclusions of law in a condemnation case where there has been no order. Sheridan County Elec. Co-op v. Anhalt, 127 M 71, 257 P2d 889 (1953).

Section Applicable to Probate Decrees: Decrees in probate proceedings, including those relative to the settlement of guardians, are not, technically speaking, judgments, but the mode of review applicable to judgments is, by this section and sections 93-8002 and 93-8003, R.C.M. 1947 (superseded by M.R.App.P.), made applicable to many of them, and a trial court has no greater power over these than it has over formal judgments. Hoppin v. Long, 74 M 558, 241 P 636 (1925); State ex rel. McHatton v. District Court, 55 M 324, 176 P 608 (1918).

Statutory Basis for Removal to District Court: While all of the decisions of District Courts are subject to review by the Supreme Court, under some appropriate procedure, causes may be removed to it by appeal only under the limitations and regulations prescribed by statute. Pierson v. Daly, 49 M 478, 143 P 957 (1914).

Setting Aside Order — Power of District Court: The District Court in a judicial district composed of one county, having regularly made an appealable order, has no power to set it aside on its own motion, where such order was not made inadvertently or improvidently. Whitbeck v. Mont. Cent. Ry., 21 M 102, 52 P 1098 (1898).

Collateral References

Appeal and Error *key* 1 through 16.

4 C.J.S. Appeal and Error §2, et seq.

25-12-102. Cases in which appeal may be taken.

Compiler's Comments

Statutes Superseded by Rules — Cases Decided Under Statutes: Section 93-8002, R.C.M. 1947, upon which this section is based, provided: "A party aggrieved may appeal in the cases prescribed in sections 93-7901 to 93-7908 and 93-8001 to 93-8023. The party appealing is known as the appellant, and the adverse party as the respondent." By order of the Supreme Court dated January 1, 1966, the Montana Rules of Appellate Procedure (M.R.App.P.; see Title 25, ch. 21) superseded, in whole or in part, sections 93-8001 through 93-8023, R.C.M. 1947. Sections 93-7901 through 93-7908, R.C.M. 1947, concerning appeals from Justices' Courts were subsequently recodified into Title 25, ch. 33 (see Table of Corresponding Code Sections for appropriate MCA section numbers). Because the provisions of all or a portion of sections 93-8001 through 93-8023, R.C.M. 1947, may be similar to the corresponding rule or rules of the M.R.App.P., all cases decided under section 93-8002, R.C.M. 1947, prior to January 1, 1966, have been included as case notes annotated below, for whatever assistance they may be to the researcher. For a designation of superseding rules, see Tables B and C, printed as a compiler's comment to Rule 43 (now Rule 53), M.R.App.P.

Case Notes

General 378
Probate Proceedings 379

GENERAL

Consent Judgment: Consent to the entry of a judgment is a waiver of any errors in it, and an appeal taken therefrom will be dismissed, the appellant not being an "aggrieved party". Weir v. Silver Bow County, 113 M 237, 124 P2d 1003 (1942).

"Aggrieved Party" Defined: Unless a party has an interest in the subject of litigation that is adversely affected by an order made or judgment rendered therein, he is not an "aggrieved party" within the meaning of this section and cannot appeal therefrom. Griffith v. Mont. Wheat Growers' Ass'n, 75 M 466, 244 P 277 (1926).

Intervenor Not "Aggrieved" — No Right of Appeal: In an action by a mortgagee for damages for the conversion of a mortgaged crop, in which a bank had intervened as holder of orders given it by the mortgagor drawn on defendant purchaser of the grain which remained unpaid, where plaintiff claimed nothing as against the intervener and the latter made no claim to anything in which plaintiff was interested and the judgment merely awarded to plaintiff the damages claimed, not mentioning intervenor, the bank was not aggrieved and therefore not entitled to appeal from the judgment. Griffith v. Mont. Wheat Growers' Ass'n, 75 M 466, 244 P 277 (1926).

Review of Denial of Motion to Intervene: Since an appeal does not lie from an order denying a motion for leave to file a complaint in intervention and the unsuccessful movant, not being a party to the action, cannot appeal from the final judgment entered therein, he may have the order reviewed on application to the Supreme Court for Writ of Supervisory Control. State ex rel. Red Lodge-Rosebud Irrigation District v. District Court, 75 M 132, 242 P 431 (1925).

Service of Notice of Appeal: While any party aggrieved may appeal no matter whether the judgment be joint or several, he must serve with notice all other parties who are interested in opposing the relief which he seeks by his appeal, if they formally appeared in the action below, else his appeal will prove ineffectual. Spokane Ranch & Water Co. v. Beatty, 37 M 342, 96 P 727, 97 P 838 (1908).

Joint Appeals: On a joint appeal, errors not common to both appellants may be considered, but one appellant will not be permitted to assume a position antagonistic to that of the other. Anderson v. N. Pac. Ry., 34 M 181, 85 P 884 (1906). See also Rand v. Butte Elec. Ry., 40 M 398, 107 P 87 (1910).

PROBATE PROCEEDINGS

Exception — Heirs Not "Aggrieved": Where the trial court in modifying its findings and decree as directed by remittitur failed to mention an exception (exceptions abolished by Rules 7(c) and 46, M.R.Civ.P., and 25-31-503, now repealed) in favor of the adverse party and relating to the widow's interest, the other heirs and the administratrix were not "parties aggrieved" and could not complain of the alleged error of the trial court. Gaer v. Bank of Baker, 113 M 116, 122 P2d 828 (1942).

Devisee Receiving Faulty Notice as "Aggrieved": A devisee under a will to whom the property devised had been awarded in a proceeding to determine heirship but who claimed that the court had not acquired jurisdiction because of faulty publication of notice as regards unknown claimants, thus endangering the validity of the decree and hence his title to the property decreed to him, by possible claims thereafter made by such claimants was an "aggrieved party" within the meaning of this section and as such entitled to appeal. In re Baxter's Estate, 98 M 291, 39 P2d 186 (1934).

Widow Not "Aggrieved": Where the widow of a testator, as defendant in a proceeding to have the probate of the will revoked and heirship determined, asserted that she was entitled to one-half of decedent's estate, both under the will and under the law of succession in case the will should be declared invalid, and by the decree she was awarded all she asked, she was not an aggrieved party and therefore not entitled to appeal from the decree otherwise in favor of plaintiffs. In re Bernheim's Estate, 82 M 198, 266 P 378 (1928).

Administrator and Heir as "Parties Aggrieved": An administrator with the will annexed and an heir of a beneficiary under the decedent's will are "parties aggrieved" under this section and can appeal from a decree granting a distribution of the estate. In re Davis' Estate, 27 M 235, 70 P 721 (1902).

Individual Rights of Administrator: A person, in his capacity as administrator, cannot appeal from an order disallowing his individual claim against the estate, and on such appeal his individual rights will not be considered. In re Barker's Estate, 26 M 279, 67 P 941 (1901).

Collateral References

Appeal and Error *key* 136, et seq., 151, 335.

4 C.J.S. Appeal and Error §§40, et seq., 154, 157, 184, 217.

4 Am. Jur. 2d Appellate Review §84, et seq.

Attorney's right to institute or maintain appeal where client refuses to do so. 91 ALR 2d 618.

Right of winning party to appeal from judgment granting him full relief sought. 69 ALR 2d 701.

Parties entitled to appeal from an order on application for removal of personal representative, guardian or trustee. 37 ALR 2d 751.

Appeal by applicant for intervention from final judgment in the cause. 15 ALR 2d 368.

Right of express trustee to appeal from order or decree not affecting own personal interest. 6 ALR 2d 147.

CHAPTER 13
EXECUTION OF JUDGMENT

Chapter Case Notes

Erroneous Denial of Motion to Quash Writ of Execution: A federal District Court allowed a default judgment against Clark in favor of plaintiffs. In order to execute the judgment on Clark's Montana assets, plaintiffs docketed the judgment in federal District Court in Montana, and about the same time, plaintiffs brought an action in Montana state court, asserting that Clark fraudulently transferred real property in order to avoid reimbursing plaintiffs. Following denial of the fraudulent transfer claim in Gulf Ins. Co. v. Clark, 2001 MT 45, 304 M 264, 20 P3d 780 (2001), plaintiffs docketed the federal judgment in Lake County District Court, requesting and receiving a writ of execution, and a levying officer than executed on Clark's accounts. Upon notice of the levy on the accounts, Clark moved to quash the writ of execution, asserting that the federal judgment was invalid, that the writ was void because the federal District Court never obtained proper personal jurisdiction, and that service by publication was inadequate because the federal order required personal service. The state District Court concluded that Clark cited no authority allowing a state court to invalidate a federal District Court's judgment when the federal transcription of judgment is filed for execution in state court, so Clark's motion to quash was denied, and Clark appealed. As set out in Carr v. Bett, 1998 MT 266, 291 M 326, 970 P2d 1017 (1998), a party seeking to vacate a foreign judgment filed in Montana state courts may do so only upon defenses that make the underlying judgment invalid or unenforceable, which include a lack of personal or subject matter jurisdiction of the rendering court, fraud in the procurement of the judgment, lack of due process, or satisfaction. However, if a foreign judgment is valid, it should have the same credit, validity, and effect in every other court of the United States that it had in the court in which it was pronounced. Thus, the state District Court erred in concluding that it had no authority to review whether the federal court had personal jurisdiction over Clark. The Supreme Court then went on to consider whether Clark was properly subject to the federal court's jurisdiction in order to determine if the federal default judgment was valid. Service by publication did not provide the federal court with jurisdiction to enter the default judgment because that service was not properly completed and was thus ineffective. In its order granting service by publication, the federal court concluded that service could not be accomplished other than by publication, effectively determining, based on plaintiffs' representations, that personal service had not been accomplished. Therefore, the state District Court committed reversible error when it failed to hold that service by publication was not properly accomplished pursuant to the federal court order. Gulf Ins. Co. v. Clark, 2003 MT 87, 315 M 121, 68 P3d 673 (2003).

Constitutionally Protected Property Interest in Statutory Exemption From Execution — Due Process Requiring Notice and Hearing to Allow Assertion of Available Exemptions: In order to establish a property interest in a benefit such as the personal property exemptions from execution, a person must show a legitimate claim of entitlement to the benefit. By stating that judgment debtors are entitled to the statutory property exemptions, the Legislature has given judgment debtors a legal right to claim and benefit from those exemptions. Therefore, Montana judgment debtors have a property interest in the statutory exemptions from execution that is protected by constitutional due process guarantees. Montana's postjudgment execution statutes violate those due process guarantees because they do not provide for notice to a judgment debtor of the seizure of the debtor's property, of the availability of statutory exemptions from execution and where to locate additional information about them, and of the availability of procedures by which to claim exemptions from execution. Further, the statutes are deficient from a due process standpoint because they do not provide for a prompt hearing on claimed exemptions. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Mathews v. Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976), and Aacen v. San Juan County Sheriff's Dept., 944 F2d 691 (10th Cir. 1991), and distinguishing Endicott-Johnson Corp. v. Encyclopedia Press, 266 US 285, 69 L Ed 288, 45 S Ct 61 (1924).

Defrauding Creditor — Elements of Sale Necessary to Establish Ownership: A judgment was entered in favor of the plaintiff, Kovacich, because of failure of Norgaard to make payments for the purchase of farm machinery. Kovacich made an attempt to levy against a truck owned by Norgaard, who, upon learning the truck was going to be seized, removed it from a consignment lot and sold it to McNair, a close friend. McNair did not register the truck in his name or purchase insurance for it. The Department of Justice verified that the truck was registered to Norgaard, and thereafter a Writ of Execution was issued, pursuant to which the truck was seized. Norgaard obtained a Writ of Prohibition preventing sale of the truck. After a hearing, the District Court set

aside the Writ of Prohibition, allowing Kovacich to proceed with the sale, and Norgaard appealed, contending District Court error in allowing the sale. The Supreme Court found that resolution of the issue turned on whether the transaction between Norgaard and McNair was an attempt by Norgaard to defraud his creditor. The court held that under 31-2-315 (now repealed), unless the transfer from Norgaard to McNair was accompanied by immediate delivery and followed by an actual and continued change of possession, the transfer "is conclusively presumed to be fraudulent and therefore void against those who are his creditors while he remains in possession". Finding no evidence of immediate delivery or of any actual change of possession, the District Court order allowing sale was upheld. Kovacich v. Norgaard, 221 M 26, 716 P2d 633, 43 St. Rep. 608 (1986).

No Liability When Creditor Did Not Direct Wrongful Levy of Execution: In an action alleging wrongful execution and conversion, the defendant-creditor's motion for summary judgment was granted properly. The creditor was not liable for wrongful execution as it did not advise, direct, or assist in the commission of the wrongful execution upon the plaintiffs' bank account but merely obtained a Writ of Execution and forwarded it to the Sheriff. The general rule of law that an execution creditor who advises, directs, or assists in a wrongful execution is liable does not apply in this case. The creditor did not participate in or direct the wrongful execution. Foley v. Audit Serv., Inc., 214 M 403, 693 P2d 528, 42 St. Rep. 49 (1985).

Part 1
Right to Enforcement of Judgment

Part Case Notes

Judgment Lien Against Husband's Property Not Supportive of Execution Against Interests of Second Wife and Children — Property Subject to Prior Judgments Only: Following dissolution of his marriage, Ken Jones purchased real property in 1986. In May 1987, he executed a homestead declaration on the property pursuant to 70-32-105. In July 1987, he conveyed the property by quitclaim deed, with one-half interest to himself and one-half to his second wife and their two daughters in equal shares. In January 1988, his second wife also filed a declaration of homestead. Also in 1988, Ken declared bankruptcy. As a result of that filing, a dissolution decree property settlement provision that he pay certain sums to his first wife Rita was redesignated as a maintenance obligation. Ken appealed that order, and while the appeal was pending, Ken and his second wife conveyed the real property to Poindexter. Rita executed upon one-half of the sale proceeds, which Poindexter had withheld to satisfy Ken's past-due maintenance and support, but $2,113.53 remained due on the underlying judgment. Rita moved for an order of sale of the property so that she could recover the remaining maintenance plus her attorney fees. The District Court determined that Ken's homestead exemption was abandoned when he sold the property to Poindexter and that because Rita's judgment liens had never been removed or extinguished, the liens attached and encumbered the property at the time the homestead exemption was abandoned and thus the property was conveyed to Poindexter subject to the liens and the execution order. The Supreme Court disagreed and reversed because: (1) Rita had already executed on Ken's half of the sale proceeds and further execution would be against the interests of the second wife and daughters and was therefore unsupported; and (2) the maintenance payments became due and judgments were entered after Ken sold the property. Under 70-21-306, a purchaser takes property subject only to prior judgments; therefore, execution was inappropriate on the property for judgments entered after Poindexter's purchase. In re Marriage of Jones v. Poindexter, 253 M 408, 833 P2d 1044, 49 St. Rep. 501 (1992).

25-13-101. Time limit for issuing execution.

Compiler's Comments

2001 Amendment: Chapter 515 in (1) at beginning deleted "Except as provided in subsection (2)" and near middle after "within" substituted "the time period prescribed in 27-2-201(1) and (2)" for "6 years after the entry of the judgment"; and made minor changes in style. Amendment effective October 1, 2001.

1995 Amendment: Chapter 60 in (2), near middle after "support obligation", inserted "or within 10 years from entry of a lump-sum judgment or order for support arrears, whichever is later"; and made minor changes in style.

Severability: Section 18, Ch. 60, L. 1995, was a severability clause.

1993 Amendment: Chapter 631 at beginning of (1) inserted exception clause; inserted (2) allowing for issuance of a writ of execution for 10 years after termination of the support obligation; and made minor changes in style.

Preamble: The preamble attached to Ch. 631, L. 1993, provided: "WHEREAS, it is necessary to draft a composite bill containing unrelated sections in order to present the proposed program improvements in a single, comprehensive bill that promotes the needs of legislative energy, efficiency, and economy by limiting the number of possible bills and by reducing the need for hearings and readings on those bills.

THEREFORE, the Legislature finds it appropriate to enact the following legislation."

Severability: Section 29, Ch. 631, L. 1993, was a severability clause.

Case Notes

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Registration of Foreign Judgment — No New Judgment Created: Plaintiffs and a Wyoming bank entered into a consent judgment, which was subsequently registered in a Montana federal District Court. The bank then filed a transcript of the judgment in state District Court, and plaintiffs moved to quash the writ of execution, which was subsequently denied by the court. On appeal, the Supreme Court reversed and applied the analysis of Juneau Spruce Corp. v. Int'l Longshoremen's & Warehousemen's Union, 128 F. Supp. 697 (D.C. Hawaii 1955), ruling that registration under 28 U.S.C. 1963 constituted a purely ministerial act and that the 6-year period during which a writ of execution can be issued commences on the date on which the judgment was docketed in the original forum when the judgment was filed in Montana federal District Court. Robinson v. First Wyo. Bank, 274 M 307, 909 P2d 689, 52 St. Rep. 1245 (1995).

Judgment Lien Extinguished by Operation of Law: In a case filed in order to have a series of conveyances declared fraudulent, the District Court erred by failing to determine that the judgment lien was extinguished by operation of law, terminating any rights of the plaintiff to the subject property. A judgment may be enforced for a period of 10 years from docketing; a writ of execution may be issued to enforce a judgment for a period of 6 years, which may be extended by the court for up to an additional 4 years; a judgment lien continues for 6 years following docketing of the judgment and then expires by operation of law (see 2001 amendment); a judgment may be extended past its 10-year duration only by filing a separate action to obtain a new judgment on the existing judgment. Jones v. Arnold, 272 M 317, 900 P2d 917, 52 St. Rep. 779 (1995).

Writs of Execution Quashed When Based on Judgment Extended by Ex Parte Motion Past Ten-Year Statute of Limitations: In 1982, Welch obtained a judgment against Huber for $6,612.34. In 1988, Lorn moved the court for an order extending the judgment. The judgment was extended until 1994. Over 10 years later, Lorn attempted to collect the judgment by obtaining writs of execution. Welch moved to quash the writs and for an order finding the order extending the judgments void for want of service upon Welch, which the District Court granted. The Supreme Court affirmed, noting that the order extending the judgment presumed to make the original judgment valid for 12 years, contrary to 27-2-201. The judgment could be extended beyond the 10-year statute of limitations only by the filing of an action, with notice to Welch. The Supreme Court said that the motions allowed by 25-13-102 (now repealed) are permissible as long as the extension granted does not exceed the 10-year statute of limitations. Welch v. Huber, 262 M 114, 862 P2d 1180, 50 St. Rep. 1469 (1993), followed in Jones v. Arnold, 272 M 317, 900 P2d 917, 52 St. Rep. 779 (1995), and Jones v. Arnold, 1998 MT 214, 290 M 444, 963 P2d 1269, 55 St. Rep. 901 (1998).

Procedure for Stay of Execution of Judgment Not Followed — Property Properly Awarded: Petitioner requested a Writ of Supervisory Control to have an ejection order declared illegal in a property dispute. The Supreme Court in reviewing the proceedings stated that a judgment

debtor desiring to stay the execution of a judgment or order of a District Court must proceed under Rule 7, M.R.App.P. That rule provides that if an appellant desires a stay of proceedings where the court has made no such order, he may present to the court and secure its approval of a supersedeas bond. In this case, the District Court fixed the amount of the bond but the bond was never presented to the court for approval prior to the ejection order. Therefore, the judgment holder was entitled to enforcement of the judgment by execution under 25-13-101 and 25-13-201. The District Court followed these statutes and was authorized to order delivery of the possession of the property under 25-13-307. State ex rel. Cady v. District Court, 203 M 522, 662 P2d 602, 40 St. Rep. 610 (1983).

Execution Upon Reservation: A judgment of a court rendered upon a commercial transaction conducted outside the exterior boundaries of a reservation is valid, and, the court having jurisdiction, there may be an execution upon wages earned on the reservation by a member of the tribe. Little Horn Bank v. Stops, 170 M 510, 555 P2d 211 (1976).

Acknowledgment of Judgment as Tolling of Statute: A statute limiting the time of effectiveness of a judgment may be tolled by acknowledgment of the judgment, as, in the instant case (quiet title action) where defendant, some 9 years after judgment for plaintiff, stipulated in open court that plaintiff was entitled to a Writ of Possession, thus acknowledging the existence of the judgment unsatisfied. Dodd v. Simon, 113 M 536, 129 P2d 224 (1942).

Right to Writ of Possession — Statutory Basis: Where, in an action to quiet title to real property, the defendant is in possession and the decree adjudges the plaintiff to be entitled thereto, the latter is entitled to a Writ to put him in possession, and the Writ may issue even though it is not ordered by the decree, since under Art. VIII, sec. 28, 1889 Mont. Const., (now Art. VII, sec. 4, 1972 Mont. Const.), law and equity may be administered in the same action. The issuance of such Writ is governed by this and the following sections on execution, and it may be issued by the clerk within 6 years after entry of judgment and after the lapse of 6 years by leave of court on motion. (See 2001 amendment.) Dodd v. Simon, 113 M 536, 129 P2d 224 (1942).

Writ of Assistance Not Affected: The Writ of Assistance, employed in mortgage foreclosure actions, issues as an aid in carrying out the decree of sale and is not governed in its issuance by the law on executions as is the Writ of Possession. Dodd v. Simon, 113 M 536, 129 P2d 224 (1942).

Judgment Roll Not Prerequisite to Execution: The making up of the judgment roll, as required by section 93-5707, R.C.M. 1947 (superseded by Rules 9, 10, and 25, M.R.App.P.), is not a prerequisite to the issuance of execution. Burton v. Kipp, 30 M 275, 76 P 563 (1904).

Writ of Execution — Compelling Placement of County Name Thereon: A Writ of Mandate to compel the clerk to issue an execution with the seal, bearing the former name of a county, is the proper remedy where the Legislature, by a void act, has attempted to change the name of a county. State ex rel. Sackett v. Thomas, 25 M 226, 64 P 503 (1901).

Form of Issuance of Execution — Name in Which Issued: The proper way to issue an execution is in the name of the party in whose favor the judgment has been given. Johnson v. Puritan Min. Co., 19 M 30, 47 P 337 (1896).

Collateral References

Execution *key* 73, 75.

33 C.J.S. Executions §§74, 75.

30 Am. Jur. 2d Executions §§32, 47, et seq.

Mere rendition or formal entry or docketing of judgment as prerequisite to issuance of valid execution thereon. 65 ALR 2d 1162.

Part payment or promise to pay judgment as affecting time for execution. 45 ALR 2d 967.

Time of issuing writ as ground of collateral attack on execution sales. 1 ALR 1437.

25-13-103. Execution after death of a party.

Case Notes

State Probate Jurisdiction of Federal Claim — Homestead Exemption — Priority of Liens: Creditor obtained a default judgment in the U.S. District Court for the Southern District of New York against an Alaska resident and attempted to execute on property in Montana that had subsequently come under Montana's exclusive probate jurisdiction. While the federal court retained jurisdiction over claims impacting the estate, the court could not seize and control property in the possession of the state probate court. It was within the jurisdiction of the state court to determine that the real property was subject to family protection allowances and exempt from execution. Although the lien was attached prior to debtor's death, the lien was extinguished upon the exercise of the family protection allowances, and the homestead allowance was exempt from and had priority over all other claims against the estate. In re Estate of Wilhelm, 233 M 255, 760 P2d 718, 45 St. Rep. 1468 (1988).

Levy of Attachment Enforced by Execution: Under this section and section 91-2717, R.C.M. 1947 (since repealed), and 27-18-308, the levy of an attachment on real property made at the commencement of an action on a promissory note creates a lien that may be enforced by execution where the levy was made and judgment obtained prior to the judgment debtor's death. Andrews v. Smithson, 114 M 360, 136 P2d 531 (1943).

Collateral References

Execution *key* 68, 69, 117, 118.

33 C.J.S. Executions §§74, 75.

30 Am. Jur. 2d Executions and Enforcement of Judgments §51.

Remedy for enforcement of judgment lien after death of judgment debtor. 114 ALR 1165, supplemented by 115 ALR 1456.

25-13-104. Compelling contribution or repayment — joint debtor, surety.

Compiler's Comments

1981 Amendment: In (1), substituted "surety" for "security".

Case Notes

Remedy Not Exclusive — Surety:

Since the statutory procedures for compelling payment are cumulative with all other rights of a surety, subsection (2) of this section is not the exclusive method by which a paying surety may compel repayment from the principal. The right to enforce repayment is based on the implied agreement that the principal will refund the surety for money paid by the surety for the benefit of the principal. The surety has a right to proceed by any recognized manner to obtain reimbursement, such as in 25-15-202, 27-1-703, 28-1-303, and 28-11-417. Janke v. Smyk, 210 M 206, 683 P2d 942, 41 St. Rep. 1011 (1984).

The remedy afforded by this section not being exclusive, a surety who has paid a judgment against his principal and himself and others as sureties may take an assignment of the judgment to himself and enforce contribution from his cosureties. NW. Nat'l Bank v. Great Falls Opera House Co., 23 M 1, 57 P 440 (1899).

Indemnity Denied: Jury verdict, finding that driver was grossly negligent, precluded insurer of driver from receiving indemnity from auto manufacturer, even though jury had also made a determination that the auto manufacturer was liable for negligent manufacture and design of auto. Auto. Club Ins. Co. v. Toyota Motor Sales, Inc., 166 M 221, 531 P2d 1337 (1975).

Purpose of Statute — Surety Substituted for Plaintiff: The purpose of this section is to relieve the paying surety from the necessity of bringing an action to enforce reimbursement or contribution. The surety paying for the principal or his cosurety is given "the benefit of the judgment to enforce contribution or repayment" if he gives the notice required in the statute. It is the intention of the provision that the paying surety shall be substituted to all the rights of the plaintiff in the judgment, with the right and privilege of using it, just as the plaintiff could use it, to enforce by the process of execution thereon the payment of such claim as he has. NW. Nat'l Bank v. Great Falls Opera House Co., 23 M 1, 57 P 440 (1899).

Statute of Limitations Not Applicable: The right of a surety, who has paid a judgment against his principal, and himself and other sureties, to enforce contribution from a cosurety, is not barred by the lapse of the statutory period of limitation after the payment of the judgment but exists so long as the judgment is alive. NW. Nat'l Bank v. Great Falls Opera House Co., 23 M 1, 57 P 440 (1899).

Collateral References

Contribution *key* 6.

18 C.J.S. Contribution §7.

25-13-105. Compelling repayment — surety on appeal.

Collateral References

Subrogation *key* 7(9).

83 C.J.S. Subrogation §61.

Part 2
Method of Enforcement

25-13-201. Judgments for money or the possession of property.

Case Notes

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two

deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Deficiency Judgment — Order to Assign Future Proceeds From Separate Cause of Action to Judgment Creditor Not Erroneous: Andersen executed a promissory note in favor of the Alpine Buffalo, Elk and Llama Ranch, Inc. (Alpine), and secured the note with real property. When no payments were made, Alpine received a judgment and foreclosure decree. After Andersen's property was sold, Alpine also received a deficiency judgment in the amount still owing. Andersen neither appealed the judgment nor made payment. Alpine later learned that Andersen was plaintiff in a pending malpractice claim against her former attorney, so Alpine sought and received an assignment of the prospective proceeds from that action. Andersen appealed the assignment order, claiming that Alpine's reliance on Rule 70, M.R.Civ.P. (Title 25, ch. 20), was misplaced because that rule is a civil contempt statute that applies only to a contemptuous party. Alpine conceded the inapplicability of the rule, but the Supreme Court pointed out that Rule 70 was not the sole basis for Alpine's motion for assignment, citing Smith v. Foss, 177 M 443, 582 P2d 329 (1978), for the proposition that a District Court possesses jurisdiction to enter any necessary orders to enforce its judgments. The District Court's assignment order did not assign Andersen's legal malpractice cause of action to Alpine, nor did Alpine receive all legal rights and title to that action. Rather, the assignment order merely required Andersen to assign future proceeds from the other litigation to Alpine in an amount limited to the funds necessary to satisfy the deficiency judgment amount. Andersen failed to establish error in the District Court's order requiring Andersen, as judgment debtor, to assign future proceeds from the separate cause of action to Alpine, the judgment creditor. Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001), distinguishing Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935), and Youngblood v. Am. St. Ins. Co., 262 M 391, 866 P2d 203 (1993).

Setoff at Time of Presentation of Writ of Execution: A judgment creditor claimed that because a bank took no action to exercise its right of setoff before a writ of execution was presented, the writ took precedence over the setoff. However, the bank acquired a right to setoff at the time payment became delinquent but chose instead to perform the setoff when presented with the writ. The judgment creditor had no greater right against the bank than did the debtor at that time, and because a judgment creditor seeking execution of a debtor's property in possession of a third party stands in the shoes of the debtor as far as the rights of the third party are concerned, the writ did not take precedence. Under these circumstances, 30-4-303 did not apply. The bank properly asserted the setoff at the time the writ was presented. Victor Werlhof Aviation Ins. v. Farmers St. Bank, 237 M 51, 771 P2d 962, 46 St. Rep. 613 (1989).

Restriction on Execution Lien — Within Equitable Power: As part of a dissolution proceeding, the District Court awarded two parcels of real property to the wife and ordered her to pay the husband designated amounts for his interest therein. Nine months after the dissolution, the husband moved for leave to execute on the property in order to satisfy the money judgment in his favor. The District Court found that a special execution, restricting levy and sale of the land for specified amounts, would further the intention of the original decree. The husband appealed, contending the District Court had abused its discretion by restricting the execution liens and limiting the right to enforce the money judgment. The Supreme Court held that the District Court had molded its decree to do equity to both parties. It was within the court's discretion to fashion a Writ of Execution in compliance with and designed to enforce its original order. Miller v. Miller, 206 M 515, 672 P2d 271, 40 St. Rep. 1819 (1983).

Procedure for Stay of Execution of Judgment Not Followed — Property Properly Awarded: Petitioner requested a Writ of Supervisory Control to have an ejection order declared illegal in a property dispute. The Supreme Court in reviewing the proceedings stated that a judgment debtor desiring to stay the execution of a judgment or order of a District Court must proceed

under Rule 7, M.R.App.P. That rule provides that if an appellant desires a stay of proceedings where the court has made no such order, he may present to the court and secure its approval of a supersedeas bond. In this case, the District Court fixed the amount of the bond but the bond was never presented to the court for approval prior to the ejection order. Therefore, the judgment holder was entitled to enforcement of the judgment by execution under 25-13-101 and 25-13-201. The District Court followed these statutes and was authorized to order delivery of the possession of the property under 25-13-307. State ex rel. Cady v. District Court, 203 M 522, 662 P2d 602, 40 St. Rep. 610 (1983).

Remedy for Execution in Excess of Judgment: Where Writ of Execution was issued to enforce a judgment, the fact that the levy of $23,610.25 was allegedly $5,000 in excess of the amount owed by the debtor did not provide grounds for a motion to quash the Writ; the proper remedy would have been to move to set aside the excess. Heller v. Osburnsen, 168 M 232, 548 P2d 607 (1975).

General Execution Improper — Use of Certified Copy of Judgment: Where one of two defendants had impounded a sum of money pending appeal from a judgment prosecuted by its codefendant and the judgment was reversed and judgment was thereupon entered directing that the money be paid over to the prevailing party, such judgment was not enforceable by levy of a general execution upon the property of the party holding the fund but, under 25-13-203, by service of a certified copy of the judgment; hence an order refusing to issue a Writ of Execution was proper. Nepstad v. E. Chicago Oil Ass'n, 96 M 183, 29 P2d 643 (1934).

No Application to Foreclosure Decree: This section has no application to sales in foreclosure, the District Court having inherent power to order such sales without a formal execution and the Sheriff deriving his power to sell from the decree and not from a so-called order of sale. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

Payment of Judgment for Money by Sale of Property — Warrant Not Required: If the property of a defendant, against whom an ordinary money judgment is entered, is subjected to the payment of the judgment by operation of law, the Sheriff cannot proceed without a warrant for so doing. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

"Process" Not to Include Order of Sale: The word "process", employed in Art. VIII, sec. 27, 1889 Mont. Const., does not include the order of sale found in the decree of a court of equity in foreclosure proceedings. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

Equity Decree for Payment of Money: When properly docketed, a decree in equity directing the payment of money becomes a lien upon the real estate of the debtor and may be enforced by execution in the same manner as a judgment in an action at law. Raymond v. Blancgrass, 36 M 449, 93 P 648 (1907), distinguished in Lewis v. Lewis, 109 M 42, 94 P2d 211 (1939).

Collateral References

Execution *key* 5 through 10, 421, et seq.; Judgment *key* 855.

33 C.J.S. Executions §§29, 38; 49 C.J.S. Judgments §585, et seq.

25-13-202. Judgments requiring the sale of property.

Case Notes

No Application to Foreclosure Decree: This section has no application to sales in foreclosure, the District Court having inherent power to order such sales without a formal execution and the Sheriff deriving his power to sell from the decree and not from a so-called order of sale. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

Payment for Judgment of Money by Sale of Property — No Warrant Required: If the property of a defendant, against whom an ordinary money judgment is entered, is subjected to the payment of the judgment by operation of law, the Sheriff cannot proceed without a warrant for so doing. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

"Process" Not to Include Order of Sale: The word "process", employed in Art. VIII, sec. 27, 1889 Mont. Const., does not include the order of sale found in the decree of a court of equity in foreclosure proceedings. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

Equity Decree for Payment of Money as Lien Upon Real Estate: When properly docketed, a decree in equity directing the payment of money becomes a lien upon the real estate of the debtor and may be enforced by execution in the same manner as a judgment in an action at law. Raymond v. Blancgrass, 36 M 449, 93 P 648 (1907), distinguished in Lewis v. Lewis, 109 M 42, 94 P2d 211 (1939).

Collateral References

Execution *key* 5 through 10, 421, et seq.; Judgment *key* 855.

33 C.J.S. Executions §§5 through 10, 407, et seq.; 49 C.J.S. Judgments §585, et seq.

25-13-203. Judgments requiring the performance of specific acts.

Compiler's Comments

1987 Amendment: In (2), near middle after "the sheriff", inserted "or levying officer, who may be a registered process server".

Case Notes

General Execution Improper — Use of Certified Copy of Judgment: Where one of two defendants had impounded a sum of money pending appeal from a judgment prosecuted by its codefendant and the judgment was reversed and judgment was thereupon entered directing that the money be paid over to the prevailing party, such judgment was not enforceable by levy of a general execution upon the property of the party holding the fund but, under this section, by service of a certified copy of the judgment; hence an order refusing to issue a Writ of Execution was proper. Nepstad v. E. Chicago Oil Ass'n, 96 M 183, 29 P2d 643 (1934).

Collateral References

Execution *key* 5 through 10, 421, et seq.; Judgment *key* 855.

33 C.J.S. Executions §24; 49 C.J.S. Judgments §585, et seq.

25-13-204. Enforcement of order to pay money.

Case Notes

Separate Maintenance Decree: A decree for separate maintenance recovered by a married woman may be enforced by execution. Raymond v. Blancgrass, 36 M 449, 93 P 648 (1907), distinguished in Lewis v. Lewis, 109 M 42, 94 P2d 211 (1939).

Collateral References

Motions *key* 66.

60 C.J.S. Motions and Orders §67.

25-13-205. Judgments against county or county officer.

Collateral References

Counties *key* 226.

25-13-211. Notification of seizure.

Compiler's Comments

Effective Date: Section 9, Ch. 89, L. 1999, provided that this section is effective on passage and approval. Approved March 16, 1999.

Applicability: Section 10, Ch. 89, L. 1999, provided: "[This act] applies to an execution of judgment commenced on or after [the effective date of this act]." Effective March 16, 1999.

25-13-212. Claiming exemption — process — time for hearing.

Compiler's Comments

Effective Date: Section 9, Ch. 89, L. 1999, provided that this section is effective on passage and approval. Approved March 16, 1999.

Applicability: Section 10, Ch. 89, L. 1999, provided: "[This act] applies to an execution of judgment commenced on or after [the effective date of this act]." Effective March 16, 1999.

Case Notes

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

25-13-213. Warrant of execution — requirements — penalties.

Compiler's Comments

Effective Date: Section 9, Ch. 89, L. 1999, provided that this section is effective on passage and approval. Approved March 16, 1999.

Applicability: Section 10, Ch. 89, L. 1999, provided: "[This act] applies to an execution of judgment commenced on or after [the effective date of this act]." Effective March 16, 1999.

Case Notes

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Part 3
Contents of Writ

25-13-301. Form and contents of writ.

Compiler's Comments

2001 Amendment: Chapter 515 inserted (4) regarding sufficiency of information required in a notice of levy. Amendment effective October 1, 2001.

1999 Amendment: Chapter 89 inserted (3) providing that a writ of execution served on an employer be accompanied by a document describing exemptions from execution; and made minor changes in style. Amendment effective March 16, 1999.

Applicability: Section 10, Ch. 89, L. 1999, provided: "[This act] applies to an execution of judgment commenced on or after [the effective date of this act]." Effective March 16, 1999.

1987 Amendment: In (1)(b) and (1)(d), after "the sheriff", inserted "or levying officer".

1981 Amendment: In (1)(c), substituted "it was entered" for "the judgment roll is filed" and made minor changes in grammar and phraseology.

Case Notes

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

How Lawful Authority to Enter and Search Private Home Under Writ of Execution Obtained — Execution Warrant: When an officer has been unable to secure property that would satisfy an underlying judgment and there is reason to believe that personal property subject to execution may be located within the debtor's residence, an "execution warrant" should be obtained

pursuant to the following procedures in order to avoid violation of the debtor's constitutional rights. An execution warrant should be issued only by a judge "upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution". If the judge is satisfied that there is a reasonable cause to believe the statements set out in the affidavit, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution. An execution warrant obtained under these procedures will protect the judgment debtor's right to be free from unreasonable search and seizure under both the U.S. and Montana Constitutions. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Nebr. v. Hinchey, 374 NW 2d 14 (Nebr. 1985).

Conversion Evidenced by Notification and Procedural Shortcomings: Johnston owned a mobile home, entitling her to possession, and Galayda owned the property on which the mobile home was located. Galayda claimed that by virtue of various notices to quit the premises, a default judgment against Johnston for back rent, and a writ of assistance directing the Sheriff to remove the mobile home, Galayda had legal authority to physically evict Johnston and her mobile home from the premises. However, a number of procedural errors occurred during the removal process that rendered the eviction actions unauthorized, including: (1) Galayda's failure under 70-24-422 to give Johnston notice to pay rent prior to filing a complaint for nonpayment and possession of the premises; (2) basing the default judgment on Galayda's incorrect sworn affidavit that Johnston owed back rent, which had in fact been paid; (3) Galayda's contract with a third party to remove the mobile home under the writ of assistance rather than having the Sheriff carry out the process, in violation of this section; (4) Galayda's service on Johnston of a notice of abandonment without sufficient facts showing absolute abandonment, in violation of 70-24-430; and (5) Galayda's failure to notify Johnston under 70-24-730 of the location of the property and of the steps necessary to reclaim the property. Failure to meet these notification and procedural steps was evidence that Johnston was wrongfully deprived of her property and constituted conversion on the part of Galayda. Johnston v. Am. Reliable Ins. Co., 253 M 253, 833 P2d 176, 49 St. Rep. 495 (1992).

Sheriff to Whom Directed: This section, declaring that a Writ of Execution must be directed "to the sheriff", means the Sheriff of the county where process is to be served. Merchants Credit Serv., Inc. v. Chouteau County Bank, 112 M 229, 114 P2d 1074 (1941), distinguished in Stokke v. Graham, 129 M 96, 281 P2d 1025 (1955).

Application to Foreclosure Decree: There is nothing in this section requiring a Writ of Execution to carry a decree of foreclosure into effect. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

Sufficiency of Foreclosure Decree: Before an officer is authorized to sell, under an ordinary judgment, he must have specific directions to do so; but in a degree of foreclosure, the property to be subjected to the payment of the debt is already indicated by and described in the decree, coupled with a mandate that it be sold by the Sheriff to satisfy the demands of the plaintiff. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

Lack of Seal of Court — Effect: The failure of the clerk to affix the seal of the court to an execution is a clerical misprision, rendering the execution voidable only. Kipp v. Burton, 29 M 96, 74 P 85 (1903). See also Burton v. Kipp, 30 M 275, 76 P 563 (1904); In re Farrell, 36 M 254, 92 P 785 (1907).

Collateral References

Execution *key* 78 through 95; Judgment *key* 222.

33 C.J.S. Executions §§80 through 95; 49 C.J.S. Judgments §76.

30 Am. Jur. 2d Executions and Enforcement of Judgments §92, et seq.

Judgment ambiguous or silent as to amount of recovery as defective for lack of certainty. 55 ALR 2d 723.

25-13-302. Execution against principal debtor before surety.

Compiler's Comments

1987 Amendment: Near middle, after "the sheriff", inserted "or levying officer".

Case Notes

Application to Suretyship Relations: This section refers to the rendition of judgments upon obligations the makers of which signed in fact as principal and surety and not to judgments upon

those on which the makers are all principals. It also applies to cases in which the parties whose rights are to be determined are before the court and not to cases in which judgment is sought, at the option of the plaintiff, against one of the obligors. Brownlee v. Young, 25 M 38, 63 P 798 (1901).

Collateral References

Execution *key* 87; Judgment *key* 234, et seq.

33 C.J.S. Executions §§194 through 210; 49 C.J.S. Judgments §§27, 33.

25-13-303. Execution when only some of defendants served.

Compiler's Comments

1987 Amendment: Near middle, after "the sheriff", inserted "or levying officer".

Collateral References

Execution *key* 86 through 89.

33 C.J.S. Executions §§194 through 210.

25-13-304. Execution against property of judgment debtor.

Compiler's Comments

1987 Amendment: Near beginning, after "the sheriff", inserted "or levying officer".

1981 Amendment: Inserted "as provided in 25-13-305".

Case Notes

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Enforceability of Civil Judgment Insufficient Compelling State Interest to Justify Warrantless Search of Judgment Debtor's Residence: Police officers searched Dorwart's home pursuant to writs of execution and seized his personal property, but without Dorwart's permission or a search warrant. The argument was made that the compelling state interest justifying the warrantless search and seizure was the enforcement of monetary judgments by the seizure of the judgment debtor's property and the preservation of the credibility of the judicial system. Although the Supreme Court has held that a compelling state interest justifying an intrusion into a person's privacy may exist when the state is acting to enforce its criminal laws for the benefit and protection of other fundamental rights of its citizens, in this case, entry was not effectuated to enforce the state's criminal laws or to protect society in general from the actions of criminal wrongdoers, but rather for the purpose of enforcing a civil judgment between two private citizens. The state's interest in postjudgment execution cases is not so compelling as to justify an intrusion into a person's private home, without the person's consent, for purposes of searching that home and seizing any property that might have some value. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998).

Entry of Residence to Levy Upon Personal Property While Judgment Debtor Incarcerated — Entry and Search of Private Home Not Authorized by Writ of Execution: Dorwart was named defendant in two small claims actions, resulting in the entry of default judgments against him and the issuance of writs of execution to enforce the judgments. About 1 month later, while driving his truck, Dorwart was stopped and served with the two writs and was subsequently also arrested for driving under the influence and incarcerated. While Dorwart was in jail, two Sheriff's deputies entered Dorwart's home and garage without his permission or a warrant and seized various items of personal property pursuant to the writs, relying on the writs as the sole authority for authorization to enter the residence and conduct the search and seizure. Dorwart

later filed a complaint, alleging various state and federal claims and common-law tort claims and contending that Montana's postjudgment execution statutes are unconstitutional. The District Court found that the deputies did not violate Dorwart's constitutional right to be free from unreasonable search and seizure because the writs constituted judicial authorization for their actions. On appeal, the prosecution relied on Ramsey v. Burns, 27 M 154, 69 P 711 (1902), for the proposition that one of the implied powers authorized by a writ of execution includes the levying officer's entry into a judgment debtor's residence or place of business in order to execute the writ and that on that basis, entry of the home was not unreasonable. The Supreme Court distinguished Ramsey because no constitutional search and seizure issue was raised in that case. Dorwart had a legitimate expectation of privacy in his home, and government intrusion without a search warrant was per se unreasonable, subject to only a few exceptions that did not apply. Citing Camara v. Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967), and G.M. Leasing Corp. v. U.S., 429 US 338, 50 L Ed 2d 530, 97 S Ct 619 (1977), the court found that the constitutional prohibition against unreasonable search and seizure applies in civil as well as criminal contexts because all citizens have a strong interest in securing their homes from government intrusion, regardless of the reason for the intrusion, and that placing limitations on the discretion of when, where, and how to conduct a search that intrudes upon a private area is the precise reason behind the search warrant requirement. Postjudgment execution procedures and writs of execution issued under the procedures did not sufficiently limit the deputies' discretion in executing the writs to satisfy constitutional search and seizure provisions. Thus, entry into Dorwart's residence and seizure of his property without permission or a warrant, relying only on the authority of the writs, violated Dorwart's constitutional search and seizure rights. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Nebr. v. Hinchey, 374 NW 2d 14 (Nebr. 1985).

How Lawful Authority to Enter and Search Private Home Under Writ of Execution Obtained — Execution Warrant: When an officer has been unable to secure property that would satisfy an underlying judgment and there is reason to believe that personal property subject to execution may be located within the debtor's residence, an "execution warrant" should be obtained pursuant to the following procedures in order to avoid violation of the debtor's constitutional rights. An execution warrant should be issued only by a judge "upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution". If the judge is satisfied that there is a reasonable cause to believe the statements set out in the affidavit, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution. An execution warrant obtained under these procedures will protect the judgment debtor's right to be free from unreasonable search and seizure under both the U.S. and Montana Constitutions. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Nebr. v. Hinchey, 374 NW 2d 14 (Nebr. 1985).

Collateral References

Execution *key* 78 through 95.

33 C.J.S. Executions §§25 through 56.

25-13-305. Execution of lien on real property.

Compiler's Comments

1987 Amendment: Near beginning, after "the sheriff", inserted "or levying officer".

Case Notes

Application to Attached Property — No Requirement for Transcript of Docket: Filing of transcript of docket of the judgment in office of clerk where real property is located in another county is not indispensable where the property was already in custodia legis under a Writ of Attachment and therefore beyond the control of the judgment debtor and free from execution or attachment by other creditors; in short, this section is intended to direct procedure in actions where attachment is not allowed or none was levied. Andrews v. Smithson, 114 M 360, 136 P2d 531 (1943).

Application to Foreclosure Decree: There is nothing in this section requiring a Writ of Execution to carry a decree of foreclosure into effect. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

Sufficiency of Foreclosure Decree: Before an officer is authorized to sell, under an ordinary judgment, he must have specific directions to do so; but in a degree of foreclosure, the property to be subjected to the payment of the debt is already indicated by and described in the decree, coupled with a mandate that it be sold by the Sheriff to satisfy the demands of the plaintiff. Thomas v. Thomas, 44 M 102, 119 P 283 (1911).

Collateral References

Execution *key* 78 through 95.

33 C.J.S. Executions §38.

25-13-306. Execution against property in hands of representative.

Compiler's Comments

1987 Amendment: Near end, after "the sheriff", inserted "or levying officer".

Case Notes

Entry of Residence to Levy Upon Personal Property While Judgment Debtor Incarcerated — Entry and Search of Private Home Not Authorized by Writ of Execution: Dorwart was named defendant in two small claims actions, resulting in the entry of default judgments against him and the issuance of writs of execution to enforce the judgments. About 1 month later, while driving his truck, Dorwart was stopped and served with the two writs and was subsequently also arrested for driving under the influence and incarcerated. While Dorwart was in jail, two Sheriff's deputies entered Dorwart's home and garage without his permission or a warrant and seized various items of personal property pursuant to the writs, relying on the writs as the sole authority for authorization to enter the residence and conduct the search and seizure. Dorwart later filed a complaint, alleging various state and federal claims and common-law tort claims and contending that Montana's postjudgment execution statutes are unconstitutional. The District Court found that the deputies did not violate Dorwart's constitutional right to be free from unreasonable search and seizure because the writs constituted judicial authorization for their actions. On appeal, the prosecution relied on Ramsey v. Burns, 27 M 154, 69 P 711 (1902), for the proposition that one of the implied powers authorized by a writ of execution includes the levying officer's entry into a judgment debtor's residence or place of business in order to execute the writ and that on that basis, entry of the home was not unreasonable. The Supreme Court distinguished Ramsey because no constitutional search and seizure issue was raised in that case. Dorwart had a legitimate expectation of privacy in his home, and government intrusion without a search warrant was per se unreasonable, subject to only a few exceptions that did not apply. Citing Camara v. Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967), and G.M. Leasing Corp. v. U.S., 429 US 338, 50 L Ed 2d 530, 97 S Ct 619 (1977), the court found that the constitutional prohibition against unreasonable search and seizure applies in civil as well as criminal contexts because all citizens have a strong interest in securing their homes from government intrusion, regardless of the reason for the intrusion, and that placing limitations on the discretion of when, where, and how to conduct a search that intrudes upon a private area is the precise reason behind the search warrant requirement. Postjudgment execution procedures and writs of execution issued under the procedures did not sufficiently limit the deputies' discretion in executing the writs to satisfy constitutional search and seizure provisions. Thus, entry into Dorwart's residence and seizure of his property without permission or a warrant, relying only on the authority of the writs, violated Dorwart's constitutional search and seizure rights. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Nebr. v. Hinchey, 374 NW 2d 14 (Nebr. 1985).

Collateral References

Execution *key* 78 through 95.

33 C.J.S. Executions §§25 through 56.

25-13-307. Execution requiring delivery of possession of property.

Compiler's Comments

1987 Amendment: In two places, after "the sheriff", inserted "or levying officer".

Case Notes

Entry of Residence to Levy Upon Personal Property While Judgment Debtor Incarcerated — Entry and Search of Private Home Not Authorized by Writ of Execution: Dorwart was named defendant in two small claims actions, resulting in the entry of default judgments against him and the issuance of writs of execution to enforce the judgments. About 1 month later, while driving his truck, Dorwart was stopped and served with the two writs and was subsequently also arrested for driving under the influence and incarcerated. While Dorwart was in jail, two

Sheriff's deputies entered Dorwart's home and garage without his permission or a warrant and seized various items of personal property pursuant to the writs, relying on the writs as the sole authority for authorization to enter the residence and conduct the search and seizure. Dorwart later filed a complaint, alleging various state and federal claims and common-law tort claims and contending that Montana's postjudgment execution statutes are unconstitutional. The District Court found that the deputies did not violate Dorwart's constitutional right to be free from unreasonable search and seizure because the writs constituted judicial authorization for their actions. On appeal, the prosecution relied on Ramsey v. Burns, 27 M 154, 69 P 711 (1902), for the proposition that one of the implied powers authorized by a writ of execution includes the levying officer's entry into a judgment debtor's residence or place of business in order to execute the writ and that on that basis, entry of the home was not unreasonable. The Supreme Court distinguished Ramsey because no constitutional search and seizure issue was raised in that case. Dorwart had a legitimate expectation of privacy in his home, and government intrusion without a search warrant was per se unreasonable, subject to only a few exceptions that did not apply. Citing Camara v. Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967), and G.M. Leasing Corp. v. U.S., 429 US 338, 50 L Ed 2d 530, 97 S Ct 619 (1977), the court found that the constitutional prohibition against unreasonable search and seizure applies in civil as well as criminal contexts because all citizens have a strong interest in securing their homes from government intrusion, regardless of the reason for the intrusion, and that placing limitations on the discretion of when, where, and how to conduct a search that intrudes upon a private area is the precise reason behind the search warrant requirement. Postjudgment execution procedures and writs of execution issued under the procedures did not sufficiently limit the deputies' discretion in executing the writs to satisfy constitutional search and seizure provisions. Thus, entry into Dorwart's residence and seizure of his property without permission or a warrant, relying only on the authority of the writs, violated Dorwart's constitutional search and seizure rights. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Nebr. v. Hinchey, 374 NW 2d 14 (Nebr. 1985).

Procedure for Stay of Execution of Judgment Not Followed — Property Properly Awarded: Petitioner requested a Writ of Supervisory Control to have an ejection order declared illegal in a property dispute. The Supreme Court in reviewing the proceedings stated that a judgment debtor desiring to stay the execution of a judgment or order of a District Court must proceed under Rule 7, M.R.App.P. That rule provides that if an appellant desires a stay of proceedings where the court has made no such order, he may present to the court and secure its approval of a supersedeas bond. In this case, the District Court fixed the amount of the bond but the bond was never presented to the court for approval prior to the ejection order. Therefore, the judgment holder was entitled to enforcement of the judgment by execution under 25-13-101 and 25-13-201. The District Court followed these statutes and was authorized to order delivery of the possession of the property under 25-13-307. State ex rel. Cady v. District Court, 203 M 522, 662 P2d 602, 40 St. Rep. 610 (1983).

Collateral References

Execution *key* 78 through 95.
33 C.J.S. Executions §§25 through 56.

25-13-308. Execution against person of judgment debtor.

Collateral References

Execution *key* 78 through 95.
33 C.J.S. Executions §§25 through 56.

Part 4
Execution and Return of Writ

25-13-401. To whom execution issued.

Compiler's Comments

1987 Amendment: In two places, after "the sheriff", inserted "or levying officer".

Case Notes

Execution in Wrong County — Authority of Sheriff: Outside of his bailiwick a Sheriff has no more power to serve process than a private citizen; hence a Writ of Execution directed to the Sheriff of one county but sent to and served by the Sheriff of another county ordering him to levy upon property of the judgment debtor in his county does not create a lien upon such property. Merchants Credit Serv., Inc. v. Chouteau County Bank, 112 M 229, 114 P2d 1074 (1941), distinguished in Stokke v. Graham, 129 M 96, 281 P2d 1025 (1955).

Sheriff to Whom Issued: The word "must" in the second sentence is mandatory and peremptory, excludes discretion, and imposes an absolute duty to perform the requirement of the statute. Merchants Credit Serv., Inc. v. Chouteau County Bank, 112 M 229, 114 P2d 1074 (1941), distinguished in McGraff v. McGillvray, 135 M 256, 339 P2d 478, 342 P2d 736 (1959).

Attorney General's Opinions

Issuance of Writ of Execution Against Delinquent Taxpayer: A Writ of Execution against a delinquent personal property taxpayer may be issued by the County Treasurer to the Sheriff of any county in the state. 35 A.G. Op. 79 (1974).

Collateral References

Execution *key* 65.

33 C.J.S. Executions §82.

30 Am. Jur. 2d Executions and Enforcement of Judgments §93.

25-13-402. How writ executed.

Compiler's Comments

2005 Amendment: Chapter 392 in (1)(b)(ii) inserted second sentence authorizing service to be mailed out of state, at the direction of the third party, if third party processes garnishment or levies from location outside the state. Amendment effective October 1, 2005.

2003 Amendments — Composite Section: Chapter 114 in (1)(b)(i) after "employee of the" substituted "third party or upon a department" for "entity or other department" and near end inserted "serving the writ by"; and made minor changes in style. Amendment effective October 1, 2003.

Chapter 510 in (6)(a) inserted third sentence requiring earnings withheld from judgment debtor to be remitted to sheriff or levying officer within 5 days of withholding; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendments — Composite Section: Chapter 515 in (1)(a) in introductory clause after "no later than" substituted "120 days" for "60 days"; inserted (1)(b) regarding service of a writ upon a corporation or other legal entity; inserted (1)(c) providing that a levy under subsection (1)(b) is effective when the writ is served by personal service or by mail; inserted (3) requiring a third party to respond within 10 business days after the date of levy, based on assets held at the time of levy; in (5) near middle after "within the" substituted "120 days" for "60 days"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 560 in (1) near beginning of introductory clause after "shall" inserted "subject to subsection (6)" and after "no later than" substituted "120 days" for "60 days"; deleted former (3) that read: "(3) With respect to earnings of a judgment debtor, an employer shall respond to the levy based upon the earnings accrued to the end of the regular pay period in which the levy occurred"; in (5) near end after "within the" substituted "120 days" for "60 days"; inserted (6) regarding a levy upon the earnings of a judgment debtor; inserted (7) providing that this section does not supersede applicable state or federal laws regarding priority; and made minor changes in style. Amendment effective July 1, 2001.

1999 Amendment: Chapter 89 in (1)(c) substituted "the judgment creditor or the judgment creditor's attorney" for "the plaintiff or his attorney"; inserted (3) requiring an employer to respond to a levy based upon earnings for the pay period in which the levy occurred; inserted (4) providing for a holding period following notification to the judgment debtor before levied property may be sold; inserted (5) providing for additional levies to satisfy the writ until the judgment is satisfied; and made minor changes in style. Amendment effective March 16, 1999.

Applicability: Section 10, Ch. 89, L. 1999, provided: "[This act] applies to an execution of judgment commenced on or after [the effective date of this act]." Effective March 16, 1999.

1987 Amendments: Chapter 88 near beginning of first sentence inserted 60-day limitation on execution of writ.

Chapter 548 in first sentence, near beginning, and in third sentence, near middle, after "the sheriff", inserted "or levying officer".

Case Notes

Erroneous Denial of Motion to Quash Writ of Execution: A federal District Court allowed a default judgment against Clark in favor of plaintiffs. In order to execute the judgment on Clark's Montana assets, plaintiffs docketed the judgment in federal District Court in Montana, and about the same time, plaintiffs brought an action in Montana state court, asserting that Clark fraudulently transferred real property in order to avoid reimbursing plaintiffs. Following denial of the fraudulent transfer claim in Gulf Ins. Co. v. Clark, 2001 MT 45, 304 M 264, 20 P3d 780 (2001), plaintiffs docketed the federal judgment in Lake County District Court, requesting and

receiving a writ of execution, and a levying officer than executed on Clark's accounts. Upon notice of the levy on the accounts, Clark moved to quash the writ of execution, asserting that the federal judgment was invalid, that the writ was void because the federal District Court never obtained proper personal jurisdiction, and that service by publication was inadequate because the federal order required personal service. The state District Court concluded that Clark cited no authority allowing a state court to invalidate a federal District Court's judgment when the federal transcription of judgment is filed for execution in state court, so Clark's motion to quash was denied, and Clark appealed. As set out in Carr v. Bett, 1998 MT 266, 291 M 326, 970 P2d 1017 (1998), a party seeking to vacate a foreign judgment filed in Montana state courts may do so only upon defenses that make the underlying judgment invalid or unenforceable, which include a lack of personal or subject matter jurisdiction of the rendering court, fraud in the procurement of the judgment, lack of due process, or satisfaction. However, if a foreign judgment is valid, it should have the same credit, validity, and effect in every other court of the United States that it had in the court in which it was pronounced. Thus, the state District Court erred in concluding that it had no authority to review whether the federal court had personal jurisdiction over Clark. The Supreme Court then went on to consider whether Clark was properly subject to the federal court's jurisdiction in order to determine if the federal default judgment was valid. Service by publication did not provide the federal court with jurisdiction to enter the default judgment because that service was not properly completed and was thus ineffective. In its order granting service by publication, the federal court concluded that service could not be accomplished other than by publication, effectively determining, based on plaintiffs' representations, that personal service had not been accomplished. Therefore, the state District Court committed reversible error when it failed to hold that service by publication was not properly accomplished pursuant to the federal court order. Gulf Ins. Co. v. Clark, 2003 MT 87, 315 M 121, 68 P3d 673 (2003).

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Enforceability of Civil Judgment Insufficient Compelling State Interest to Justify Warrantless Search of Judgment Debtor's Residence: Police officers searched Dorwart's home pursuant to writs of execution and seized his personal property, but without Dorwart's permission or a search warrant. The argument was made that the compelling state interest justifying the warrantless search and seizure was the enforcement of monetary judgments by the seizure of the judgment debtor's property and the preservation of the credibility of the judicial system. Although the Supreme Court has held that a compelling state interest justifying an intrusion into a person's privacy may exist when the state is acting to enforce its criminal laws for the benefit and protection of other fundamental rights of its citizens, in this case, entry was not effectuated to enforce the state's criminal laws or to protect society in general from the actions of criminal wrongdoers, but rather for the purpose of enforcing a civil judgment between two private citizens. The state's interest in postjudgment execution cases is not so compelling as to justify an intrusion into a person's private home, without the person's consent, for purposes of searching that home and seizing any property that might have some value. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998).

Entry of Residence to Levy Upon Personal Property While Judgment Debtor Incarcerated — Entry and Search of Private Home Not Authorized by Writ of Execution: Dorwart was named defendant in two small claims actions, resulting in the entry of default judgments against him and the issuance of writs of execution to enforce the judgments. About 1 month later, while driving his truck, Dorwart was stopped and served with the two writs and was subsequently also arrested for driving under the influence and incarcerated. While Dorwart was in jail, two

Sheriff's deputies entered Dorwart's home and garage without his permission or a warrant and seized various items of personal property pursuant to the writs, relying on the writs as the sole authority for authorization to enter the residence and conduct the search and seizure. Dorwart later filed a complaint, alleging various state and federal claims and common-law tort claims and contending that Montana's postjudgment execution statutes are unconstitutional. The District Court found that the deputies did not violate Dorwart's constitutional right to be free from unreasonable search and seizure because the writs constituted judicial authorization for their actions. On appeal, the prosecution relied on Ramsey v. Burns, 27 M 154, 69 P 711 (1902), for the proposition that one of the implied powers authorized by a writ of execution includes the levying officer's entry into a judgment debtor's residence or place of business in order to execute the writ and that on that basis, entry of the home was not unreasonable. The Supreme Court distinguished Ramsey because no constitutional search and seizure issue was raised in that case. Dorwart had a legitimate expectation of privacy in his home, and government intrusion without a search warrant was per se unreasonable, subject to only a few exceptions that did not apply. Citing Camara v. Municipal Court, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967), and G.M. Leasing Corp. v. U.S., 429 US 338, 50 L Ed 2d 530, 97 S Ct 619 (1977), the court found that the constitutional prohibition against unreasonable search and seizure applies in civil as well as criminal contexts because all citizens have a strong interest in securing their homes from government intrusion, regardless of the reason for the intrusion, and that placing limitations on the discretion of when, where, and how to conduct a search that intrudes upon a private area is the precise reason behind the search warrant requirement. Postjudgment execution procedures and writs of execution issued under the procedures did not sufficiently limit the deputies' discretion in executing the writs to satisfy constitutional search and seizure provisions. Thus, entry into Dorwart's residence and seizure of his property without permission or a warrant, relying only on the authority of the writs, violated Dorwart's constitutional search and seizure rights. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Nebr. v. Hinchey, 374 NW 2d 14 (Nebr. 1985).

How Lawful Authority to Enter and Search Private Home Under Writ of Execution Obtained — Execution Warrant: When an officer has been unable to secure property that would satisfy an underlying judgment and there is reason to believe that personal property subject to execution may be located within the debtor's residence, an "execution warrant" should be obtained pursuant to the following procedures in order to avoid violation of the debtor's constitutional rights. An execution warrant should be issued only by a judge "upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution". If the judge is satisfied that there is a reasonable cause to believe the statements set out in the affidavit, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution. An execution warrant obtained under these procedures will protect the judgment debtor's right to be free from unreasonable search and seizure under both the U.S. and Montana Constitutions. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Nebr. v. Hinchey, 374 NW 2d 14 (Nebr. 1985).

Setoff at Time of Presentation of Writ of Execution: A judgment creditor claimed that because a bank took no action to exercise its right of setoff before a writ of execution was presented, the writ took precedence over the setoff. However, the bank acquired a right to setoff at the time payment became delinquent but chose instead to perform the setoff when presented with the writ. The judgment creditor had no greater right against the bank than did the debtor at that time, and because a judgment creditor seeking execution of a debtor's property in possession of a third party stands in the shoes of the debtor as far as the rights of the third party are concerned, the writ did not take precedence. Under these circumstances, 30-4-303 did not apply. The bank properly asserted the setoff at the time the writ was presented. Victor Werlhof Aviation Ins. v. Farmers St. Bank, 237 M 51, 771 P2d 962, 46 St. Rep. 613 (1989).

Surplus Proceeds — Duty of Sheriff to Deliver to Debtor: A Sheriff selling property on execution pursuant to a judgment is a trustee for the debtor as well as the creditor, and he is bound, unless otherwise directed by the court, if the property sells for more than enough to pay the judgment and costs, to pay the overplus to the judgment debtor. Sherlock v. Vinson, 90 M 235, 1 P2d 71 (1931).

No Application to Judgment Lien — Notice and Sale Only Necessary: The object of a levy is to bring property within the custody of the law, but where it, by operation of a judgment lien, is

already in the custody of the law, no levy is necessary; nothing more is required than to give the necessary notice and sell. Britannia Min. Co. v. USF&G Co., 43 M 93, 115 P 46 (1911).

Collateral References

Execution *key* 122, et seq.
33 C.J.S. Executions §§105 through 127.
30 Am. Jur. 2d Executions and Enforcement of Judgments §177, et seq.

25-13-403. Security for costs when property seized.

Compiler's Comments

1987 Amendment: Near beginning, after "the sheriff", inserted "or levying officer".

Collateral References

Sheriffs and Constables *key* 101.
80 C.J.S. Sheriffs and Constables §56.
30 Am. Jur. 2d Executions and Enforcement of Judgments §207.

25-13-404. Return of the execution.

Compiler's Comments

2001 Amendment: Chapter 560 in (1) near beginning after "provided in" substituted "25-13-402(6) and subsection (3) of this section" for "subsections (2) and (3)" and near middle after "more than" substituted "120 days" for "60 days"; in (2) near middle after "more than" substituted "120 days" for "90 days" and after "sheriff" deleted "or levying officer"; and made minor changes in style. Amendment effective July 1, 2001.

1987 Amendments: Chapter 88 in (1) inserted reference to subsection (3), after "returnable" inserted "to the clerk of the court in which the judgment was rendered", after "60 days" substituted "after receipt of the recovery" for "after its receipt", and at end of subsection substituted "following imposition of levy, as provided in 25-13-402" for "to the clerk of the court in which the judgment was rendered"; and inserted (3) providing for return by mail of execution to officer, agent, or attorney.

Chapter 548 in (1) and (2), near end after "the sheriff", inserted "or levying officer".

1983 Amendment: At beginning of (1), inserted proviso; and inserted (2) relating to writ of execution issued by County Treasurer.

1981 Amendment: In (1), substituted "clerk of the court in which the judgment was rendered" for "clerk with whom the judgment roll is filed. When the execution is returned, the clerk must attach it to the judgment roll."

Case Notes

Amendment of Writ — Service: Where 2 years after a Writ of Execution, which was good in the county in which it was issued but invalid in the county to which it was sent and served, the trial court ordered its amendment by changing the name of the county in which the Sheriff was directed to serve it, without notice to the party upon whom it had been served, the amendment resulted in effect in a new Writ which was never served, and the attempted amendment was ineffectual for the purpose of validating the original service. Merchants Credit Serv., Inc. v. Chouteau County Bank, 112 M 229, 114 P2d 1074 (1941), distinguished in Stokke v. Graham, 129 M 96, 281 P2d 1025 (1955).

Expiration of Writ: The 60 days within which a Writ of Execution must be served, under this section (see 2001 amendment), prescribe the life of the Writ; if not served within that time, it is functus officio. Merchants Credit Serv., Inc. v. Chouteau County Bank, 112 M 229, 114 P2d 1074 (1941).

Collateral References

Execution *key* 90, 330 through 347.
33 C.J.S. Executions §§89, 320 through 334.
30 Am. Jur. 2d Executions and Enforcement of Judgments §217, et seq.
Sheriff's deed as prima facie evidence of return. 108 ALR 667; 36 ALR 1001.

25-13-405. Clerk to record returned execution when levy on real property.

Collateral References

Execution *key* 90, 330 through 347.
33 C.J.S. Executions §327.
30 Am. Jur. 2d Executions and Enforcement of Judgments §230, et seq.
Sheriff's deed as prima facie evidence of return. 108 ALR 667; 36 ALR 1001.

Part 5
Property Subject to Execution

25-13-501. What property subject to execution.

Case Notes

General 398
Application to Debtor's Cause of Action 399

GENERAL

Failure to Record Aircraft Conveyance With Federal Agency — Unrecorded Ownership Interest Invalid to Cut Off Right to Levy on Aircraft: Ford signed a promissory note for $28,503.62, plus interest, for products purchased from Lewistown Propane Co. (Lewistown). Lewistown sought to collect on the promissory note, and Ford subsequently filed a confession of judgment with the District Court for the full amount. At this time, Becky was allegedly helping Ford to refinance Ford's debt, and Ford sold three pieces of farm machinery and an airplane to Becky. Section 503(c) of the Federal Aviation Act of 1958 requires that every aircraft transfer be evidenced by a recorded instrument before the rights of innocent third parties can be affected; however, neither Ford nor Becky recorded the transfer. When Lewistown attempted to collect on its judgment, it inquired with the state Department of Transportation and the Federal Aviation Administration about the ownership of the aircraft and determined that the aircraft was still registered in Ford's name and had no liens or encumbrances attached, and that Ford had paid the annual federal registration fees. Lewistown then seized the aircraft and advised Ford that it intended to sell the aircraft to satisfy the judgment against Ford. Upon learning of the seizure of the aircraft, Becky intervened and sought a stay of execution of judgment, which the District Court granted. Lewistown appealed and the Supreme Court reversed. Lewistown, as judgment creditor, was entitled to rely on the federal records, but because Becky's ownership interest was unrecorded at the time of Lewistown's execution of the levy, Becky's interest was invalid as to Lewistown and could not be used to cut off Lewistown's right to levy on the aircraft. Lewistown Propane Co. v. Ford, 2002 MT 27, 308 M 243, 42 P3d 229 (2002), applying Kovacich v. Norgaard, 221 M 26, 716 P2d 633 (1986).

Equitable Ownership Interest Adequate for Lien Purposes: In order to determine whether the holder of an equitable title was an owner of real property for purposes of establishing a lien under 25-9-301, the Supreme Court decided an equitable ownership interest was sufficient. The intent of this section is clearly to make a judgment lien operative against all real property interests. Hannah v. Martinson, 232 M 469, 758 P2d 276, 45 St. Rep. 1203 (1988).

Third Person Subject to Attachment — Notice and Writ Required: This section provides that the procedures prescribed by 27-18-401 are required to attach a debt when a Writ of Execution is involved. This section and 27-18-401 establish that a Writ of Attachment or Execution is not alone sufficient to create a lien under 27-18-307 when a debt owed by a third person is the subject of attachment; also required is notice that the debt owing is attached in pursuance of the Writ. Phillips v. Loberg, 186 M 331, 607 P2d 561 (1980).

Fraudulent Conveyances: The lien, which a creditor who seeks to have a conveyance of realty set aside as fraudulent must have acquired as a condition precedent to his right to maintain the action, may be acquired, under this section, by levy of execution, and having once been acquired, it is not lost by failure of the Sheriff to hold a sale but, instead, making return nulla bona. Stone-Ordean-Wells Co. v. Strong, 94 M 20, 20 P2d 639 (1933).

Corporate Stock — Manner of Levy: Under this section, shares of stock in a building and loan association are levied upon by the Writ of Execution in the same manner as upon a Writ of Attachment. Fousek v. DeForest, 90 M 448, 4 P2d 472 (1931).

Unrecorded Interest Not Subject to Lien: This section, construed with 25-9-301, leads to the conclusion that an interest undisclosed by the records is not subject to the lien of a docketed judgment. Piccolo v. Tanaka, 78 M 445, 253 P 890 (1927), distinguished in Gaines v. Van Demark, 106 M 1, 74 P2d 454 (1937); McMillan v. Davenport, 44 M 23, 118 P 756 (1911), distinguished in Gaines v. Van Demark, 106 M 1, 74 P2d 454 (1937).

Redemption Rights Not Subject to Execution: The right to redeem is a personal privilege and not a property right, and hence it does not come within the category of any of the interests enumerated in this section as subject to execution. Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

Purpose of Section: The purpose of the Legislature in enacting this section was to furnish an expeditious method of satisfying a judgment, and not to extend the operation of the lien. In other words, the purpose was to put upon the same footing, so far as the levy of execution is concerned,

personal property and interests in real estate that are not affected by the lien of the judgment. McMillan v. Davenport, 44 M 23, 118 P 756 (1911).

APPLICATION TO DEBTOR'S CAUSE OF ACTION

Deficiency Judgment — Order to Assign Future Proceeds From Separate Cause of Action to Judgment Creditor Not Erroneous: Andersen executed a promissory note in favor of the Alpine Buffalo, Elk and Llama Ranch, Inc. (Alpine), and secured the note with real property. When no payments were made, Alpine received a judgment and foreclosure decree. After Andersen's property was sold, Alpine also received a deficiency judgment in the amount still owing. Andersen neither appealed the judgment nor made payment. Alpine later learned that Andersen was plaintiff in a pending malpractice claim against her former attorney, so Alpine sought and received an assignment of the prospective proceeds from that action. Andersen appealed the assignment order, claiming that Alpine's reliance on Rule 70, M.R.Civ.P. (Title 25, ch. 20), was misplaced because that rule is a civil contempt statute that applies only to a contemptuous party. Alpine conceded the inapplicability of the rule, but the Supreme Court pointed out that Rule 70 was not the sole basis for Alpine's motion for assignment, citing Smith v. Foss, 177 M 443, 582 P2d 329 (1978), for the proposition that a District Court possesses jurisdiction to enter any necessary orders to enforce its judgments. The District Court's assignment order did not assign Andersen's legal malpractice cause of action to Alpine, nor did Alpine receive all legal rights and title to that action. Rather, the assignment order merely required Andersen to assign future proceeds from the other litigation to Alpine in an amount limited to the funds necessary to satisfy the deficiency judgment amount. Andersen failed to establish error in the District Court's order requiring Andersen, as judgment debtor, to assign future proceeds from the separate cause of action to Alpine, the judgment creditor. Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001), distinguishing Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935), and Youngblood v. Am. St. Ins. Co., 262 M 391, 866 P2d 203 (1993).

Cause of Action Not Property or Debt: A cause of action for personal injuries is not subject to execution at the instance of the judgment debtor of one bringing the action, being neither property nor a debt, within the meaning of this section. Toole v. Paumie Parisian Dye House, 101 M 74, 52 P2d 162 (1935).

Cause of Action Not Subject to Attachment Before Judgment: A cause of action for personal injuries is not a "chose in action" such as may be classed as personal property, within the meaning of this section and 27-18-407, does not constitute a "debt" as the term is used in the same section, and is not subject to attachment before judgment. Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935).

Levy Upon Cause of Action: A cause of action being personal property not capable of manual delivery, levy of execution upon it must, under this section, be made in like manner as upon a Writ of Attachment, which is, under subsection (1) of 27-18-405, by leaving a copy of the Writ and a notice that the cause of action is levied upon with the owner; hence where the copy and notice were delivered to the Clerk of the District Court and not to the owner, the levy was ineffective. State ex rel. Coffey v. District Court, 74 M 355, 240 P 667 (1925).

Recovery of Money as Chose in Action: A cause of action is the right which a party has to institute a judicial proceeding, and if the relief sought is the recovery of money, the cause of action is designated a "thing" or "chose in action", which is personal property and therefore subject to seizure and sale in satisfaction of a judgment. State ex rel. Coffey v. District Court, 74 M 355, 240 P 667 (1925), distinguished in Baker v. Tullock, 106 M 375, 77 P2d 1035 (1938).

Collateral References

Execution *key* 20 through 58.

33 C.J.S. Executions §§25 through 56.

30 Am. Jur. 2d Executions and Enforcement of Judgments §119, et seq.

Interest of spouse in estate by entireties as subject to levy of attachment or execution in satisfaction of his or her individual debt. 75 ALR 2d 1172.

Solid mineral royalty as real or personal property for purposes of execution. 68 ALR 2d 735.

Judgment debtor's personal injury claims against third person or latter's liability insurer as subject to creditor's bill. 51 ALR 2d 595.

Vendee's interest under executory contract as subject to execution or attachment. 1 ALR 2d 730, 744.

25-13-502. Debts owed to judgment debtor.

Collateral References

Payment *key* 5.

25-13-503. Property claimed by third persons.

Case Notes

Indemnity Bond Furnished by Third Party Claimant: The officer is not bound to deliver possession to the claimant if the execution plaintiff furnishes an indemnity bond. Gallick v. Bordeaux, 31 M 328, 78 P 583 (1904).

Collateral References

Execution *key* 178 through 211.

33 C.J.S. Executions §§194, 195.

30 Am. Jur. 2d Executions and Enforcement of Judgments §129, et seq.

Execution in action on note or bond, not resulting in sale of mortgaged property, as precluding foreclosure of real estate mortgage. 37 ALR 2d 962.

Rights of creditors of life insured as to options or other benefits available to him during his lifetime. 37 ALR 2d 268.

Surplus income of trust, in excess of amount required for support and education of beneficiary, as subject of supplementary proceedings. 36 ALR 2d 1227.

25-13-504. Garnishment of public officers.

Case Notes

Equitable Title to Amounts Due to Prevail: In garnishment the equitable title to the property sought to be reached will prevail over the bare legal title. Notice or knowledge by a county of the assignment by its Sheriff to a deputy of his claim for mileage was not necessary unless it acted to its prejudice before notice. A judgment creditor who levies execution on all money due from a county to his debtor (here a Deputy Sheriff), acquires all the rights which the debtor had at the time of the levy to the extent of the creditor's claim. DeForest v. Cascade County, 112 M 599, 120 P2d 425 (1941).

Collateral References

Execution *key* 57.

33 C.J.S. Executions §32.

30 Am. Jur. 2d Executions and Enforcement of Judgments §144.

25-13-505. Personal property subject to a security interest.

Collateral References

Attachment *key* 57, et seq., 164; Execution *key* 42, et seq., 129, 130.

7 C.J.S. Attachment §§53, 56, 75, 79, 223 through 233; 33 C.J.S. Executions §§47 through 49, 109 through 111.

25-13-506. Duty of secured party.

Case Notes

Attorney's Letter Insufficient to Constitute Notice to Secured Party: A letter from an attorney representing a party seeking to satisfy a judgment, which letter asked for financial information the bank could not properly give, was held insufficient to constitute notice to the secured party for purposes of holding the bank in contempt for failure to release vehicles in which it had a security interest. First Nat'l Bank of Ekalaka v. Hereford, 225 M 281, 731 P2d 1323, 44 St. Rep. 233 (1987).

Collateral References

Attachment *key* 57, et seq., 164; Execution *key* 42, et seq., 129, 130.

7 C.J.S. Attachment §§53, 56, 75, 89, 223 through 233; 33 C.J.S. Executions §§47 through 49, 109 through 111.

Part 6
Property Exempt From Execution

Part Case Notes

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that

they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

Workers' Compensation — No Bankruptcy Exemption: Workers' compensation benefits are not exempt from federal bankruptcy. 42 St. Rep. 2043 (U.S. Bankruptcy Court for the District of Montana; order of Dec. 26, 1985).

Spendthrift Provision Valid — Exemption From Collection by Creditors: In a case of first impression, the Supreme Court held spendthrift provisions in trusts to be valid. In this case, the beneficiary's attempted assignment of trust income to his creditors was invalid, though the creditors could execute against the income after payment of the income to the beneficiary. A lower court order directing trustee to pay the trust income directly to the creditors was reversed. Section 72-24-210 (now repealed) did not apply because: (1) the trust was made up of personal property and three contracts for deed, which under the doctrine of equitable conversion are personal property to the seller; and (2) the trust provided that any income not distributed was to be added to principal, thus providing a direction for accumulation. Lundgren v. Hoglund, 219 M 295, 711 P2d 809, 42 St. Rep. 2031 (1985).

Part Attorney General's Opinions

Residential Homestead Property — Lien for Welfare Payments Not Allowed: A county may not execute on a lien for welfare payments against residential property owned by welfare recipients when there has been a homestead declaration recorded on the property. 42 A.G. Op. 112 (1988).

Provisions Inapplicable to Property Under Tax Lien: The exemption provisions of this part do not apply when personal property is seized and sold for payment of delinquent personal property taxes. 41 A.G. Op. 90 (1986).

Exemption Procedures: When asked for an opinion on the proper procedure to be followed by a Sheriff presented with an exemption affidavit by the debtor, the Attorney General concluded that: (1) the Sheriff may require an indemnity bond from the attachment creditor; (2) the Sheriff may request attachment debtors to file their exemption affidavits in the Justice Court for a determination of validity; and (3) if the debtor refuses to file the affidavit in court, the Sheriff is forced to determine the validity of the claim, but the Sheriff may require a bond of indemnity from the attachment plaintiff. 28 A.G. Op. 38 (1959).

Part Collateral References

Exemption of property purchased with exempt proceeds of insurance. 96 ALR 410.

Deposit of exempt funds as affecting debtor's exemption. 67 ALR 1203.

Debtor's exemption of proceeds of insurance on property itself exempt. 63 ALR 1286.

Validity of statute reducing or abolishing exemption as against particular classes of claims. 6 ALR 1140.

Right of individual partner to exemption in partnership property, 4 ALR 300.

Bankruptcy Code, 11 U.S.C. §522.

25-13-601. Waiver of exemptions in unsecured note unenforceable.

Case Notes

Writs of Execution Used to Enter, Search, and Seize — Damages for Violation of Constitutional Rights — Immunity of Peace Officers: Two brothers sued the Sheriff and two deputies for violating their Montana constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures. Neither writs of execution issued to enforce default judgments against one brother nor the postjudgment statutes under which they were issued expressly directed or authorized local peace officers to enter the other brother's house and search for and seize property of the brother against whom the writs were issued and who lived in the house. Therefore, 2-9-103 did not give the peace officers immunity from suit on the basis that they acted "under the authority of law". However, to the extent that any claim for damages for violation of due process is based on failure to provide the brother against whom the writs were issued with notice of property that is exempt from execution and a timely hearing, the claim results from the execution statutes' constitutional inadequacy, and recovery for those procedural inadequacies is barred by the provision in 2-9-103 for immunity for an action under authority of a law subsequently found unconstitutional. The District Court's dismissal, based on statutory

immunity, of the brothers' other claims was reversed. Dorwart v. Caraway, 2002 MT 240, 312 M 1, 58 P3d 128 (2002).

25-13-606. Protection of property of residents.

Compiler's Comments

Saving Clause: Section 13, Ch. 302, L. 1987, provided: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act." Effective October 1, 1987.

Severability: Section 14, Ch. 302, L. 1987, was a severability section.

Case Notes

Constitutionally Protected Property Interest in Statutory Exemption From Execution — Due Process Requiring Notice and Hearing to Allow Assertion of Available Exemptions: In order to establish a property interest in a benefit such as the personal property exemptions from execution, a person must show a legitimate claim of entitlement to the benefit. By stating that judgment debtors are entitled to the statutory property exemptions, the Legislature has given judgment debtors a legal right to claim and benefit from those exemptions. Therefore, Montana judgment debtors have a property interest in the statutory exemptions from execution that is protected by constitutional due process guarantees. Montana's postjudgment execution statutes violate those due process guarantees because they do not provide for notice to a judgment debtor of the seizure of the debtor's property, of the availability of statutory exemptions from execution and where to locate additional information about them, and of the availability of procedures by which to claim exemptions from execution. Further, the statutes are deficient from a due process standpoint because they do not provide for a prompt hearing on claimed exemptions. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Mathews v. Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976), and Aacen v. San Juan County Sheriff's Dept., 944 F2d 691 (10th Cir. 1991), and distinguishing Endicott-Johnson Corp. v. Encyclopedia Press, 266 US 285, 69 L Ed 288, 45 S Ct 61 (1924).

25-13-607. Claim enforceable against exempt property.

Compiler's Comments

Saving Clause: Section 13, Ch. 302, L. 1987, provided: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act." Effective October 1, 1987.

Severability: Section 14, Ch. 302, L. 1987, was a severability section.

25-13-608. Property exempt without limitation — exceptions.

Compiler's Comments

2003 Amendment: Chapter 429 inserted (1)(i) concerning enumerated retirement benefits; inserted (1)(j) concerning benefits payable under Title 19, chapter 20; and made minor changes in style. Amendment effective July 1, 2003.

2001 Amendments — Composite Section: Chapter 4 in (2) near middle of introductory clause after "employment" deleted "as defined in 42 U.S.C. 662(f)". Amendment effective October 1, 2001.

Chapter 352 at end of (2)(b) deleted "if the spouse or former spouse is the custodial parent of a child for whom child support is owed or owing and the judgment debtor is the parent of the child". Amendment effective April 23, 2001.

1999 Amendment: Chapter 262 inserted (1)(e) concerning individual retirement accounts; in (2) after "disability benefits" inserted "and assets of individual retirement accounts"; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 2, Ch. 262, L. 1999, provided: "[This act] applies to judgments filed after September 30, 1999."

1997 Amendment: Chapter 552 in (1)(d) inserted exception clause; in introductory clause of (2) inserted "and disability benefits"; and made minor changes in style. Amendment effective July 1, 1997.

1989 Amendment: In (1)(b) and (1)(c) inserted exception clause; inserted (2) providing that debtor may not exempt veterans' or social security benefits if debt is for child support or related maintenance; and made minor changes in form.

Saving Clauses: Section 2, Ch. 240, L. 1989, and sec. 13, Ch. 302, L. 1987, were saving clauses. Chapter 302 effective October 1, 1987.

Severability: Section 14, Ch. 302, L. 1987, was a severability section.

Case Notes

Attorney Fees in Marriage Dissolution Considered Judgment Debt — Not Assessable Against Exempt VA Disability Benefits: The District Court included a portion of the husband's Veterans Benefits Association (VA) disability benefits as part of the division of marital property and assessed attorney fees against the husband. He contended that federal law precluded both and that because his VA benefits composed his sole source of income, his wife's attorney fees would have to be paid from property that was exempt from execution under 38 U.S.C. 5301 and this section. The Supreme Court reversed, agreeing that VA disability benefits are not considered "disposable retired pay" to be treated as marital property and holding that an award of attorney fees in a dissolution action comprises a judgment debt that may not be executed against exempt federal disability benefits. Under Montana law prior to adoption of the Uniform Marriage and Divorce Act, attorney fees were treated as a form of temporary support or alimony pendente lite. However, that Act contains separate statutory provisions for an award of costs and attorney fees and an award of temporary maintenance or support, expressing a legislative intent that a judgment for attorney fees not be characterized as a form of maintenance or support (see also 27B C.J.S. Divorce §343). In this case, the District Court did not direct the payment of attorney fees from the husband's disability benefits, so the Supreme Court directed that, on remand, the District Court revisit the issue after considering property distribution, maintenance, and child support, with the husband's payment potentially coming instead from the value of his nonexempt property. In re Marriage of Strong, 2000 MT 178, 300 M 331, 8 P3d 763, 57 St. Rep. 709 (2000), following Dyche v. Dyche, 507 SW 2d 293 (Mo. 1978).

Constitutionally Protected Property Interest in Statutory Exemption From Execution — Due Process Requiring Notice and Hearing to Allow Assertion of Available Exemptions: In order to establish a property interest in a benefit such as the personal property exemptions from execution, a person must show a legitimate claim of entitlement to the benefit. By stating that judgment debtors are entitled to the statutory property exemptions, the Legislature has given judgment debtors a legal right to claim and benefit from those exemptions. Therefore, Montana judgment debtors have a property interest in the statutory exemptions from execution that is protected by constitutional due process guarantees. Montana's postjudgment execution statutes violate those due process guarantees because they do not provide for notice to a judgment debtor of the seizure of the debtor's property, of the availability of statutory exemptions from execution and where to locate additional information about them, and of the availability of procedures by which to claim exemptions from execution. Further, the statutes are deficient from a due process standpoint because they do not provide for a prompt hearing on claimed exemptions. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Mathews v. Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976), and Aacen v. San Juan County Sheriff's Dept., 944 F2d 691 (10th Cir. 1991), and distinguishing Endicott-Johnson Corp. v. Encyclopedia Press, 266 US 285, 69 L Ed 288, 45 S Ct 61 (1924).

Garnishment of Social Security Benefits for Unpaid Maintenance — Proper for Former Spouse During Custodial Period: Pursuant to a divorce decree, the husband failed to pay child support or maintenance. At the wife's request, the District Court subsequently issued an order directing the Social Security Administration to withhold the total delinquent child support and maintenance from the husband's Social Security benefits. On appeal, the Supreme Court reversed, ruling that pursuant to the three conditions outlined in statute, the husband's Social Security benefits may be garnished for maintenance only for the amount of maintenance that accrued during the 7-month period that the wife was the child's custodial parent. In re Marriage of Mikesell, 276 M 403, 916 P2d 740, 53 St. Rep. 418 (1996).

Maintenance Not a Debt: The duty of a spouse to support separates court-ordered maintenance from a judgment debt. Spousal maintenance is an obligation and not a debt, so the spouse owing maintenance is not a judgment debtor granted an exemption. A union disability pension may be used to meet maintenance payments. In re Marriage of Boharski, 257 M 71, 847 P2d 709, 50 St. Rep. 161 (1993).

Husband's Annuity Constituting Retirement — Not Exempt From Marital Support: Based on the analysis presented in Villasenor v. Villasenor, 657 P2d 889 (9th Cir. 1982), appellant's civil service disability annuity constitutes "retirement" benefits, rather than "disability" benefits. Because retirement benefits are not exempt from execution, the District Court did not err in ordering direct payment to ex-spouse of a share of former husband's monthly disability retirement annuity. In re Marriage of Castor, 249 M 495, 817 P2d 665, 48 St. Rep. 807 (1991), distinguished in In re Marriage of Boharski, 257 M 71, 847 P2d 709, 50 St. Rep. 161 (1993).

Social Security Benefits Traceable to Spouse — Exempt From Execution: The District Court found that under this section, social security benefits of the judgment debtor were exempt from

execution but that similar benefits belonging to the debtor's spouse and traceable to the couple's joint bank account were not exempt. The Supreme Court held that under 42 U.S.C. 407(a) and the decisions in Philpott v. Essex County Welfare Bd., 409 US 413, 34 L Ed 2d 608, 93 S Ct 590 (1973), and Gen. Motors Acceptance Corp. v. Deskins, 474 NE 2d 1207 (Ohio App. 1984), social security benefits deposited in bank accounts, if reasonably traceable, are exempt from execution. Dean v. Hoepfner, 245 M 366, 801 P2d 579, 47 St. Rep. 2162 (1990).

Collateral References

Enforcement of claim for alimony or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions. 52 ALR 5th 221.

25-13-609. Personal property exempt subject to value limitations.

Compiler's Comments

1999 Amendment: Chapter 237 in (2) increased automobile exemption from $1,200 to $2,500; and made minor changes in style. Amendment effective October 1, 1999.

1989 Amendment: In (3) inserted "aggregate", combined former subsections (a), (b), and (c), after "books" substituted "and" for "or", and inserted a comma after "tools".

Saving Clauses: Section 2, Ch. 130, L. 1989 and sec. 13, Ch. 302, L. 1987, were saving clauses. Chapter 130 effective October 1, 1989. Chapter 302 effective October 1, 1987.

Severability: Section 14, Ch. 302, L. 1987, was a severability section.

Case Notes

DECISIONS UNDER SECTION 25-13-609

Business Expense Account Not Exempt From Execution: The husband maintained an account for business expenses that were not personal income. The District Court exempted that account from execution for a property settlement that survived the husband's bankruptcy. The Supreme Court reversed. The funds that passed through the account were neither tools of the trade nor a percentage of the husband's disposable earnings, and the District Court did not have authority to exempt an account that was not addressed or exempted from execution by statute. Further, the exemption was a retroactive modification of the property settlement that violated 40-4-208 and improperly restricted the wife's ability to levy execution. In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004).

Joint Bankruptcy Debtors Allowed to Claim Separate Exemption of Interest in Jointly Owned Personal Property: Three married couples filed similar joint bankruptcy petitions wherein each spouse claimed a separate set of personal property exemptions pursuant to this section. The bankruptcy trustee objected to the claimed objections in each case, contending that joint debtors were limited to a single set of exemptions. The U.S. Bankruptcy Court certified the question to the Montana Supreme Court. The court held that the specific provisions of 31-2-106 control over the general personal property exemptions available to judgment debtors in this section. Section 31-2-106 allows each individual to claim the allowable exemptions in any bankruptcy proceeding. Because each joint debtor maintains an interest in jointly held personal property, each may claim a separate exemption of personal interest in that property, essentially stacking the two exemptions in one item of personal property. However, in cases when the personal property is owned solely by one of the joint debtors, only the debtor with the ownership interest may claim an exemption for that property. In re Zimmermann, Landon, & Maly, 2002 MT 90, 309 M 337, 46 P3d 599 (2002).

Constitutionally Protected Property Interest in Statutory Exemption From Execution — Due Process Requiring Notice and Hearing to Allow Assertion of Available Exemptions: In order to establish a property interest in a benefit such as the personal property exemptions from execution, a person must show a legitimate claim of entitlement to the benefit. By stating that judgment debtors are entitled to the statutory property exemptions, the Legislature has given judgment debtors a legal right to claim and benefit from those exemptions. Therefore, Montana judgment debtors have a property interest in the statutory exemptions from execution that is protected by constitutional due process guarantees. Montana's postjudgment execution statutes violate those due process guarantees because they do not provide for notice to a judgment debtor of the seizure of the debtor's property, of the availability of statutory exemptions from execution and where to locate additional information about them, and of the availability of procedures by which to claim exemptions from execution. Further, the statutes are deficient from a due process standpoint because they do not provide for a prompt hearing on claimed exemptions. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998), following Mathews v. Eldridge, 424 US 319, 47 L Ed 2d 18, 96 S Ct 893 (1976), and Aacen v. San Juan County Sheriff's

Dept., 944 F2d 691 (10th Cir. 1991), and distinguishing Endicott-Johnson Corp. v. Encyclopedia Press, 266 US 285, 69 L Ed 288, 45 S Ct 61 (1924).

DECISIONS UNDER FORMER EXEMPTION
SECTIONS 25-13-611 AND 25-13-612

Implements of Trade:

Debtor is a self-employed excavation contractor. His backhoe and flatbed trailer are exempt from execution in a bankruptcy proceeding as they are tools or implements within the meaning of this section and are necessary to the debtor to carry on his trade as an excavator. The fact that the backhoe and trailer are not necessary to the debtor's obtaining employment is not relevant. The section does not provide a contingency that a showing that the debtor could obtain work without the items negates the exemption. MacDonald v. Mercill, 220 M 146, 714 P2d 132, 43 St. Rep. 247 (1986).

It is not necessary that claimant shall have plied his trade without interruption, and if, though temporarily resorting necessarily to some other means of livelihood, he intended to return to original occupation when circumstances permitted, he is entitled to protection of the statute. State ex rel. Bartol v. Justice of the Peace Court, 102 M 1, 55 P2d 691 (1936).

Truck Equipped With Crane — Not Tool or Implement to Carry on Trade — Bankruptcy: A truck, equipped as a mobile crane used as a hoist for heavy equipment repair, used by the bankruptcy debtor in his trade or business, is not a "tool or implement" within the meaning of 25-13-612 (since repealed). In re Gehnert, 40 St. Rep. 1894 (1983).

Denial of Motion to Release Attached Property — Ruling Not Final: Where a ruling denying defendant's motion to release attached property was based on what the District Court considered to be an informality of the accompanying affidavit, the ruling lacked finality and was not a bar to a new motion and affidavit. Kidder v. Varner, 136 M 328, 347 P2d 721 (1959).

Motion to Exempt — Use of Affidavits: It is customary in the practice in this state to use affidavits with motions to exempt; however, it is not required by statute. A showing of jurisdiction and exempt status can be made by deposition or at a hearing on a motion or by petition to exempt. Kidder v. Varner, 136 M 328, 347 P2d 721 (1959).

Res Judicata: Where a ruling denying defendant's motion to release attached property was based on what the District Court considered to be an informality of the accompanying affidavit, the ruling lacked finality and was not a bar to a new motion and affidavit. Kidder v. Varner, 136 M 328, 347 P2d 721 (1959).

Irrigation Works: The property of a reservoir company which furnished water to landowners in an irrigation district which owned majority of stock of the reservoir company was not subject to execution by construction company which enlarged reservoir and obtained judgment against the reservoir company for work done, not because of district's ownership of stock but because the supplying of water to landowners of irrigation district was public service. Ackroyd v. Winston Bros. Co., 113 F2d 657 (1940), reversing Ackroyd v. Brady Irrigation Co., 27 F. Supp. 503 (D.C. Mont. 1939).

State Property: No state property or the property of any state agency whatever is referred to or included in the broadest reading of this section, but it may not be argued that under the doctrine of inclusio unius est exclusio alterius there are no other exemptions, to permit foreclosure upon property belonging to the state or used by the sovereign authority of the state for public purposes (irrigation). Ackroyd v. Winston Bros. Co., 113 F2d 657 (1940).

Jurisdiction of Justice of Peace to Determine Exemption: A Justice of the Peace may, on motion supported by affidavit or evidence, determine the validity of a claim for exemption of personal property seized under attachment issued out of his court. State ex rel. Bartol v. Justice of the Peace Court, 102 M 1, 55 P2d 691 (1936).

Miner's Exemption: Coal cars, timbers, rails, and a wagon scale used in coal mining are exempt from attachment to the value of $1,000 under subsection (1)(e), when the miner is married or the head of a family, as "implements" forming a part of his equipment for work. State ex rel. Bartol v. Justice of the Peace Court, 102 M 1, 55 P2d 691 (1936).

Exemption Statute to Be Liberally Construed: Exemption statutes should be liberally construed for the benefit of the exemption claimant. McMullen v. Shields, 96 M 191, 29 P2d 652 (1934).

Motor Vehicle as Constituting a "Wagon": In application of the rule of liberal construction, under this section (prior to enactment of sections 93-5819 through 93-5822, R.C.M. 1947, now codified as 25-13-602 (since repealed) and 25-13-617 (since repealed)), exempting to a farmer, as the head of a family, a cart or wagon, an automobile, constituting the only means of conveyance of supplies to and products from the farm to market and taking the place of and serving the

purposes of a wagon is exempt from execution as a "wagon". McMullen v. Shields, 96 M 191, 29 P2d 652 (1934).

Liberal Construction of Exemption Statute Required: Exemption law must be liberally construed, provided claimant is within class exempted. In re Frazier, 5 F. Supp. 903 (D.C. Mont. 1934).

Physicians and Surgeons — Optometrist Not Included: Optometrist was not within the provision exempting from execution the instruments and office furniture of "physician" or "surgeon". In re Frazier, 5 F. Supp. 903 (D.C. Mont. 1934).

Purpose of Section: Exemption statutes, such as this section, are primarily intended for the protection of the home as well as for the protection of the state, which is interested in the welfare of the homes within its confines and the throwing of safeguards about them. In re Metcalf's Estate, 93 M 542, 19 P2d 905 (1933).

Burden of Proof: Exemption statutes must be liberally construed, yet where an exemption is extended to a certain class of persons, as by 25-13-611 and 25-13-612 (since repealed), the claimant must bring himself within the spirit of its provisions; i.e., he must show that he belongs to one of the classes mentioned. Swanz v. Clark, 71 M 385, 229 P 1108 (1924).

Identification of Exempt Property Required: Where a debtor owns more property of a given class than the law exempts, he must, in order to secure the benefit of the exemption, identify the property he claims as exempt and segregate it from the portion liable to seizure. Tetrault v. Ingraham, 54 M 524, 171 P 1148 (1918), distinguished in Weir v. Hom Tong, 100 M 1, 46 P2d 45 (1935), and followed in Brenton v. Estate of Sandvig, 250 M 220, 819 P2d 184, 48 St. Rep. 859 (1991).

Collateral References

Exemptions *key* 31 through 78.

35 C.J.S. Exemptions §§26, et seq., 36, 46.

31 Am. Jur. 2d Exemptions §§31 through 34.

Validity of contractual stipulations waiving debtor's exemption. 94 ALR 2d 967.

Exemption of proceeds of National Service Life Insurance from claims of creditors. 54 ALR 2d 1335.

Exemption of automobiles from seizure for debts. 37 ALR 2d 714.

Endowment policy as life insurance within exemption law. 30 ALR 2d 752.

Debtor's exemption as regards annuities or installment payments pursuant to exercise of option by beneficiary entitled to proceeds of life insurance. 164 ALR 914.

Radio as within debtor's exemptions. 63 ALR 1028.

What are "tools", "implements", "instruments", "utensils", or "apparatus" within the meaning of debtor's exemption laws. 52 ALR 826; 36 ALR 669; 9 ALR 1020; 2 ALR 818.

Constitutionality of statute exempting proceeds of life or benefit insurance. 1 ALR 757.

25-13-610. Tracing exempt personal property.

Compiler's Comments

Saving Clause: Section 13, Ch. 302, L. 1987, provided: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act." Effective October 1, 1987.

Severability: Section 14, Ch. 302, L. 1987, was a severability section.

Case Notes

Social Security Benefits Traceable to Spouse — Exempt From Execution: The District Court found that under 25-13-608, social security benefits of the judgment debtor were exempt from execution but that similar benefits belonging to the debtor's spouse and traceable to the couple's joint bank account were not exempt. The Supreme Court held that under 42 U.S.C. 407(a) and the decisions in Philpott v. Essex County Welfare Bd., 409 US 413, 34 L Ed 2d 608, 93 S Ct 590 (1973), and Gen. Motors Acceptance Corp. v. Deskins, 474 NE 2d 1207 (Ohio App. 1984), social security benefits deposited in bank accounts, if reasonably traceable, are exempt from execution. Dean v. Hoepfner, 245 M 366, 801 P2d 579, 47 St. Rep. 2162 (1990).

Unlimited Use of Forty-Five Day Exemption: There is no limit to the number of times a judgment debtor can claim the 45-day exemption under 25-13-614 (now under 25-13-610) on earnings for personal services. Blakely v. Dupre, 209 M 282, 679 P2d 1255, 41 St. Rep. 708 (1984).

25-13-613. Property necessary to carry out governmental functions.

Compiler's Comments

1989 Amendment: In (1) deleted "25-13-611" and deleted brackets around "25-13-609(1)".

Erroneous Reference: The reference in subsection (1) to 25-13-611 is erroneous. Section 25-13-611 was repealed by Ch. 302, L. 1987. Section 25-13-609(1), enacted by Ch. 302, appears to most closely correspond to the property formerly mentioned in 25-13-611.

1985 Amendment: Near beginning of (1) after "judgment debtors", deleted "who are married or who are heads of families".

Case Notes

State Money Exempt From Execution: The state cannot be a judgment debtor because an execution would result in the impairment of sovereign powers and would be contrary to public policy and because construction would not result in the state gaining any beneficial powers. First Nat'l Bank v. Sourdough Land & Cattle Co., 171 M 390, 558 P2d 654 (1976).

Denial of Motion to Release Attached Property — Ruling Not Final: Where a ruling denying defendant's motion to release attached property was based on what the District Court considered to be an informality of the accompanying affidavit, the ruling lacked finality and was not a bar to a new motion and affidavit. Kidder v. Varner, 136 M 328, 347 P2d 721 (1959).

Motion to Exempt — Use of Affidavits: It is customary in the practice in this state to use affidavits with motions to exempt; however, it is not required by statute. A showing of jurisdiction and exempt status can be made by deposition or at a hearing on a motion or by petition to exempt. Kidder v. Varner, 136 M 328, 347 P2d 721 (1959).

Irrigation Works: The property of a reservoir company which furnished water to landowners in an irrigation district which owned majority of stock of the reservoir company was not subject to execution by construction company which enlarged reservoir and obtained judgment against the reservoir company for work done, not because of district's ownership of stock but because the supplying of water to landowners of irrigation district was public service. Ackroyd v. Winston Bros. Co., 113 F2d 657 (1940), reversing Ackroyd v. Brady Irrigation Co., 27 F. Supp. 503 (D.C. Mont. 1939).

State Property: No state property or the property of any state agency whatever is referred to or included in the broadest reading of this section, but it may not be argued that under the doctrine of inclusio unius est exclusio alterius there are no other exemptions, to permit foreclosure upon property belonging to the state or used by the sovereign authority of the state for public purposes (irrigation). Ackroyd v. Winston Bros. Co., 113 F2d 657 (1940).

Jurisdiction of Justice of Peace to Determine Exemption: A Justice of the Peace may, on motion supported by affidavit or evidence, determine the validity of a claim for exemption of personal property seized under attachment issued out of his court. State ex rel. Bartol v. Justice of the Peace Court, 102 M 1, 55 P2d 691 (1936).

Exemption Statute to Be Liberally Construed: Exemption statutes should be liberally construed for the benefit of the exemption claimant. McMullen v. Shields, 96 M 191, 29 P2d 652 (1934).

Liberal Construction of Exemption Statute Required: Exemption law must be liberally construed, provided claimant is within class exempted. In re Frazier, 5 F. Supp. 903 (D.C. Mont. 1934).

Purpose of Section: Exemption statutes, such as this section, are primarily intended for the protection of the home as well as for the protection of the state, which is interested in the welfare of the homes within its confines and the throwing of safeguards about them. In re Metcalf's Estate, 93 M 542, 19 P2d 905 (1933).

Burden of Proof: Exemption statutes must be liberally construed, yet where an exemption is extended to a certain class of persons, as by 25-13-611 (since repealed) and this section, the claimant must bring himself within the spirit of its provisions; i.e., he must show that he belongs to one of the classes mentioned. Swanz v. Clark, 71 M 385, 229 P 1108 (1924).

School Property: A mechanics' lien (now construction lien) cannot be enforced against a schoolhouse and lots held by school trustees for uses of a public school. Whiteside v. School District, 20 M 44, 49 P 445 (1897).

25-13-614. Earnings of judgment debtor.

Compiler's Comments

1989 Amendment: In (1) substituted "Earnings of a judgment debtor that are not subject to garnishment as provided in this section are exempt" for "No earnings are exempt unless the judgment debtor complies with 25-13-411." Amendment effective March 24, 1989.

Effective Date — Applicability: Section 4, Ch. 301, L. 1989, provided: "[This act] is effective on passage and approval and applies to bankruptcy petitions in which discharge takes place on or after [the effective date of this act]." Approved March 24, 1989.

1987 Amendment: Redesignated former (2)(a) as (1); and substituted (2) through (5) (see 1987 Session Law for text) for former language that read: "Except as provided in subsection (2), the earnings of the judgment debtor for his personal services rendered during the 45-day period prior to the levy of execution or attachment are exempt to the extent such earnings are necessary for the support of his family.

(2) (a) No earnings are exempt unless the judgment debtor complies with 25-13-411.

(b) Earnings are exempt under this section from judgments or orders for maintenance or child support only to the extent allowed by 15 U.S.C. 1673.

(c) One-half of earnings are not exempt for debts incurred by the judgment debtor or his family for gasoline and the common necessaries of life.

(3) The words "his family", as used in this section, except to the extent that these words include a person covered by a judgment or order under subsection (2), are to be construed to include:

(a) the judgment debtor's spouse;

(b) every person who resides with the judgment debtor under his care or maintenance and who is:

(i) a minor child of the judgment debtor or of his spouse or former spouse;

(ii) a minor grandchild, brother, or sister or minor child of a brother or sister of the judgment debtor or of his spouse;

(iii) a father, mother, grandfather, or grandmother of the judgment debtor or of his spouse or former spouse;

(iv) an unmarried sister, brother, or any other relative of the judgment debtor mentioned in this section who has attained the age of majority and is unable to care for or support himself."

Saving Clause: Section 13, Ch. 302, L. 1987, provided: "This act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before the effective date of this act." Effective October 1, 1987.

Severability: Section 14, Ch. 302, L. 1987, was a severability section.

1985 Amendment: In (1) substituted "subsection (2)" for "this section", substituted "during the 45-day period prior to" for "at any time within 45 days next preceding", substituted "are exempt to the extent such earnings are necessary for the support of his family" for "when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family supported in whole or in part by his labor, are exempt"; inserted (2)(a) requiring judgment debtor to comply with 25-13-411; in (2)(b) after "Earnings" deleted "for personal services"; and substituted (2)(c) as rephrasing of former (3) that read: "Whenever debts are incurred by any such person or his wife or family for gasoline and for the common necessaries of life, then the one-half of such earnings are nevertheless subject to execution, garnishment, and attachment to satisfy debts so incurred."

Saving Clause: Section 4, Ch. 538, L. 1985, was a saving clause.

1983 Amendment: At beginning of (1), inserted exception clause; at end of (1), deleted "but where"; inserted (2) limiting personal services earnings exemption to extent allowed by 15 U.S.C. 1673 as to maintenance or child support; at beginning of (3) inserted "Whenever"; and in (4), inserted exception clause referring to (2).

1981 Amendment: In (2) substituted specific enumeration of family members for "the words "his family", as used in this section, are to be construed with the words "head of family", as used in 70-32-102".

Federal Statutes: Federal restrictions on garnishment are found in 15 U.S.C. 1673. The federal minimum wage is found in 29 U.S.C. 206(a)(1).

Case Notes

Business Expense Account Not Exempt From Execution: The husband maintained an account for business expenses that were not personal income. The District Court exempted that account from execution for a property settlement that survived the husband's bankruptcy. The Supreme Court reversed. The funds that passed through the account were neither tools of the trade nor a percentage of the husband's disposable earnings, and the District Court did not have authority to exempt an account that was not addressed or exempted from execution by statute. Further, the exemption was a retroactive modification of the property settlement that violated 40-4-208 and improperly restricted the wife's ability to levy execution. In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004).

Wage Garnishment for Past Maintenance Payments Allowed — Execution Required Prior to Garnishment: Although this section allows for garnishment from wages for maintenance obligations, execution on either a judgment or an order is required before a salary can be

garnished for past due amounts. In re Marriage of Mease, 2004 MT 59, 320 M 229, 92 P3d 1148 (2004), following White v. White, 195 M 470, 636 P2d 844 (1981).

Judgment Lien Against Husband's Property Not Supportive of Execution Against Interests of Second Wife and Children — Property Subject to Prior Judgments Only: Following dissolution of his marriage, Ken Jones purchased real property in 1986. In May 1987, he executed a homestead declaration on the property pursuant to 70-32-105. In July 1987, he conveyed the property by quitclaim deed, with one-half interest to himself and one-half to his second wife and their two daughters in equal shares. In January 1988, his second wife also filed a declaration of homestead. Also in 1988, Ken declared bankruptcy. As a result of that filing, a dissolution decree property settlement provision that he pay certain sums to his first wife Rita was redesignated as a maintenance obligation. Ken appealed that order, and while the appeal was pending, Ken and his second wife conveyed the real property to Poindexter. Rita executed upon one-half of the sale proceeds, which Poindexter had withheld to satisfy Ken's past-due maintenance and support, but $2,113.53 remained due on the underlying judgment. Rita moved for an order of sale of the property so that she could recover the remaining maintenance plus her attorney fees. The District Court determined that Ken's homestead exemption was abandoned when he sold the property to Poindexter and that because Rita's judgment liens had never been removed or extinguished, the liens attached and encumbered the property at the time the homestead exemption was abandoned and thus the property was conveyed to Poindexter subject to the liens and the execution order. The Supreme Court disagreed and reversed because: (1) Rita had already executed on Ken's half of the sale proceeds and further execution would be against the interests of the second wife and daughters and was therefore unsupported; and (2) the maintenance payments became due and judgments were entered after Ken sold the property. Under 70-21-306, a purchaser takes property subject only to prior judgments; therefore, execution was inappropriate on the property for judgments entered after Poindexter's purchase. In re Marriage of Jones v. Poindexter, 253 M 408, 833 P2d 1044, 49 St. Rep. 501 (1992).

Earnings Not Subject to Unpaid Alimony Claim: Prior to 1987, this section did not differentiate between different types of judgments but plainly provided an exemption of earnings against execution regardless of the nature of the underlying claim, and the Supreme Court could not insert an exception for delinquent alimony payment judgments. Earnings were exempt from execution on a judgment for unpaid alimony, and though an alimony claim is not strictly a debt, when reduced to judgment it becomes merged in the judgment and loses its underlying character, and the judgment created a debt the same as any other money judgment. White v. White, 195 M 470, 636 P2d 844, 38 St. Rep. 2041 (1981).

Proceeding in Federal Court — State Law Applicable: Prior to the 1983 amendment, this section and not 15 U.S.C. §1673 governed, by virtue of Rule 69(a), Fed.R.Civ.P., whether a judgment creditor could levy execution on the wages of its debtor in an action brought in federal court. U.S. v. Dumont, 416 F. Supp. 632 (D.C. Mont. 1976).

Waiver of Exemption Not Effective: General waiver of statutory exemption in secured promissory note was not enforceable as against divorcee working to provide the necessities for herself and her children; a levy of execution could not be had on her wages. Anaconda Fed. Credit Union v. West, 157 M 175, 483 P2d 909 (1971).

Liberal Construction Required: Exemption statutes must be liberally construed in favor of the exemption claimant. Williams v. Sorenson, 106 M 122, 75 P2d 784 (1938).

Mileage and Traveling Expenses as "Earnings": Mileage and traveling expenses allowed a county officer are properly considered "earnings" under this section when it appears they are necessary for the use of his family, the word "earnings" being more comprehensive than "wages" and "salary". They are part of the compensation for services rendered by such officer. Williams v. Sorenson, 106 M 122, 75 P2d 784 (1938).

Necessity of Earnings as Reasonable Necessity: It is not necessary for exemption claimant to show that his earnings are necessary for the support of his family in the purchase of the necessities of life; if they are "necessary for the use" of the family, it is sufficient, the word "necessary" not meaning an absolute or indispensable necessity but reasonable, requisite, and proper. A revolving fund (now a state special revenue fund) used to pay an assessor's mileage and expenses allowed by law or by contract of employment is for the necessary use of his family within the meaning of this section. Williams v. Sorenson, 106 M 122, 75 P2d 784 (1938).

Mine Products: This section, prior to its amendment, was construed to exempt to a placer miner the gold dust taken from his claim by his own labor within the statutory period next preceding a levy of execution or attachment, when he was shown to be a poor man who resided in the state and depended for support upon his personal labor in working his mine, and the debt was not for the common necessaries of life. Dayton v. Ewart, 28 M 153, 72 P 420 (1903).

"Personal Services Rendered" as Including Self-Employment: The words "personal services rendered" do not necessarily contemplate that the services be rendered another; they may, in proper cases, mean the services which one renders to himself. Dayton v. Ewart, 28 M 153, 72 P 420 (1903).

Property of Spouse: Where the wages of a judgment debtor were levied upon and by him claimed as exempt from execution as his personal earnings and necessary for the use of his family residing in this state, supported wholly or in part by his labor, evidence on behalf of the officer making the levy, in an action against him to recover such wages, as to the quantity and value of the property held in the name of plaintiff's wife and used by the family in common during such period is admissible upon the issue as to whether or not the family was in fact supported by the earnings of the plaintiff or from some other source. Cushing v. Quigley, 11 M 577, 29 P 337 (1891), distinguished in Tetrault v. Ingraham, 54 M 524, 171 P 1148 (1918).

Collateral References

35 C.J.S. Exemptions §§47 through 50.

31 Am. Jur. 2d Exemptions §§38 through 63.

Enforcement of claim for alimony or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions. 52 ALR 5th 221.

Part 7
Sale on Execution

25-13-701. Notice of sale on execution.

Compiler's Comments

1999 Amendment: Chapter 51 in (1)(c) near end of notice form after "day of ...." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

1987 Amendment: In (1)(a), (1)(b), and (1)(c) substituted "the county" for "the township or city"; and made minor changes in phraseology.

1985 Amendment: At end of (1)(b) after "10 days", added "and by publishing a copy of the notice at least 1 week before the sale in a newspaper of general circulation published in the county, if there be one".

Case Notes

Personal Service on Defendant or Defendant's Counsel Not Required for Execution Sales: Mikelson argued that Rules 5(a) and 81(c), M.R.Civ.P. (Title 25, ch. 20), when read together, required that notice of a Sheriff's sale of Mikelson's property be served personally on Mikelson or his counsel. However, those rules deal with notice within District Court proceedings and do not relate to notice in execution sales, which are governed by this section. Nothing in this section requires that notice of an execution sale be served personally on Mikelson or his counsel. Bank of Baker v. Mikelson Land Co., 1999 MT 76, 294 M 64, 979 P2d 180, 56 St. Rep. 315 (1999).

Posting on Private Building in Public Area Constituting Adequate Notice: This section mandates that notice of a Sheriff's sale of property be posted in three public places in the county where the property is situated. In the present case, notice was posted next to the main door of a private, vacant structure on the property, which Mikelson contended was in a private rather than public place. However, the notice was posted immediately adjacent to a publicly traveled road and sidewalk where the public had a right to be, which constituted posting in a public place, so the Supreme Court determined that the posting was adequate. Bank of Baker v. Mikelson Land Co., 1999 MT 76, 294 M 64, 979 P2d 180, 56 St. Rep. 315 (1999).

Actual Notice to Mortgagor Not Required: This section does not require personal notice to the mortgagor in sales on execution of judgment on real property. When stockholders of the defendant corporation were represented by counsel and appeared in person at the proceedings leading up to the judgment against them held before the execution sale, failure to provide the corporation with actual notice of the judicial sale was not a denial of due process. Kansas City Life Ins. Co. v. Bratsky Farms, 238 M 398, 778 P2d 859, 46 St. Rep. 1366 (1989), distinguishing Peterson v. Mont. Bank of Bozeman, N.A., 212 M 37, 687 P2d 673 (1984).

Restraint of Sale — Additional Notice Required: District Court ordering the restraining of a sale of real property on execution can determine if additional notice is required after the injunction is lifted if the initial notice requirements of this section have been met. Williams v. Superior Homes, Inc., 148 M 38, 417 P2d 92 (1966).

Failure to State Time of Sale in Notice as Irregularity: Where the plaintiff caused an execution to be issued on the defendant's mineral rights and the Sheriff failed to state the exact hour of the execution sale in the published notice but did so in the posted notice, the omission of

the hour is an irregularity not affecting the validity of the sale, as the statute does not require that the hour of sale be included. Fox v. Curry, 96 M 212, 29 P2d 663 (1934).

Sale of Mining Machinery in Violation of Section — Penalty: In selling mining machinery under an execution as personal property, upon 5 days' notice only, instead of as real property on notice of 20 days, a Sheriff violates the provisions of this section and subjects himself and his surety to the penalty prescribed in 25-13-702. Britannia Min. Co. v. USF&G Co., 43 M 93, 115 P 46 (1911).

Failure to Give Notice as Not Invalidating Sale: Failure to give the notice does not invalidate the sale, the remedy provided in 25-13-702 being exclusive. Burton v. Kipp, 30 M 275, 76 P 563 (1904), followed in Kansas City Life Ins. Co. v. Bratsky Farms, 238 M 398, 778 P2d 859, 46 St. Rep. 1366 (1989).

Collateral References

Execution *key* 222.

33 C.J.S. Executions §§225 through 229.

30 Am. Jur. 2d Executions and Enforcement of Judgments §§391 through 398.

25-13-702. Penalty for selling without notice or destruction of notice.

Case Notes

Penalty for Wrongful Sale Only — Change in Sureties: The penalty prescribed by this section is affixed to a wrongful sale, not a wrongful levy; and the officer and his surety are liable for a wrongful sale, though the levy was made in a former term of the officer, when he had other sureties. Britannia Min. Co. v. USF&G Co., 43 M 93, 115 P 46 (1911).

Collateral References

Execution *key* 454, et seq.

33 C.J.S. Executions §§425 through 437.

25-13-703. Postponement of sale.

Collateral References

Execution *key* 223.

33 C.J.S. Executions §220.

30 Am. Jur. 2d Executions and Enforcement of Judgments §401.

25-13-704. Conduct of sale.

Case Notes

Bar of Deficiency Judgment Inapplicable to Improper Sale of Collateral: Despite their concession that the Uniform Commercial Code (U.C.C.) did not govern the improper sale of collateral in a judicial foreclosure sale, Haugens sought to apply the U.C.C. remedy barring deficiency judgment to a violation of this section, but could cite no authority for limiting the District Court to a U.C.C. remedy in a non-U.C.C. case. Although a secured party is precluded from obtaining a deficiency judgment for failing to give adequate notice, the total bar of a deficiency judgment is unwarranted absent a showing that the creditor proceeded in bad faith or with unclean hands, as in this case when the creditor proceeded diligently for 5 ½ years and the amount of collateral improperly sold amounted to only 15% of the judgment. It was equitable and within the court's power to fashion a remedy allowing a supplemental pleading to determine the amount of damages sustained by the Haugens through the unlawful sale of collateral and to require the Haugens to prove the damages, rather than apply the U.C.C. remedy to the execution sale. Blaine Bank of Mont. v. Haugen, 260 M 29, 858 P2d 14, 50 St. Rep. 927 (1993).

Requirement of Cash Payment: At a personal property execution sale, the execution officer is bound to accept only cash for the bid. "Purchase money" required to be paid by 25-13-708 does not include checks. Proto v. Missoula County, 230 M 351, 749 P2d 1094, 45 St. Rep. 265 (1988).

Impeachment of Sheriff's Return: A statement in the Sheriff's return that he sold the land in separate parcels, as required by this section, may be overcome only by clear, unequivocal, and convincing evidence. Husky Hi Power, Inc. v. Schmidt, 140 M 353, 372 P2d 142 (1962).

Hour of Sale: In the absence of a provision in this section fixing the hour when an execution sale of oil and gas rights in certain described lands was required to be held, the fact that the posted notice designated a certain hour while the published one failed to give the hour, was a mere irregularity not affecting the validity of the sale. Fox v. Curry, 96 M 212, 29 P2d 663 (1934).

Property Not Consisting of Known Lots — Law Inapplicable to Foreclosure: Where the plaintiff brought an action against the defendant to foreclose a mortgage and obtained a default judgment, the court correctly refused to remove language from the judgment directing that the property foreclosed be sold together as a unit. This statute requiring sale in separate units in

certain instances is not applicable to sales under mortgage foreclosure. Even were it applicable, the fact that the land in question is comprised substantially of 13 ½ 40-acre subdivisions does not indicate it is divided into known lots or parcels. Elston v. Hix, 67 M 294, 215 P 657 (1923).

Section Directory Only — Sale in Gross as Voidable: This section is directory only so that a sale in gross is voidable only and not void or open to collateral attack. Thomas v. Thomas, 44 M 102, 119 P 283 (1911), distinguished in Holt v. Sather, 81 M 442, 264 P 108 (1928).

Presumption of Officer's Compliance With Statute — Gross Sales: It must be presumed that an officer complied with the statute in the sale of a city lot, though it was composed of two parcels and was sold in gross, since the parcels may not have been known or may have been offered separately and sold in gross only after it was found that there were no bidders for the parcels. Burton v. Kipp, 30 M 275, 76 P 563 (1904).

Sale Not Invalidated by Inadequate Price: Mere inadequacy of the price, not attended by fraud, mistake, or surprise tending to influence the result, does not invalidate a sale under execution. Burton v. Kipp, 30 M 275, 76 P 563 (1904).

Collateral References

Execution *key* 226 through 241.

33 C.J.S. Executions §§215 through 224.

30 Am. Jur. 2d Executions and Enforcement of Judgments §§404 through 409.

Propriety of accepting check or promissory note in satisfaction of bid at execution or judicial sale had for cash. 86 ALR 2d 292.

Issuance or levy of execution before expiration of judgment lien as affecting execution sale after statutory period. 77 ALR 2d 1068.

Foreclosure sale of mortgaged real estate as a whole or in parcels. 61 ALR 2d 505.

Enforceability as between the parties of agreement to purchase property at judicial sale for their joint benefit. 14 ALR 2d 1267.

What constitutes a "public sale". 4 ALR 2d 575.

25-13-705. Procedure when purchaser refuses to pay.

Case Notes

Measure of Damages: In an action by the Sheriff, under this section, to recover loss on resale of property made necessary by the purchaser's repudiation of his bid at the prior execution sale, the measure of his recovery is not the value of the property but the amount of his previous bid. Sherlock v. Vinson, 90 M 235, 1 P2d 71 (1931).

Notice of Resale After Refusal to Pay: Where the Sheriff regularly readvertised real property for sale after the highest bidder at the first sale had repudiated his bid, thus giving notice to all the world including such bidder, the latter was not entitled to special notice of resale to hold him liable for loss sustained by his default under this section. Sherlock v. Vinson, 90 M 235, 1 P2d 71 (1931).

Tender of Certificate of Sale Not Required: Defendant, a defaulting purchaser of realty at execution sale, in an action by the Sheriff brought under this section to recover the difference in the amount of defendant's bid and the amount which the officer received on resale, was not in a position to rely on the Sheriff's failure to tender him a certificate of sale where he had stated that he would not have paid the amount of his bid even if a certificate had been tendered, thus showing that tender would have been an idle ceremony not required by law. Sherlock v. Vinson, 90 M 235, 1 P2d 71 (1931).

Collateral References

Contempt *key* 20, et seq.; Execution *key* 236 through 239.

17 C.J.S. Contempt §14; 33 C.J.S. Executions §§234 through 238.

30 Am. Jur. 2d Executions and Enforcement of Judgments §§426 through 429.

25-13-706. Rejection of subsequent bids after refusal to pay.

Collateral References

Execution *key* 236.

33 C.J.S. Executions §234.

25-13-707. Liability of officer after resale.

Collateral References

Sheriffs and Constables *key* 120, et seq.

80 C.J.S. Sheriffs and Constables §86, et seq.

25-13-708. Conveyance of personal property capable of manual delivery.

Compiler's Comments

1999 Amendment: Chapter 89 near beginning substituted "purchase price" for "purchase money"; and made minor changes in style. Amendment effective March 16, 1999.

Applicability: Section 10, Ch. 89, L. 1999, provided: "[This act] applies to an execution of judgment commenced on or after [the effective date of this act]." Effective March 16, 1999.

Case Notes

Requirement of Cash Payment: At a personal property execution sale, the execution officer is bound to accept only cash for the bid. "Purchase money" required to be paid by 25-13-708 does not include checks. Proto v. Missoula County, 230 M 351, 749 P2d 1094, 45 St. Rep. 265 (1988).

Collateral References

Execution *key* 241, 278 through 280.

33 C.J.S. Executions §310.

25-13-709. Conveyance of personal property not capable of manual delivery.

Compiler's Comments

1999 Amendment: Chapter 89 near beginning substituted "purchase price" for "purchase money"; and made minor changes in style. Amendment effective October 1, 1999.

Applicability: Section 10, Ch. 89, L. 1999, provided: "[This act] applies to an execution of judgment commenced on or after [the effective date of this act]." Effective March 16, 1999.

25-13-710. Real property — what interest transferred.

Case Notes

Failure to Record Aircraft Conveyance With Federal Agency — Unrecorded Ownership Interest Invalid to Cut Off Right to Levy on Aircraft: Ford signed a promissory note for $28,503.62, plus interest, for products purchased from Lewistown Propane Co. (Lewistown). Lewistown sought to collect on the promissory note, and Ford subsequently filed a confession of judgment with the District Court for the full amount. At this time, Becky was allegedly helping Ford to refinance Ford's debt, and Ford sold three pieces of farm machinery and an airplane to Becky. Section 503(c) of the Federal Aviation Act of 1958 requires that every aircraft transfer be evidenced by a recorded instrument before the rights of innocent third parties can be affected; however, neither Ford nor Becky recorded the transfer. When Lewistown attempted to collect on its judgment, it inquired with the state Department of Transportation and the Federal Aviation Administration about the ownership of the aircraft and determined that the aircraft was still registered in Ford's name and had no liens or encumbrances attached, and that Ford had paid the annual federal registration fees. Lewistown then seized the aircraft and advised Ford that it intended to sell the aircraft to satisfy the judgment against Ford. Upon learning of the seizure of the aircraft, Becky intervened and sought a stay of execution of judgment, which the District Court granted. Lewistown appealed and the Supreme Court reversed. Lewistown, as judgment creditor, was entitled to rely on the federal records, but because Becky's ownership interest was unrecorded at the time of Lewistown's execution of the levy, Becky's interest was invalid as to Lewistown and could not be used to cut off Lewistown's right to levy on the aircraft. Lewistown Propane Co. v. Ford, 2002 MT 27, 308 M 243, 42 P3d 229 (2002), applying Kovacich v. Norgaard, 221 M 26, 716 P2d 633 (1986).

Foreclosure of Rights in CRP Payments During Redemption: When the District Court foreclosed all of the Jordans' right, title, and interest in and to "various grazing rights, government crop allotments, government subsidies or payments-in-kind compensation pertaining to the property", the foreclosure included the first security interest in federal CRP payments. Aetna Life Ins. Co. v. Jordan, 254 M 208, 835 P2d 770, 49 St. Rep. 703 (1992).

What Interest Judgment Lien Attaches: A judgment lien can only attach to the actual interest of the judgment debtor. It cannot attach to an interest that does not exist, nor can it claim superiority as against a valid prior interest. A judgment lien can only bind an interest in real property when the debtor himself, during the existence of the judgment lien, could voluntarily transfer or alienate the interest. Hannah v. Martinson, 232 M 469, 758 P2d 276, 45 St. Rep. 1203 (1988), followed in Disler v. Ford Motor Credit Co., 2000 MT 304, 302 M 391, 15 P3d 864, 57 St. Rep. 1288 (2000).

No Deficiency Judgment Upon Foreclosure of Trust Deed: A lender, electing to foreclose on its security under a trust deed by judicial procedure, is not entitled to remedies inconsistent with the Small Tract Financing Act of Montana. Specifically, the lender may not recover a deficiency judgment against the borrower, and the borrower has no right of redemption as is accorded in a

judicial foreclosure of a conventional mortgage. First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203, 44 St. Rep. 451 (1987).

Foreclosure Payment Not as Constituting Acceptance of Third Mortgage: Defendants, with legal title to property by purchase at foreclosure sale but strangers to contract creating third mortgage debt, had not assumed it by their tender of the amount due and did not discharge the lien of plaintiff's third mortgage but thereby stopped the running of interest and subjected plaintiff, refusing to accept, to costs of suit. Parcells v. Nelson, 103 M 412, 63 P2d 131 (1936).

Holder of Mortgage Lien Protected — Equity of Redemption: The purpose of preserving to a holder of a mortgage lien an equity of redemption is to protect him from loss, and if he receives all that he is entitled to, his lien is extinguished and with it his equity of redemption. Parcells v. Nelson, 103 M 412, 63 P2d 131 (1936).

Suit to Compel Satisfaction of Third Mortgage After Foreclosure Purchase: Defendants, with legal title to property by purchase at foreclosure sale under first and second mortgages, who made tender and deposited the money in court, could, if they desired, sue the holder of the third mortgage to compel an acceptance and the satisfaction of the mortgage; and this they are required to do to clear their title to the premises. Parcells v. Nelson, 103 M 412, 63 P2d 131 (1936).

Rights of Debtor and Purchaser in Property Sold:

On sale of real property under execution or decree of foreclosure, the purchaser is substituted for and acquires all the right, title, and interest of the judgment debtor in the property sold, leaving in the latter only the bare statutory right to redeem, which right is a personal privilege and not a property right and is not subject to levy and sale under execution. Hillsdale College v. Thompson, 99 M 400, 44 P2d 753 (1935).

A sale of real property pursuant to decree of foreclosure divests the mortgagor of his title and vests it in the purchaser, the only right left the mortgagor being that of redemption. Hillsdale College v. Thompson, 99 M 400, 44 P2d 753 (1935); Williard v. Campbell, 91 M 493, 11 P2d 782 (1932).

Under this section, the purchaser at a foreclosure sale is substituted to and acquires all the interest of the judgment debtor in the property sold, leaving in the judgment debtor only the bare right to redeem. Citizens' Nat'l Bank v. W. Loan & Bldg. Co., 64 M 40, 208 P 893 (1922).

After foreclosure sale and before redemption, the judgment debtor has neither legal nor equitable title to the property sold. State ex rel. Hopkins v. Stephens, 63 M 318, 206 P 1094 (1922).

An execution sale transfers the legal title to the purchaser, leaving in the judgment debtor simply the right to redeem. McQueeney v. Toomey, 36 M 282, 92 P 561 (1907).

Defective Title in Debtor — No Greater Right Transferred to Purchaser: The rule of caveat emptor applies to sales under execution, and the purchaser acquires no title where the judgment debtor was holding the legal title as trustee for another. Stauffacher v. Great Falls Pub. Serv. Co., 99 M 324, 43 P2d 647 (1935); Vaughn v. Schmalsle, 10 M 186, 25 P 102 (1890); McAdow v. Black, 6 M 601, 13 P 377 (1887); Story v. Black, 5 M 26, 1 P 1 (1883); Chumasero v. Vial, 3 M 376 (1879).

Purchaser as Actual Owner — Protection of Rights Against Assignee: The purchaser on execution sale becomes the actual owner of the property, subject only to the right of redemption, and as such is entitled to protect his interest and contest the right of the assignee of a subsequent judgment to redeem. Lepper v. Home Ranch Co., 90 M 558, 4 P2d 722 (1931); Brown v. Timmons, 79 M 246, 256 P 176 (1927); Libby Lumber Co. v. Pac. States Fire Ins. Co., 79 M 166, 255 P 340 (1927); Reynolds v. Davis, 78 M 56, 252 P 386 (1926); Leonard v. Western, 74 M 513, 241 P 523 (1925).

Certificate of Sale as "Conveyance" — Certificate to Be Recorded: The certificate of sale issued to purchaser under a foreclosure sale by the Sheriff is a "conveyance" within the meaning of the laws requiring recording. Citizens' Nat'l Bank v. W. Loan & Bldg. Co., 64 M 40, 208 P 893 (1922).

Application to Foreclosure Sales: This section, though apparently pertaining exclusively to sales under levies by execution upon judgments, includes sales made under foreclosure decrees. Banking Corp. of Mont. v. Hein, 52 M 238, 156 P 1085 (1916); Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

Right of Redemption as Applicable to Power of Sale Under Mortgage: The provisions of the code governing the right of redemption apply not only to redemption from sales on execution but also to those had under a power of sale contained in a mortgage or deed of trust. Banking Corp. of Mont. v. Hein, 52 M 238, 156 P 1085 (1916).

Trust for Debtor Created: Although this section provides that on execution sale the purchaser is substituted to and acquires the right, title, and interest of the judgment debtor, yet, if the

purchaser is a close friend and business associate of the debtor and agrees to buy four properties without severance at sale for a grossly inadequate consideration and to hold whatever little he gets only as a mortgage and after sale before expiration of the redemption period again agrees so to hold the property and the debtor within 2 years offers to redeem, the purchaser acquires no title of the debtor, who may redeem at any time, the transaction being a trust, and once a mortgage, remaining always a mortgage. Leggat v. McLure, 234 F 620 (1916).

Collateral References

Execution *key* 241, 260 through 302, et seq.; Mortgages *key* 531 through 554, 591, et seq.

33 C.J.S. Executions §§293, 294; 59A C.J.S. Mortgages §§841, 893 through 903.

30 Am. Jur. 2d Executions and Enforcement of Judgments §§479 through 511.

Title acquired or affected by judicial or execution sale of interest of spouse in estate by entireties in satisfaction of his or her individual debt. 75 ALR 2d 1172.

Rights and remedies of one purchasing at judicial or execution sale where there was misrepresentation or mistake as to acreage or location of boundaries of tract sold. 69 ALR 2d 254.

Rights acquired by purchaser at foreclosure sale as affected by dedication of land by mortgagor. 63 ALR 2d 1164.

Lien of purchaser at judicial or execution sale, where sale is void because proceedings are imperfect or irregular. 142 ALR 325.

25-13-711. Real property — certificate of sale.

Case Notes

Certificate as "Conveyance" — Subject to Recording: The certificate of sale issued to purchaser under a foreclosure sale by the Sheriff is a "conveyance" within the meaning of the laws requiring recording. Citizens' Nat'l Bank v. W. Loan & Bldg. Co., 64 M 40, 208 P 893 (1922).

Collateral References

Mortgages *key* 368.

33 C.J.S. Executions §§283, 284.

30 Am. Jur. 2d Executions and Enforcement of Judgments §§437 through 442.

25-13-712. Property subject to a security interest — disposition of proceeds, security agreement.

Case Notes

Directed Verdict Proper Despite Claim That Sale Not Commercially Reasonable: Defendants contended that no deficiency judgment should have been granted because the sale of their truck was done in a manner that was not commercially reasonable for the following reasons: (1) the repossession affidavit signed by the bank officer was false; and (2) plaintiff improperly refused to credit defendants with credit life and credit disability insurance refunds received during foreclosure and canceled defendants' insurance. However, defendants demonstrated no way in which the affidavit changed the amount received from the sale or credited to defendants, and evidence showed that defendants' maintenance account on the truck was credited with the insurance refund. Further, defendants stipulated at trial that notice of the sale was received and that a commercially reasonable price had been obtained for the truck and thus could not raise issues as to the time, place, or advertising of the sale on appeal. NW. Truck & Trailer Sales, Inc. v. Dvorak, 269 M 150, 887 P2d 260, 51 St. Rep. 1530 (1994).

Collateral References

Attachment *key* 57, et seq., 164; Execution *key* 42, et seq., 129, 130.

7 C.J.S. Attachment §§53, 56, 75, 79, 223 through 233; 33 C.J.S. Executions §§47, 109 through 111, 258 through 264.

30 Am. Jur. 2d Executions and Enforcement of Judgments §512, et seq.

25-13-713. Procedure when sale invalidated, revival of judgment.

Case Notes

Application to Personal Property Sale — Revival of Judgment: Though a purchaser of real property at a judicial sale, title to which fails, has a double remedy under this section, in that he may bring an action in the nature of one for money had and received or have the original judgment revived for his own use and benefit and proceed against the judgment debtor, a buyer of personalty is confined to the latter remedy. Tetrault v. Ingraham, 54 M 524, 171 P 1148 (1918).

Application to Foreclosure Sales: This section applies to sales under foreclosure. McCarthy v. St. Bank of Townsend, 54 M 319, 170 P 15 (1918).

Void Foreclosure Sale — Failure of Service: A purchaser of lands at a foreclosure sale under a decree which, unknown to him but known to the judgment creditor, was void because of

nonservice of summons on some of the defendants, may, under this section, as well as in the absence of statute, by independent action recover reimbursement from the judgment creditor, subrogation not offering any remedy. McCarthy v. St. Bank of Townsend, 54 M 319, 170 P 15 (1918).

Eviction by Judgment Creditor: When the purchaser of real estate sold on execution is evicted therefrom under the provisions of this section in proceedings instituted by the judgment creditor, by which the judgment and execution under which he purchased were declared void, he may recover the purchase money from the judgment creditor. Elling v. Harrington, 17 M 322, 42 P 851 (1895).

Collateral References

Execution *key* 285 through 287, et seq.; Mortgages *key* 537, et seq.

33 C.J.S. Executions §§305 through 307, 312 through 314; 59A C.J.S. Mortgages §§902 through 920.

30 Am. Jur. 2d Executions and Enforcement of Judgments §486, et seq.

Part 8
Redemption of Real Property

25-13-801. Who may redeem.

Case Notes

Substantial Compliance With Redemption Statutes Sufficient: Savoy purchased two tracts of land at a foreclosure sale. Six days before the expiration of the redemption period, Farmers Home Administration (FmHA) notified the Cascade County Sheriff's office that it was redeeming the property purchased by Savoy at the foreclosure sale. Savoy argued that FmHA had failed to properly follow statutory requirements in that it filed the notice with the Sheriff rather than the County Clerk and had not filed an affidavit of the amount owing and that the notice was inadequate to prove that FmHA had a redeemable interest in the property. The Supreme Court held that substantial compliance with the statutes is sufficient, as in the present case in which Savoy had not been prejudiced by FmHA's failure to strictly comply with statutory requirements. Savoy v. Cascade County Sheriff's Dept., 268 M 507, 887 P2d 160, 51 St. Rep. 1300 (1994).

Foreclosure Sale Order Not Violative of Conveyance Restriction or Redemption Right: Defendant contended the wording of an order of sale in a foreclosure proceeding, stating that defendants "have no lien, right, title, estate, claim, or interest on or to the mortgaged property, whether real, personal, or mixed hereinafter described", incorrectly severed his interest in the land prior to foreclosure sale and severely hindered his attempts to sell the land and satisfy the promissory note. However, the language did not violate 71-1-202 because it did not enable the mortgage owner to recover possession without a foreclosure and sale. Further, the statement did not affect the defendant's 1-year statutory right of redemption. Aetna Life Ins. Co. v. Slack, 232 M 250, 756 P2d 1140, 45 St. Rep. 1028 (1988).

Cancellation of Joint Tenant's Interest — No Right to Redeem: A joint tenant whose right, title, and interest in real property was canceled prior to a foreclosure sale no longer had the right to redeem under this section. Jesmain v. Mills, 224 M 154, 728 P2d 800, 43 St. Rep. 2093 (1986).

Right of Redemption as Statutory — Imposition of Conditions of Redemption: The right of redemption is a purely statutory one exercisable only within the time and under the conditions specified by the statutes; it is not property in any sense but a bare personal privilege; a person from whom statutory redemption is sought cannot impose any conditions upon the redemptioner not imposed by statute. Lester v. J. & S. Inv. Co., 171 M 149, 557 P2d 299 (1976).

"Successor in Interest" Defined: The use of the expression "successors in interest" means nothing more than that one who has succeeded to the title to the property or has been substituted to the rights of the debtor or redemptioner has the same right. Williard v. Campbell, 91 M 493, 11 P2d 782 (1932); Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

Recording of Certificate of Sale — Right of Creditor to Redeem: A Sheriff's certificate of sale on foreclosure issued to the purchaser is a conveyance within the meaning of the laws requiring recording. By virtue of the sale the legal and equitable title of the mortgagor passes to the purchaser and there remains in the former the mere personal privilege of redeeming within the statutory period, such right to redeem being also accorded, under this section, to a redemptioner, i.e., a creditor having a lien by judgment, mortgage, or attachment subsequent to that on which the property was sold. Dipple v. Neville, 82 M 280, 267 P 214 (1928).

Transfer of Right to Redeem: The right of redemption is not one of property but a mere personal privilege, which cannot be levied upon or sold on execution at the instance of a judgment debtor but may be transferred to another by the debtor, the transferee being a

"successor in interest" within the meaning of this section and as such entitled to redeem. Brown v. Timmons, 79 M 246, 256 P 176 (1927).

Attachment Before Redemption Period Expired — Rights Acquired: Where real property had been sold on mortgage foreclosure and a creditor of the judgment debtor levied a Writ of Attachment on it before the period of redemption had expired, he acquired no lien by virtue of it and therefore did not become a redemptioner within the meaning of subsection (2) of this section, so as to entitle him to a Sheriff's deed. State ex rel. Hopkins v. Stephens, 63 M 318, 206 P 1094 (1922).

"Debtor" Defined: The term "debtor", as used in subsection (1)(a) of this section, refers exclusively to the debtor whose land was subjected to forced sale. Marcellus v. Wright, 51 M 559, 154 P 714 (1916).

Wife of Debtor Not Redemptioner: The wife of a mortgagor of real property is not, by virtue of her relationship to him, a "redemptioner" as that term is defined by this section. Marcellus v. Wright, 51 M 559, 154 P 714 (1916). See State ex rel. Harnden v. Crawford, 58 M 72, 189 P 1119 (1920).

Collateral References

Execution *key* 291 through 302, et seq.; Mortgages *key* 591, et seq.

33 C.J.S. Executions §§265 through 267; 59A C.J.S. Mortgages §§1006 through 1030.

55 Am. Jur. 2d Mortgages §885, et seq.

What judgment creditor, other than execution sale creditor, may redeem from execution sale. 58 ALR 2d 467.

Redemption of client's property sold at execution or judicial sale to attorney. 20 ALR 2d 1308.

25-13-802. Time for redemption — amount to be paid.

Compiler's Comments

1991 Amendment: In (1) substituted clause relating to interest rate established by judgment for "1/2 of 1% per month thereon in addition"; inserted (3) relating to recovery of repair and maintenance costs; and made minor changes in style.

Case Notes

Person Not in Residence on Mortgaged Property Not Entitled to Possession During Statutory Redemption Period: Halseth defaulted on several promissory notes, so Independence Bank filed a foreclosure action on Halseth's property in Blaine County. At trial, Halseth contended that because he was currently residing on the property, he was entitled to possession of the property during the 1-year redemption period following the foreclosure sale. Although Halseth maintained a residence in Harlem, he testified that he had moved a camper trailer to the Blaine County property for the sole purpose of establishing his right to retain the property during the redemption period. The District Court applied the definition of residence in 1-1-215, and determined that Halseth resided in Harlem, not on the Blaine County property, and that he was therefore not entitled to retain possession during the redemption period. Halseth appealed. The Supreme Court agreed with the District Court's findings. Even though he moved the camper trailer to Blaine County, Halseth retained ties to the Harlem residence and did not intend to relinquish it. Absent a demonstration of the union of act and intent necessary to change permanent residence from Harlem to Blaine County, Halseth could not be said to reside at the Blaine County property and was not entitled to retain possession of the property during the redemption period. Independence Bank v. Halseth, 2002 MT 100, 309 M 398, 46 P3d 657 (2002).

Reimbursement by Title Insurance Company on Property Redeemed — Buyer Not Entitled to Purchase Price From Seller — Subrogation: A buyer received payment equivalent to the purchase price from a title insurance company pursuant to a policy held by the seller. He later sought to recover the purchase price from the seller after the title was redeemed by the original owners. The lower court applied the principle of subrogation in determining that the claim of the buyer was subrogated to the title insurance company, and that since the buyer had been compensated, it would not be just to permit him to pursue the seller for the purchase price. McDonald v. Grassle, 228 M 25, 740 P2d 1122, 44 St. Rep. 1312 (1987).

No Deficiency Judgment Upon Foreclosure of Trust Deed: A lender, electing to foreclose on its security under a trust deed by judicial procedure, is not entitled to remedies inconsistent with the Small Tract Financing Act of Montana. Specifically, the lender may not recover a deficiency judgment against the borrower, and the borrower has no right of redemption as is accorded in a judicial foreclosure of a conventional mortgage. First St. Bank of Forsyth v. Chunkapura, 226 M 54, 734 P2d 1203, 44 St. Rep. 451 (1987).

Accounting of Rents and Profits Not Available: Where a redemptioner, proceeding under this section, deposited with the Sheriff the amount paid by the purchaser at execution sale with

interest and at the same time demanded an accounting of the rents and profits received by the latter, which could only be done under 25-13-822, the attempt to redeem under this section was nullified and therefore the redemption not completed by the deposit. Leonard v. Western, 74 M 513, 241 P 523 (1925). See also Reynolds v. Davis, 78 M 56, 252 P 386 (1926).

No Payment of Junior Liens by Judgment Debtor: While a "redemptioner" must, when redeeming property sold under forced sale, pay to the purchaser the amount of his purchase and any prior lien he may hold on the property, the judgment debtor may redeem by paying simply the amount of the purchase price, with interest, etc. Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

No Retroactive Application of Amendment: The 1895 amendment of this section extending the period of redemption from 6 months to 1 year could not constitutionally be applied to a mortgage executed before the effective date of the mortgage. State ex rel. Cruse Sav. Bank v. Gilliam, 18 M 109, 45 P 661 (1896), reversing 18 M 94, 44 P 394 (1896).

Law Review Articles

Deficiency Judgment Relief in Montana Foreclosures, Bentwood, 53 Mont. L. Rev. 255 (1992).

Collateral References

33 C.J.S. Executions §§268, 269; 59A C.J.S. Mortgages §§1034 through 1039.

55 Am. Jur. 2d Mortgages §§897, 898, 902, et seq.

Necessity and sufficiency of tender of payment by one seeking to redeem property from mortgage foreclosure. 80 ALR 2d 1317.

Redemption rights of mortgagor making timely tender but of inadequate amount because of officer's mistake. 45 ALR 2d 1327.

25-13-803. Subsequent redemptions — when permitted, amount paid.

Compiler's Comments

1991 Amendment: In (1), in first sentence and in second sentence after "rate", substituted clause relating to interest rate established by judgment for reference to 1/2 of 1% per month.

Case Notes

Effect of Sale to Judgment Debtor or Creditor — Redemptioner: A redemption from foreclosure of mortgaged real property by the judgment debtor (mortgagor) or his successor in interest terminates the effect of the sale, restores one or the other to his estate, and restores junior liens, wiped out by the sale; but a redemption by a redemptioner (a creditor) transfers to him the rights of the purchaser under the sale, and at the expiration of all periods of redemption, he is entitled to a Sheriff's deed on the original certificate of sale. Dipple v. Neville, 82 M 280, 267 P 214 (1928).

Time for Redemption by Judgment Debtor: The right of redemption may be invoked only by compliance with the statutory provisions; under them the judgment debtor may redeem from foreclosure at any time within 1 year from the date of sale, and this period of limitation cannot be shortened by any action of a redemptioner. On the other hand, on the expiration of the 1-year period, his right of redemption ceases and he is in no position thereafter to question the title of a redemptioner who acted within the time given him by the statute. Dipple v. Neville, 82 M 280, 267 P 214 (1928).

Redemption by Judgment Debtor From Redemptioner: In providing that a judgment debtor, in redeeming, must make the same payments as are required to effect a redemption by a redemptioner, the Legislature intended to declare merely that if a judgment debtor redeems from a redemptioner, he must make the payments which have been made by the redemptioner. Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

Time for Execution of Sheriff's Deed: The Sheriff is authorized to execute his deed to real estate, sold under execution, only at the expiration of a year from the day of the sale. Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

Deficiency Attaching to Property Redeemed by Judgment Debtor: If the debtor redeems, the effect of this section is to terminate the sale and restore the estate to him, whereupon any deficiency would attach as a lien. McQueeney v. Toomey, 36 M 282, 92 P 561 (1907), followed in Farm Credit Bank of Spokane v. Newton, 252 M 336, 829 P2d 931, 49 St. Rep. 267 (1992).

Collateral References

Corporations *key* 482 ½, 523, et seq.; Execution *key* 291, et seq.; Mortgages *key* 606, et seq.

19 C.J.S. Corporations §689; 33 C.J.S. Executions §§265 through 276; 59A C.J.S. Mortgages §§991 through 1093.

55 Am. Jur. 2d Mortgages §§889, 902, et seq.

25-13-804. Redemption by stockholder or corporation.

Compiler's Comments

1991 Amendment: In (1) and (2), after "rate", substituted clause relating to interest rate established by judgment for "of 1/2 of 1% per month".

Case Notes

Time for Redemption by Judgment Debtor: The right of redemption may be invoked only by compliance with the statutory provisions; under them the judgment debtor may redeem from foreclosure at any time within 1 year from the date of sale, and this period of limitation cannot be shortened by any action of a redemptioner. On the other hand, on the expiration of the 1-year period, his right of redemption ceases and he is in no position thereafter to question the title of a redemptioner who acted within the time given him by the statute. Dipple v. Neville, 82 M 280, 267 P 214 (1928).

Redemption by Judgment Debtor From Redemptioner: In providing that a judgment debtor, in redeeming, must make the same payments as are required to effect a redemption by a redemptioner, the Legislature intended to declare merely that if a judgment debtor redeems from a redemptioner, he must make the payments which have been made by the redemptioner. Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

Time for Execution of Sheriff's Deed: The Sheriff is authorized to execute his deed to real estate, sold under execution, only at the expiration of a year from the day of the sale. Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

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Collateral References

Corporations *key* 482 ½, 523, et seq.; Execution *key* 291, et seq.; Mortgages *key* 606, et seq.

19 C.J.S. Corporations §689; 33 C.J.S. Executions §§265 through 267; 59A C.J.S. Mortgages §§1006 through 1030.

25-13-805. Redemption by debtor from spouse.

Compiler's Comments

1991 Amendment: After "rate" substituted clause relating to interest rate established by judgment for "of 1/2 of 1% per month".

Case Notes

Time for Redemption by Judgment Debtor: The right of redemption may be invoked only by compliance with the statutory provisions; under them the judgment debtor may redeem from foreclosure at any time within 1 year from the date of sale, and this period of limitation cannot be shortened by any action of a redemptioner. On the other hand, on the expiration of the 1-year period, his right of redemption ceases and he is in no position thereafter to question the title of a redemptioner who acted within the time given him by the statute. Dipple v. Neville, 82 M 280, 267 P 214 (1928).

Redemption by Judgment Debtor From Redemptioner: In providing that a judgment debtor, in redeeming, must make the same payments as are required to effect a redemption by a redemptioner, the Legislature intended to declare merely that if a judgment debtor redeems from a redemptioner, he must make the payments which have been made by the redemptioner. Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

Time for Execution of Sheriff's Deed: The Sheriff is authorized to execute his deed to real estate, sold under execution, only at the expiration of a year from the day of the sale. Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

Deficiency Attaching to Property Redeemed by Judgment Debtor: If the debtor redeems, the effect of this section is to terminate the sale and restore the estate to him, whereupon any deficiency would attach as a lien. McQueeney v. Toomey, 36 M 282, 92 P 561 (1907), followed in Farm Credit Bank of Spokane v. Newton, 252 M 336, 829 P2d 931, 49 St. Rep. 267 (1992).

Collateral References

Corporations *key* 482 ½, 523, et seq.; Execution *key* 291, et seq.; Mortgages *key* 606, et seq.

19 C.J.S. Corporations §689; 33 C.J.S. Executions §§265 through 267; 59A C.J.S. Mortgages §1009.

25-13-806. Notice of redemption, liens, and taxes and assessments paid.

Case Notes

Substantial Compliance With Redemption Statutes Sufficient: Savoy purchased two tracts of land at a foreclosure sale. Six days before the expiration of the redemption period, Farmers Home Administration (FmHA) notified the Cascade County Sheriff's office that it was redeeming the property purchased by Savoy at the foreclosure sale. Savoy argued that FmHA had failed to properly follow statutory requirements in that it filed the notice with the Sheriff rather than the County Clerk and had not filed an affidavit of the amount owing and that the notice was inadequate to prove that FmHA had a redeemable interest in the property. The Supreme Court held that substantial compliance with the statutes is sufficient, as in the present case in which Savoy had not been prejudiced by FmHA's failure to strictly comply with statutory requirements. Savoy v. Cascade County Sheriff's Dept., 268 M 507, 887 P2d 160, 51 St. Rep. 1300 (1994).

Sufficiency of Information in Notice of Redemption: Defendant argued that a notice of redemption was deficient in that it did not set forth exactly what was owed on the judgment, what the purchase price was, what interest had been paid, what taxes had been paid, or what the purchaser's lien debt was. Instead, the notice provided a description of the real property, the date of the judgment and decree of foreclosure, the amount of the judgment, the total amount paid in redemption, and the required signature of redemptioner. This section does not require that the notice include any of the information defendant listed; rather, the information provided was sufficient for the purpose of giving notice. Kansas City Life Ins. Co. v. Bratsky Farms, 238 M 398, 778 P2d 859, 46 St. Rep. 1366 (1989).

25-13-807. Papers redemptioner must produce.

Case Notes

Substantial Compliance With Redemption Statutes Sufficient: Savoy purchased two tracts of land at a foreclosure sale. Six days before the expiration of the redemption period, Farmers Home Administration (FmHA) notified the Cascade County Sheriff's office that it was redeeming the property purchased by Savoy at the foreclosure sale. Savoy argued that FmHA had failed to properly follow statutory requirements in that it filed the notice with the Sheriff rather than the County Clerk and had not filed an affidavit of the amount owing and that the notice was inadequate to prove that FmHA had a redeemable interest in the property. The Supreme Court held that substantial compliance with the statutes is sufficient, as in the present case in which Savoy had not been prejudiced by FmHA's failure to strictly comply with statutory requirements. Savoy v. Cascade County Sheriff's Dept., 268 M 507, 887 P2d 160, 51 St. Rep. 1300 (1994).

25-13-808. To whom redemption money paid.

Case Notes

Misrepresentation by Sheriff: For the purposes of redemption, this section makes the Sheriff the agent of the purchaser at the sale. It is his duty to know when the time for redemption expires. A false representation made by him upon the subject is in legal effect a misrepresentation made by the purchaser or creditor, and though it be innocently made, the latter cannot profit by it. Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

"Successor in Office" Defined: Any Sheriff succeeding his predecessor, whether immediately or not, is the latter's "successor" within the meaning of that term as used in this section. McCauley v. Jones, 34 M 375, 86 P 422 (1906).

Collateral References

Execution *key* 298, 302 through 307, et seq.; Mortgages *key* 554, 606, et seq.

33 C.J.S. Executions §270; 59A C.J.S. Mortgages §§1047 through 1053.

25-13-809. Effect of redemption by debtor or debtor's spouse — certificate of redemption.

Case Notes

Effect of Sale to Judgment Debtor: A redemption from foreclosure of mortgaged real property by the judgment debtor (mortgagor) or his successor in interest terminates the effect of the sale, restores one or the other to his estate, and restores junior liens, wiped out by the sale; but a redemption by a redemptioner (a creditor) transfers to him the rights of the purchaser under the sale, and at the expiration of all periods of redemption, he is entitled to a Sheriff's deed on the original certificate of sale. Dipple v. Neville, 82 M 280, 267 P 214 (1928).

Deficiency Attaching to Property Redeemed by Judgment Debtor: If the debtor redeems, the effect of this section is to terminate the sale and restore the estate to him, whereupon any

deficiency would attach as a lien. McQueeney v. Toomey, 36 M 282, 92 P 561 (1907), followed in Farm Credit Bank of Spokane v. Newton, 252 M 336, 829 P2d 931, 49 St. Rep. 267 (1992).

Collateral References

Execution *key* 302; Mortgages *key* 624.
33 C.J.S. Executions §271; 59A C.J.S. Mortgages §§1089 through 1093.
55 Am. Jur. 2d Mortgages §§913 through 915.

25-13-810. When purchaser entitled to conveyance.

Case Notes

No Time Requirement Related to Notice: Defendant contended that a Sheriff's deed cannot be issued until 60 days after notice of redemption has been given. Here, because redemption occurred in February, the notice was dated June 17, and the deed was dated July 7, defendant claimed the deed was void and invalid as a basis for the writ of assistance. However, this section allows a Sheriff's deed to be issued when: (1) 60 days have elapsed after redemption; (2) no other redemption has been made; (3) notice of redemption has been given; and (4) the time for redemption has expired. This section establishes no time requirement related to the notice; therefore, the deed was valid as a basis for the writ. Kansas City Life Ins. Co. v. Bratsky Farms, 238 M 398, 778 P2d 859, 46 St. Rep. 1366 (1989).

Time for Redemption by Judgment Debtor: The right of redemption may be invoked only by compliance with the statutory provisions; under them the judgment debtor may redeem from foreclosure at any time within 1 year from the date of sale, and this period of limitation cannot be shortened by any action of a redemptioner. On the other hand, on the expiration of the 1-year period, his right of redemption ceases and he is in no position thereafter to question the title of a redemptioner who acted within the time given him by the statute. Dipple v. Neville, 82 M 280, 267 P 214 (1928).

Time for Execution of Sheriff's Deed: The Sheriff is authorized to execute his deed to real estate, sold under execution, only at the expiration of a year from the day of the sale. Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

25-13-811. Who to execute conveyance.

Case Notes

"Successor in Office" Defined: Any Sheriff succeeding his predecessor, whether immediately or not, is the latter's "successor" within the meaning of that term as used in this section. McCauley v. Jones, 34 M 375, 86 P 422 (1906).

Time for Conveyance to Purchaser: A purchaser at foreclosure sale went into possession after the expiration of the year within which the mortgagor was entitled to redeem. Nearly 4 years afterward the then Sheriff, as successor of the Sheriff making the sale, at the request of the purchaser executed to him a deed. The mortgagor made no offer to redeem. The deed was applied for within a reasonable time and was valid under this section. McCauley v. Jones, 34 M 375, 86 P 422 (1906).

Collateral References

Execution *key* 313; Mortgages *key* 527.
33 C.J.S. Executions §§278, 280; 59A C.J.S. Mortgages §§924 through 930.

25-13-821. Possession of lands during redemption period.

Case Notes

Occupation of Foreclosed Land as Home — Payment of Rents and Profits Not Required: Defendants occupied the land that was foreclosed on as their home. To require that they pay rent or profits from the land diminished their unqualified right to possession under 71-1-229 and this section in a way that was not provided for by the Legislature. Fed. Land Bank of Spokane v. Snider, 247 M 508, 808 P2d 475, 48 St. Rep. 285 (1991), distinguishing Citizens' Nat'l Bank v. W. Loan & Bldg. Co., 64 M 40, 208 P 893 (1922).

Foreclosure Sale Order Not Violative of Conveyance Restriction or Redemption Right: Defendant contended the wording of an order of sale in a foreclosure proceeding, stating that defendants "have no lien, right, title, estate, claim, or interest on or to the mortgaged property, whether real, personal, or mixed hereinafter described", incorrectly severed his interest in the land prior to foreclosure sale and severely hindered his attempts to sell the land and satisfy the promissory note. However, the language did not violate 71-1-202 because it did not enable the mortgage owner to recover possession without a foreclosure and sale. Further, the statement did not affect the defendant's 1-year statutory right of redemption. Aetna Life Ins. Co. v. Slack, 232 M 250, 756 P2d 1140, 45 St. Rep. 1028 (1988).

Vendees of Mortgagee Not "Execution Debtors": Purchasers who took premises subject to preexisting mortgage and who had not assumed payment of mortgage, even though occupying premises as their home at time of foreclosure, were not "execution debtors" within meaning of statute and were not entitled to possession of premises during 1-year period of redemption. First Nat'l Bank of Circle v. Hastetter, 149 M 142, 423 P2d 306 (1967).

Right to Possession Inapplicable to Business Establishment: The right of possession during the period of redemption, granted to a mortgagor by this section, does not apply unless the debtor occupies the premises as a home for himself and family and does not apply to a business establishment. Rock Island Plow Co. v. Cut Bank Implement Co., 101 M 117, 53 P2d 116 (1935).

Right to Possession — Change of Possession: The right granted by this section to remain in possession during the period of redemption is exempt from forced sale. The right, however, is lost if there is a change of possession. U.S. Bldg. & Loan Ass'n v. Stevens, 93 M 11, 17 P2d 62 (1932).

Waiver of Right to Possession Previously Allowed:

Prior to the 1933 amendment, the contention that the stipulation for waiver of any claim of homestead or right of possession of the mortgaged premises during the period of redemption is invalid on the ground that the right conferred by this section was in the nature of a homestead and that, therefore, the stipulation was void as contrary to the public policy of the exemption laws, could not be sustained. U.S. Bldg. & Loan Ass'n v. Stevens, 93 M 11, 17 P2d 62 (1932).

Prior to the 1933 amendment, under authority of 71-1-105, the parties to a real estate mortgage could incorporate therein a stipulation for immediate possession by the mortgagee in case of default by the mortgagor to make payment of interest, taxes, etc., promptly, notwithstanding this section. Kelly v. Roberts, 93 M 106, 17 P2d 65 (1932).

Prior to the 1933 amendment, where a mortgagor agreed to the incorporation of a clause in the mortgage to relinquish his right to remain in possession of the property on foreclosure sale, public policy did not prevent the enforcement of the agreement if it sufficiently identified the right sought to be relinquished. Kelly v. Roberts, 93 M 106, 17 P2d 65 (1932).

Premises Not Occupied as Home — Purchaser Entitled to Possession: The purchaser at a sale of realty under foreclosure is, as against the judgment debtor, entitled to possession during the period of redemption if the premises are not occupied by the debtor as a home for himself and his family. Lepper v. Home Ranch Co., 90 M 558, 4 P2d 722 (1931); Kester v. Amon, 81 M 1, 261 P 288 (1927); State ex rel. Flowerree v. District Court, 71 M 89, 227 P 579 (1924); Dyer v. Schmidt, 67 M 6, 213 P 1117 (1923); Citizens' Nat'l Bank v. W. Loan & Bldg. Co., 64 M 40, 208 P 893 (1922).

Law Review Articles

Deficiency Judgment Relief in Montana Foreclosures, Bentwood, 53 Mont. L. Rev. 255 (1992).

25-13-822. Rents and profits during redemption period, accounting.

Compiler's Comments

1991 Amendment: In (1) inserted last sentence relating to amounts to be subtracted from credit for rents and profits.

Case Notes

Foreclosure of Rights in CRP Payments During Redemption: When the District Court foreclosed all of the Jordans' right, title, and interest in and to "various grazing rights, government crop allotments, government subsidies or payments-in-kind compensation pertaining to the property", the foreclosure included the first security interest in federal CRP payments. Aetna Life Ins. Co. v. Jordan, 254 M 208, 835 P2d 770, 49 St. Rep. 703 (1992).

Occupation of Foreclosed Land as Home — Payment of Rents and Profits Not Required: Defendants occupied the land that was foreclosed on as their home. To require that they pay rent or profits from the land diminished their unqualified right to possession under 25-13-821 and 71-1-229 in a way that was not provided for by the Legislature. Fed. Land Bank of Spokane v. Snider, 247 M 508, 808 P2d 475, 48 St. Rep. 285 (1991), distinguishing Citizens' Nat'l Bank v. W. Loan & Bldg. Co., 64 M 40, 208 P 893 (1922).

Management Fee Disallowed: Purchaser may not offset rents and profits with a so-called management fee. In taking possession of the property, the buyer is taking a calculated chance and the buyer may have gained the property at a bargain price. Management is part of the price of his investment, a chance that he takes. Lester v. J. & S. Inv. Co., 171 M 149, 557 P2d 299 (1976).

Time for Demand for Accounting: While the holder of an inferior mortgage lien may, under this section, after foreclosure sale under a prior mortgage, demand an accounting of rents and profits from the purchaser, he must do so within 1 year; after expiration of such period, his

demand is ineffectual even though the provisions of the section be invoked on resort to equitable redemption. Parcells v. Nelson, 103 M 412, 63 P2d 131 (1936).

Measure of Rents and Profits — Who Entitled: The purchaser of real property at foreclosure sale, from the time of the sale until redemption, and a redemptioner, from the time of his redemption until another redemption, are entitled to receive the rents from the property sold from the tenant in possession or the value of the use and occupation thereof. Lepper v. Home Ranch Co., 90 M 558, 4 P2d 722 (1931).

Recognition of Landlord-Tenant Relationship — Rights to Rent: Where the purchaser of mortgaged lands upon taking possession found thereon a tenant engaged in growing a crop who thereafter recognized the purchaser as his landlord and agreed to pay him as rent one-third of the crop, the former under this section, was entitled to receive from the latter the rent or the value of the use and occupation of the land. Swanberg v. Schaefer, 88 M 16, 289 P 561 (1930).

Vendor Reserving Rents and Profits — Loss of Right Upon Foreclosure: Where the vendee of mortgaged farm lands, then in possession of a tenant, held under a deed in which the vendor reserved to himself the right to receive the rents therefrom, the vendor lost such right on foreclosure sale, the purchaser at such sale then having become entitled to the rents until redemption. Dolin v. Wachter, 87 M 466, 288 P 616 (1930).

Contract for Crop Rents Creating "Tenant in Possession": A contract between the owner of land and one who desires to farm it, under which the latter agrees to pay as rental a portion of the crops raised thereon, is a lease and not a cropping agreement. The tenant becomes the owner of the crops as personal property, subject to his obligation to deliver the portion agreed upon to his landlord and is a "tenant in possession" within the meaning of this section. Blodgett Loan Co. v. Hansen, 86 M 406, 284 P 140 (1930), distinguished in Lepper v. Home Ranch Co., 90 M 558, 4 P2d 722 (1931).

Successive Foreclosure Sales — Apportionment of Rent: Under this section, rents payable in crops under a lease executed by the purchaser of mortgaged lands on foreclosure of a second mortgage and a tenant and in force at the time the holder of the first mortgage foreclosed and became its purchaser were properly apportionable between the two purchasers on the basis of the time the property was held by them, respectively, and the contention that the section has application only to cases where a redemption has been had cannot be sustained. Blodgett Loan Co. v. Hansen, 86 M 406, 284 P 140 (1930), distinguished in Lepper v. Home Ranch Co., 90 M 558, 4 P2d 722 (1931).

Accounting Furnished After Expiration of Redemption Period — Time for Redemption: A redemptioner of real property from execution sale who, just prior to the expiration of the period of redemption, demanded from the purchaser a verified statement of the rents and profits, which was furnished after the expiration of such period, to then effect a redemption under that section was required to tender the amount due within 5 days after receiving the statement, to effect a redemption; and failure of plaintiff to allege that he had made such tender rendered the pleading insufficient in an action to enjoin issuance of the deed to the purchaser. Reynolds v. Davis, 78 M 56, 252 P 386 (1926).

Protest of Amount of Rents and Profits: A redemptioner who considers the statement furnished him by the purchaser at execution sale of real property of the rents and profits thereof incorrect, must, to effect the redemption under this section, nevertheless tender the amount apparently due but may do so under protest, thus advising the Sheriff that the excess is not intended as a gift and making him a bailee of the redemptioner for the portion of the tender considered excessive. Reynolds v. Davis, 78 M 56, 252 P 386 (1926).

Redemptioner to Assume All Burdens of Statute: Since the right to redeem is purely statutory, a redemptioner availing himself of the provisions of this section, under which the amount he has to pay to the purchaser may be much less than he would have to pay if proceeding under 25-13-802 and under which the time within which redemption may be made is extended, must assume its burdens in order to enjoy its benefits. Leonard v. Western, 74 M 513, 241 P 523 (1925).

Time for Tender of Redemption if Accounting Made: A redemptioner, proceeding under 25-13-802, must within 1 year from date of execution sale tender or pay the amount paid by the purchaser with interest up to the time of redemption. Where, however, he proceeds under this section and asks for an accounting of the rents and profits received by the purchaser, a tender is not necessary until an account has been made, either voluntarily, in which event the period of redemption is extended 5 days after it is made, or compulsorily by means of a suit in equity, in which case the period is extended 15 days after final determination of the suit; but the redemption is not completed until the accounting is had and the amount due determined and paid or tendered within time. Leonard v. Western, 74 M 513, 241 P 523 (1925).

Action for Accounting — Designation of Defendant: Where a loan company had transferred its interest in real property bought by it at foreclosure sale to another with the understanding that the legal title and right of possession should remain in it until full payment had been made, the proper party defendant in an action for an accounting of rents and profits therefrom was the company and not the vendee. Citizens' Nat'l Bank v. W. Loan & Bldg. Co., 64 M 40, 208 P 893 (1922).

Redemptioner Entitled to Rents and Profits Actually Received: In the absence of any showing of willful default or negligence on the part of the purchaser of realty at foreclosure sale, the redemptioner is entitled, under this section, to demand an accounting by notice or suit in equity, only to the rents and profits actually received by the former. Citizens' Nat'l Bank v. W. Loan & Bldg. Co., 64 M 40, 208 P 893 (1922), distinguished in Fed. Land Bank of Spokane v. Snider, 247 M 508, 808 P2d 475, 48 St. Rep. 285 (1991).

"Tenant" Defined: In an action for an accounting by a redemptioner against the purchaser at a foreclosure sale for rents and profits received by the latter, the word "tenant" used in this section is not to be construed in its strict or technical sense but as indicating one who holds possession of the land by any kind of title, either in fee, for life, for years, at will, or at sufferance. Citizens' Nat'l Bank v. W. Loan & Bldg. Co., 64 M 40, 208 P 893 (1922).

Collateral References

Execution *key* 281, et seq.; Mortgages *key* 549.

33 C.J.S. Executions §311; 59A C.J.S. Mortgages §899.

25-13-823. Restraint of waste during redemption period.

Collateral References

Execution *key* 282, et seq.; Injunction *key* 45, et seq.

33 C.J.S. Executions §§379, 380; 43A C.J.S. Injunctions §132, et seq.

25-13-824. Enjoining injury to property after sale and before conveyance.

Collateral References

Mortgages *key* 465, 465 ½.

59A C.J.S. Mortgages §§773, 775.

25-13-825. Damages for injury to property after sale and before conveyance.

Collateral References

33 C.J.S. Executions §§379, 380.

CHAPTER 14
PROCEEDINGS IN AID OF EXECUTION

Part 1
Proceedings to Determine Availability of Property

Part Case Notes

Purpose of Parts 1 and 2: The general purpose of parts 1 and 2 of this chapter is to provide a substitute for a creditor's bill, a cheaper and easier method of reaching assets of the debtor that cannot be reached by the execution method. In re Downey, 31 M 441, 78 P 772 (1904).

25-14-101. Debtor to answer concerning his property when execution unsatisfied.

Compiler's Comments

1981 Amendment: Substituted "judgment is docketed" for "judgment roll is filed"; substituted "who is a resident may" for "must".

Case Notes

Court Outside of County of Defendant's Residence — Defendant Not Required: A debtor may not be required to attend court outside the county of his residence in a proceeding initiated under this section. Belote v. Bakken, 139 M 43, 359 P2d 372 (1961).

Reference to Referee — Discretion of Trial Court: Where referee is appointed to conduct proceedings supplementary to execution in response to an application for an order requiring judgment debtor to appear and answer concerning his property, notice to the judgment debtor need not be given before ordering his examination or the examination of third persons in absence of statutory requirement; the time and place for appearance of the debtor are properly left to be fixed by the referee within bounds of the statute. The existence of exceptional conditions

requiring reference was for trial court to determine in exercise of sound discretion; and where numerous persons were to be examined at various places, a reference was proper. Bair v. Bank of Am. Nat'l Trust & Sav. Ass'n, 112 F2d 247 (9th Cir. 1940).

Manner of Application of Statute: This section is applicable to cases wherein the judgment creditor has no knowledge of the existence of any property subject to levy under execution, and in such a case any order for examination of the judgment debtor may be obtained only after execution is returned. Section 25-14-102 applies where the judgment creditor has knowledge of property belonging to the debtor, but he has been unable to locate or have it levied upon under execution, and the order may be obtained after issuance of execution and before its return. Brindjonc v. Brindjonc, 96 M 481, 31 P2d 725 (1934).

Order Requiring Defendant to Appear — Time for Use: A creditor's bill to enforce a judgment lien against property claimed by defendants under a judicial sale need not be preceded by proceedings supplementary to execution, as such summary process is applicable to the discovery of property subject to execution, concealed or withheld by the debtor or others in collusion with him without pretense of substantial right, and not to cases where the attitude of the parties to the property in controversy is fully understood. Ryan v. Maxey, 14 M 81, 35 P 515 (1894). See also Wilson v. Harris, 21 M 374, 54 P 46 (1898), distinguished in Raymond v. Blancgrass, 36 M 449, 93 P 648 (1908).

Compelling Delivery of Property: If there be property which cannot be reached directly by execution and which the judgment debtor refuses to apply, he may be compelled, in proceedings supplementary to execution, to deliver it up in satisfaction of the judgment. Sperling v. Calfee, 7 M 514, 19 P 204 (1888). See also Bank of Minn. v. Hayes, 11 M 533, 29 P 90 (1891).

Collateral References

Execution *key* 358 through 420.

33 C.J.S. Executions §§340, 378.

30 Am. Jur. 2d Executions and Enforcement of Judgments §§551, et seq., 615, et seq.

25-14-102. Procedure when debtor withholding property from execution, arrest.

Case Notes

Description of Property Found Insufficient: A creditor's affidavit on information and belief that the debtor had property that could be applied to the judgment but not specifying any such property was insufficient to initiate a proceeding under this section; such affidavit, if sufficient at all, initiates a proceeding under 25-14-101. Belote v. Bakken, 139 M 43, 359 P2d 372 (1961).

Description of Property Found Sufficient: In proceedings supplemental to execution brought under this section, affidavit of judgment creditor that execution had been issued and still remained in the Sheriff's hands, that the debtor had refused to pay the judgment, that he had money as a result of settlement of a personal injury claim, which could be applied to the settlement of the judgment, was sufficiently definite and certain as to what money was referred to therein. Brindjonc v. Brindjonc, 96 M 481, 31 P2d 725 (1934).

Manner of Application of Statute: Section 25-14-101, providing for proceedings supplemental to execution, is applicable to cases wherein the judgment creditor has no knowledge of the existence of any property subject to levy under execution, and in such a case an order for examination of the judgment debtor may be obtained only after execution is returned. This section applies where the judgment creditor has knowledge of property belonging to the debtor, but he has been unable to locate or have it levied upon under execution, and the order may be obtained after issuance of execution and before its return. Brindjonc v. Brindjonc, 96 M 481, 31 P2d 725 (1934).

Judgment After Order for Examination — Irregular Proceedings: Where no judgment had been entered or valid execution issued at the time of an order for the examination of a defendant on proceedings supplementary to execution, the proceedings are irregular and cannot be cured by the subsequent entry of a judgment nunc pro tunc. Barber v. Briscoe, 9 M 341, 23 P 726 (1890).

Collateral References

33 C.J.S. Executions §378.

Retainer of indebtedness of heir, legatee, or distributee from proceeds of partition sale. 164 ALR 717; 110 ALR 1304; 75 ALR 884.

25-14-103. Debtors of judgment debtor and those holding his property to answer.

Case Notes

Alternative Remedies: In a suit by a judgment creditor against the judgment debtor and others who claimed an interest in the property involved, the plaintiff alleged that such interest was unknown to him, and therefore prayed, not that the title be quieted, but that the extent of

his interest and the amount of his judgment lien be adjudged, and the complaint was sufficient against general demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed). While he could have had recourse to 70-28-101 relative to quieting title or to this section relating to supplementary proceedings, neither proceeding is necessarily exclusive. Christie v. Morris, 116 M 210, 149 P2d 250 (1944), distinguished in Cut Bank v. Clapper Motor Co., 120 M 274, 182 P2d 474 (1947).

Third Persons Holding Funds of Judgment Debtor Subject to Court Order: Where in proceedings supplemental it is made to appear that a third person, not made a party, holds funds belonging to the judgment debtor which could be applied to the judgment, it is the duty of the court under this section to bring in such person to be examined, and if he makes no claim to the funds, the court may order their application on the judgment. If, on the other hand, he disputes the claim of the judgment debtor to their possession, the court may empower the judgment creditor to bring suit to recover the amount and enjoin transfer or other disposition of the funds or appoint a receiver to collect and apply the money. Brindjonc v. Brindjonc, 96 M 481, 31 P2d 725 (1934).

Collateral References

33 C.J.S. Executions §364.

30 Am. Jur. 2d Executions and Enforcement of Judgments §615, et seq.

25-14-104. Procedure when debt to or ownership of judgment debtor denied.

Case Notes

Scope of Supplementary Proceedings — Court Bound by Statute: If there is a denial of ownership of property sought in proceedings supplementary, the court is not to determine whether the claim is valid or invalid but may only proceed under the provisions of this section. Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958).

Scope of Supplementary Proceedings — Contested Claims Not to Be Litigated: Contested claims as to title to property that the judgment creditor seeks to subject to his execution cannot be litigated in proceedings supplementary to execution. Letz v. Letz, 123 M 494, 215 P2d 534 (1950).

Statutory Basis of Powers: In proceedings supplemental to execution, the only powers possessed by the court are those given it by 25-14-107 and this section. Johnson v. Lundeen, 61 M 145, 200 P 451 (1921).

Complaint — No Requirement to Allege Court Permission: In an action under this section, it is not necessary to allege that an order was made by the court permitting the action to be brought. Sweeney v. Schlessinger, 18 M 326, 45 P 213 (1896).

Collateral References

30 Am. Jur. 2d Executions and Enforcement of Judgments §612.

25-14-105. Requiring witnesses to testify.

Case Notes

Reference Justified: Where numerous persons were to be examined at various places, a reference was proper. Bair v. Bank of Am. Nat'l Trust & Sav. Ass'n, 112 F2d 247 (9th Cir. 1940).

Collateral References

Execution *key* 395, et seq.; Witnesses *key* 1, et seq.

33 C.J.S. Executions §384; 97 C.J.S. Witnesses §2, et seq.

25-14-106. Immunity of witnesses to criminal proceedings.

Collateral References

Criminal Law *key* 393, et seq.; Execution *key* 399.

22A C.J.S. Criminal Law §649, et seq.; 33 C.J.S. Executions §387.

25-14-107. Order to apply property to satisfaction of judgment.

Case Notes

Copartners Not Parties — Partnership Property Not Subject to Supplemental Proceedings: In supplemental proceedings in aid of execution, District Court had no authority to render judgment ordering plaintiff to recover against all doctors, copartners, doing business as a medical clinic, a copartnership, so that judgment against one doctor became a judgment against his three associates, where his associates were not served with process, were not present, were not parties to the proceedings, and were not represented. Hoopes v. District Court, 141 M 128, 375 P2d 691 (1962).

Disputed Claims to Property — Authority of Court: If there is a denial of ownership of property which is sought in proceedings supplementary, the court is not to determine whether the claim is valid or invalid but may only apply the provisions of 25-14-104 and order that an action be instituted to determine the fact in dispute. Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958).

Disputed Claims to Property — Court Not to Direct Delivery: This statute may be the basis of an order of application only when the supplementary proceedings result in the discovery of property or assets in the hands of a third person which indisputably belong to the debtor, and if the ownership of the property is in dispute, the court is powerless to make an order directing its delivery to the creditor. Hustad v. Reed, 133 M 211, 321 P2d 1083 (1958).

Statutory Basis of Judicial Powers: In proceedings supplemental to execution, the only powers possessed by the court are those given it by this section and 25-14-104. Johnson v. Lundeen, 61 M 145, 200 P 451 (1921).

Jurisdiction of Court Over Sale Contract Proceeds: Where an owner sold his land on the installment plan and put the land contract and his deed in escrow with a bank, to be delivered to the purchaser upon completion of the payments, but in the meantime the land was attached as the property of the vendor and judgment obtained upon which execution was returned unsatisfied and there still remained in the bank some of the money paid in on the land contract, the court had jurisdiction in proceedings supplementary to execution under this section to order the judgment and execution to be satisfied and discharged out of the balance held by the bank; but 25-14-104 had no application to such a proceeding. Knapp v. Andrus, 56 M 37, 180 P 908 (1919).

Collateral References

33 C.J.S. Executions §§390 through 394.

30 Am. Jur. 2d Executions and Enforcement of Judgments §551.

Surplus income of trust, in excess of amount required for support and education of beneficiary, as subject of supplementary proceedings. 36 ALR 2d 1227.

25-14-108. Contempt to disobey referee's orders.

Collateral References

33 C.J.S. Executions §§413 through 422.

30 Am. Jur. 2d Executions and Enforcement of Judgments §644.

Part 2
Appointment of Receiver

Part Case Notes

Purpose of Parts 1 and 2: The general purpose of parts 1 and 2 of this chapter is to provide a substitute for a creditor's bill, a cheaper and easier method of reaching assets of the debtor that cannot be reached by the execution method. In re Downey, 31 M 441, 78 P 772 (1904).

25-14-201. Appointment of receiver — notice.

Case Notes

Appointment of Receiver Allowable, After Service of Order to Attend, Without Notice to Judgment Debtor: The District Court did not abuse its discretion by issuing an ex parte order appointing a receiver without notice to the judgment debtor. The plain language of this section specifically provides that the court may appoint a receiver at any time after the order to attend and be examined has been served on the judgment debtor and may do so without further notice to the judgment debtor. The order was served in this case. May v. First Nat'l Pawn Brokers, Ltd., 270 M 132, 890 P2d 386, 52 St. Rep. 111 (1995).

Collateral References

33 C.J.S. Executions §§399 through 401.

30 Am. Jur. 2d Executions and Enforcement of Judgments §166.

25-14-202. Order appointing receiver to be filed.

Compiler's Comments

1981 Amendment: Substituted "judgment is docketed or a transcript of the original docket is filed" for "judgment roll is filed, or a transcript of the judgment."

25-14-204. When property vests in receiver.

Collateral References

33 C.J.S. Executions §§407 through 409.

25-14-205. Relation back of receiver's title.

Collateral References
33 C.J.S. Executions §407.

Part 3
Discharge of Imprisoned Judgment Debtor

25-14-301. Persons imprisoned to be discharged.

Collateral References
Execution *key* 450, et seq.
33 C.J.S. Executions §17.
30 Am. Jur. 2d Executions and Enforcement of Judgments §549.

25-14-302. Notice of application for discharge.

Collateral References
30 Am. Jur. 2d Executions and Enforcement of Judgments §§549, 550.

25-14-304. Hearing on application.

Collateral References
30 Am. Jur. 2d Executions and Enforcement of Judgments §§549, 550.

25-14-305. Interrogatories directed to prisoner by plaintiff.

Compiler's Comments
1981 Amendment: Substituted "the plaintiff" for "him" after "required by".

25-14-307. Order of discharge.

Collateral References
30 Am. Jur. 2d Executions and Enforcement of Judgments §549.

25-14-309. Effect of discharge.

Collateral References
30 Am. Jur. 2d Executions and Enforcement of Judgments §§549, 550.

25-14-311. Discharge at instance of plaintiff.

Collateral References
Execution *key* 446.

25-14-312. Discharge upon failure of plaintiff to advance money for support of prisoner.

Collateral References
Execution *key* 441, 451.
33 C.J.S. Executions §428.

CHAPTER 15
LIABILITY OF JOINT DEBTORS

Part 1
Applying Judgment to Joint Debtor

25-15-101. Summoning joint debtor not originally served.

Collateral References
Judgment *key* 855(2).
49 C.J.S. Judgments §§586, 587, 590.
Vacation of judgment as to one or more of multiple parties against whom rendered as requiring vacation as to all. 42 ALR 2d 1030.
Waiver of Statute of Limitations by executor or administrator as affecting joint obligation. 8 ALR 2d 707, 708.

25-15-106. Trial of issues — limit on verdict.

Collateral References

Liability of several persons guilty of several acts one of which alone caused injury in absence of showing as to whose act was the cause. 5 ALR 2d 98.

Part 2
Discharge of Joint Debtor

25-15-201. Discharge of one joint debtor.

Case Notes

Release Discharging Joint Tortfeasor: Where plaintiff compromised an action against the Sheriff for false arrest and imprisonment by defendants paying him $1,000 and he executing a release captioned "release in full of all claims", reciting that he accepted said sum as "complete compensation for all injuries sustained in connection with" the matters set forth in the complaint, the release operated against the plaintiff's claim against the County Attorney. Beedle v. Carolan, 115 M 587, 148 P2d 559 (1944).

Collateral References

Compromise and Settlement *key* 4, 16, et seq.; Judgment *key* 888.

15A C.J.S. Compromise and Settlement §§6, 22; 49 C.J.S. Judgments §564.

25-15-202. Effect of discharge — right of contribution.

Compiler's Comments

1987 Amendment: At beginning inserted exception clause and made minor change in phraseology.

Collateral References

Compromise and Settlement *key* 16, et seq.; Contribution *key* 8, et seq.; Judgment *key* 888.

15A C.J.S. Compromise and Settlement §22; 49 C.J.S. Judgments §564.

CHAPTER 19
UNIFORM DISTRICT COURT RULES

Chapter Case Notes

Use of Verdict Form Not Abuse of Discretion: Defendant claimed the District Court abused its discretion in using a verdict form offered by the state, contending it was confusing. The Supreme Court found no error, noting the form was: (1) consistent with the amended information; (2) clearly framed; (3) carefully explained by the County Attorney during closing argument; and (4) further explained by a jury instruction. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Grant of Extension for Filing Briefs Under Rule 2 — Notification Required: Under Rule 2, M.U.D.C.R., extensions of time for filing briefs may be granted on oral application. However, the court must be notified by counsel of the desire or need for an extension before one may be granted. St. v. Onstad, 234 M 487, 764 P2d 473, 45 St. Rep. 2071 (1988).

Notice of Hearing of Default Judgment — No Conflict Between Uniform District Court Rules and Rules of Civil Procedure: The controlling rules relating to the entry of default judgments are found in Rule 55, M.R.Civ.P. (Title 25, ch. 20), and, with respect to service, are found in Rules 5 and 6, M.R.Civ.P. (Title 25, ch. 20). The Uniform District Court Rules do not enlarge, vary, or control the provisions of the Montana Rules of Civil Procedure. Fed. S&L Ins. Corp. v. Anderson, 233 M 339, 760 P2d 80, 45 St. Rep. 1537 (1988).

Uniform Rules for District Courts — Time Limit for Filing Brief in Support of Rule 12 Motion: In an action for strict liability in tort for personal injuries, defendant filed a motion for change of venue on November 17, 1982, and a brief in support of the motion on November 24, 1982. The motion was denied by the District Court for failure to file a supporting brief within 5 days, the time limit allowed by Rule II of the Uniform Rules for District Courts of Montana. The Supreme Court reversed and remanded the case to District Court, ruling that under Rule 6(a), M.R.Civ.P., three of the days intervening between the time of filing of the motion and the time of filing of the brief are excluded from the calculation of the maximum permissible time, so the filing of the brief was timely. Tanniehill v. Remington Arms Co., 207 M 501, 675 P2d 948, 41 St. Rep. 103 (1984).

Local Rule as Conflicting With Montana Rules of Civil Procedure: Local court Rule 3, Park County District Court, states in part that a party opposing a motion has 10 days after the filing

and service of the moving party's brief to serve and file a reply brief. When applied to a motion for summary judgment, local Rule 3 conflicts with Rule 56(c), M.R.Civ.P. Whenever a local rule conflicts with the M.R.Civ.P., the local rule must be set aside. Krusemark v. Hansen, 186 M 174, 606 P2d 1082 (1980).

Ex Parte Trial Briefs: A District Court rule allowing for the filing of ex parte trial briefs used solely by defendant to inform the trial court of complex arguments to be presented at trial does not violate the plaintiff's due process rights. Hill v. Squibb & Sons, 181 M 199, 592 P2d 1383 (1979).

Briefs Required on Preliminary Motion: Trial court rule requiring filing of briefs in support of preliminary motion is proper exercise of authority under this rule and may be enforced by summary denial of motion where brief has not been filed. Hansen v. Kiernan, 159 M 448, 499 P2d 787 (1972).

Chapter Collateral References

Courts *key* 78 through 80.

21 C.J.S. Courts §126.

Power of court to prescribe rules of pleadings, practice, or procedure. 158 ALR 705; 110 ALR 22.

The New Uniform District Court Rules, State Bar of Montana C.L.E. publication, April 1987.

Rule 1. Form of papers presented for filing.

Advisory Commission Notes

A form which complies with this Rule is shown in Form "A".

Compiler's Comments

1993 Amendment: In an order dated March 25, 1993, the Supreme Court in (b)(5), after "size;", inserted remainder of subsection concerning recycled paper; and in first sentence of (b)(6), after "only;", inserted exception concerning printing on both sides and inserted second sentence concerning original brief being printed on one side.

Form "A": The following form has been adopted by the Montana Supreme Court under the Montana Uniform District Court Rules as the first page of all papers presented for filing:

JOHN LAW
Law, Smith & Jones
Attorneys at Law
P.O. Box 1111
Radersburg, MT
Telephone: (406)020-3457
Attorneys for Plaintiff
MONTANA ..... JUDICIAL DISTRICT COURT, ... COUNTY.....,

....., Plaintiff, -vs- ....., Defendant.

Cause No. .....
COMPLAINT

Rule 2. Motions.

Case Notes

Discretion of District Court to Grant Enlargement of Time to Respond to Motion: The wife filed a motion to enforce the pension provisions of a dissolution decree, and the husband moved for an enlargement of time nearly a month later. The District Court declined to grant the enlargement because there was nothing to indicate that the husband's failure to respond within the required 10 days was the result of excusable neglect. On appeal, the husband contended that under Rules 6 and 11, M.R.Civ.P. (Title 25, ch. 20), he was entitled to an enlargement of time in order to reply to the motion to enforce. The Supreme Court disagreed and affirmed. Parties are not entitled to an enlargement of time; rather, the granting of an enlargement of time is within the discretion of the District Court, which in this case found the husband's arguments unpersuasive. In re Marriage of Weber, 2004 MT 206, 322 M 324, 95 P3d 694 (2004).

Error to Dismiss Action in Light of Evidence That Plaintiff Did Not Receive Motion: City Judge Dorrington cited attorney Fennessy for contempt of court for allegedly making false statements to the court and for a lack of responsibility in the performance of duties and lack of respect for the court. Fennessy filed a motion in District Court to stay the contempt proceeding in City Court, contending that Dorrington did not have jurisdiction to issue the contempt citation

and was prohibited from acting as the complaining witness, prosecutor, and judge for the contempt proceedings. Dorrington then filed a motion to dismiss and 3 days later moved to continue the hearing and quash subpoenas. In his response to the motion to continue, Fennessy stated that if Dorrington had filed a motion to dismiss, Fennessy had not received the motion thus he had no opportunity to review it. Nevertheless, that same day the District Court granted the motion to dismiss. Fennessy moved to reconsider and included affidavits from his attorney and staff stating that a motion to dismiss had never been received, but the motion to reconsider was denied, so Fennessy appealed. The Supreme Court reversed. A motion to dismiss is viewed with disfavor and rarely granted, and dismissal of an action is justified only when the allegations of a complaint clearly demonstrate that plaintiff does not have a claim. A court may not dismiss a claim unless it appears that plaintiff is not entitled to relief under any set of facts that could be proved in support of a claim. In this case, the District Court failed to follow this rule by dismissing Fennessy's motion before the 10-day time limit to respond had expired and abused its discretion by refusing to reconsider its order of dismissal even though there was evidence that Fennessy had not received the motion to dismiss and thus was unable to respond to or review it. Fennessy v. Dorrington, 2001 MT 204, 306 M 307, 32 P3d 1250 (2001).

Appropriateness of Treatment Plan Requirement That Parents Provide Explanation of Child's Injuries: Four treatment plans were developed with the parents, the purpose of all of which was to: (1) return the child to parental custody; (2) enable the parents to provide a safe and nurturing environment for the child; (3) enable the parents to develop an awareness of the child's needs and an ability to meet those needs; (4) help the parents develop minimal parenting skills; and (5) resolve the issues that led to the child's abuse, which included a requirement that the parents provide a reasonable and consistent explanation for the child's injuries. The parents were subsequently convicted of endangering the welfare of the child, and the state petitioned for custody. Prior to the permanent custody hearing, the mother moved to strike the task that required an explanation of the child's injuries, but the state never filed a brief in response to the motion. Nevertheless, the motion was denied. Following the termination of the mother's parental rights, she challenged the appropriateness of that task on grounds that the task placed her in the untenable position of having to choose between incriminating herself and failing to complete the treatment plan, in violation of her right against self-incrimination, relying on In re A.N., 2000 MT 35, 298 M 237, 995 P2d 427 (2000). The Supreme Court found her reliance on In re A.N. misplaced. The mother waived her self-incrimination privileges by voluntarily testifying regarding her knowledge of the child's injuries at both the permanent custody hearing and during the criminal proceeding and could not argue later that the disputed task impinged on her constitutional privilege against self-incrimination. Further, the state's duty to protect children, as set out in 41-3-101, necessitated that the parents come to terms with the reasons why the child was abused, and without demonstrable willingness from the parents to resolve the abuse issues, the District Court had no assurance that the child would not be abused again. Thus, the task was a fair requirement in the treatment plan, and the District Court did not err in concluding that the plan was appropriate or in denying the motion to strike the task from the plan. Denying the motion was within the court's discretion regardless of whether the state filed a brief in response to the motion. In re A.C., 2001 MT 126, 305 M 404, 27 P3d 960 (2001).

Reasonable Assumption of Time Remaining to Appeal Following Reinstatement — Error in Dismissal for Failure to Timely Appeal: Roses' complaint against Abrahamses for unpaid rent was dismissed in Justice's Court and subsequently appealed to District Court, where it was scheduled for a pretrial conference. After scheduling, Roses filed a motion for substitution of counsel. Notice of a new pretrial conference date was sent to previous counsel, but substituted counsel did not receive notice of the date. Neither Roses nor counsel appeared at the hearing, so the action was dismissed for failure to appear. The court rescinded that order upon Roses' motion for relief on grounds that Roses were not properly notified; however, prior to dismissal, Abrahamses filed a motion to dismiss for failure to timely appeal, and following rescission of its order, the District Court granted Abrahamses' motion based on its sua sponte conclusion that Roses had failed to file an answer brief within the 10-day period required by this rule. The court reasoned that the time to respond to the motion to dismiss was tolled during the time that Roses' action had been dismissed for failure to appear, but that when that order was rescinded, Roses had only so much time remaining as had been remaining when the appeal was first dismissed. The Supreme Court disagreed and reversed, holding that in the interest of resolving the controversy on its merits, without notice to the contrary, it was reasonable for Roses to assume that 10 days remained from reinstatement of the appeal to respond to the motion to dismiss and that the appeal was dismissed for a second time before that 10-day period elapsed. Rose v. Abrahams, 1999 MT 314, 297 M 255, 991 P2d 459, 56 St. Rep. 1263 (1999).

Failure to File Supporting "Brief" — Dismissal Reversed: Moody filed a wrongful discharge action followed by an amended complaint. In filing a motion to dismiss the action, the defendant filed an answer to Moody's amended complaint rather than a brief supporting the motion to dismiss. The District Court, after designating the answer as a supporting brief, dismissed Moody's complaint with prejudice. Moody appealed, alleging that the defendant failed to file a "brief" in support of the motion to dismiss within 5 days as required by this rule. On appeal, the Supreme Court reversed and remanded the case, holding that documents that have procedural significance beyond the merits of their contents are required to be correctly labeled. The District Court erred when it granted the motion to dismiss because the defendant's motion was not supported by a properly identified brief. Moody v. Northland Royalty Co., 286 M 89, 951 P2d 18, 54 St. Rep. 1317 (1997).

Court May Not Grant Unanswered but Legally Unsupported Motion: The city moved to have Pizzola's motion for a trial de novo denied on the basis that he had not filed the motion within the required 10 days. On appeal, the city acknowledged that the motion was timely because intermediate holidays and weekend days are not counted in calculating the 10-day appeal period. The city argued that the dismissal was still appropriate because Pizzola had not responded to its motion and that therefore the District Court had the discretion to grant the city's unanswered motion. The Supreme Court held that a District Court cannot properly grant a legally unsupported and insupportable motion to which a timely response has not been filed by the other party. The Supreme Court stated, moreover, that a "deemed admission" that a motion is well taken under subsection (b) of this rule cannot convert a motion that is incorrect as a matter of law into a motion that is well taken as a matter of law. St. v. Pizzola, 283 M 522, 942 P2d 709, 54 St. Rep. 774 (1997).

Failure to Respond to Motion for Attorney Fees — Grounds for Granting Motion: The provision of subsection (b) of this rule that failure to file an answer brief to a motion within 10 days is an admission that the motion is well taken does not require the District Court to grant the unanswered motion. Therefore, the District Court did not have to grant former wife's motion for attorney fees in her proceeding for modification of child support on the ground that former husband did not respond to the motion. In re Marriage of Dishon, 277 M 501, 922 P2d 1186, 53 St. Rep. 816 (1996).

Failure to Answer Motion to Strike Amended Complaint Following Extension — Leave to Amend Properly Denied: The District Court, despite defendant's objections, accommodated plaintiff by extending the time in which he could amend his complaint. Having granted the extension, the court did not abuse its discretion in denying further extensions or in denying leave to amend after plaintiff failed to file an answer to defendant's motion to strike the complaint. Gursky v. Parkside Professional Village, 258 M 148, 852 P2d 569, 50 St. Rep. 470 (1993).

Failure to File Brief in Support of Motion for Interest — Right Waived to Appeal Interest: Lumber Enterprises, Inc. received a judgment on a contract against Hansens, but the District Court refused to award prejudgment interest. The Supreme Court affirmed the denial of interest based on the failure of Lumber Enterprises to file a brief in support of its motion to amend the findings of the District Court to allow the award of interest. By failing to abide by subsection (b) of this rule, the Supreme Court held that Lumber Enterprises waived its right to bring a request to the Supreme Court to award that interest. Lumber Enterprises, Inc. v. Hansen, 257 M 11, 846 P2d 1046, 50 St. Rep. 138 (1993).

Lack of Supporting Brief and Notice of Motion — Ruling Not Invalidated: Coward made a motion to alter or amend judgment but failed to file a supporting brief within 5 days and failed to give notice to Grounds that the motion would be heard along with the hearing on her motion for contempt. These omissions notwithstanding, the District Court partially granted Coward's motion. The Supreme Court held that the District Court did not abuse its discretion. Citing Maberry v. Gueths, 238 M 304, 777 P2d 1285 (1989), the Supreme Court said that even though failure to file a brief is an admission that the motion is not well taken, the District Court still has discretion whether to grant the motion. The parties were also invited to propose a briefing schedule and/or evidentiary hearing date to present supplemental arguments, but failed to do so. Under these circumstances, the District Court did not abuse its discretion. In re Marriage of Grounds & Coward, 256 M 397, 846 P2d 1034, 50 St. Rep. 114 (1993).

Oral Pronouncement of Guilt and Delayed Sentencing — Appeal Improper Pending Final Judgment: Following a nonjury trial on February 5, the Justice of the Peace orally pronounced defendant guilty of DUI and driving while the privilege to do so was suspended or revoked and ordered defendant to obtain an alcohol evaluation and return for sentencing February 26. On February 7, the Justice's Court issued a written order and mailed it to the prospective parties. On February 11, defendant filed a notice of appeal with the District Court, and the case was

transferred on March 11. On March 28, the state filed a motion to dismiss on the basis that the appeal was premature because defendant had not been sentenced. On April 1, the District Court dismissed and remanded the case back to Justice's Court for sentencing before defendant had an opportunity to respond with a brief. An appeal cannot be utilized until judgment has been fully rendered. Dismissal was proper because the District Court lacked subject matter jurisdiction absent final judgment by the Justice's Court. St. v. Wilson, 252 M 264, 827 P2d 1286, 49 St. Rep. 243 (1992).

Attempt to Amend Pleadings in Responsive Brief Properly Ignored: Defendant claimed that the District Court disregarded his affidavit and subsequent demand in his responsive brief to amend the pleadings to conform to his filed affidavit alleging fraudulent conduct. However, because there was no allegation of misconduct in his complaint and he did not properly file a motion to amend his pleadings, attempting rather to amend his pleadings in his responsive brief, defendant did not meet the requirements of this rule and his demand for amended pleadings was properly ignored. Nimmick v. Hart, 248 M 1, 808 P2d 481, 48 St. Rep. 293 (1991).

Failure to File Supporting Brief — New Trial Denied: Defendant maintained that he was entitled to a new trial pursuant to 46-16-701 and 46-16-702. The state contended that a summary ruling was proper under this rule because defendant failed to file a supporting brief within 5 days. Defendant argued that this rule did not apply to criminal cases. The state contended that the decision to deny the motion for a new trial was a matter of trial court discretion. The Supreme Court held that the District Court did not abuse its discretion in denying the motion when defendant failed to provide sufficient information to support his motion for a new trial. St. v. Sor-Lokken, 246 M 70, 803 P2d 638, 47 St. Rep. 2264 (1990).

Discretion of District Court to Grant or Deny Unanswered Motions: Following the District Court's entry of judgment, plaintiffs filed and served motions to amend the findings, for a new trial, and to alter the judgment. Defendants did not file a response to the motions within the 10 days allowed under Rule 59(c), M.R.Civ.P. (Title 25, ch. 20). Plaintiffs then moved that the motions be deemed admitted and well-taken as allowed under this uniform rule. The court denied the motions, and plaintiffs argued that defendants' failure to file a response in the time allowed requires the court to grant the unanswered motions. However, this rule does not remove the discretion of the District Court to grant or deny unanswered motions as it sees fit. Maberry v. Gueths, 238 M 304, 777 P2d 1285, 46 St. Rep. 1287 (1989), followed in Petri v. Mont. St. Univ., 260 M 392, 860 P2d 154, 50 St. Rep. 1133 (1993), and St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996). See also St. v. Pizzola, 283 M 522, 942 P2d 709, 54 St. Rep. 774 (1997), holding that a legally unsupported motion may not be granted on the basis that it is unanswered.

Failure to File Brief Not Admission That Summary Judgment Motion Well Taken: This rule provides that failure to file a brief by the moving party is considered an admission that the motion is without merit and that failure to file a reply brief an admission that the motion is well taken. The Supreme Court held that the essential question for a District Court deciding a summary judgment motion is whether a genuine issue of material fact exists that cannot be decided on a merely technical fact, such as the filing of briefs on time. Cole v. Flathead County, 236 M 412, 771 P2d 97, 46 St. Rep. 469 (1989).

Failure to File Brief Not Waiver of Right to Oral Argument: The Supreme Court ruled that the right to oral argument on a Rule 56, M.R.Civ.P. (Title 25, ch. 20), motion cannot be waived by failing to file a brief. In some cases, the lower court might by order dispense with the necessity of a hearing, but in the ordinary case, the right to a hearing must be specifically waived by all parties. Cole v. Flathead County, 236 M 412, 771 P2d 97, 46 St. Rep. 469 (1989). However, see Aetna Life Ins. Co. v. Jordan, 254 M 208, 835 P2d 770, 49 St. Rep. 703 (1992), in which case, after the granting of a summary judgment in favor of plaintiff, defendants hired a new attorney who filed several motions and requested a hearing but failed to raise any factual matters relevant to issuance of the summary judgment. In this case, failure to raise any genuine issue of material fact relevant to the motion for summary judgment constituted waiver of a hearing.

Absence of Answer Brief Insufficient to Compel Granting of Posttrial Motions: A parent in an adoption proceeding made posttrial motions to alter or amend judgment, for a new trial, and to stay execution of sentence pending appeal. No responsive briefs were filed within the time allowed. The District Court properly granted the stay of execution because no responsive brief was timely filed pursuant to this rule; however, it refused to grant the other motions because they related to the determination of facts. The absence of a responsive brief did not change the court's determination of the facts or compel a grant of all posttrial motions. In re Adoption of S.E., 232 M 31, 755 P2d 27, 45 St. Rep. 843 (1988), followed in In re Support of K.F., 232 M 326, 756 P2d 460, 45 St. Rep. 1087 (1988).

Rule 4. Filing of discovery.

Advisory Commission Notes

Adoption of this rule requires an amendment to Rules 30(f) and 33(a), Mont.R.Civ.P. It is the opinion of the Commission, after long discussion, that the benefits of not routinely filing discovery outweigh the disadvantages.

There are several counties, Lewis & Clark, Silverbow, and at least one district of Cascade County for example, that do not have discovery routinely filed at the present date - in contravention of the Rules of Civil Procedure.

Case Notes

Motion Referring to Discovery to Precede Summary Judgment Hearing: The District Court did not err in failing to consider an issue raised for the first time in proposed findings of fact and conclusions of law and filed 2 days after the court signed a summary judgment order. Whatever is filed and however the filing is accomplished, it must precede the summary judgment hearing; otherwise, the issue is not properly before the court. Harrison v. Chance, 244 M 215, 797 P2d 200, 47 St. Rep. 1539 (1990).

Rule 5. Pre-trial order and pre-trial conference.

Advisory Commission Notes

The pre-trial order is intended to supersede the pleadings and to state the issues to be tried. It is not intended that parties be held to or examined concerning claims and other matters contained in prior pleadings. This is contrary to the holding in Easterday v. Canty, 712 P.2d 1305 (Mont. 1986), which case would, in part, be overruled by adoption of this Rule.

Case Notes

Refusal to Admit Letter Introduced During Trial Not Error: In a dispute over the charges for the care and training of horses, the parties agreed that Watkins would accept $5,000 for his services. The Williamses gave Watkins two checks for $2,500, but they stopped payment on the second check and refused to tender the rest of the money on the basis that one of the horses had been mistreated. The jury returned a verdict in favor of Watkins for $20,191 for services. The Williamses argued that the lower court erred in excluding a letter introduced during trial that purported to contain material terms of compensation for Watkins' services. The Supreme Court ruled that the lower court had not erred in excluding the letter because the Williamses had failed to produce the letter in response to discovery requests and had not listed it as an exhibit as required by the lower court's scheduling order. Watkins v. Williams, 265 M 306, 877 P2d 19, 51 St. Rep. 489 (1994).

Additional Peremptory Challenges Granted to Hostile Parties — Rule to Be Applied: King sued the Montana Power Company and two wholly owned subsidiaries for wrongful discharge. At trial, the District Court granted eight peremptory challenges to the three codefendants. Because a requirement for a demonstration of prejudice would invade the internal processes of the jury, the Supreme Court held that no prejudice need be shown in order for additional peremptory challenges to be granted to one side in a lawsuit and expressly overruled Leary v. Kelly Pipe Co., 169 M 511, 549 P2d 813 (1976), which required prejudice. The Supreme Court held that parties seeking additional peremptory challenges must request them prior to trial, the issue should be raised by motion prior to voir dire if no pretrial conference is held, the number of peremptory challenges should be included in the pretrial order, and the trial court should expressly set forth in the record the reasons for its ruling. If peremptory challenges are improperly granted, prejudice is presumed as a matter of law. In the present case, the Supreme Court held that the District Court incorrectly required "diversity of interest" instead of "hostility" and that the facts showed insufficient hostility to require additional peremptory challenges allowed by the District Court. The District Court therefore committed reversible error in granting those additional challenges, and a new trial was ordered. King v. Special Resource Management, Inc., 256 M 367, 846 P2d 1038, 50 St. Rep. 117 (1993).

Rule 6. Briefs.

Advisory Commission Notes

After long debate, it is the opinion of the Commission that all briefs must be served upon opposing counsel. "The day is gone when the prototype old fashioned attorney produced the hidden witness at trial or the uncited but decisive case and left the opposing attorney lying bloody on the courtroom floor. Justice is achieved, under the spirit of our modern rules, by full and open disclosure of law and fact." Hill v. Squibb & Sons, E.R., 592 P.2d 1383, 1391 (Mont.

1979). Indeed, Rule 19 of the Thirteenth Judicial District, upheld in Hill, has now been modified to require service of all briefs on opposing counsel.

Rule 7. Jury instructions and verdict forms.

Case Notes

Montana Pattern Instruction No. 2.06 — Instruction to Be Coordinated With 27-1-317: After Lacock was injured in a shooting at a 4B's restaurant, he brought an action against 4B's, claiming that the restaurant should have foreseen that he would be injured. The District Court gave Montana Pattern Instruction No. 2.06, but left off the last line of the instruction in deference to Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567 (1990). The Supreme Court held that leaving off the last line of the instruction was error because the decision in Kitchen Krafters must be coordinated with 27-1-317. Without the last line of the instruction, the Supreme Court noted that a jury will be mistakenly led into believing that to be held liable, a defendant must foresee the specific injury to the plaintiff. Lacock v. 4B's Restaurants, Inc., 277 M 17, 919 P2d 373, 53 St. Rep. 492 (1996).

Use of Verdict Form Not Abuse of Discretion: Defendant claimed the District Court abused its discretion in using a verdict form offered by the state, contending it was confusing. The Supreme Court found no error, noting the form was: (1) consistent with the amended information; (2) clearly framed; (3) carefully explained by the County Attorney during closing argument; and (4) further explained by a jury instruction. St. v. Kills On Top, 243 M 56, 793 P2d 1273, 47 St. Rep. 984 (1990).

Rule 8. Findings and conclusions.

Case Notes

Late Filing of Proposed Findings and Conclusions Allowed by Extension of Time: In a divorce proceeding, the wife filed proposed findings of fact and conclusions of law the day before the trial. On the day of the trial, the husband requested sanctions for late filing, and the judge prohibited the wife from presenting any evidence at trial. When reminded by the wife that he had previously agreed to allow her an extension of time to file her proposals, the judge withdrew the sanction. In the absence of a showing that the judge abused his discretion, the Supreme Court would not overturn the ruling. In re Marriage of Dirnberger, 237 M 398, 773 P2d 330, 46 St. Rep. 898 (1989).

Rule 9. Juror questionnaire.

Advisory Commission Notes

The questionnaire shall be in the form shown in Form "B".

Compiler's Comments

Form "B": The following form has been adopted by the Montana Supreme Court under the Montana Uniform District Court Rules as the juror questionnaire form:

FORM "B"
MONTANA UNIFORM DISTRICT COURT RULES

PLEASE FILL OUT AND RETURN THE FOLLOWING WITHIN SEVEN (7) DAYS TO THE CLERK OF THE DISTRICT COURT, BOX.....,..... , MONTANA

QUESTIONNAIRE AS TO QUALIFICATION FOR JURY SERVICE
(PLEASE PRINT OR TYPE)

1. Name .....
2. Address ..... City ..... Zip Code .....
3. If you live outside of the city limits, please state the round trip mileage from your home to the city limits .....
4. Telephone: Home ..... Office .....
5. How long have you resided there? ... Years in State? .....
6. Married .... Single .... Age .... Sex ....
7. Do you have children? .... Ages ..... Sex .....
8. What education have you had? .....
9. Are you employed at present? .... Occupation .....
10. Employer's name ..... Address .....
11. a. If you are married, name of spouse. .....
    b. If married, occupation of spouse. .....
    c. If retired, or not working, give last occupation. .....
    d. If married, give spouse's employer. .....

e. Do you own or are you buying your own home? .....
12. Have you ever served as a juror? .... If so, in what court? .....
13. Have you or any member of your immediate family ever been injured in an accident? .... If so, what type? .....
14. Are you, or any member of your immediate family involved in law enforcement in any official capacity? .... If so, briefly explain. .....
.....
15. Have you or any member of your immediate family ever been a plaintiff or defendant in a law suit? .... What type of suit? .....
.....
16. Are you or your spouse related to any attorney? .... If so, his or her name and address. .....
17. Are you or your spouse presently being represented by an attorney? .... If so, his or her name and address .....
.....
18. Do you have any disability which you feel would make it difficult to serve on a jury? .... If so, briefly explain .....
19. In order to serve as a trial juror, you must be a registered elector whose name appears on the most recent list of all registered electors as prepared by the county registrar, and not convicted of malfeasance in office or any felony or other high crime.
20. Do you feel you should be excused from serving as a juror? .... If you answer "yes", complete the enclosed affidavit and have your signature notarized and return within seven (7) days to the Clerk of the District Court.

I certify that the foregoing statements are true to the best of my knowledge and belief.

DATE ..... SIGNATURE .....

Rule 10. Death or removal of attorney.

Case Notes

Required Notice of Withdrawal of Counsel: When counsel for a party withdraws, in order to properly protect the interests of the unrepresented party, the opposing party, by written notice, must require the unrepresented party to appoint another attorney or appear in person, as provided in 37-61-405. The written notice must include the date of the next action required in the case and notice that if the unrepresented party fails to appoint an attorney or appear in person within 20 days from the date of notice, the action or other proceeding will proceed and may result in a judgment or other order being entered against the unrepresented party. Once proper notice is given, any continued refusal by the unrepresented party to participate in the proceedings may justly result in default judgment or other final judgment against that party's interests. Quantum Elec., Inc. v. Schaeffer, 2003 MT 29, 314 M 193, 64 P3d 1026 (2003), following McPartlin v. Fransen, 178 M 178, 582 P2d 1255 (1978), and Stanley v. Holms, 281 M 329, 934 P2d 196 (1997), and overruling Sikorski & Sons, Inc. v. Sikorski, 162 M 442, 512 P2d 1147 (1973), and Audit Serv., Inc. v. Kraus Constr., Inc., 189 M 94, 615 P2d 183 (1980), to the extent that Sikorski and Audit Serv. waived a failure of opposing counsel to comply with 37-61-405.

Withdrawal of Counsel — "Rule 10 Notice" Sent to Last-Known Address Held "Notice as Required by Law": In a dissolution proceeding between Christina and Laramie, Laramie's counsel withdrew after he had not been contacted by Laramie for approximately 18 months. In the notice of withdrawal, Laramie's counsel provided Christina's counsel with Laramie's last-known address. Christina's counsel then sent a "Rule 10 notice", pursuant to this rule, to Laramie at the address provided by his former counsel, informing Laramie that he must appoint another attorney, that trial was scheduled for a particular date, and that if he did not appoint an attorney or appear, a default judgment might be made against him. That notice was returned by the post office because Laramie was apparently no longer living at that address. After a decree of dissolution was entered, Christina's counsel obtained Laramie's address from his mother and sent Laramie a notice of entry of judgment. Fifty-six days later, Laramie moved, pursuant to Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), to set aside the judgment, arguing that Christina's counsel did not exercise due diligence in obtaining his correct mailing address and that if Christina's counsel obtained his correct address through his mother after entry of judgment, Christina's counsel could have done so before entry of judgment. Citing McPartlin v. Fransen, 178 M 178, 582 P2d 1255 (1978), and Stanley v. Holms, 281 M 329, 934 P2d 196 (1997), the Supreme Court held that Christina's counsel, by mailing the Rule 10 notice to Laramie's last-known address, satisfied the requirement that he make a good faith effort to notify Laramie and that Christina's counsel had no obligation to "track down" Laramie through his mother. In re Marriage of Wallace, 284 M 360, 944 P2d 227, 54 St. Rep. 920 (1997).

Notice Required When Counsel Withdraws — Discovery Deadline Tolled: Only 3 days before the deadline for answers to discovery requests, Holms's counsel moved to withdraw, citing irreconcilable personal and professional differences with Holms regarding handling of the case and a breakdown in attorney-client communication. Four days after the discovery deadline, Stanleys moved for summary judgment based to a great extent on matters considered admitted by Holms's failure to respond to requests for admissions pursuant to Rule 36(a), M.R.Civ.P. (Title 25, ch. 20). Twelve days after the motion for summary judgment, the court heard and granted counsel's motion to withdraw. On the same day, Stanleys served Holms with confirmation of the court's oral instruction to Holms regarding this rule and with a notice of the hearing on the motion for summary judgment. Seven days before the hearing, Holms's new counsel agreed to undertake representation and the following day moved to amend the pleadings, to file amended responses to Stanleys' first discovery requests, and to continue Stanleys' motion for summary judgment. On the date set for hearing on the summary judgment, the court heard oral argument and granted Stanleys' motion about 3 months later. In its order, the court concluded that the 30-day deadline in Rule 36(a), M.R.Civ.P., was not tolled because this rule did not apply. However, pursuant to 37-61-405 and this rule, the opposing party with notice of the withdrawal of counsel has a duty to provide adequate notice to the unrepresented party when that party's attorney ceases to act as such, not just when the attorney dies or is removed, suspended, or actually withdraws, before taking advantage of a default on the part of the other side. The purpose of this notice requirement is to prevent a represented party from taking unfair advantage of the situation of the opposing party who has actually or effectively lost representation and to ensure that the unrepresented party receives a fair trial. The case was remanded for consideration of the motion to amend the pleadings and reconsideration of the summary judgment motion in light of the amended pleadings, the discovery responses, and the state of the record at the time that the motion for summary judgment is heard. Stanley v. Holms, 281 M 329, 934 P2d 196, 54 St. Rep. 195 (1997), following McPartlin v. Fransen, 178 M 178, 582 P2d 1255 (1978), and followed in In re Marriage of Wallace, 284 M 360, 944 P2d 227, 54 St. Rep. 920 (1997). On remand, the District Court did not abuse its discretion in conducting the summary judgment hearing and ruling on Stanley's motion for summary judgment without allowing Holms the opportunity to conduct further discovery. Stanley v. Holms, 1999 MT 41, 293 M 343, 975 P2d 1242, 56 St. Rep. 178 (1999), following Howell v. Glacier Gen. Assurance Co., 240 M 383, 785 P2d 1018, 46 St. Rep. 2216 (1989).

Rule 14. Chief district judge.

Compiler's Comments

Effective Date: Rule 14 was effective January 30, 1996.

CHAPTER 20
RULES OF CIVIL PROCEDURE

Chapter Compiler's Comments

History of Montana Rules of Civil Procedure: The Montana Rules of Civil Procedure are the result of a study and recommendations made to the Legislature by the Civil Rules Commission, created pursuant to Ch. 255, L. 1959 (previously codified as sec. 93-221 through 93-233, R.C.M. 1947, and repealed by sec. 60, Ch. 344, L. 1977). The work of the Civil Rules Commission was described in the preface to vol. 7, R.C.M. 1947. Notes which the Commission included in its report and recommendations on the proposed rules to the Montana Supreme Court have been included in the annotations to Title 25, ch. 20, under the heading of "Commission Notes". Internal references to the rules in the original Commission report referred to them as "proposed" rules because, at the time of the report, the rules had not been approved by either the Montana Supreme Court or the Legislature. Internal references to "proposed" rules have now been dropped in favor of the more current reference simply to "rules". The original rules were approved by the Montana Supreme Court on December 12, 1960, and were enacted by the Legislature in Ch. 13, L. 1961, effective January 1, 1962. Following the enactment of the rules, the Legislature created an Advisory Committee on Rules to advise the Supreme Court on subsequent amendment of the adopted rules. The Advisory Committee was created by Ch. 16, L. 1963, and continues to advise the court in a manner similar to the original Commission, under the authority of 3-2-702, MCA, and Rule 86(a), M.R.Civ.P. Notes of the Advisory Committee have also been included.

Identity With Federal Rules: As the notes of the Civil Rules Commission and the Advisory Committee indicate, many of the Montana Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure (F.R.Civ.P.) applicable in United States District Courts and codified at Title 28, United States Code. The Civil Rules Commission, the Advisory Committee, and the compiler have frequently compared the M.R.Civ.P. to the F.R.Civ.P. and have occasionally made reference to the notes or report of the "Federal Advisory Committee", which is formally titled the Standing Committee on Rules of Practice and Procedure, a committee reporting the form of the proposed F.R.Civ.P. and subsequent amendments to the Judicial Conference of the United States under the authority of 28 U.S.C. §§331, 2072.

As to the applicability of cases litigated under the F.R.Civ.P. to the corresponding M.R.Civ.P., see, e.g., [USF&G Co. v. Rodgers, 267 M 178, 882 P2d 1037, 51 St. Rep. 1023 (1994);] Petritz v. Albertsons, Inc., 187 M 102, 608 P2d 1089 (1980); State Highway Comm'n v. Antonioli, 145 M 411, 401 P2d 563 (1965); Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

In 1983, the United States Supreme Court approved and transmitted to the Congress eighteen new or amended rules of the F.R.Civ.P. A bill (HR 3497) was introduced to delay the effective date of those rules and rule amendments but failed to be signed into law prior to the August 1 deadline established by federal statute.

Commission Notes Deleted: In some instances the original comments of the Civil Rules Commission on the similarity between the M.R.Civ.P. and the F.R.Civ.P. have become outdated by subsequent amendment of either or both rules. Where for this reason the report of the Commission is no longer helpful or has become misleading, the applicable section of the report has not been included as "Commission Notes". Where some value may still be gained from an otherwise outdated section of the commission notes, the material has been included along with an appropriate explanation by the compiler. For the language of outdated comments of the Commission, reference should be made to the Commission's notes or to the R.C.M. 1947.

Effect of Publishing Montana Rules of Civil Procedure: Section 2, Ch. 1, L. 1979 provided: "(1) The legislature recognizes the supreme court's authority pursuant to Article VII, section 2, of the Montana constitution to make rules governing procedure and practice before the courts.

(2) The legislature also recognizes that the practice of printing such rules with the Montana statutes is of benefit to code users and facilitates implementation of Article VII, section 2(3), of the Montana constitution concerning disapproval by the legislature.

(3) Therefore, the Montana Rules of Civil Procedure, printed as chapter 20, Title 25, MCA; the Montana Rules of Appellate Civil Procedure [now Montana Rules of Appellate Procedure], printed as chapter 21, Title 25, MCA; and the Montana Rules of Evidence, printed as chapter 10, Title 26, MCA, appear only for the purpose of facilitating use of the code. Neither this act nor publication of the rules may be construed as an attempt to readopt or promulgate the rules."

Chapter Case Notes

Application of Rules When Prevailing Practice at Odds With Them: When called upon to decide a case involving the Montana Rules of Civil Procedure, the court's task is to apply the rules as written, not to conform the rules to what may be a prevailing practice that is at odds with what the rules clearly and unambiguously require. Busch v. Atkinson, 278 M 478, 925 P2d 874, 53 St. Rep. 1020 (1996).

Notice and Hearing Required: Plaintiff changed attorneys during a proceeding. The order substituting counsel provided for attorney fees to the original counsel. It was error for the District Court to award fees without notice to the plaintiff and without providing an opportunity for a hearing. Bink v. First Bank West, Great Falls, Inc., 246 M 414, 804 P2d 384, 48 St. Rep. 17 (1991).

Notice of Hearing of Default Judgment — No Conflict Between Uniform District Court Rules and Rules of Civil Procedure: The controlling rules relating to the entry of default judgments are found in Rule 55, M.R.Civ.P., and, with respect to service, are found in Rules 5 and 6, M.R.Civ.P. The Uniform District Court Rules do not enlarge, vary, or control the provisions of the Montana Rules of Civil Procedure. Fed. S&L Ins. Corp. v. Anderson, 233 M 339, 760 P2d 80, 45 St. Rep. 1537 (1988).

Retroactivity of Rules of Procedure: Although legislative intent to give retrospective force to a statute must appear and all doubt will be resolved against retrospective application, the Rules of Civil Procedure apply retrospectively. State ex rel. Johnson v. District Court, 148 M 22, 417 P2d 109 (1966); Lumbermen's Mut. Cas. Co. v. Babcock & Wilcox Co., 34 F.R.D. 515 (D.C. Mont. 1964); Weber v. Hydroponics, Inc., 226 F. Supp. 177 (D.C. Mont. 1962).

Chapter Law Review Articles

Nearing the End of Federal Civil Justice Reform in Montana, Tobias, 59 Mont. L. Rev. 95 (1998).

Contemplating the End of Federal Civil Justice Reform in Montana, Tobias, 58 Mont. L. Rev. 281 (1997).

Ongoing Federal Civil Justice Reform in Montana, Tobias, 57 Mont. L. Rev. 511 (1996).

Continuing Federal Justice Reform in Montana, Tobias, 57 Mont. L. Rev. 143 (1996).

An Update on the 1993 Federal Rules Amendments and the Montana Civil Rules, Tobias, 56 Mont. L. Rev. 547 (1995).

Studying Montana State Civil Justice Reform, Tobias, 56 Mont. L. Rev. 319 (1995).

Re-evaluating Federal Civil Justice Reform in Montana, Tobias, 56 Mont. L. Rev. 307 (1995).

More on Federal Civil Justice Reform in Montana, Tobias, 54 Mont. L. Rev. 357 (1993).

Updating Federal Civil Justice Reform in Montana, Tobias, 54 Mont. L. Rev. 89 (1993).

Civil Justice Planning in the Montana Federal District, Tobias, 53 Mont L. Rev. 239 (1992).

Should Montana Adopt a Civil Justice Reform Act?, Tobias, 53 Mont. L. Rev. 233 (1992).

The Montana Federal Civil Justice Plan, Tobias, 53 Mont. L. Rev. 91 (1992).

Federal Court Procedural Reform in Montana, Tobias, 52 Mont. L. Rev. 433 (1991).

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Chapter Collateral References

Lawyers' Deskbook, State Bar of Montana.

Montana Pleading and Practice Forms, Compiled with Commentary by Professor William F. Crowley, University of Montana School of Law (copyright 1983 by University of Montana School of Law).

I. Scope of Rules — One Form of Action

Rule 1. Scope of rules.

Commission Notes

Rule 81 states exceptions to the coverage of these rules; but exceptions are qualified by the provisions of subdivision (c) of Rule 81.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule except for the substitution of the words "district courts of the state of Montana" for "United States district courts", deletion of the reference to admiralty, and the insertion of the proviso.

Case Notes

Failure to Serve Original Summons Cured by Service of Amended Summons — Failure to Obtain Leave of Court to Amend Summons and Remove Party From Summons Not Fatal to Service of Process: Schmitz filed a pro se action for medical malpractice against Vasquez and Sanz on April 5, 1994. On April 1, 1997, after determining that her claim against Sanz had not gone through the Montana Medical Legal Panel procedure, Schmitz amended her complaint without permission of the District Court and, through counsel, filed the amended complaint. A new summons was issued by the Clerk of District Court on April 1, 1997, and was served on Vasquez the same day. The amended complaint and the new summons were identical to those previously filed and issued except that they did not include any claim against or notice to Sanz. The District Court dismissed the suit because the original summons had not been served within 3 years of its issuance, as required by Rule 41(e), M.R.Civ.P. Relying upon Yarborough v. Glacier County, 285 M 494, 948 P2d 1181 (1997), and distinguishing Ass'n of Unit Owners v. Big Sky, 224 M 142, 729 P2d 469 (1986), and Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364 (1996), the Supreme Court held that since the amended complaint and new summons had only the effect of deleting Sanz as a defendant, Vasquez received the same notice from the amended complaint and second summons that he would have received from the first complaint and summons and therefore was not prejudiced by Schmitz's failure to serve the first complaint within 3 years and failure to obtain leave of court to amend the summons by removing Sanz as a defendant. For these reasons and because the purpose of the Montana Rules of Civil Procedure is to obtain a just, speedy, and inexpensive determination of every action, the Supreme Court held that Schmitz complied with the substance and purpose of Rule 41(e) and that the District Court erred in dismissing the suit. Schmitz v. Vasquez, 1998 MT 314, 292 M 164, 970 M 1039, 55 St. Rep. 1288 (1998).

Denial of Motion for Temporary Change of Custody Not Appealable: The Supreme Court held that although the denial of Shupe's motion for a temporary change of custody was not appealable under appellate rules, the District Court also denied Shupe's petition to modify custody and that order was appealable. In re Marriage of Shupe, 276 M 409, 916 P2d 744, 53 St. Rep. 447 (1996).

Applicability of Rules of Civil Procedure to Workers' Compensation Court: Since the Workers' Compensation Court is expressly made subject to the Montana Administrative Procedure Act and the Act allows each agency subject to the Act to promulgate its own procedural rules, the Montana Rules of Civil Procedure are not directly applicable to the court. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Writ of Supervisory Control — Needless Litigation: Because an order denying a motion to dismiss is not an appealable order, a Writ of Supervisory Control is proper to prevent needless litigation. State ex rel. Buttrey Foods, Inc. v. District Court, 148 M 350, 420 P2d 845 (1966).

Effect of Former Case Law: By adopting the Rules of Civil Procedure, the Supreme Court did not abandon its prior decisions. Sewell v. Beatrice Foods Co., 145 M 337, 400 P2d 892 (1965).

Disposal on Grounds Other Than Merits: The rules encourage disposition of cases quickly and on the merits. Close scrutiny should be given when one party moves to have the case disposed of on grounds other than the merits. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

Effect of Rules: The effect of the Rules of Civil Procedure is to give greater emphasis to the substance of the pleadings and not the mere form. The court erred here in dismissing complaint with prejudice for failure to state a claim. Spaberg v. Johnson, 143 M 500, 392 P2d 78 (1964).

Collateral References

Courts *key* 85(2).

21 C.J.S. Courts §126.

Rule 2. One form of action.

Commission Notes

The rule is identical with the Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Record-Based or Nonrecord-Based Information Determinative of Appropriateness of Direct Appeal or Petition for Postconviction Relief — Direct Appeal Dismissed When Record Insufficient to Substantiate Effectiveness of Counsel: In 1999, White moved for an evidentiary hearing to allow the development of facts that were not part of the record but that were necessary to sustain a claim of ineffective assistance of counsel. The Supreme Court declared by order that a petition for postconviction relief would be the proper avenue for White's nonrecord-based ineffective assistance of counsel claim. Nevertheless, in late 2000, White appealed, contending that the claim of prejudicial error resulting from her trial counsel's various failures to provide representation, such as the failure to call witnesses, make an opening statement, or offer a theory of the case at any stage of the proceedings, was supported by the record and proper for direct appeal. The general rule set out in Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999), is that when ineffective assistance claims are based on facts of record, they must be raised on direct appeal, while claims based on allegations not documented in the record must be raised by petition for postconviction relief. The underlying principle of the rule is that a silent record cannot rebut the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The two distinct classifications of on-record and off-record actions tend to overlap at times, and though not easily distilled into a formula, the definitive question that decides whether actions are on-record or off-record is whether the record fully explains why counsel took the particular course of action. Generally, an alleged failure to object to the introduction of evidence, to the testimony of a witness, or to prosecutorial misconduct at trial is considered record-based and appropriate for direct appeal. Likewise, counsel's own conduct in presenting the case, such as improperly eliciting damaging testimony from a witness or rendering an improper opening statement or closing argument, may be pointed to as record-based. Decisions regarding the timing and number of objections and whether to offer no opening statement at all lie within counsel's tactical discretion, indicating that nonrecord-based information explaining the tactic may be involved. Similarly, counsel's failure to adequately investigate, to prepare a defense, to become familiar with critical areas of the applicable law, to offer a particular jury instruction, to object to the trial court's failure to consider sentencing

alternatives, to object to the admission of evidence that is evidenced by the record, or to fully inform defendant of the consequences of various options and rights, even though the prejudicial results of the ineffectiveness appear on the record, may constitute a nonrecord-based claim. In White's case, the record supplied some indicia of why a certain objection was raised at a particular time, but was still insufficient to determine to what extent counsel's actions were purely tactical or resulted from deficient representation. Thus, the information was considered nonrecord-based and should have been raised by petition for postconviction relief, so White's direct appeal was dismissed without prejudice. St. v. White, 2001 MT 149, 306 M 58, 30 P3d 340 (2001), followed in St. v. Earl, 2003 MT 158, 316 M 263, 71 P3d 1201 (2003), St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), St. v. Notti, 2003 MT 296, 318 M 146, 79 P3d 289 (2003), and St. v. Rinkenbach, 2003 MT 348, 318 M 499, 82 P3d 8 (2003). See also St. v. Turnsplenty, 2003 MT 159, 316 M 275, 70 P3d 1234 (2003), and State v. Davis, 2003 MT 341, 318 M 459, 81 P3d 484 (2003).

Collateral References

Action *key* 25(1).
1A C.J.S. Actions §182.
1 Am. Jur. 2d Actions §1, et seq.

II. Commencement of Action — Service of Process, Pleadings, Motions, and Orders

Rule 3. Commencement of action.

Commission Notes

The rule is identical with the Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Trial De Novo Allowed in District Court Despite Failure to Request Jury Trial in Justice's Court — No Waiver of Right to Jury Trial: The District Court erred in determining that under 25-33-301, a waiver of the right to a jury trial in Justice's Court waives the right to a jury trial de novo on appeal in District Court. The court disregarded the interplay of Rule 38, M.R.Civ.P., and 25-33-301 with this rule in attempting to harmonize the statute and the rules. The language in 25-33-301, limiting appeals from Justice's Court to the pleadings filed in Justice's Court, does not limit jury trial demands in appeals from Justice's Court because jury trial demands are not pleadings. The plain meaning of Rule 81(b), M.R.Civ.P., requires that Rule 38 and this rule be given meanings that are consistent with 25-33-301 and the right to trial by jury. Thus, when a party makes a jury trial demand under Rule 38 for a trial de novo on appeal in District Court, the action commences when the party serves and files notice of appeal pursuant to 25-33-102 and 25-33-103. In appeals from Justice's Court, jury trial demands must be made within 10 days of the filing of notice of appeal. Further, participation in a bench trial in District Court without objection does not constitute waiver of the right to a jury trial so long as a timely jury trial demand is made in District Court. Balyeat Law, P.C. v. Harrison, 1999 MT 144, 295 M 13, 983 P2d 902, 56 St. Rep. 566 (1999), following U.S. v. Calif. Mobile Home Park Management Co., 107 F3d 1374 (9th Cir. 1997), and Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998).

Commencement of Action — Counterclaim and Third-Party Complaint: This rule provides that a civil action is commenced by filing a complaint. Thus, in determining when an action is commenced for the purposes of the Statute of Limitations in a libel action based upon allegations made in the original complaint, the date of filing the counterclaim and third-party complaint in libel is the commencement of the action, not the date 1 ½ years earlier when a motion for leave to file a motion to strike, amended answer, counterclaim, and third-party complaint was filed. Engine Rebuilders, Inc. v. Seven Seas Import-Export & Mercantile, Inc., 189 M 236, 615 P2d 871 (1980).

Jurisdiction of Court Invoked by Complaint: The District Court is a court of general jurisdiction, and has power to hear and determine all classes of cases, except petty cases, of which exclusive jurisdiction is given Justice's and police Courts by the 1889 Montana Constitution (now Art. VII, sec. 4 and 5, 1972 Mont. Const.); but it can acquire jurisdiction of a particular civil case only by the filing of a written complaint. Crawford v. Pierse, 56 M 371, 185 P 315 (1919), explained in State ex rel. Delmoe v. District Court, 100 M 131, 46 P2d 39 (1935).

Action "Commenced" by Complaint: Until a complaint is filed in a civil action, no action is commenced or can be pending. State ex rel. Working v. Mayor, 43 M 61, 114 P 777 (1911).

Statute of Limitations: A complaint filed within 6 years confers jurisdiction, though the summons is not served within that time. Haupt v. Burton, 21 M 572, 55 P 110 (1898).

Collateral References

Action *key* 64.

1A C.J.S. Actions §§305 through 317.

1 Am. Jur. 2d Actions §§63 through 67; 61A Am. Jur. 2d Pleading §68.

Tolling of Statute of Limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action. 27 ALR 2d 236.

Filing of pleadings as amounting to bringing of suit within limited time required by mechanics' lien statute. 75 ALR 695.

Rule 4. Persons subject to jurisdiction — process — service

Case Notes

Unincorporated Association Considered Person Subject to Suit: MacPheat filed a libel complaint against Schauf and the insurance company association to which Schauf belonged, claiming that Schauf wrote a libelous letter on the association letterhead to the judge who was presiding over one of MacPheat's criminal proceedings. The association moved to be removed from the action, asserting that it was simply a federally registered service mark and not a person or legal entity subject to service of process. The District Court agreed and dismissed the association from the suit. MacPheat appealed, and the Supreme Court reversed. The association made the same service mark argument in Oliver v. Farmers Ins. Group of Cos., 941 P2d 985 (Okla. 1997). In that case, the Oklahoma Supreme Court acknowledged that under traditional common law, a voluntary, unincorporated association could not be sued under its name because it did not have a legal status apart from that of its individual members, but that because of the unjustness of the rule in present day society, the rule has been modified in many jurisdictions. The Oklahoma court dismissed the service mark argument, because whatever else the association did, it clearly had a name under which a number of companies insured against risks for profit. The Montana Supreme Court found that reasoning persuasive. An unincorporated association was defined in Assoc. Press v. Mont. Senate Republican Caucus, 286 M 172, 951 P2d 65 (1997), as a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective. The association in this case was thus considered a person within the definition in Rule 4A, M.R.Civ.P., and to conclude otherwise and sanction the association's intangible classification would unnecessarily restrict those who can be sued in Montana courts and fly in the face of Montana's constitutional open courts provision. The association name was one under which its affiliates transacted business, so MacPheat could properly serve and bring suit against the association under 25-5-104 without naming and serving process on the members individually. However, once the association was brought before the court, MacPheat still had the burden of establishing the liability of the association's members, if any, under the applicable substantive law. MacPheat v. Schauf, 2002 MT 23, 308 M 215, 41 P3d 895 (2002).

Defective Service — Persons Entitled to Raise Issue: Questions of defective service may be raised only by a person upon whom the allegedly defective service was made, a rule that applies equally to parties and intervenors. Hull v. D. Irvin Transp., Ltd., 213 M 75, 690 P2d 414, 41 St. Rep. 1954 (1984).

Service of Compliance Order on City — No Personal Service on Mayor Required — Particular Statute Control General: City's contention that service of compliance order was defective personal service because served on City Clerk and not Mayor was erroneous as express provisions relating to service of compliance order under Montana water pollution act control over general statutes relating to service of process in a civil action upon a municipality. State ex rel. Dept. of Health and Environmental Sciences v. Livingston, 169 M 431, 548 P2d 155 (1976).

Out of State for Purpose of Statute of Limitations: When process was available at the time accident occurred to bring defendant before court, defendant was not out of state for purposes of Statute of Limitations. Baker v. Ferguson Research, Inc., 61 F.R.D. 637 (D.C. Mont. 1974); State ex rel. McGhee v. District Court, 162 M 31, 508 P2d 130 (1973).

Rule 4A. Definition of person.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

1999 Amendment: Inserted reference to limited liability company. Amendment effective August 15, 1999.

Identity With Federal Rule: This rule has no counterpart in the Federal Rules.

Amendments: The 1965 amendment restated this rule without change.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Unincorporated Association Considered Person Subject to Suit: MacPheat filed a libel complaint against Schauf and the insurance company association to which Schauf belonged, claiming that Schauf wrote a libelous letter on the association letterhead to the judge who was presiding over one of MacPheat's criminal proceedings. The association moved to be removed from the action, asserting that it was simply a federally registered service mark and not a person or legal entity subject to service of process. The District Court agreed and dismissed the association from the suit. MacPheat appealed, and the Supreme Court reversed. The association made the same service mark argument in Oliver v. Farmers Ins. Group of Cos., 941 P2d 985 (Okla. 1997). In that case, the Oklahoma Supreme Court acknowledged that under traditional common law, a voluntary, unincorporated association could not be sued under its name because it did not have a legal status apart from that of its individual members, but that because of the unjustness of the rule in present day society, the rule has been modified in many jurisdictions. The Oklahoma court dismissed the service mark argument, because whatever else the association did, it clearly had a name under which a number of companies insured against risks for profit. The Montana Supreme Court found that reasoning persuasive. An unincorporated association was defined in Assoc. Press v. Mont. Senate Republican Caucus, 286 M 172, 951 P2d 65 (1997), as a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective. The association in this case was thus considered a person within the definition in this rule, and to conclude otherwise and sanction the association's intangible classification would unnecessarily restrict those who can be sued in Montana courts and fly in the face of Montana's constitutional open courts provision. The association name was one under which its affiliates transacted business, so MacPheat could properly serve and bring suit against the association under 25-5-104 without naming and serving process on the members individually. However, once the association was brought before the court, MacPheat still had the burden of establishing the liability of the association's members, if any, under the applicable substantive law. MacPheat v. Schauf, 2002 MT 23, 308 M 215, 41 P3d 895 (2002).

Political Caucuses Considered Person Subject to Suit: A political party caucus is by definition considered an unincorporated association or body of two or more persons having a joint or common interest. Drawing no distinction between presession and session caucuses, the Supreme Court held, on the basis of the plain language in this rule, that a political party caucus is a person subject to court jurisdiction. Assoc. Press v. Mont. Senate Republican Caucus, 286 M 172, 951 P2d 65, 54 St. Rep. 1360 (1997).

Collateral References

Courts *key* 85(2).

Rule 4B. Jurisdiction of persons.

Commission and Advisory Committee Notes

COMMISSION NOTE

This rule expands the exercise of personal jurisdiction over nonresidents in cases having substantial contacts with Montana. It is in accord with a trend that began more than thirty years ago with the nonresident motorist acts. The constitutional basis for such expanded jurisdiction is afforded by such decisions of the Supreme Court of the United States as International Shoe Co. v. Washington, 326 US 310, 90 L Ed 95, 66 S Ct 154 (1945) and McGee v. International Life Ins. Co., 355 US 220, 2 L Ed 223, 78 S Ct 199 (1958). In these decisions the court departed materially from

the rigid rule of Pennoyer v. Neff, 95 US 714, 24 L Ed 565 (1877), although, as was pointed out in Hanson v. Denckla, 357 US 235, 2 L Ed 1283, 78 S Ct 1228 (1958), the rule of Pennoyer v. Neff has not wholly disappeared. Under the new and flexible standard of due process a state may exercise personal jurisdiction whenever the relation between it and the particular litigation sued upon makes it reasonable for the state to try the particular case. In such an inquiry importance attaches to what the defendant has caused to be done in the forum state.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 4B(1)(f). The amendment conforms the rule to the terminology of the Uniform Probate Code.

Compiler's Comments

Identity With Federal Rule: This rule has no counterpart in the Federal Rules.

Amendments: The 1965 amendment restated this rule without change in substance.

The amendment of October 9, 1984, in (1)(f) substituted "personal representative" for "executor or administrator".

Case Notes

General 444
Person Found Within State 449
Transacting Business in State 451
Accrual of Tort Within State 454
Property Interest Within State 457
Insuring Person or Property Within State 457
Contract for Services or Material Furnished Within State 458
Acting as Representative of Corporation Organized or Located in State 459
Acquisition of Jurisdiction 460

GENERAL

Justiciable Controversy Created by Intervention of Child Support Enforcement Division With Continuing District Court Jurisdiction Over Child Support Orders: As part of a marriage dissolution, the District Court ordered that the husband pay monthly child support in a specific amount. The Child Support Enforcement Division (CSED) subsequently notified the court that it intended to modify the order pursuant to its authority in 40-5-272 and 40-5-273. The court, sua sponte, then enjoined CSED from modifying any child support orders issued by a Montana District Court, asserting that CSED's actions in modifying a court order violated the constitutional separation of powers clause. On appeal, CSED maintained that this case did not present a justiciable controversy, primarily because neither party to the dissolution action challenged the constitutionality of the statutes in question, and that the court was therefore without jurisdiction to decide the issue. The Supreme Court disagreed, finding that a justiciable controversy did exist. Once the original equitable jurisdiction of the District Court was invoked in the dissolution action, the court retained continuing jurisdiction following entry of the child support order. As a result, the court properly used its inherent authority to protect both its continuing jurisdiction and the husband's right not to be adversely affected by an act of CSED that the court considered unconstitutional. Further, the court had personal jurisdiction over CSED because CSED's notification that it intended to intervene interjected CSED into the ongoing matter, constituting a voluntary appearance into the case under this rule and vesting personal jurisdiction over CSED with the District Court. Seubert v. Seubert, 2000 MT 241, 301 M 382, 13 P3d 365, 57 St. Rep. 1006 (2000). See also In re Marriage of Harper, 235 M 41, 764 P2d 1283 (1988), and Gryczan v. St., 283 M 433, 942 P2d 112 (1997).

Lex Loci Delicti Commissi Abandoned — "Most Significant Relationship" Approach Adopted as Choice of Law to Determine Applicable Substantive Law in Issues of Tort: In a personal injury/product liability/wrongful death action in which there is a potential conflict of laws, the traditional choice of law rule, known as lex loci delicti commissi (law of the place where the wrong was committed), which provides that the infliction of injury is actionable under the law of the state in which it was received, was abandoned in favor of the approach in Restatement (Second) of Conflict of Laws 145(1) (1971), which seeks to apply the law of the state with the most significant relationship to the occurrence and the parties. This choice of law was adopted previously in contract disputes in Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994), and the Supreme Court found no reason not to apply it to tort issues in favor of the traditional rule in the present case. Phillips v. Gen. Motors Corp., 2000 MT 55, 298 M 438, 995 P2d 1002, 57 St. Rep. 259 (2000).

Defendant Not "Found Within" Montana — No Substantial, Systematic, Continuous Presence in State Through Advertising, Website, or Dealership — Jurisdiction Precluded: Any person found within Montana is subject to general jurisdiction of Montana courts. To be "found within" Montana, a defendant's activities must be substantial, systematic, and continuous. (See Int'l Shoe Co. v. Wash., 326 US 310, 90 L Ed 95, 66 S Ct 154 (1945).) Bedrejo contended that Triple E Canada, Ltd.'s (Triple E) advertising in national magazines, its Internet website, its travel club, and its out-of-state dealerships that served at least three Montanans established Triple E's presence within Montana. The Supreme Court found that these activities did not meet the Int'l Shoe standard. The court cited Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.C. N.Y. 1996), and Millennium Enterprises, Inc. v. Millennium Music LP, 33 F. Supp. 907 (D.C. Oreg. 1999), in rejecting the argument that the availability to a website from Montana could be construed as a basis for long-arm jurisdiction. Also, mere placement of advertisements in nationally distributed papers or journals does not rise to the level of purposeful contact with a forum in order to exercise personal jurisdiction over the advertiser, as determined in Federated Rural Elec. Ins. v. Kootenai Elec. Co-op, 17 F3d 1302 (10th Cir. 1994). Further, Triple E was not registered as a Montana business; had no employees, distributors, dealers, office, warehouse, or other real property in Montana; had no telephone listing in Montana; and did no direct advertising with Montana media. Any entry by Triple E into the state amounted to only an insignificant trickle in the stream of commerce; thus, jurisdiction by Montana courts would have been unreasonable. Bedrejo v. Triple E Canada, Ltd., 1999 MT 200, 295 M 430, 984 P2d 739, 56 St. Rep. 778 (1999), following Simmons v. St., 206 M 264, 670 P2d 1372, 40 St. Rep. 1650 (1983), and followed in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Child Support — No Jurisdiction Over Father When No Minimum Contacts by Father With Montana: Verleen and Howard were divorced in California, and Howard was ordered to pay child support. Thereafter, Verleen moved with the children to Montana, where she sought and obtained a decree in Missoula County to modify the California court order with respect to visitation and the amount of child support. Howard was personally served in California but did not respond to the motion. Later, Verleen obtained a default judgment against Howard. Later still, Verleen sought an order in California that Howard's home be sold to satisfy the Montana judgments. Howard responded that the Montana court had no jurisdiction. The Supreme Court held that while a question of waiver was raised because of Howard's failure to raise the issue of personal jurisdiction under a Rule 12(b), M.R.Civ.P., motion, the correct analysis is whether the District Court ever had personal jurisdiction over Howard. The Supreme Court held that because the requirements of 40-4-210 had not been satisfied, the only method under which jurisdiction could otherwise obtain was under this rule. Citing Kulko v. Calif. Superior Court, 436 US 84 (1978), the Supreme Court held that there were simply no facts to suggest that Howard had any "minimum contacts" with Montana to warrant a Montana court obtaining jurisdiction over him because Howard's only connection with Montana is that his children now reside here. Heinle v. District Court, 260 M 489, 861 P2d 171, 50 St. Rep. 1141 (1993).

No General or Long-Arm Jurisdiction Over Nonresident Subcontractor: At the request of plaintiff, a Montana contractor, a Utah tile company submitted a bid for tile work by telephone. After being awarded the contract, the Utah company discovered a mistake in its bid and informed defendant that it could not perform the job. Finding jurisdiction over the Utah company, the District Court ordered the company to pay damages. The Supreme Court reversed, ruling that neither submitting a bid nor entering into a contract with the Montana contractor constitutes "substantial contracts" sufficient enough to invoke general jurisdiction or long-arm jurisdiction over the Utah company. Edsall Constr. Co., Inc. v. Robinson, 246 M 378, 804 P2d 1039, 48 St. Rep. 75 (1991), followed in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Initial Appearance — Appearance General — Waiver of All Irregularities: Defendants' attorney made an initial appearance to vacate a default judgment without reserving the question of personal jurisdiction. As a result, defendants' appearance was general and waived all irregularities in the service of process. Spencer v. Ukra, 246 M 430, 804 P2d 380, 48 St. Rep. 25 (1991), distinguished in MacPheat v. Schauf, 1998 MT 250, 291 M 182, 969 P2d 265, 55 St. Rep. 1032 (1998).

Factors in Determining Reasonableness of Jurisdiction: In determining the reasonableness of jurisdiction, the Supreme Court cited the factors set out in Jackson v. Kroll, 223 M 161, 724 P2d 717 (1986): (1) the extent of defendant's purposeful interjection into Montana; (2) the burden on defendant of defending in Montana; (3) the extent of conflict with the sovereignty of defendant's state; (4) Montana's interest in adjudicating the dispute; (5) the most efficient resolution of the controversy; (6) the importance of Montana to plaintiff's interest in convenient

and effective relief; and (7) the existence of an alternative forum. Once plaintiff shows that defendant has purposefully availed itself of the privilege of conducting activities in the forum, a presumption of reasonableness arises that defendant can overcome only by presenting a compelling case that jurisdiction would be unreasonable. Simmons Oil Corp. v. Holly Corp., 244 M 75, 796 P2d 189, 47 St. Rep. 1397 (1990).

Contact Due to Unilateral Activity — No Jurisdiction: Plaintiff moved to Montana and filed suit against her New York dentist. Even though the exercise of personal jurisdiction was proper under this rule, defendant did not purposefully avail itself of Montana law or direct its commercial activity toward Montana. Defendant's contacts with Montana were due solely to plaintiff's unilateral activities. Assertion of personal jurisdiction over defendant would violate due process. Petrik v. Pub. Serv. Mut. Ins. Co., 879 F2d 682 (9th Cir. 1989).

Preliminary Hearing Procedure Appropriate to Determine Personal Jurisdiction Dispute: A preliminary hearing by the District Court pursuant to Rule 12(d), M.R.Civ.P., is the appropriate procedure if there are material facts in dispute regarding whether the court has personal jurisdiction. If there are jurisdictional facts intertwined with facts involving the merits of the case, the court may determine its jurisdiction in a plenary pretrial proceeding. Minuteman Aviation, Inc. v. Swearingen, 237 M 207, 772 P2d 305, 46 St. Rep. 741 (1989).

Lack of Jurisdiction — Lack of Power to Adjudicate: Generally, courts lacking subject matter jurisdiction over a cause of action have no power to adjudicate issues in the action. Sterrett v. Milk River Prod. Credit Ass'n, 234 M 459, 764 P2d 467, 45 St. Rep. 2048 (1988).

Legal Malpractice as Tort Action Sufficient to Establish Jurisdiction of Out-of-State Attorney: A claim for legal malpractice falls within the definition of tort action as set forth in subsection (1)(b) of this Rule and is sufficient to establish court jurisdiction over an out-of-state attorney who is not within the state for general jurisdictional purposes. Turner v. Tranakos, 229 M 51, 744 P2d 898, 44 St. Rep. 1772 (1987).

Long-Arm Jurisdiction — Test: The Supreme Court applies the following three-part test, articulated in Simmons v. St., 206 M 264, 670 P2d 1372, 40 St. Rep. 1650 (1983), for determining if a Montana court may exercise "long-arm jurisdiction" over a defendant whose activities are neither substantial nor sufficiently continuous and systematic to invoke general jurisdiction: (1) the nonresident defendant must do some act or consummate some transaction within the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable. Turner v. Tranakos, 229 M 51, 744 P2d 898, 44 St. Rep. 1772 (1987). This test was applied in Simmons Oil Corp. v. Holly Corp., 244 M 75, 796 P2d 189, 47 St. Rep. 1397 (1990). See also Bedrejo v. Triple E Canada, Ltd., 1999 MT 200, 295 M 430, 984 P2d 739, 56 St. Rep. 778 (1999), and Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Court to Consider Reasonableness of Exercise of Jurisdiction Over Nonresident Defendant: For a Montana court to exercise jurisdiction over a nonresident defendant, it must be satisfied that: (1) the resident defendant comes within the provisions of the long-arm statutes; and (2) the exercise of long-arm jurisdiction over the nonresident defendant comports with traditional notions of fair play and substantial justice. Simmons v. St., 206 M 264, 670 P2d 1372, 40 St. Rep. 1650 (1983), followed in Columbia Falls Aluminum Co. v. Hindin/Owne/Engelke, Inc., 224 M 202, 728 P2d 1342, 43 St. Rep. 2132 (1986), Petrik v. Colby, 224 M 531, 730 P2d 1167, 43 St. Rep. 2392 (1986), Nelson v. San Joaquin Helicopters, 228 M 267, 742 P2d 447, 44 St. Rep. 1510 (1987), Simmons Oil Corp. v. Holly Corp., 244 M 75, 796 P2d 189, 47 St. Rep. 1397 (1990), Bedrejo v. Triple E Canada, Ltd., 1999 MT 200, 295 M 430, 984 P2d 739, 56 St. Rep. 778 (1999), and B.T. Metal Works v. United Die & Mfg. Co., 2004 MT 286, 323 M 308, 100 P3d 127 (2004).

Nonresident Laboratory Subjected to Suit Under Long-Arm Statute — Exercise of Jurisdiction Unreasonable — Violation of Due Process: Since 1977, the Montana Department of Health and Environmental Sciences (now Department of Public Health and Human Services), the agency responsible under Title 50, ch. 19, part 2, for the testing of newborns for metabolic disorders, has contracted with an Oregon state laboratory for the testing. Plaintiff's minor son was born in June 1977. A sample of his blood was sent to the Oregon laboratory. No abnormality was reported. A few months later the son exhibited symptoms of a metabolic disorder, and treatment was begun in September 1977. After first filing an action in Oregon, which was later dismissed on procedural grounds, plaintiff filed a negligence action in Montana against the states of Montana and Oregon, alleging that the delay in treatment had caused his son permanent and irreparable brain and neuromuscular damage. The trial court dismissed the action against the state of Oregon on jurisdictional grounds. The Supreme Court affirmed, ruling that although both subsections (b) and (e) of Rule 4B, M.R.Civ.P., potentially confer jurisdiction

over the state of Oregon in this case, it would be a denial of due process for the Montana state courts to exercise that jurisdiction. The court found that Oregon had not structured its activities in such a way as to purposely avail itself of the privilege of functioning in Montana. Further, the court ruled that an evaluation of the interests of sovereignty, efficiency of resolution, and provision of important interstate medical services compels the conclusion that it would be unreasonable in this case to exercise jurisdiction over the state of Oregon. Simmons v. St., 206 M 264, 670 P2d 1372, 40 St. Rep. 1650 (1983). See also Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Enforcement of Foreign Judgment — Lack of Personal Jurisdiction:

A default judgment was obtained in Colorado against defendants, Montana residents, in a case which arose from defendants' participation in a reciprocal interinsurance agreement. Some of the subscribers to the agreement were Colorado residents. The Supreme Court upheld the District Court's refusal to enforce the judgment in Montana, ruling that enforcement of the judgment would be a violation of the federal due process clause because the defendants had not had sufficient "minimum contacts" with the state of Colorado to warrant the exercise of personal jurisdiction over the defendants. The court stated that the provision of the Colorado long-arm statute that covered causes of action arising from "contracting to insure any person, property or risk residing or located within this state at the time of contracting" was not applicable because this was not the sort of "company" that was contemplated when the long-arm statutes were drafted. The court further stated that the defendants did not know the name of the insurance company which issued the policy and had not purposely availed themselves of the privilege of conducting activities within the state of Colorado. Benham v. Woltermann, 201 M 149, 653 P2d 135, 39 St. Rep. 2017 (1982).

Figgins entered into a collective bargaining agreement with the Teamsters Union. The agreement contained provisions concerning payment to the Teamsters Pension Trust Fund located in Seattle. The agreement did not specify where the contributions were to be made, but Figgins agreed to execute all necessary forms. One form designated a bank in Colorado as the depositary bank. Figgins sent payments to the Colorado bank. Later, Figgins was audited and an action brought in Colorado to collect delinquent contributions. Figgins did not defend the Colorado suit. Plaintiff brought suit in Montana to enforce the Colorado default judgment. The Montana Supreme Court said that Figgins did not have sufficient contacts or ties to the State of Colorado to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the Colorado judgment. May v. Figgins, 186 M 383, 607 P2d 1132 (1980).

Jurisdiction of State Court Over Nonresident Federally Chartered Bank — Sufficiency of Evidence — Denial of Due Process and Equal Protection: Officers of the plaintiff corporation traveled to Reno, Nevada, to deposit money in the defendant branch bank in anticipation of business in Nevada and later brought an action in a Montana District Court against the defendant for unlawful dishonor of a check and associated charges. The District Court did not err in dismissing the action for lack of jurisdiction. Under the provisions of 12 U.S.C. §94, a federally chartered bank may be sued, among other places, where it is "located". The U.S. Supreme Court in Citizens & S. Nat'l Bank v. Bougas, 434 US 35 (1977), construed the term "located" to mean wherever branch offices are found. Because there is no branch bank in Montana and there has been no business operation conducted by the defendant in Montana that would constitute a waiver of the protection of federal law, the District Court had no jurisdiction. There was, moreover, sufficient evidence before the District Court for it to make the determination that there was no voluntary waiver and the U.S. Supreme Court has held in Mercantile Nat'l Bank at Dallas v. Langdeau, 371 US 555 (1963), that Congress "unquestionably" has the authority to determine those situations in which national banks can be sued. Hamelly Int'l, Inc. v. First Nat'l Bank of Nev., 199 M 221, 648 P2d 282, 39 St. Rep. 1304 (1982).

Involvement in Another Lawsuit as Insufficient Minimum Contact for Jurisdiction: The United Bank of Pueblo filed suit in 1970 seeking appointment of a receiver for Larry C. Iverson, Inc., on rescission of a land sale contract. In 1980, Bouma, a party to the contract, filed this suit, claiming violation of his civil rights. United Bank and other defendants claimed lack of in personam jurisdiction under Montana's "long-arm statute", alleging that they did not receive such benefits as a result of conducting business within Montana to establish the minimum contacts necessary for jurisdiction. The court held that the only contact of United Bank of Pueblo is its involvement in a suit in Montana District Court. State court litigation in pursuit of out-of-state obligations cannot subject a corporation to local jurisdiction. Neither does United Bank's ownership of stock in Larry C. Iverson, Inc., a Montana corporation, support a claim of

jurisdiction; United Bank's motion to dismiss was granted. Bouma v. Larry C. Iverson, Inc., 38 St. Rep. 765 (D.C. Mont. 1981) (apparently not reported in Federal Supplement).

Defendant Subject to Process — Absence From State No Bar to Statute of Limitations: Harmer sued Antimony for attorney fees, and Antimony counterclaimed, sounding in fraud. The court concluded that Antimony knew of Harmer's relationship with Resources (a corporation contracting with Antimony), and therefore the counterclaim is barred by the 2-year Statute of Limitations, 27-2-203. Harmer's contacts with Montana were such as to subject him to the reach of Rule 4B, M.R.Civ.P., and therefore the Statute of Limitations is not tolled by 27-2-402. Harmer v. Laurence, 37 St. Rep. 1333 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

Known Out-of-State Address — No Tolling of Statute of Limitations: When persons involved in a tort who were residents of the state at its occurrence subsequently moved to another state, and plaintiff insurance company was aware of their address, the Statute of Limitations didn't toll due to absence from the state under 27-2-402 because Montana District Courts had jurisdiction under this rule and process could be served under the "long-arm statute", Rule 4D(3), M.R.Civ.P. Beedie v. Shelley, 187 M 556, 610 P2d 713 (1980).

Proper Forum Selection — F.E.L.A. Actions: With the plaintiff, the scene of the injury, and most of the witnesses in Idaho, a suit for personal injuries filed in Montana was improperly dismissed by the District Court under the doctrine of forum non conveniens. The Supreme Court reversed stating that the doctrine must be tempered by an open-door policy and that the doctrine should not presently be applied to Federal Employer's Liability Act (F.E.L.A.) actions. Bevacqua v. Burlington N., Inc., 183 M 237, 598 P2d 1124 (1979).

Custody — Personal Jurisdiction Unnecessary: Personal jurisdiction over a parent is not necessary to the termination of his parental rights to a minor child so long as the parent has actual notice of the termination or the District Court makes an effort reasonably calculated to provide notice to the parent. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Forum Non Conveniens Not Applicable in F.E.L.A. Suits: The doctrine of forum non conveniens is not applicable to a Federal Employer's Liability Act (F.E.L.A.) suit filed in a Montana District Court. There is a strong policy favoring plaintiff's forum selection in F.E.L.A. cases, and the Montana Constitution states that the courts of justice must be open to all persons. Labella v. Burlington N., Inc., 182 M 202, 595 P2d 1184 (1979).

Jurisdictional Defense Lost — Scope of Jurisdiction Over Nonresidents: Defendant could not inject plea of lack of jurisdiction over the person after filing motion asserting lack of jurisdiction over the subject matter. Jurisdiction is proper over nonresident buyer purchasing through nonresident agent when one payment was made directly to and one order was made directly with resident seller. Prentice Lumber Co. v. Spahn, 156 M 68, 474 P2d 141 (1970).

Effect of Misnomer: For ramifications of complaint filed against nonexisting defendant due to misnomer being used, see Wentz v. Alberto Culver Co., 294 F. Supp. 1327 (D.C. Mont. 1969).

Retroactivity of Rules of Procedure: Although legislative intent to give retrospective force to a statute must appear and all doubt will be resolved against retrospective application, the Rules of Civil Procedure apply retrospectively. State ex rel. Johnson v. District Court, 148 M 22, 417 P2d 109 (1966); Lumbermen's Mut. Cas. Co. v. Babcock & Wilcox Co., 34 F.R.D. 515 (D.C. Mont. 1964); Weber v. Hydroponics, Inc., 226 F. Supp. 117 (D.C. Mont. 1962).

Defendants Named Not Served: Persons named as defendants, but who were not served with process and did not enter an appearance, were not parties to the action for the purpose of determining their entitlement to witness fees. Nelson v. Mont. Iron Min. Co., 140 M 331, 371 P2d 874 (1962).

Service of Summons Prior to Effective Date: The giving effect to the service of summons provisions of this rule, when the operative facts of the case to which the rule was applied had taken place prior to the effective date of the Montana Rules of Civil Procedure as set out in Rule 86(a), was not a prohibited retroactive application of this rule within the meaning of 1-2-109. Weber v. Hydroponics, Inc., 226 F. Supp. 117 (D.C. Mont. 1962).

Motion to Quash and Order to File Answer — No Waiver of Objection: Under former law, a defendant who appears specially to test the jurisdiction of the court by motion to quash an alleged defective service of summons and reserves his exception to an adverse ruling upon his motion does not waive his objection to jurisdiction by obeying the order of the court directing him to file his answer within a stated time. State ex rel. NW. Eng'r Co. v. District Court, 114 M 179, 133 P2d 594 (1943).

PERSON FOUND WITHIN STATE

Jurisdiction of Montana Courts Over Wrongful Discharge Case Involving Montana Citizen When Montana Law Applies — Dismissal for Lack of Jurisdiction Reversed: Plaintiff was a Montana resident hired by a Florida corporation, which was operated out of Oklahoma, to lay fiber optic cable throughout the country. While working in Indiana, plaintiff had a dispute with a supervisor and was fired. Plaintiff brought an action in Montana, claiming a violation of the Wrongful Discharge From Employment Act. The District Court held that under 39-2-912, the Montana courts lacked subject matter jurisdiction and dismissed the claim. On appeal, the Supreme Court reversed. Even though plaintiff never signed a written employment contract, the court held that a contract provision may be broad enough to indicate that an entire contract be governed by the laws of the state governing the particular provision. The fact that the defendant corporation paid income taxes, unemployment insurance premiums, and wages in Montana indicated an intent to be governed by Montana law. The court also concluded that under sections 187 and 188 of Restatement (Second) of Conflict of Laws (1971), the local law of the state with the most significant relationship to the transaction applies to questions of contract interpretation absent an effective choice of law by the parties. Plaintiff was considered a Montana resident despite the fact that employment required travel to other states, and the court concluded that it was appropriate to apply the Wrongful Discharge From Employment Act to the case even though the Act does not expressly provide for extraterritorial jurisdiction. Montana courts have subject matter jurisdiction in cases involving a Montana resident when Montana law applies, so plaintiff's case should not have been dismissed for lack of subject matter jurisdiction. Burchett v. MasTec N. America, Inc., 2004 MT 177, 322 M 93, 93 P3d 1247 (2004). See also Dailey v. Transitron Electronic Corp., 475 F2d 12 (5th Cir. 1973).

Forum State — Contacts Considered in Determining State With More Specific Relationship in Personal Injury or Wrongful Death Product Liability Action: Montana residents were killed in Kansas in a car made in Michigan and sold in North Carolina. Sections 146 and 175 of Restatement (Second) of Conflict of Laws (1971) that deal with personal injury and wrongful death actions provide that the rights and liabilities of the parties are to be determined in accordance with the law of the state where the injury occurred unless, with respect to a particular issue, another state has a more specific relationship. In order to determine whether a state other than the place of injury has a more significant relationship, the following contacts are taken into account, pursuant to Restatement (Second) of Conflict of Laws 145(2) (1971), applying the principles of Restatement (Second) of Conflict of Laws 6 (1971): (1) needs of the interstate and international system; (2) policies of the interested states, including place of injury, place of conduct, and residence of the parties; (3) justified expectations; (4) basic policies underlying the particular field of law; and (5) the certainty, predictability, and uniformity of result as well as the ease in the determination and application of the law to be applied. However, the principles need not be given equal weight. In this case, the relevant policies of the interested states were of primary importance. The focus of Montana law is not only on the regulation of products sold in Montana, but also on providing the maximum protection and compensation to Montana residents, considering mainly the condition of the product and not the conduct of the manufacturer. Kansas, where the injury occurred, did not maintain a similar interest in the application of its product liability laws because the injured were Montana citizens. (See Sternhagen v. Dow Co., 282 M 168, 935 P2d 1139, 54 St. Rep. 299 (1997).) Michigan also lacked such an interest because Michigan's only contact with the dispute was the location of the manufacturer. (See Farrell v. Ford Motor Co., 501 NW 2d 567 (Mich. App. 1993). Under North Carolina's vested rights approach to conflict of laws, that state would apply the law of the jurisdiction where the injury occurred, whatever that law might be. After holding that the relevant residence of the plaintiff was the residence at the time of injury, the Supreme Court found that Montana, as the place of domicile, had a significant relationship to the issues and that because the purpose behind Montana product liability law was implicated by the facts, Montana law should apply. Phillips v. Gen. Motors Corp., 2000 MT 55, 298 M 438, 995 P2d 1002, 57 St. Rep. 259 (2000). See also Tillett v. Lippert, 275 M 1, 909 P2d 1158, 53 St. Rep. 1 (1996).

Residence of Limited Partner in State Not Sufficient to Establish Residence of Limited Partnership for Jurisdictional Purposes: Lurie contended that because one of the partners of a limited partnership lived in Montana, the limited partnership itself was a resident for purposes of determining general jurisdiction, citing Carden v. Arkoma Associates, 494 US 185, 108 L Ed 2d 157, 110 S Ct 1015 (1990). The Supreme Court distinguished Carden because that case involved interpretation of a federal statute defining federal diversity of citizenship jurisdiction, while Montana courts apply state statutory law and the "minimum contacts" principles enunciated in Int'l Shoe Co. v. Wash., 326 US 310, 90 L Ed 95, 66 S Ct 154 (1945), and In re

Estate of Ducey, 241 M 419, 787 P2d 749 (1990), to determine whether a defendant's activities are so substantial or systematic and continuous that it can be said that the defendant is "found" within the state. The mere fact that a limited partner resides in Montana does not mean that the limited partnership is therefore a person found in this state, nor does that fact establish the minimum contacts necessary to warrant a finding that the limited partnership can be found within the state for purposes of general jurisdiction. Lurie v. 8182 Md. Associates, 282 M 455, 938 P2d 676, 54 St. Rep. 429 (1997).

Claim for Overtime — Jurisdiction of Department of Labor and Industry: The Department of Labor and Industry had jurisdiction to hold a hearing and make a ruling on a heavy equipment operator's claim against his employer for overtime wages because: (1) it has a duty under 39-1-102 to enforce state wage laws affecting Montana citizens; (2) under 39-3-209, it must investigate alleged violations of such laws and institute actions for unpaid wages; (3) it may take assignments of wage claims in trust and maintain any proceeding to enforce the claims; (4) it may enforce the federal Fair Labor Standards Act and institute an action on behalf of an employee to recover overtime wages due and unpaid under that Act; and (5) traditional notions of jurisdiction gave the department jurisdiction, as employer and employee were Montana residents, employer's principal place of business was in Montana, the employment contract was entered into in Montana, and part of the work was performed here. To rule that since part of the work was performed in North Dakota there was no jurisdiction in the department would unduly burden the parties, would lead to an oppressive requirement that they litigate in each state a claim for wages allegedly due for work performed there, and would fractionalize employee's claim to the extent that its pursuit would not be worthwhile. Hoehne v. Sherrodd, Inc., 205 M 365, 668 P2d 232, 40 St. Rep. 1363 (1983).

Jurisdiction Over Foreign Corporations: Jurisdiction over foreign corporation was proper and did not violate "fundamental fairness" or "minimum contacts" tests. Great Plains Crop Management, Inc. v. Tryco Mfg. Co., 554 F. Supp. 1025 (D.C. Mont. 1983) (fraud, breach of warranties); Scanlan v. Norma Projektil Fabrik, 345 F. Supp. 292 (D.C. Mont. 1972) (tort, dynamite importation); Swanson Painting Co. v. Local 260, 391 F2d 523 (1968) (although majority of activity in federal enclave); Boyt v. Emmco Ins. Co., 271 F. Supp. 366 (D.C. Mont. 1967) (conversion); Bullard v. Rhodes Pharmacal Co., 263 F. Supp. 79 (D.C. Mont. 1967) (products liability), distinguished in Aylstock v. Mayo Foundation, 341 F. Supp. 560 (D.C. Mont. 1972); Cont. Oil Co. v. Atwood & Morrill Co., 265 F. Supp. 692 (D.C. Mont. 1967) (products liability), distinguished in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000); Yules v. G.M.C., 297 F. Supp. 674 (D.C. Mont. 1969); and Hartung v. Wash. Iron Works, 267 F. Supp. 408 (D.C. Mont. 1964) (tort, cableway).

Out-of-State Airline "Found Within Montana": An airline had no flights into or out of Montana, had no property or personnel in the state, and paid no taxes in the state. It solicited business in the state via advertising and provided a toll-free reservation service for its out-of-state flights. The airline's activities in the state were sufficient to declare it "found within Montana" for purposes of U.S. District Court in personam jurisdiction in the District of Missoula. Reed v. Am. Airlines, Inc., 197 M 34, 640 P2d 912, 39 St. Rep. 335 (1982), distinguished in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

No Jurisdiction in Montana Courts Over Reservation Indian — URESA (Now UIFSA): The wife appealed the dismissal of her action seeking to enforce child support payments under the Uniform Reciprocal Enforcement of Support Act (URESA) (now Uniform Interstate Family Support Act (UIFSA)). The District Court ruled it had no jurisdiction, and the Supreme Court agreed there was neither subject matter jurisdiction nor personal jurisdiction. The husband was a Blackfeet Indian living on the reservation in Montana. Jurisdiction could not be found in federal enabling statutes because neither the tribe nor the state complied with them; there were no off-reservation acts in Montana sufficient to vest state courts with jurisdiction over the husband; and a reservation Indian's domicile on the reservation is not an in-state contact that grants jurisdiction to state courts. The father has not acquiesced in state jurisdiction and has challenged state court jurisdiction from the outset. The fact that there was no appeal from the tribal court, the only avenue open to the wife, to the federal court system was not an argument in favor of state court jurisdiction. There must be a legal basis supporting state jurisdiction. State ex rel. Flammond v. Flammond, 190 M 350, 621 P2d 471, 37 St. Rep. 1991 (1980).

Custody — Jurisdiction After Voluntary Appearance: When a father who could not be served in California appeared voluntarily in Montana for a custody hearing involving his daughter then living in Montana, the Montana court obtained personal jurisdiction over him. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Service of Process Within Exterior Boundaries of Indian Reservation: Service of process on Indian defendant in divorce action was effective where marriage took place off the reservation; service of process on Indian reservation was not violation of Indian tribe's sovereignty under United States law. Bad Horse v. Bad Horse, 163 M 445, 517 P2d 893 (1974), certiorari denied, 419 US 847 (1974), distinguished in Fisher v. District Court, 424 US 382, 96 S Ct 943 (1976).

Corporations — Mere Solicitation and Shipping — Inference of Jurisdiction: A corporation is not "found within the state" unless it has agents or officers upon whom process may be served or unless its business has been of such character and extent to warrant an inference that it has subjected itself to jurisdiction within the state. Mere solicitation and shipping into the state does not evoke that inference. McIntosh v. Heil Co., 350 F. Supp. 866 (D.C. Mont. 1972).

Voluntary Appearance by Defendant: A voluntary appearance by a defendant is equivalent to personal service of the summons and a copy of the complaint upon him. Strnod v. Abadie, 141 M 224, 376 P2d 730 (1962).

TRANSACTING BUSINESS IN STATE

Initial Contact by Nonresident to Do Business Not Required: An out-of-state company does not have to make the initial contact with a Montana resident to do business for jurisdiction to attach under this rule. B.T. Metal Works v. United Die & Mfg. Co., 2004 MT 286, 323 M 308, 100 P3d 127 (2004).

Jurisdiction Proper in Defendant's State — Effect on Montana Jurisdiction: Whether the state of a nonresident company's place of business might be a proper jurisdiction for action against the company by a Montana company has no bearing on whether jurisdiction may also be had in Montana. B.T. Metal Works v. United Die & Mfg. Co., 2004 MT 286, 323 M 308, 100 P3d 127 (2004).

Nonresident Company Negotiating and Filling Contracts for Eight Years: Defendant, a nonresident company, negotiated contracts for and sold the plaintiff resident company metal latches for 8 years and then solicited and did business with another resident company. This was sufficient contact with Montana for defendant to be subject to jurisdiction under this rule. The exercise of jurisdiction was fundamentally fair and did not offend traditional notions of fair play and substantial justice as embodied in the due process clause. B.T. Metal Works v. United Die & Mfg. Co., 2004 MT 286, 323 M 308, 100 P3d 127 (2004).

No Accrual of Tort Action in Montana — Dismissal for Lack of Personal Jurisdiction Proper: Plaintiff, a Montana corporation, filed a complaint against defendants' company, a Pennsylvania corporation, for breach of contract, claiming damages of $74,500. Defendants removed the case to federal District Court. However, because the minimum amount in controversy necessary to confer federal diversity jurisdiction is $75,000, the federal court remanded back to Montana state court. Defendants then moved to dismiss the case for lack of personal jurisdiction. Dismissal was granted, and plaintiff appealed to the Supreme Court. The Supreme Court applied the test in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359 (2000), to determine whether the Montana court could exercise personal jurisdiction over a nonresident defendant. The court noted that a nonresident is not subject to Montana jurisdiction by merely entering into a contract with a Montana resident, but rather there must be a showing that the complaint arose from business that was transacted within Montana. Here, the actions that gave rise to the alleged torts occurred outside Montana and thus did not result in the accrual of a tort action in Montana. Therefore, the District Court did not err in holding that it lacked personal jurisdiction over defendants, and dismissal of the case was proper. Cimmaron Corp. v. Smith, 2003 MT 73, 315 M 1, 67 P3d 258 (2003). See also Bird v. Hiller, 270 M 467, 892 P2d 931 (1995).

Defendant Not "Found Within" Montana — No Substantial, Systematic, Continuous Presence in State Through Advertising, Website, or Dealership — Jurisdiction Precluded: Any person found within Montana is subject to general jurisdiction of Montana courts. To be "found within" Montana, a defendant's activities must be substantial, systematic, and continuous. (See Int'l Shoe Co. v. Wash., 326 US 310, 90 L Ed 95, 66 S Ct 154 (1945).) Bedrejo contended that Triple E Canada, Ltd.'s (Triple E) advertising in national magazines, its Internet website, its travel club, and its out-of-state dealerships that served at least three Montanans established Triple E's presence within Montana. The Supreme Court found that these activities did not meet the Int'l Shoe standard. The court cited Bensusan Restaurant Corp. v. King, 937 F. Supp. 295 (S.D.C. N.Y. 1996), and Millennium Enterprises, Inc. v. Millennium Music LP, 33 F. Supp. 907 (D.C. Oreg. 1999), in rejecting the argument that the availability to a website from Montana could be construed as a basis for long-arm jurisdiction. Also, mere placement of advertisements in nationally distributed papers or journals does not rise to the level of purposeful contact with a forum in order to exercise personal jurisdiction over the advertiser, as determined in Federated

Rural Elec. Ins. v. Kootenai Elec. Co-op, 17 F3d 1302 (10th Cir. 1994). Further, Triple E was not registered as a Montana business; had no employees, distributors, dealers, office, warehouse, or other real property in Montana; had no telephone listing in Montana; and did no direct advertising with Montana media. Any entry by Triple E into the state amounted to only an insignificant trickle in the stream of commerce; thus, jurisdiction by Montana courts would have been unreasonable. Bedrejo v. Triple E Canada, Ltd., 1999 MT 200, 295 M 430, 984 P2d 739, 56 St. Rep. 778 (1999), following Simmons v. St., 206 M 264, 670 P2d 1372, 40 St. Rep. 1650 (1983), and followed in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

No General or Long-Arm Jurisdiction Over Nonresident Subcontractor: At the request of plaintiff, a Montana contractor, a Utah tile company submitted a bid for tile work by telephone. After being awarded the contract, the Utah company discovered a mistake in its bid and informed defendant that it could not perform the job. Finding jurisdiction over the Utah company, the District Court ordered the company to pay damages. The Supreme Court reversed, ruling that neither submitting a bid nor entering into a contract with the Montana contractor constitutes "substantial contracts" sufficient enough to invoke general jurisdiction or long-arm jurisdiction over the Utah company. Edsall Constr. Co., Inc. v. Robinson, 246 M 378, 804 P2d 1039, 48 St. Rep. 75 (1991), followed in Bi-Lo Foods, Inc. v. Alpine Bank, 1998 MT 40, 287 M 367, 955 P2d 154, 55 St. Rep. 131 (1998), and Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

State Jurisdiction Over Out-of-State Trust Company: The deceased resided in Montana for several years before her death, and her will was placed in probate in Montana. She established a trust in Nevada when she was a resident of that state. The administrator of the will petitioned the Montana court for an order to have the proceeds of the Nevada trust transferred to Montana for distribution under Montana's probate proceedings. The Supreme Court held that, when evaluated by the "minimum contacts" due process standard, the activities of the trust company in its dealings with the deceased were not significant enough to give the state jurisdiction over the trust company. In re Estate of Ducey, 241 M 419, 787 P2d 749, 47 St. Rep. 232 (1990).

Proper Jurisdiction in Montana Court — Facts Constituting Transaction of Business in State: The facts that a contract to find a lender involved a loan for operation of a Montana business, that collateral for the loan was to be the business itself, that a nonresident representative made two trips to Montana with prospective lenders to assist in inspection of the business and attended business meetings while in Montana, and that the Montana business was the party contemplated to benefit from the financing arrangement constituted the transaction of business in Montana sufficient to place the nonresident within the jurisdiction of Montana courts. Columbia Falls Aluminum Co. v. Hindin/Owne/Engelke, Inc., 224 M 202, 728 P2d 1342, 43 St. Rep. 2132 (1986).

Foreign Corporation Jurisdiction — Ads, Mailings, Phone Calls, Sales, and Business Discussions: Federal District Court's exercise of jurisdiction over Illinois corporation with sole place of business in Illinois was consistent with this rule and not offensive to due process and notions of fair play. Corporation's activities in Montana were substantial. It advertised in a magazine that could reasonably be expected to reach an agriculture-oriented state like Montana, mailed a brochure into this state, facilitated a sale here through phone calls to and from corporation, invited Montana buyer to its Illinois plant in the hope of making a sale here, sold buyer three pieces of equipment at three different times, and discussed with buyer the possibility of becoming its dealer in Montana. Great Plains Crop Management, Inc. v. Tryco Mfg. Co., Inc., 554 F. Supp. 1025, 40 St. Rep. 206 (D.C. Mont. 1983), distinguished in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Jurisdiction Over Foreign Corporations: Jurisdiction over foreign corporation was proper and did not violate "fundamental fairness" or "minimum contacts" tests. Great Plains Crop Management, Inc. v. Tryco Mfg. Co., 554 F. Supp. 1025 (D.C. Mont. 1983) (fraud, breach of warranties); Scanlan v. Norma Projektil Fabrik, 345 F. Supp. 292 (D.C. Mont. 1972) (tort, dynamite importation); Swanson Painting Co. v. Local 260, 391 F2d 523 (1968) (although majority of activity in federal enclave); Boyt v. Emmco Ins. Co., 271 F. Supp. 366 (D.C. Mont. 1967) (conversion); Bullard v. Rhodes Pharmacal Co., 263 F. Supp. 79 (D.C. Mont. 1967) (products liability), distinguished in Aylstock v. Mayo Foundation, 341 F. Supp. 560 (D.C. Mont. 1972); Cont. Oil Co. v. Atwood & Morrill Co., 265 F. Supp. 692 (D.C. Mont. 1967) (products liability), distinguished in Yules v. G.M.C., 297 F. Supp. 674 (D.C. Mont. 1969); Hartung v. Wash. Iron Works, 267 F. Supp. 408 (D.C. Mont. 1964) (tort, cableway).

Jurisdiction of State Court Over Nonresident Federally Chartered Bank — Sufficiency of Evidence — Denial of Due Process and Equal Protection: Officers of the plaintiff corporation traveled to Reno, Nevada, to deposit money in the defendant branch bank in anticipation of

business in Nevada and later brought an action in a Montana District Court against the defendant for unlawful dishonor of a check and associated charges. The District Court did not err in dismissing the action for lack of jurisdiction. Under the provisions of 12 U.S.C. §94, a federally chartered bank may be sued, among other places, where it is "located". The U.S. Supreme Court in Citizens & S. Nat'l Bank v. Bougas, 434 US 35 (1977), construed the term "located" to mean wherever branch offices are found. Because there is no branch bank in Montana and there has been no business operation conducted by the defendant in Montana that would constitute a waiver of the protection of federal law, the District Court had no jurisdiction. There was, moreover, sufficient evidence before the District Court for it to make the determination that there was no voluntary waiver and the U.S. Supreme Court has held in Mercantile Nat'l Bank at Dallas v. Langdeau, 371 US 555 (1963), that Congress "unquestionably" has the authority to determine those situations in which national banks can be sued. Hamelly Int'l, Inc. v. First Nat'l Bank of Nev., 199 M 221, 648 P2d 282, 39 St. Rep. 1304 (1982).

Minimum Contacts Found — Potato Buyer's Telephonic Order: Where defendant Idaho potato buyer telephoned Montana grower, purchased potatoes, and accepted several shipments but failed to pay for many of them and paid late on others, the lower court did not err in exercising jurisdiction over out-of-state defendant. Parker Bros. Farms, Inc. v. Burgess, 197 M 293, 642 P2d 1063, 39 St. Rep. 571 (1982).

Out-of-State Airline "Found Within Montana": An airline had no flights into or out of Montana, had no property or personnel in the state, and paid no taxes in the state. It solicited business in the state via advertising and provided a toll-free reservation service for its out-of-state flights. The airline's activities in the state were sufficient to declare it "found within Montana" for purposes of U.S. District Court in personam jurisdiction in the District of Missoula. Reed v. Am. Airlines, Inc., 197 M 34, 640 P2d 912, 39 St. Rep. 335 (1982).

Rock Concert Promotion as Transaction of Business: A rock concert promoter, a resident of California, was found to have been properly served in personam when a summons was issued in Missoula, although the promoter was never personally served. The promoter was found to have been covered by the "long-arm statute". He was doing business in Montana and pursuing activities which were "substantial" or "continuous and systematic". He had sufficient and substantial "minimum contacts" with Montana because he was found promoting a concert in Montana and had done so before, because he availed himself of privileges and benefits of the laws of Montana, and because he had in his possession movies allegedly belonging rightfully to the plaintiff. N. Dak. v. Newberger d.b.a. Amusement Conspiracy, 188 M 323, 613 P2d 1002 (1980), distinguished in Reed v. Am. Airlines, Inc., 197 M 34, 640 P2d 912, 39 St. Rep. 335 (1982).

Minimum Contacts Found — Physician's Telephone Diagnosis: Montana's long-arm statute provided plaintiff with jurisdiction to sue in Montana on a negligent telephone diagnosis which was part of postsurgery service, even though the surgery itself was performed in Utah where the physician practiced. The three rules applicable in such an instance were satisfied: an act within the forum, cause of action arising from that act, and reasonableness of subjecting defendant to jurisdiction within the forum. McGee v. Riekhof, 442 F. Supp. 1276, 35 St. Rep. 117 (D.C. Mont. 1978), distinguished in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Jurisdiction Over Corporation Based on Jurisdiction Over Subsidiary: Montana federal District Court does not have personal jurisdiction over foreign parent corporation merely because it has personal jurisdiction over a domestic subsidiary. Court held it lacked personal jurisdiction over parent corporation by following the case of Cannon Mfg. Co. v. Cudahy Packing Co., 267 US 333 (1925), holding that a corporation of one state shall not be amenable to suit in federal court for another state in which plaintiff resides merely because it employs a subsidiary corporation as the instrumentality for doing business herein, because here formal separateness between the two corporations has been maintained and the parent does not control the internal affairs of the subsidiary. Crow Tribe of Indians v. Mohasco Indus., Inc., 406 F. Supp. 738 (D.C. Mont. 1976).

Affidavit in Denial of Jurisdiction Found Insufficient: Affidavit of corporation stating that it had no "representative resident" in Montana, but also stating that "orders received from dealers in Montana are accepted in Indiana", did not satisfactorily answer plaintiff's allegation that defendant had an agent in Montana, nor did it answer the allegation that defendant had violated its warranties and committed torts against the plaintiff in Montana. Harrington v. Holiday Rambler Corp., 165 M 32, 525 P2d 556 (1974).

Corporations — Mere Solicitation and Shipping — Inference of Jurisdiction: A corporation is not "found within the state" unless it has agents or officers upon whom process may be served or unless its business has been of such character and extent to warrant an inference that it has

subjected itself to jurisdiction within the state. Mere solicitation and shipping into the state does not evoke that inference. McIntosh v. Heil Co., 350 F. Supp. 866 (D.C. Mont. 1972).

Jurisdiction Over Nonresident Hospital — Service Upon Hospital Employee: Personal services of employee doctor of hospital in Minnesota, rendered to plaintiff in Montana at plaintiff's convenience and incidental to employee's personal journey to Montana, was not sufficient to bring hospital under jurisdiction of Montana for a tort occurring in Minnesota. Aylstock v. Mayo Foundation, 341 F. Supp. 560 (D.C. Mont. 1972).

ACCRUAL OF TORT WITHIN STATE

Forum State — Contacts Considered in Determining State With More Specific Relationship in Personal Injury or Wrongful Death Product Liability Action: Montana residents were killed in Kansas in a car made in Michigan and sold in North Carolina. Sections 146 and 175 of Restatement (Second) of Conflict of Laws (1971) that deal with personal injury and wrongful death actions provide that the rights and liabilities of the parties are to be determined in accordance with the law of the state where the injury occurred unless, with respect to a particular issue, another state has a more specific relationship. In order to determine whether a state other than the place of injury has a more significant relationship, the following contacts are taken into account, pursuant to Restatement (Second) of Conflict of Laws 145(2) (1971), applying the principles of Restatement (Second) of Conflict of Laws 6 (1971): (1) needs of the interstate and international system; (2) policies of the interested states, including place of injury, place of conduct, and residence of the parties; (3) justified expectations; (4) basic policies underlying the particular field of law; and (5) the certainty, predictability, and uniformity of result as well as the ease in the determination and application of the law to be applied. However, the principles need not be given equal weight. In this case, the relevant policies of the interested states were of primary importance. The focus of Montana law is not only on the regulation of products sold in Montana, but also on providing the maximum protection and compensation to Montana residents, considering mainly the condition of the product and not the conduct of the manufacturer. Kansas, where the injury occurred, did not maintain a similar interest in the application of its product liability laws because the injured were Montana citizens. (See Sternhagen v. Dow Co., 282 M 168, 935 P2d 1139, 54 St. Rep. 299 (1997).) Michigan also lacked such an interest because Michigan's only contact with the dispute was the location of the manufacturer. (See Farrell v. Ford Motor Co., 501 NW 2d 567 (Mich. App. 1993). Under North Carolina's vested rights approach to conflict of laws, that state would apply the law of the jurisdiction where the injury occurred, whatever that law might be. After holding that the relevant residence of the plaintiff was the residence at the time of injury, the Supreme Court found that Montana, as the place of domicile, had a significant relationship to the issues and that because the purpose behind Montana product liability law was implicated by the facts, Montana law should apply. Phillips v. Gen. Motors Corp., 2000 MT 55, 298 M 438, 995 P2d 1002, 57 St. Rep. 259 (2000). See also Tillett v. Lippert, 275 M 1, 909 P2d 1158, 53 St. Rep. 1 (1996).

Lex Loci Delicti Commissi Abandoned — "Most Significant Relationship" Approach Adopted as Choice of Law to Determine Applicable Substantive Law in Issues of Tort: In a personal injury/product liability/wrongful death action in which there is a potential conflict of laws, the traditional choice of law rule, known as lex loci delicti commissi (law of the place where the wrong was committed), which provides that the infliction of injury is actionable under the law of the state in which it was received, was abandoned in favor of the approach in Restatement (Second) of Conflict of Laws 145(1) (1971), which seeks to apply the law of the state with the most significant relationship to the occurrence and the parties. This choice of law was adopted previously in contract disputes in Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994), and the Supreme Court found no reason not to apply it to tort issues in favor of the traditional rule in the present case. Phillips v. Gen. Motors Corp., 2000 MT 55, 298 M 438, 995 P2d 1002, 57 St. Rep. 259 (2000).

Purpose of Choice of Law Rule — Public Policy Subsumed: Addressing the question of whether, in a personal injury and wrongful death action, Montana recognized a public policy exception that would require application of Montana law even when Montana's choice of law rules dictate application of the laws of another state, the Supreme Court noted that for choice of law purposes, the public policy of a state is simply the rules, as expressed in its legislative enactments and judicial decisions, that it uses to decide controversies. The purpose of choice of law rules is to resolve conflicts between competing policies. In this case, considerations of public policy were accounted for, being expressly subsumed within the "most significant relationship" approach in Restatement (Second) of Conflict of Laws 6(2)(b) and (2)(c) (1971), which mandate consideration of the relevant policies of all the interested states, so a public policy exception to

the most significant relationship test would have been redundant. Phillips v. Gen. Motors Corp., 2000 MT 55, 298 M 438, 995 P2d 1002, 57 St. Rep. 259 (2000). See also Casarotto v. Lombardi, 268 M 369, 886 P2d 931, 51 St. Rep. 1350 (1994), and Rothwell v. Allstate Ins. Co., 1999 MT 50, 293 M 393, 976 P2d 512, 56 St. Rep. 203 (1999).

No Personal Jurisdiction Over Nonresident Lawyer — Jurisdiction Not Acquired Through Interstate Communications: Plaintiffs sued an out-of-state attorney, alleging theft and conversion and fraud and deceit arising out of a dispute over settlement money. On defendant's motion, the District Court dismissed the complaint for lack of personal jurisdiction. When defendant came into possession of and allegedly asserted unauthorized control over settlement checks in Idaho, defendant did not do any act that resulted in the accrual of the tort of conversion within Montana. When all representations regarding the claims took place in Idaho and the settlement was negotiated in Idaho, defendant's act of mailing the contingency fee agreement and other letters to plaintiffs in Montana did not create jurisdiction in Montana. Jurisdiction is not acquired through interstate communications pursuant to a contract to be performed in another state. Bird v. Hiller, 270 M 467, 892 P2d 931, 52 St. Rep. 288 (1995), followed in Bi-Lo Foods, Inc. v. Alpine Bank, 1998 MT 40, 287 M 367, 955 P2d 154, 55 St. Rep. 131 (1998), and Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Jurisdiction Over Nonresident Defendant Based Upon Conduct and Not Subrogation Pursuant to Contract — Exercise of Long-Arm Jurisdiction Reasonable: St. Paul's insured, Lynn, and Allstate's insured, Glassing, were involved in a car accident. After judgment against Glassing, St. Paul paid Lynn pursuant to the underinsured motorist provision of its policy and then sought recovery against Glassing based on a right of subrogation. The Supreme Court held that jurisdiction of Glassing was not based upon a provision of the insurance contract but upon subrogation as a matter of law and upon the tortious conduct of Glassing in Montana. The Supreme Court held that under the facts of the case, it was reasonable for the District Court to exercise personal jurisdiction over Glassing even though he resided in Minnesota and reversed the District Court's dismissal for lack of jurisdiction. St. Paul Fire & Marine Ins. Co. v. Allstate Ins. Co., 257 M 47, 847 P2d 705, 50 St. Rep. 154 (1993).

Tort Claim Against Production Credit Association — Subject Matter Jurisdiction: For the purpose of determining subject matter jurisdiction of a tort claim against a Production Credit Association (PCA), a PCA is not a federal instrumentality for the purposes of the Federal Tort Claims Act (FTCA), and therefore jurisdiction does not rest exclusively in federal court. The Montana Supreme Court determined that under tests set forth in recent federal District Court decisions, PCAs are essentially nongovernmental, independent entities that Congress did not intend FTCA to cover. The court, which was reluctant to deprive court access to plaintiffs for this type of claim, found subject matter jurisdiction outside FTCA. Tooke v. Miles City Prod. Credit Ass'n, 234 M 387, 763 P2d 1111, 45 St. Rep. 1993 (1988).

Legal Malpractice as Tort Action Sufficient to Establish Jurisdiction of Out-of-State Attorney: A claim for legal malpractice falls within the definition of tort action as set forth in subsection (1)(b) of this Rule and is sufficient to establish court jurisdiction over an out-of-state attorney who is not within the state for general jurisdictional purposes. Turner v. Tranakos, 229 M 51, 744 P2d 898, 44 St. Rep. 1772 (1987).

Jurisdiction Over Foreign Corporations: Jurisdiction over foreign corporation was proper and did not violate "fundamental fairness" or "minimum contacts" tests. Great Plains Crop Management, Inc. v. Tryco Mfg. Co., 554 F. Supp. 1025 (D.C. Mont. 1983) (fraud, breach of warranties); Scanlan v. Norma Projektil Fabrik, 345 F. Supp. 292 (D.C. Mont. 1972) (tort, dynamite importation); Swanson Painting Co. v. Local 260, 391 F2d 523 (1968) (although majority of activity in federal enclave); Boyt v. Emmco Ins. Co., 271 F. Supp. 366 (D.C. Mont. 1967) (conversion); Bullard v. Rhodes Pharmacal Co., 263 F. Supp. 79 (D.C. Mont. 1967) (products liability), distinguished in Aylstock v. Mayo Foundation, 341 F. Supp. 560 (D.C. Mont. 1972); Cont. Oil Co. v. Atwood & Morrill Co., 265 F. Supp. 692 (D.C. Mont. 1967) (products liability), distinguished in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000); Yules v. G.M.C., 297 F. Supp. 674 (D.C. Mont. 1969); and Hartung v. Wash. Iron Works, 267 F. Supp. 408 (D.C. Mont. 1964) (tort, cableway).

Nonresident Laboratory Subjected to Suit Under Long-Arm Statute — Exercise of Jurisdiction Unreasonable — Violation of Due Process: Since 1977, the Montana Department of Health and Environmental Sciences (now Department of Public Health and Human Services), the agency responsible under Title 50, ch. 19, part 2, for the testing of newborns for metabolic disorders, has contracted with an Oregon state laboratory for the testing. Plaintiff's minor son was born in June 1977. A sample of his blood was sent to the Oregon laboratory. No abnormality was reported. A few months later the son exhibited symptoms of a metabolic disorder, and

treatment was begun in September 1977. After first filing an action in Oregon, which was later dismissed on procedural grounds, plaintiff filed a negligence action in Montana against the states of Montana and Oregon, alleging that the delay in treatment had caused his son permanent and irreparable brain and neuromuscular damage. The trial court dismissed the action against the state of Oregon on jurisdictional grounds. The Supreme Court affirmed, ruling that although both subsections (b) and (e) of Rule 4B, M.R.Civ.P., potentially confer jurisdiction over the state of Oregon in this case, it would be a denial of due process for the Montana state courts to exercise that jurisdiction. The court found that Oregon had not structured its activities in such a way as to purposely avail itself of the privilege of functioning in Montana. Further, the court ruled that an evaluation of the interests of sovereignty, efficiency of resolution, and provision of important interstate medical services compels the conclusion that it would be unreasonable in this case to exercise jurisdiction over the state of Oregon. Simmons v. St., 206 M 264, 670 P2d 1372, 40 St. Rep. 1650 (1983), followed in Bi-Lo Foods, Inc. v. Alpine Bank, 1998 MT 40, 287 M 367, 955 P2d 154, 55 St. Rep. 131 (1998). See also Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Known Out-of-State Address — No Tolling of Statute of Limitations: When persons involved in a tort who were residents of the state at its occurrence subsequently moved to another state, and plaintiff insurance company was aware of their address, the Statute of Limitations didn't toll due to absence from the state under 27-2-402 because Montana District Courts had jurisdiction under this rule and process could be served under the "long-arm statute", Rule 4D(3), M.R.Civ.P. Beedie v. Shelley, 187 M 556, 610 P2d 713 (1980).

Minimum Contacts Found — Physician's Telephone Diagnosis: Montana's long-arm statute provided plaintiff with jurisdiction to sue in Montana on a negligent telephone diagnosis which was part of postsurgery service, even though the surgery itself was performed in Utah where the physician practiced. The three rules applicable in such an instance were satisfied: an act within the forum, cause of action arising from that act, and reasonableness of subjecting defendant to jurisdiction within the forum. McGee v. Riekhof, 442 F. Supp. 1276, 35 St. Rep. 117 (D.C. Mont. 1978), distinguished in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

No Long-Arm Jurisdiction — Deviation From Route: The Supreme Court held that none of the out-of-state defendants' actions could be said to "result" in the accrual of a tort action within this state. The fatal accident occurred during a joyride by the pilot/flight instructor defendant. This joyride was not merely a deviation from his route to and from Montana; it was a completely separate and unauthorized trip. Haker v. SW. Ry., 176 M 364, 578 P2d 724 (1978).

Nonresident Leasing Corporation Amenable to Long-Arm Jurisdiction Based on Fraud: Court is not acting outside bounds of fair play and substantial justice in holding that a foreign corporation is answerable in a Montana forum for inducing a citizen of this state to act on that corporation's alleged fraudulent misrepresentation made where nonresident airplane leasing corporation made representations airplane was airworthy when in fact it was not. Montana's jurisdiction over tort actions is perhaps the broadest long-arm provision adopted by any state for substituted service as the tortious act does not have to happen in Montana, but only that the act results in the "accrual" within this state of a tort action. Johnson Flying Serv., Inc. v. Mackey Int'l, Inc., 32 St. Rep. 879 (D.C. Mont. 1975) (apparently not reported in Federal Supplement), distinguished in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Affidavit in Denial of Jurisdiction Found Insufficient: Affidavit of corporation stating that it had no "representative resident" in Montana, but also stating that "orders received from dealers in Montana are accepted in Indiana", did not satisfactorily answer plaintiff's allegation that defendant had an agent in Montana, nor did it answer the allegation that defendant had violated its warranties and committed torts against the plaintiff in Montana. Harrington v. Holiday Rambler Corp., 165 M 32, 525 P2d 556 (1974).

Jurisdiction Over Tort Accruing in Montana: Swedish corporation which sold ammunition throughout the United States through an American distributor subjected itself to Montana jurisdiction when defective ammunition sold in Idaho resulted in injury in Montana. Scanlan v. Norma Projektil Fabrik, 345 F. Supp. 292 (D.C. Mont. 1972).

John Doe Defendant — Removal to Federal Court: In action against foreign corporation and its resident employee, who was joined as John Doe but who was not served with process and did not appear, for injuries caused by employee's negligence, the test for removal of cause to federal court on diversity of citizenship was whether employee had any real connection with controversy. A resident citizen, properly joined, is not merely a nominal party who can be ignored because not served or he has not appeared. The corporation was not entitled to have action

removed on ground of diversity of citizenship. Jensen v. Safeway Stores, Inc., 24 F. Supp. 585 (D.C. Mont. 1938).

PROPERTY INTEREST WITHIN STATE

Jurisdictional Defense Lost — Scope of Jurisdiction Over Nonresidents: Defendant could not inject plea of lack of jurisdiction over the person after filing motion asserting lack of jurisdiction over the subject matter. Jurisdiction is proper over nonresident buyer purchasing through nonresident agent when one payment was made directly to and one order was made directly with resident seller. Prentice Lumber Co. v. Spahn, 156 M 68, 474 P2d 141 (1970).

INSURING PERSON OR PROPERTY WITHIN STATE

No Montana Personal Jurisdiction Over Regional Out-of-State Insurer: Carter, a part-time "snow bird" resident of Montana, was injured in an automobile accident in Montana shortly after moving from Mississippi. Carter filed a declaratory judgment action against the defendant, a regional out-of-state insurer that did not do business in Montana, requesting interpretation of an insurance contract issued on Carter's vehicles in Mississippi. The insurer contested Montana's exercise of personal jurisdiction and moved for summary judgment. The District Court concluded that it did not have personal jurisdiction and granted summary judgment. Carter appealed, but the Supreme Court affirmed. The court cited Bahn v. Chicago Motor Club, 634 A2d 63 (Md. 1993), for the holding that although an insurer's promise to provide nationwide coverage may establish that the insurer has agreed to submit to jurisdiction in any forum that has jurisdiction to adjudicate claims against its insured, this agreement does not imply a further agreement to allow the insured to bring suit against the insurer in any state. Even though the insurer could reasonably anticipate that the insured could suffer an injury within the insurer's 50-state coverage, that foreseeability, without more, was not sufficient to subject the insurer to personal jurisdiction in Montana courts. The underlying dispute related to coverage and had nothing to do with the fact that the accident occurred in Montana or that Carter was living in this state at the time. Thus, although Carter had every right to sue the insurer over its coverage issues, in this case, Montana courts did not have personal jurisdiction over the insurer that was required as a predicate to maintenance of an action in Montana. Summary dismissal was proper. Carter v. Miss. Farm Bureau Cas. Ins. Co., 2005 MT 74, 326 M 350, 109 P3d 735 (2005). See also Bi-Lo Foods, Inc. v. Alpine Bank, 1998 MT 40, 287 M 367, 955 P2d 154 (1998).

Out-of-State Insurer Contracting to Insure Property in Montana Subject to Personal Jurisdiction of Montana Courts: Seal sold saddles and tack to Hart for $53,315.86. Hart paid $13,315.86 down, with the balance due following sale of the items at a California auction. Hart was to procure insurance on the goods to protect against casualty loss and theft. The items were stolen en route to California, so Hart could not pay the balance, and the South Dakota insurer that issued the policies refused to pay on grounds that Hart was not a common carrier and, as owner of the property, was not hauling the property of another. Seal sued Hart and the insurance agent for breach of contract and failure to procure insurance. The District Court entered judgment against Hart but dismissed the claim against the insurance agent for lack of personal jurisdiction. Seal appealed, arguing both general and personal jurisdiction. The Supreme Court noted that even though a defendant maintains minimal contacts with the forum, Montana courts may exercise specific long-arm jurisdiction over the defendant if the cause of action arises from any of the activities enumerated in this rule and the exercise of jurisdiction does not offend due process. The District Court correctly concluded that general jurisdiction did not exist because the South Dakota insurer's nominal associations with Montana were not sufficient to rise to the level of substantial or continuous and systematic contacts. However, the Supreme Court held that personal jurisdiction did exist because the claim arose out of contracting to insure property or risk located within Montana at the time of contracting. Seal v. Hart, 2002 MT 149, 310 M 307, 50 P3d 522 (2002).

Jurisdiction Over Nonresident Law Firm — Denial of Liability as Sufficient Minimum Contacts: After purchasing property through a realtor, appellants discovered that the realtor had misrepresented the size of the property at time of purchase. The realtor, pursuant to the title insurance policy, notified the company by giving notice to the company's agent, the Kroll law firm in New York. Appellants filed a complaint against Kroll after the firm denied liability on the part of the realtor. The District Court granted Kroll's motion to dismiss, stating that the act of denying liability on an insurance claim produced insufficient minimum contacts by Kroll to satisfy due process under this rule. The Supreme Court reversed, holding that jurisdiction over the New York firm was reasonable because Montana has a great interest in regulating bad faith

by insurance companies in the state. Jackson v. Kroll, 223 M 161, 724 P2d 717, 43 St. Rep. 1622 (1986).

Enforcement of Foreign Judgment — Lack of Personal Jurisdiction: A default judgment was obtained in Colorado against defendants, Montana residents, in a case which arose from defendants' participation in a reciprocal interinsurance agreement. Some of the subscribers to the agreement were Colorado residents. The Supreme Court upheld the District Court's refusal to enforce the judgment in Montana, ruling that enforcement of the judgment would be a violation of the federal due process clause because the defendants had not had sufficient "minimum contacts" with the state of Colorado to warrant the exercise of personal jurisdiction over the defendants. The court stated that the provision of the Colorado long-arm statute that covered causes of action arising from "contracting to insure any person, property or risk residing or located within this state at the time of contracting" was not applicable because this was not the sort of "company" that was contemplated when the long-arm statutes were drafted. The court further stated that the defendants did not know the name of the insurance company which issued the policy and had not purposely availed themselves of the privilege of conducting activities within the state of Colorado. Benham v. Woltermann, 201 M 149, 653 P2d 135, 39 St. Rep. 2017 (1982).

CONTRACT FOR SERVICES OR
MATERIAL FURNISHED WITHIN STATE

Minimum Contacts Found — Defendant Subject to Long-Arm Statute: Defendant, a Colorado corporation, ordered a Swimlift from plaintiff. The Swimlift was manufactured in Montana and shipped back to Montana for repairs, and payment was to be made in Montana. Plaintiff sued in Montana for recovery of an amount remaining due on a contract. The District Court dismissed for lack of personal jurisdiction over defendant. The Supreme Court held that defendant had established minimum contacts with the State of Montana and that the exercise of jurisdiction over defendant in this case comports with due process. Spectrum Pool Prod., Inc. v. MW Golden, Inc., 1998 MT 283, 291 M 439, 968 P2d 728, 55 St. Rep. 1157 (1998).

Nonresident Laboratory Subjected to Suit Under Long-Arm Statute — Exercise of Jurisdiction Unreasonable — Violation of Due Process: Since 1977, the Montana Department of Health and Environmental Sciences (now Department of Public Health and Human Services), the agency responsible under Title 50, ch. 19, part 2, for the testing of newborns for metabolic disorders, has contracted with an Oregon state laboratory for the testing. Plaintiff's minor son was born in June 1977. A sample of his blood was sent to the Oregon laboratory. No abnormality was reported. A few months later the son exhibited symptoms of a metabolic disorder, and treatment was begun in September 1977. After first filing an action in Oregon, which was later dismissed on procedural grounds, plaintiff filed a negligence action in Montana against the states of Montana and Oregon, alleging that the delay in treatment had caused his son permanent and irreparable brain and neuromuscular damage. The trial court dismissed the action against the state of Oregon on jurisdictional grounds. The Supreme Court affirmed, ruling that although both subsections (b) and (e) of Rule 4B, M.R.Civ.P., potentially confer jurisdiction over the state of Oregon in this case, it would be a denial of due process for the Montana state courts to exercise that jurisdiction. The court found that Oregon had not structured its activities in such a way as to purposely avail itself of the privilege of functioning in Montana. Further, the court ruled that an evaluation of the interests of sovereignty, efficiency of resolution, and provision of important interstate medical services compels the conclusion that it would be unreasonable in this case to exercise jurisdiction over the state of Oregon. Simmons v. St., 206 M 264, 670 P2d 1372, 40 St. Rep. 1650 (1983). See also Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Foreign Corporation Jurisdiction — Ads, Mailings, Phone Calls, Sales, and Business Discussions: Federal District Court's exercise of jurisdiction over Illinois corporation with sole place of business in Illinois was consistent with this rule and not offensive to due process and notions of fair play. Corporation's activities in Montana were substantial. It advertised in a magazine that could reasonably be expected to reach an agriculture-oriented state like Montana, mailed a brochure into this state, facilitated a sale here through phone calls to and from corporation, invited Montana buyer to its Illinois plant in the hope of making a sale here, sold buyer three pieces of equipment at three different times, and discussed with buyer the possibility of becoming its dealer in Montana. Great Plains Crop Management, Inc. v. Tryco Mfg. Co., Inc., 554 F. Supp. 1025, 40 St. Rep. 206 (D.C. Mont. 1983), distinguished in Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Minimum Contacts Found — Potato Buyer's Telephonic Order: Where defendant Idaho potato buyer telephoned Montana grower, purchased potatoes, and accepted several shipments but failed to pay for many of them and paid late on others, the lower court did not err in exercising jurisdiction over out-of-state defendant. Parker Bros. Farms, Inc. v. Burgess, 197 M 293, 642 P2d 1063, 39 St. Rep. 571 (1982).

Jurisdiction Over Nonresident Hospital — Service Upon Hospital Employee: Personal services of employee doctor of hospital in Minnesota, rendered to plaintiff in Montana at plaintiff's convenience and incidental to employee's personal journey to Montana, was not sufficient to bring hospital under jurisdiction of Montana for a tort occurring in Minnesota. Aylstock v. Mayo Foundation, 341 F. Supp. 560 (D.C. Mont. 1972).

Contracts — Negotiations by Mail and Telephone: Although primary negotiations for sale of membership in stock exchange were had in Utah, locus of contract was in Montana and jurisdiction was acquired under this section in view of fact that negotiations continued via telephone and mail in Montana, that delivery was contemplated and would be made in Montana, and that purchase money mortgage or equivalent lien would follow subject matter of contract to Montana. State ex rel. Goff v. District Court, 157 M 495, 487 P2d 292 (1971).

ACTING AS REPRESENTATIVE OF CORPORATION ORGANIZED OR LOCATED IN STATE

Jurisdiction Over Foreign Corporations: Jurisdiction over foreign corporation was proper and did not violate "fundamental fairness" or "minimum contacts" tests. Great Plains Crop Management, Inc. v. Tryco Mfg. Co., 554 F. Supp. 1025 (D.C. Mont. 1983) (fraud, breach of warranties); Scanlan v. Norma Projektil Fabrik, 345 F. Supp. 292 (D.C. Mont. 1972) (tort, dynamite importation); Swanson Painting Co. v. Local 260, 391 F2d 523 (1968) (although majority of activity in federal enclave); Boyt v. Emmco Ins. Co., 271 F. Supp. 366 (D.C. Mont. 1967) (conversion); Bullard v. Rhodes Pharmacal Co., 263 F. Supp. 79 (D.C. Mont. 1967) (products liability), distinguished in Aylstock v. Mayo Foundation, 341 F. Supp. 560 (D.C. Mont. 1972); Cont. Oil Co. v. Atwood & Morrill Co., 265 F. Supp. 692 (D.C. Mont. 1967) (products liability), distinguished in Yules v. G.M.C., 297 F. Supp. 674 (D.C. Mont. 1969); Hartung v. Wash. Iron Works, 267 F. Supp. 408 (D.C. Mont. 1964) (tort, cableway).

Jurisdiction Over Corporation Based on Jurisdiction Over Subsidiary: Montana federal District Court does not have personal jurisdiction over foreign parent corporation merely because it has personal jurisdiction over a domestic subsidiary. Court held it lacked personal jurisdiction over parent corporation by following the case of Cannon Mfg. Co. v. Cudahy Packing Co., 267 US 333 (1925), holding that a corporation of one state shall not be amenable to suit in federal court for another state in which plaintiff resides merely because it employs a subsidiary corporation as the instrumentality for doing business herein, because here formal separateness between the two corporations has been maintained and the parent does not control the internal affairs of the subsidiary. Crow Tribe of Indians v. Mohasco Indus., Inc., 406 F. Supp. 738 (D.C. Mont. 1976).

Affidavit in Denial of Jurisdiction Found Insufficient: Affidavit of corporation stating that it had no "representative resident" in Montana, but also stating that "orders received from dealers in Montana are accepted in Indiana", did not satisfactorily answer plaintiff's allegation that defendant had an agent in Montana, nor did it answer the allegation that defendant had violated its warranties and committed torts against the plaintiff in Montana. Harrington v. Holiday Rambler Corp., 165 M 32, 525 P2d 556 (1974).

Corporations — Mere Solicitation and Shipping — Inference of Jurisdiction: A corporation is not "found within the state" unless it has agents or officers upon whom process may be served or unless its business has been of such character and extent to warrant an inference that it has subjected itself to jurisdiction within the state. Mere solicitation and shipping into the state does not evoke that inference. McIntosh v. Heil Co., 350 F. Supp. 866 (D.C. Mont. 1972).

John Doe Defendant — Removal to Federal Court: In action against foreign corporation and its resident employee, who was joined as John Doe but who was not served with process and did not appear, for injuries caused by employee's negligence, the test for removal of cause to federal court on diversity of citizenship was whether employee had any real connection with controversy. A resident citizen, properly joined, is not merely a nominal party who can be ignored because not served or he has not appeared. The corporation was not entitled to have action removed on ground of diversity of citizenship. Jensen v. Safeway Stores, Inc., 24 F. Supp. 585 (D.C. Mont. 1938).

ACQUISITION OF JURISDICTION

Analysis of District Court Personal Jurisdiction Over Nonresident Defendant — Due Process Test: The Supreme Court applies a two-part analysis in determining whether a District Court may exercise specific personal jurisdiction over a nonresident defendant. The analysis involves whether jurisdiction exists pursuant to subsection (1) of this rule, and whether the District Court's exercise of jurisdiction comports with due process. There is a three-part test for determining whether the exercise of jurisdiction comports with due process: (1) the nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which the defendant purposefully avails the defendant of the privileges of conducting activities in the forum; (2) the claim must be one that arises out of or results from the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. A plaintiff is not required to demonstrate each of these elements, and once a plaintiff shows that the defendant has purposefully availed the defendant of the privileges of conducting activities in this state, a presumption of reasonableness arises that the defendant can overcome only by presenting a compelling case that jurisdiction would not be reasonable. A presumption also arises that the exercise of jurisdiction over third-party defendants is reasonable, which can be overcome only by demonstrating with compelling reasons that jurisdiction would be unreasonable. In the present case, after an employee's claims were settled, plaintiff and the employer stipulated to dismissal of plaintiff's claims, but the District Court also dismissed the third-party action after concluding that no Montana parties remained in the action. However, plaintiff's dismissal did not remove the last Montana party from the action because the third-party employer was an ongoing business entity engaged in commercial activity in this state and was thus considered a person for determining jurisdictional questions under Rule 4B and was entitled to consideration as a Montana resident for jurisdictional purposes. The District Court correctly held that the actions of the third-party defendants fell within the plain language of Rule 4B, subjecting them to Montana's specific jurisdiction and erred in declining to exercise jurisdiction over the third-party defendants. The third-party defendants purposefully availed themselves to Montana jurisdiction, and the exercise of jurisdiction over them was reasonable and comported with due process. The case was therefore remanded for further proceedings. Nasca v. Hull, 2004 MT 306, 323 M 484, 100 P3d 997 (2004). See also Simmons Oil Corp. v. Holly Corp., 244 M 75, 796 P2d 189 (1990).

Erroneous Denial of Motion to Quash Writ of Execution: A federal District Court allowed a default judgment against Clark in favor of plaintiffs. In order to execute the judgment on Clark's Montana assets, plaintiffs docketed the judgment in federal District Court in Montana, and about the same time, plaintiffs brought an action in Montana state court, asserting that Clark fraudulently transferred real property in order to avoid reimbursing plaintiffs. Following denial of the fraudulent transfer claim in Gulf Ins. Co. v. Clark, 2001 MT 45, 304 M 264, 20 P3d 780 (2001), plaintiffs docketed the federal judgment in Lake County District Court, requesting and receiving a writ of execution, and a levying officer than executed on Clark's accounts. Upon notice of the levy on the accounts, Clark moved to quash the writ of execution, asserting that the federal judgment was invalid, that the writ was void because the federal District Court never obtained proper personal jurisdiction, and that service by publication was inadequate because the federal order required personal service. The state District Court concluded that Clark cited no authority allowing a state court to invalidate a federal District Court's judgment when the federal transcription of judgment is filed for execution in state court, so Clark's motion to quash was denied, and Clark appealed. As set out in Carr v. Bett, 1998 MT 266, 291 M 326, 970 P2d 1017 (1998), a party seeking to vacate a foreign judgment filed in Montana state courts may do so only upon defenses that make the underlying judgment invalid or unenforceable, which include a lack of personal or subject matter jurisdiction of the rendering court, fraud in the procurement of the judgment, lack of due process, or satisfaction. However, if a foreign judgment is valid, it should have the same credit, validity, and effect in every other court of the United States that it had in the court in which it was pronounced. Thus, the state District Court erred in concluding that it had no authority to review whether the federal court had personal jurisdiction over Clark. The Supreme Court then went on to consider whether Clark was properly subject to the federal court's jurisdiction in order to determine if the federal default judgment was valid. Service by publication did not provide the federal court with jurisdiction to enter the default judgment because that service was not properly completed and was thus ineffective. In its order granting service by publication, the federal court concluded that service could not be accomplished other than by publication, effectively determining, based on plaintiffs' representations, that personal service had not been accomplished. Therefore, the state District Court committed reversible

error when it failed to hold that service by publication was not properly accomplished pursuant to the federal court order. Gulf Ins. Co. v. Clark, 2003 MT 87, 315 M 121, 68 P3d 673 (2003).

Remedy for Criminal Prosecution of Public Nuisance: Panasuk, convicted in City Court of misdemeanor criminal public nuisance charges under 45-8-111, contended that because 3-10-301, 25-31-102, and this rule preclude a nonrecord court from hearing actions involving the title to or possession of real property, jurisdiction for prosecution of the public nuisance charge must lie with the District Court. He cited 45-8-112 as authority that any action to abate a nuisance must be brought in the name of the state and that because abatement is a form of injunctive relief, the District Court has exclusive jurisdiction. He also argued that 27-30-202 provides the exclusive civil and criminal remedies for public nuisance. His claims were dismissed for the following reasons: (1) charges filed under 45-8-111 were criminal rather than related to a civil action involving title to or possession of real property, which is regulated by the sections cited by Panasuk; (2) the remedy created by 27-30-202 has been supplemented by subsequent legislative action regarding a City Court's jurisdiction over misdemeanors and by the enactment of 46-17-101, which requires that all prosecutions brought in City Court be commenced by a sworn complaint; and (3) because Panasuk's interpretation would result in a direct contradiction between 27-30-202 and statutes subsequently enacted, the argument that 27-30-202 provides the exclusive remedies for public nuisance is erroneous. Billings v. Panasuk, 253 M 403, 833 P2d 1050, 49 St. Rep. 499 (1992).

Rock Concert Promotion as Transaction of Business: A rock concert promoter, a resident of California, was found to have been properly served in personam when a summons was issued in Missoula, although the promoter was never personally served. The promoter was found to have been covered by the "long-arm statute". He was doing business in Montana and pursuing activities which were "substantial" or "continuous and systematic". He had sufficient and substantial "minimum contacts" with Montana because he was found promoting a concert in Montana and had done so before, because he availed himself of privileges and benefits of the laws of Montana, and because he had in his possession movies allegedly belonging rightfully to the plaintiff. N. Dak. v. Newberger d.b.a. Amusement Conspiracy, 188 M 323, 613 P2d 1002 (1980), distinguished in Reed v. Am. Airlines, Inc., 197 M 34, 640 P2d 912, 39 St. Rep. 335 (1982).

Custody — Jurisdiction After Voluntary Appearance: When a father who could not be served in California appeared voluntarily in Montana for a custody hearing involving his daughter then living in Montana, the Montana court obtained personal jurisdiction over him. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Custody — Personal Jurisdiction Unnecessary: Personal jurisdiction over a parent is not necessary to the termination of his parental rights to a minor child so long as the parent has actual notice of the termination or the District Court makes an effort reasonably calculated to provide notice to the parent. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Service of Process Within Exterior Boundaries of Indian Reservation: Service of process on Indian defendant in divorce action was effective where marriage took place off the reservation; service of process on Indian reservation was not violation of Indian tribe's sovereignty under United States law. Bad Horse v. Bad Horse, 163 M 445, 517 P2d 893 (1974), certiorari denied, 419 US 847 (1974), distinguished in Fisher v. District Court, 424 US 382, 96 S Ct 943 (1976).

Jurisdiction Acquired Over State Agency — Petitions Filed in Two Counties: When adoption petition was filed in one county, but state agency later filed petition in another county to have child declared dependent and neglected in another county, the court in the latter county was required to dismiss petition before it as former county had jurisdiction. State ex rel. Habeck v. District Court, 157 M 231, 484 P2d 272 (1971).

Retroactive Application — Malpractice Action: This rule applied to act of alleged malpractice occurring in Montana prior to effective date of this rule, and doctor who had not resided in Montana since effective date of rule could be served properly with process in California under Rule 4D(3). State ex rel. Johnson v. District Court, 148 M 22, 417 P2d 109 (1966).

Voluntary Appearance by Defendant: A voluntary appearance by a defendant is equivalent to personal service of the summons and a copy of the complaint upon him. Strnod v. Abadie, 141 M 224, 376 P2d 730 (1962).

Defendants Named Not Served: Persons named as defendants, but who were not served with process and did not enter an appearance, were not parties to the action for the purpose of determining their entitlement to witness fees. Nelson v. Mont. Iron Min. Co., 140 M 331, 371 P2d 874 (1962).

Service of Summons Prior to Effective Date: The giving effect to the service of summons provisions of this rule, when the operative facts of the case to which the rule was applied had taken place prior to the effective date of the Montana Rules of Civil Procedure as set out in Rule

86(a), was not a prohibited retroactive application of this rule within the meaning of 1-2-109. Weber v. Hydroponics, Inc., 226 F. Supp. 117 (D.C. Mont. 1962).

Motion to Quash and Order to File Answer — No Waiver of Objection: Under former law, a defendant who appears specially to test the jurisdiction of the court by motion to quash an alleged defective service of summons and reserves his exception to an adverse ruling upon his motion does not waive his objection to jurisdiction by obeying the order of the court directing him to file his answer within a stated time. State ex rel. NW. Eng'r Co. v. District Court, 114 M 179, 133 P2d 594 (1943).

Jurisdiction of Cause Presumed: Under this section a judgment entered after personal service of summons and regular on its face is prima facie presumed to have been entered within jurisdiction. State ex rel. Matt v. District Court, 86 M 193, 282 P 1042 (1929).

Appearance to Object to Jurisdiction — No Waiver of Objection: Under former law, a party, by appearing in a case in response to a summons served upon him, when in fact the service is void, does not make a voluntary appearance so as to effect a waiver of objection to the service. If he has first appeared specially to question the court's jurisdiction over him, and on his points being overruled has saved an exception, he does not by a subsequent general appearance waive his right to object to the jurisdiction. State ex rel. Lane v. District Court, 51 M 503, 154 P 200 (1915).

Special Appearance to Challenge Jurisdiction: Under former law, service of summons on a nonresident defendant will not warrant a judgment in personam against a defendant who appears specially to challenge the jurisdiction of the court. Silver Camp Min. Co. v. Dickert, 31 M 488, 78 P 967 (1904). See Gassert v. Strong, 38 M 18, 98 P 497 (1908); Thrift v. Thrift, 54 M 463, 171 P 272 (1918), distinguished in Talbot v. Talbot, 120 M 167, 181 P2d 148 (1947), and Johnson v. Johnson, 137 M 11, 349 P2d 310 (1960).

Law Review Articles

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).

Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 315 (1983).

Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 344 (1981).

The Long Arm of Montana's Rule 4B: Due Process Limits to the Exercise of Jurisdiction Over Foreign Defendants, Rossbach, 37 Mont. L. Rev. 420 (1976).

Construction of Montana's Long Arm Statute: This note compares the decision of Bullard v. Rhodes Pharmacal Co., 263 F. Supp. 79 (D.C. Mont. 1967) with U.S. Supreme Court and previous Montana Supreme Court decisions concerning the constitutional limitations on state jurisdiction over nonresidents. 28 Mont. L. Rev. 260 (1966).

Personal Jurisdiction Over Non-Residents and Montana's New Rule 4B, Towe, 24 Mont. L. Rev. 3 (1962).

Jurisdiction Over Corporations "Doing Business" Within the State: This note compares the case of LeVecke v. Greisedieck Western Brewing Company, 233 F2d 722 (9th Cir. 1956) to previous court decisions concerning jurisdiction over nonresident corporations. 18 Mont. L. Rev. 215 (1956).

The Effect of Lack of Jurisdiction, Slaight, 16 Mont. L. Rev. 54 (1955).

"Doing Business" in Illinois as a Basis of Jurisdiction Over Nonresidents—Due Process and Contracts, Ganz, Vol. 1, No. 4 Illinois Continuing Legal Education 75 (Oct. 1963).

Collateral References

Appearance *key* 19; Courts *key* 11, 12.

6 C.J.S. Appearances §17; 21 C.J.S. Courts §§186 through 192.

Rule 4C. Process.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

1997 Amendment: In an order dated January 7, 1997, the Supreme Court substituted subsection (1) concerning placing the responsibility for serving the summons on the party filing the complaint rather than on the Clerk of the District Court. Amendment effective February 14, 1997.

Identity With Federal Rule: As of May 1, 1990, paragraph (1) of this rule was still similar to Federal Rule 4(a). The first sentence of the Federal Rule provides for delivery of the summons to

"the plaintiff or the plaintiff's attorney who shall be responsible for prompt service of the summons and a copy of the complaint". The second sentence of the Federal Rule simply provides that separate or additional summons shall issue "against any defendants".

The first sentence of paragraph (2) is identical with the first sentence of Federal Rule 4(b). The second and third sentences of paragraph (2), which were added by the 1963 amendment, have no counterpart in the Federal Rules.

Amendments: The 1965 amendment made minor changes in the caption to paragraph (2) and in references to R.C.M. 1947.

The amendment of September 29, 1967, substituted the last sentence in subdivision (2) for former sentence requiring compliance with 15-18-304 (since repealed) and 70-28-207 and with provisions of Rule 4D(5)(h); and made minor changes in phraseology.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

No District Court Jurisdiction to Enter Marriage Dissolution in Favor of One Party Absent Service of Dissolution Petition and Summons on Other Party: On August 15, 2003, the parties entered a property settlement agreement dividing the marital estate, and the wife also signed a consent to entry of judgment agreeing to dissolution if the property settlement agreement was presented to the District Court for approval and made an integral part of the dissolution. The husband then filed a petition for dissolution and included the settlement agreement and the wife's consent to entry of judgment, but did not serve the wife with any of the filings. The District Court held a hearing without the wife being present, adopted the settlement agreement, and entered a decree of dissolution. The husband's counsel mailed a copy of the judgment to the wife, who then filed a Rule 60(b), M.R.Civ.P., motion to set aside the judgment, claiming that the decree was void because the husband failed to have a summons issued and to serve her with process. The motion was denied, but on appeal, the Supreme Court vacated the judgment. Dissolution proceedings are not exempt from rules regarding service of process, and if one party commences a dissolution proceeding, the other party must be served as provided in the Montana Rules of Civil Procedure. Further, a petition for dissolution must be signed under oath by both parties. The wife's execution of the documents prior to the filing of the case did not constitute a voluntary appearance in the action, nor does notice of a hearing substitute for service of summons. A District Court may obtain personal jurisdiction through strict compliance with the mandatory rules for service of process, and in this case, the wife's signing of documents prior to the filing of the dissolution petition did not confer jurisdiction on the court absent service of process. Thus, the District Court abused its discretion in failing to grant the wife's motion to set aside the judgment, and the case was remanded for further proceedings. In re Marriage of Zacher, 2004 MT 249, 323 M 54, 98 P3d 309 (2004), following Marriage of Blaskovich, 249 M 248, 815 P2d 581 (1991), and In re Marriage of Grounds/Coward, 271 M 350, 897 P2d 200 (1995).

Dismissal for Failure to Issue Summons Within Year After Action Commenced: Subsection (1) of this rule requires the clerk to forthwith issue a summons upon the filing of a complaint. It is mandatory and leaves no room for interpretation. It does not require claimant or claimant's attorney to request or direct issuance. The lower court's dismissal under Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., which requires dismissal if the summons is not issued within a year after commencement of the action, was reversed, and the case was remanded. The failure to issue the summons resulted directly from the clerk's failure to perform a duty required by rule. However, the court stated that subsection (1) of this rule did not comport with the accepted usual practice, which was for the attorney filing the complaint to prepare the summons and direct the clerk to issue it. The court stated that it intended to amend the rule to conform it to the practice. (See 1997 amendment.) Busch v. Atkinson, 278 M 478, 925 P2d 874, 53 St. Rep. 1020 (1996).

Service by Mother of Party Defective: Mavanee Ulsher filed for divorce from her husband Mickey Fonk. The deputy sheriff left the summons with Fonk's mother and signed the return that he had personally served Fonk. A decree of dissolution was entered by default and contained an order that Fonk pay child support. The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) sought enforcement of its assigned child support rights by intercepting Fonk's tax returns and garnishing his income. Fonk filed an action alleging that he was not the children's natural father. Ulsher moved for dismissal, arguing that the paternity issue was res judicata and constituted a collateral attack on the default judgment entered in the dissolution action. Fonk alleged that he had never been properly served in the dissolution action, although his mother testified that she laid the papers on the table and told him they were there and the next morning the papers were gone. The lower court ruled that the service of process was valid on the basis that it had been served on Fonk not by the sheriff but by an "other person over the age of 18 not a party to the action" as permitted by Rule

4D(1)(a), M.R.Civ.P. The Supreme Court held that the service was invalid on the basis of the language in subsection (1) of this rule, which states that "the clerk shall . . . deliver the summons either to the sheriff . . . or to the person who is to serve it", and since the summons was not delivered to Fonk's mother by the clerk, Fonk's mother was not authorized by law to make service of process. In re Marriage of Fonk/Ulsher, 260 M 379, 860 P2d 145, 50 St. Rep. 1112 (1993), followed in In re Marriage of Shikany, 268 M 493, 887 P2d 153, 51 St. Rep. 1031 (1994). See also Ihnot v. Ihnot, 2000 MT 77, 299 M 137, 999 P2d 303, 57 St. Rep. 338 (2000).

Failure to Comply With Service Requirements — Prejudice Shown: The Supreme Court will uphold the jurisdiction of a District Court despite a failure to comply with all mandatory service requirements only when the plaintiff affirmatively shows that there is absolutely no possibility of prejudice from the failure. Sink v. Squire, 236 M 269, 769 P2d 706, 46 St. Rep. 352 (1989).

Amended Complaint Served With Original Summons and Complaint — Personal Jurisdiction Acquired: Where the defendant implement company sought to set aside a default judgment obtained against it by arguing that service of an amended complaint with the original summons and complaint constituted defective service and deprived the District Court of personal jurisdiction, the Supreme Court held that since service of the original summons and complaint was properly made, the only issue was whether the amendment was properly made. Because Rule 4C does not require a summons to be served with an amended complaint and because the amended complaint may be served by delivering a copy to the party and may be filed within a reasonable time after service, the simultaneous service of the amended complaint did not deprive the District Court of jurisdiction over the defendant. Elk Run Ranch v. Green Line Implement Co., 205 M 413, 668 P2d 258, 40 St. Rep. 1397 (1983).

Clerk's Authority to Issue Exclusive: The power to issue a summons lies exclusively with the clerk. An attorney can only request that the summons be issued. (See 1997 amendment.) Larango v. Lovely, 196 M 43, 637 P2d 517, 38 St. Rep. 2107 (1981).

Requirement for Name of Plaintiff's Attorney Mandatory: The provision of section 93-3003, R.C.M. 1947 (superseded by Rules 4D and 12(a), M.R.Civ.P.), requiring that the name of plaintiff's attorney be endorsed on a summons was mandatory, unless it be affirmatively shown that the absence of his name could not possibly have worked prejudice to defendant; if it did not, it was void. Holt v. Sather, 81 M 442, 264 P 108 (1928).

Attorney's Name to Be Shown — Purpose: Under former law, the purpose of the requirement that the name of plaintiff's attorney be endorsed on the summons was to advise defendant who plaintiff's attorney is, so that he might know to whom notice must be given of any step he might desire to take in his defense. State ex rel. Jerry v. District Court, 57 M 328, 188 P 365 (1920).

County Shown in Title: A summons entitled in the wrong county is void and will not support an attachment. Duluth Brewing & Malting Co. v. Allen, 51 M 89, 149 P 494 (1915).

Signature of Clerk: The signature of the clerk is a matter of substance, and a fundamental part of the summons, without which there is no summons. In re Farrell, 36 M 254, 92 P 785 (1907); Sharman v. Huot, 20 M 555, 52 P 558 (1898), distinguished in Kipp v. Burton, 29 M 96, 74 P 85 (1903).

Seal of Court Required: Under former law, a District Court summons is void if issued without the seal of the court, where the statute provides that it "must be issued under the seal of the court", and no jurisdiction of the defendant is acquired by the service thereof. Choate v. Spencer, 13 M 127, 32 P 651 (1893), distinguished in Kipp v. Burton, 29 M 96, 74 P 85 (1903). See Burke v. Inter-State S&L Ass'n, 25 M 315, 64 P 879 (1901); In re Farrell, 36 M 254, 92 P 785 (1907).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1, 12 (1961).

Collateral References

Process *key* 1 through 150.

72 C.J.S. Process §§1 through 10.

62B Am. Jur. 2d Process §§1 through 111.

Omission of signature of issuing officer on civil process or summons as affecting jurisdiction of the person. 37 ALR 2d 928.

Delay in issuance or service of summons as requiring or justifying order discontinuing suit. 167 ALR 1058.

Rule 4D. Service.

Commission and Advisory Committee Notes

COMMISSION NOTE TO 1965 AMENDMENT

Because of criticism from several members of the Bar, as well as the office of the Secretary of State, changes have been made in the provisions of Rule 4. In addition, some housekeeping changes have also been made.

We have inserted at the points where changes or additions have been made the new language italicized [not italicized herein; see compiler's comments below].

Several members of the Bar have called the attention of the Rules Committee to the fact that particularly in quiet title actions, where defunct corporations were involved, and where none of the persons could be found with due diligence upon whom service could be completed that would be binding on the defunct corporation, that effective service could not be obtained by reason of the requirement of a return of a registered receipt showing delivery of the summons and complaint to the defunct corporation. We have now corrected that defect. In doing so, we have also brought within the framework of Rule 4 the provisions of R.C.M. 1947, Sections 93-3008, 93-3011, and 93-3012, which will be superseded [superseded by Rule 4D, M.R.Civ.P.—Supreme Court Order 10750]. In addition, as long as we are changing Rule 4, we have now specified and delineated the same persons to be served whether or not the defendants are domestic or foreign corporations, or domestic or foreign partnerships or other unincorporated associations. It will be recalled that when Rule 4 was first promulgated, and in an effort not to bring about any changes in our prior practice, the old, separate, segregated statutes pertaining to domestic and foreign corporations were segregated in Rule 4. There is no reason, however, why the same persons should not be delineated for both domestic and foreign corporations, and we have now done so in this new writing of Rule 4.

In lieu of the requirement of a return receipt signed on behalf of the corporations, which in many instances cannot be accomplished, as pointed out in the criticism from the Bar, we have now added a requirement for publication of summons against such corporation where none of the persons can be found with due diligence upon whom personal service can be completed. (See the new D(2)(f). In so providing, however, we have now spelled out that the same procedure for publications shall be followed for serving corporations personally in in personam actions, as we have provided for serving such corporations by publication in in rem actions (see D(5)(e)).

Accordingly, we have made an effort to combine and streamline service on corporations by designating the same individual persons who can be served, whether the corporations are domestic or foreign, and providing the same procedure of publication where such persons cannot be found with due diligence, whether or not the defendants are domestic and foreign, and we have eliminated the necessity of the return of a signed registry receipt objected to so heavily by the Bar.

A second important change in the rule is specific authorization for an attorney for the plaintiff to incorporate within the framework of one single affidavit all the material necessary for serving defunct corporations personally, for serving by way of publication, and for serving the secretary of state.

Changes have also been made in those portions of the rule providing for service on the secretary of state. We have eliminated the necessity of the intermediate step of having summons and complaint go through the hands of the sheriff in Lewis and Clark County; we have cut down on the papers that must be kept on file by the secretary of state, particularly eliminating the necessity of his keeping a copy of the complaint; and we have provided a requirement that the secretary of state shall now serve upon the attorney for the plaintiff the factual information showing what was done by the secretary of state in effecting service, and the date when it was accomplished.

There are other minor housekeeping changes in the rule, and wherever there is any change, omission, alteration, or new language, reference to it is contained at the points where such is accomplished.

COMMISSION NOTE
TO SEPTEMBER 7, 1965, AMENDMENT

The amendments to Rule 4D(2) as to (e) is to remove an "attorney" because of doubt as to who would be such within the meaning of the Rule. As to (f) to avoid possible conflict of the provisions of this subdivision and those of 4B.

The other amendments [Rules 50(b), 52(b), 59(e), and 60(c)] will expedite the hearing and determination of the motions involved, and provide a time after submission within which the motions are deemed denied if the court fails to decide them.

ADVISORY COMMITTEE'S NOTE
TO NOVEMBER 28, 1966, AMENDMENT

Rule 4D(2)(i): The purpose of the amendment is to remove doubts as to the manner of suing an estate and a trust, resultant from the inclusion of "an estate" and "a trust" in the definition of a person in 4A.

Rule 4D(3): To make it clear that the personal service outside this state dispenses with the necessity for following the procedure for service by publication prescribed by 4D(5). The provision for service of "a summons and complaint" permits personal service of either the original summons or the summons for publication, together with the complaint. As provided in 4D(5)(g), in case of personal service outside of this state service is complete on the date of such service.

Rule 4D(8)(d): To make it clear that it is the date and not the hour of day which should be shown in the admission of service. The time requirement in certificates or affidavits of personal service is considered desirable and no change in the last paragraph of 4D(8) is recommended.

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: None.

See Committee's Note to 42C(2).

ADVISORY COMMITTEE'S COMMENT
ON DECEMBER 31, 1975, AMENDMENT

This change brings the rule into line with the recent legislative changes. Except as amended Rule 4 would remain the same.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 4D(1)(a). The amendment clarifies the language of the present rule. The reference to Rule 45 has been deleted as being unnecessary.

Subdivision 4D(1)(b). The amendment is based upon the 1983 Amendment of Rule 4(c)(2) of the Federal Rule. It provides for a method of service by mail which is optional. Changes have been made in the Federal Rule and Form 18-A in order to clarify the language. It is not the intent of the Commission that service by mail procedure can also be utilized in serving the state and its boards and agencies through the attorney general.

Subdivision 4D(2). The amendment deletes the provision that only one copy of the complaint need be served when two or more defendants are residents of the same county. Any justification for the rule appears to have long ago expired.

Subdivision 4D(2)(h). The amendment provides for service only upon the attorney general as to the state and state boards and agencies and to any other party if a statute so prescribes. Duplication of service found in the present rule appears cumbersome and unnecessary. Rule 12(a) has been amended to provide that the state and its boards and agencies have 40 days after service within which to answer a complaint.

Subdivision 4D(5)(a)(iii). The amendment conforms the rule to the terminology of Title 40, MCA.

Subdivision 4D(8)(e). The amendment is intended to provide a method of return of service of process when the service by mail procedure of Rule 4D(1)(b) is utilized.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

COMMISSION NOTE TO
1993 AMENDMENT

The amendment increases the fee payable to the secretary of state from $5.00 for each defendant to $10.00 for each address of the defendant.

Compiler's Comments

2001 Amendment: In (2)(f) at beginning of second sentence substituted "If, after exercising reasonable diligence, the party causing summons to be issued is unsuccessful in serving said parties, an affidavit must be filed" for "Upon the filing" and after "pending" deleted "of an affidavit" and in third sentence increased fee from $5 to $10 and at end inserted "and where service is requested at more than one address, an additional $10 shall be paid for each party to be served at each additional address"; in (6)(a) at end of third sentence deleted "and there has also been deposited with the clerk of court in which such claim for relief is pending" and in fourth sentence after "$10" inserted "will be deposited with said clerk", after "each" deleted "address", and at end inserted "and where service is requested at more than one address an additional $10 shall be paid for each party to be served at each additional address"; and made minor changes in style. Amendment effective May 1, 2001.

1999 Amendment: Throughout (2)(e) and (2)(f) inserted references to limited liability company. Amendment effective August 15, 1999.

1993 Amendment: In (6)(a) increased fee payable to Secretary of State from $5 for each defendant to $10 for each address of defendants; and made minor changes in style.

Amendments: The 1965 amendment rewrote paragraphs (e) and (f) of subdivision (2), for previous text of which see parent volume; substituted "if the defendant is a domestic or foreign corporation, that none of the persons designated in D(2)(e) above can" for "that the defendant, if a domestic or foreign corporation, has no agent for the service of process, nor managing nor business agent, cashier, secretary, or other officer who can" in clause (ii) of paragraph (5)(c); inserted "and if desired, it may be combined in one instrument with the affidavit required under 4D(2)(f), or 4D(6)" at the end of clause (ii) of paragraph (5)(c); substituted the second sentence of paragraph (5)(e) for two sentences applying only to foreign corporations, for text of which see parent volume; substituted "any party intended to be served by such publication" for "any person not served within said 60-day period" at the end of paragraph (5)(f); completely rewrote subdivision (6), for previous text of which see parent volume; inserted "by" in clause (8)(b); and made minor style changes in paragraphs (3), (4), and (5)(a)(iv).

The amendment of September 7, 1965, in subdivision (2), deleted "or attorney" in clause (i) of paragraph (e) and, in paragraph (f), substituted "court of this state" for "court in this state" in the first clause of the first sentence, substituted "subject to the jurisdiction . . . Rule 4B above" for "actually doing business within Montana or was actually doing business in Montana at the time the claim for relief arose," in the second clause of the first sentence, and substituted "persons" for "person" in the fourth sentence.

The amendment of November 28, 1966, added paragraph (i) of subdivision (2); in the second sentence of subdivision (3), deleted "of summons" after "Where service", deleted "made after the filing of the required complaint and required affidavit for publication" after "out of the state", inserted the reference to 4(5)(c), and made other changes in phraseology; and, in clause (8)(d), substituted "date" for "time".

The amendment of September 29, 1967, in subdivision (4), inserted "with the provisions hereafter prescribed in D(5)(h), and" and "93-6228".

The 1971 amendment inserted in subdivision (2)(e)(ii) the provision for service on the registered agent named in the records of the secretary of state.

The 1975 amendment lowered the age in subdivision (1) from 21 to 18.

The amendment of October 9, 1984, in (1)(a) after "made" deleted "by a sheriff of" and inserted "in", after "found" substituted "by a sheriff, deputy sheriff, constable" for "by his deputy, by a constable authorized by law", and after "action" deleted "except that a subpoena may be served as provided in Rule 45"; inserted (1)(b); in introduction of (2), at end of second sentence, deleted "unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants"; in (2)(h) after "complaint" deleted "to the governor, or to any member of such state board or state agency, and also by delivering an additional copy of the summons and complaint" and after "attorney general" inserted "and to any other party which may be prescribed by statute"; in (5)(a)(iii) substituted "dissolution" for "divorce" in two places and "a declaration of invalidity of a marriage" for "annulment of marriage"; and inserted (8)(e).

The May 1, 1990, amendment made language in the rule gender neutral.

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GENERAL

No District Court Jurisdiction to Enter Marriage Dissolution in Favor of One Party Absent Service of Dissolution Petition and Summons on Other Party: On August 15, 2003, the parties entered a property settlement agreement dividing the marital estate, and the wife also signed a consent to entry of judgment agreeing to dissolution if the property settlement agreement was presented to the District Court for approval and made an integral part of the dissolution. The husband then filed a petition for dissolution and included the settlement agreement and the wife's consent to entry of judgment, but did not serve the wife with any of the filings. The District Court held a hearing without the wife being present, adopted the settlement agreement, and entered a decree of dissolution. The husband's counsel mailed a copy of the judgment to the wife, who then filed a Rule 60(b), M.R.Civ.P., motion to set aside the judgment, claiming that the decree was void because the husband failed to have a summons issued and to serve her with process. The motion was denied, but on appeal, the Supreme Court vacated the judgment. Dissolution proceedings are not exempt from rules regarding service of process, and if one party commences a dissolution proceeding, the other party must be served as provided in the Montana Rules of Civil Procedure. Further, a petition for dissolution must be signed under oath by both parties. The wife's execution of the documents prior to the filing of the case did not constitute a voluntary appearance in the action, nor does notice of a hearing substitute for service of summons. A District Court may obtain personal jurisdiction through strict compliance with the mandatory rules for service of process, and in this case, the wife's signing of documents prior to the filing of the dissolution petition did not confer jurisdiction on the court absent service of process. Thus, the District Court abused its discretion in failing to grant the wife's motion to set aside the judgment, and the case was remanded for further proceedings. In re Marriage of Zacher, 2004 MT 249, 323 M 54, 98 P3d 309 (2004), following Marriage of Blaskovich, 249 M 248, 815 P2d 581 (1991), and In re Marriage of Grounds/Coward, 271 M 350, 897 P2d 200 (1995).

Failure to Personally Serve Notice of Child Custody Proceedings to Parent Incarcerated Out-of-State Not Reversible Error: The father was incarcerated in Washington state and was notified by mail of proceedings prior to the filing of a petition for permanent legal custody and termination of parental rights regarding his children, rather than by personal service. He contended that failure to serve notice personally was reversible error. The Supreme Court disagreed. Although the preferred practice is to personally serve parents and legal guardians whose whereabouts are known with copies of all petitions in accordance with 41-3-422, the issue of personal service was not dispositive in this case. Because the father was incarcerated at all times during the proceedings, it would have been impossible for him to exercise his legal rights to parent the children during that time. He was unable to show how personal service would have significantly impacted the proceedings or how invalidation of the proceedings would have a significant impact on his parental rights. Therefore, failure to personally serve the father with notice of the proceedings prior to filing the petition for permanent legal custody was not reversible error. In re L.M.A.T. & B.L.F.T., 2002 MT 163, 310 M 422, 51 P3d 504 (2002).

Abuse of Discretion in Failure to Reference Statutory Judicial Review Provisions in Administrative Order Addressing Child Support Enforcement — Due Process Violation Constituting Reversible Error: The mother filed a petition with the Child Support Enforcement Division (CSED) for assistance in obtaining child support from the father. CSED initiated an administrative action to determine the amount of support owing, and an administrative law judge conducted a contested case hearing on the issue and entered an order establishing the father's current and past-due child support obligation. The order included a paragraph notifying the parents of their statutory right to petition for judicial review of the administrative decision under Title 2, ch. 4, part 7 (MAPA), but did not reference 40-5-253, which contains more specific procedural requirements for appealing from an administrative decision in a child support enforcement case than the provisions in MAPA. The father filed a petition for judicial review and mailed copies to the mother and CSED but failed to properly serve the parties as required in

40-5-253. The District Court concluded that it lacked subject matter jurisdiction because the father failed to comply with 40-5-253. The court dismissed the petition. The father moved the court to amend or reconsider the petition, contending that the application of 40-5-253 violated his due process rights because he did not receive sufficient notice of the procedures by which to obtain judicial review of the administrative decision. The motion was denied, but the court nevertheless subsequently entered another order correcting the clerical error by adding a reference to 40-5-253 to the notice provision of the earlier order and then granted CSED's motion to dismiss. The father appealed. The Supreme Court noted that proper service of a petition for judicial review was a threshold requirement for the District Court to obtain jurisdiction in this case and that under Title 2, ch. 4, part 7, a petition for judicial review may be properly served by mailing copies to the agency and other parties, but there is no requirement that a summons be issued and served in conjunction with the petition. By filing the petition for judicial review and mailing copies to the mother and CSED, the father fulfilled the service requirements of MAPA and Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469 (1996). However, specific statutory requirements prevail over general provisions such as those in MAPA, and the Supreme Court agreed that the portion of the notice informing the father that MAPA would govern the proceedings was misleading, absent any reference to the different, specific procedural requirements for CSED actions under 40-5-253. The Supreme Court adopted federal interpretations of the due process notice requirements in this regard, which provide that the opportunity to be heard is not meaningful if the notice provided does not accurately inform the person to whom it is given of how to take advantage of that opportunity. The notice provisions in the administrative order did not provide father with adequate notice to meet due process requirements, so application of 40-5-253 would violate the father's due process rights. Under these unique circumstances, it was required that the father's petition for judicial review must be governed by the service requirements of MAPA and Hilands. Those requirements were met, so the District Court did acquire subject matter jurisdiction and abused its discretion in dismissing the father's petition for judicial review based on his failure to comply with 40-5-253. The case was reversed for further proceedings under MAPA. Pickens v. Shelton-Thompson, 2000 MT 131, 300 M 16, 3 P3d 603, 57 St. Rep. 543 (2000), followed in In re Support Obligation of McGurran v. Dept. of Public Health and Human Services, 2003 MT 145, 316 M 188, 70 P3d 734 (2003). See also Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 2d 865, 70 S Ct 652 (1950), Gonzales v. Sullivan, 914 F2d 1197 (9th Cir. 1990), Walters v. Reno, 145 F3d 1032 (9th Cir. 1998), and City of W. Covina v. Perkins, 525 US 234, 142 L Ed 2d 636, 119 S Ct 678 (1999).

Failure to Provide Sufficient Notice to Hold Defendant Liable for Prior Default Judgment — Amendment of Complaint to Include Alleged Business Alter Ego Denied — Summons Untimely: Hadford obtained a default judgment against Big Sky Billing Service, Inc. (Big Sky), in a wrongful discharge action but named neither Big Sky director in the complaint. After learning that Big Sky had no assets, Hadford filed a complaint against Credit Bureau of Havre, Inc. (Credit Bureau), and John Does I through IV, alleging that Big Sky was the alter ego of Credit Bureau and that Credit Bureau was thus liable for the default judgment obtained against Big Sky. A summons was issued and served on Credit Bureau but not on the John Does. Credit Bureau sought summary dismissal, contending that it had not received sufficient notice of the wrongful discharge action to be held personally liable for the default amount, and submitted a supporting affidavit that Credit Bureau was not the alter ego of Big Sky. Hadford moved to amend the complaint to substitute the Credit Bureau director for a John Doe. The trial court granted Credit Bureau's request for summary dismissal and denied Hadford's motion to amend the complaint. Distinguishing numerous cases regarding service of a parent corporation as constituting notice to subsidiaries or affiliates, the Supreme Court held that the lack of service of summons barred Hadford from holding Credit Bureau liable for the default judgment and that notice to Big Sky did not constitute notice to Credit Bureau. Further, because no summons was issued on any of the John Doe defendants within 1 year of commencement of the action, as required by Rule 41(e), M.R.Civ.P., the motion to amend the complaint to substitute a party was untimely and properly denied, and the action was dismissed. Hadford v. Credit Bureau of Havre, Inc., 1998 MT 179, 289 M 529, 962 P2d 1198, 55 St. Rep. 727 (1998), followed in Reisdorff v. Yellowstone County, 1999 MT 280, 296 M 525, 989 P2d 850, 56 St. Rep. 1128 (1999).

Knowledge by Husband Not Substitute for Service on His Corporation: Grounds sued Coward for past-due maintenance and also asked for an order allowing her to join her husband's professional corporation as a party. The lower court ruled that Coward owed his ex-wife over $80,000 and that his professional corporation was jointly and severally liable for his obligations. The Supreme Court held that despite the fact that the husband was the sole officer, director, and shareholder of the corporation, personal service on him did not constitute service on the

corporation and therefore the lower court had not obtained jurisdiction over the corporation and could not hold it liable for the husband's debts. In re Marriage of Grounds/Coward, 271 M 350, 897 P2d 200, 52 St. Rep. 482 (1995).

Specific Methods of Service as Governing Over General Methods: Where specific statutes such as 27-18-701 provide for the method of service, those specifics govern over the general rules set out in the Montana Rules of Civil Procedure. Taylor, Thon, Thompson & Peterson v. Cannaday, 230 M 151, 749 P2d 63, 45 St. Rep. 102 (1988).

Amended Complaint Served With Original Summons and Complaint — Personal Jurisdiction Acquired: Where the defendant implement company sought to set aside a default judgment obtained against it by arguing that service of an amended complaint with the original summons and complaint constituted defective service and deprived the District Court of personal jurisdiction, the Supreme Court held that since service of the original summons and complaint was properly made, the only issue was whether the amendment was properly made. Because Rule 4C does not require a summons to be served with an amended complaint and because the amended complaint may be served by delivering a copy to the party and may be filed within a reasonable time after service, the simultaneous service of the amended complaint did not deprive the District Court of jurisdiction over the defendant. Elk Run Ranch v. Green Line Implement Co., 205 M 413, 668 P2d 258, 40 St. Rep. 1397 (1983).

Collateral Attack on Judgments — Reasonable Diligence — Invalid Service — Failure of Jurisdiction: While it is a general rule that a judgment cannot be attacked in a collateral action, such attack is permissible if the first judgment is void for lack of jurisdiction. If service of process is improperly made, the court acquires no jurisdiction over that party and it may collaterally attack the judgment. "Reasonable diligence" was not used by appellants in the prior action to locate individuals to be served under Rule 4D(2)(f), M.R.Civ.P., because they had dealt with such individuals before and should have been able to contact them, and the Secretary of State had the name and address of the corporate agent and director on file. Therefore, service upon the Secretary of State did not confer jurisdiction, and collateral attack was proper. Russell Realty v. Kenneally, 185 M 496, 605 P2d 1107 (1980), followed in Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106, 49 St. Rep. 1162 (1992).

Clerk's Affidavit Not Acceptable as to Variant Date of Service: A District Court Clerk's affidavit should not be accepted to prove that service was made on a date other than the date shown on the certificate of mailing on the notice of entry of judgment because the affidavit is not part of the record on appeal. Flathead Hay Cubing, Inc. v. Moore, 35 St. Rep. 1260 (1978) (apparently not reported in Montana Reports or Pacific Reporter).

Decree of Dissolution: A decree of dissolution affects the status of the parties and so is an action in rem. Therefore, the court did not err in entering a decree even in the absence of the respondent. Blair v. Blair, 178 M 220, 583 P2d 403, 35 St. Rep. 1256 (1978).

SUBSECTION (1) — BY WHOM SERVED

Service by Mother of Party Defective: Mavanee Ulsher filed for divorce from her husband Mickey Fonk. The deputy sheriff left the summons with Fonk's mother and signed the return that he had personally served Fonk. A decree of dissolution was entered by default and contained an order that Fonk pay child support. The Department of Social and Rehabilitation Services (now Department of Public Health and Human Services) sought enforcement of its assigned child support rights by intercepting Fonk's tax returns and garnishing his income. Fonk filed an action alleging that he was not the children's natural father. Ulsher moved for dismissal, arguing that the paternity issue was res judicata and constituted a collateral attack on the default judgment entered in the dissolution action. Fonk alleged that he had never been properly served in the dissolution action, although his mother testified that she laid the papers on the table and told him they were there and the next morning the papers were gone. The lower court ruled that the service of process was valid on the basis that it had been served on Fonk not by the sheriff but by an "other person over the age of 18 not a party to the action" as permitted by subsection (1)(a) of this rule. The Supreme Court held that the service was invalid on the basis of the language in Rule 4C(1), M.R.Civ.P., which states that "the clerk shall . . . deliver the summons either to the sheriff . . . or to the person who is to serve it", and since the summons was not delivered to Fonk's mother by the clerk, Fonk's mother was not authorized by law to make service of process. In re Marriage of Fonk/Ulsher, 260 M 379, 860 P2d 145, 50 St. Rep. 1112 (1993), followed in In re Marriage of Shikany, 268 M 493, 887 P2d 153, 51 St. Rep. 1031 (1994). See also Ihnot v. Ihnot, 2000 MT 77, 299 M 137, 999 P2d 303, 57 St. Rep. 338 (2000).

Dissolution — Actual Knowledge Without Proper Service Insufficient to Confer Jurisdiction: Husband attempted to have wife served by a Sheriff out of state but mistakenly gave the Sheriff

an incorrect address. Later, by mail, husband sent wife papers that she refused to sign but that she acknowledged receiving by a letter stating that she would not sign. A summons was not included with the complaint. The District Court found that the wife's reply letter constituted proof of constructive or substituted service and entered a default judgment. On appeal, the Supreme Court held that the District Court did not acquire personal jurisdiction over the wife and that the default decree of dissolution was void. Marriage of Blaskovich, 249 M 248, 815 P2d 581, 48 St. Rep. 675 (1991).

Coal Shipped F.O.B. Montana Mine — Delivery Accepted — Long-Arm Jurisdiction: The Ninth Circuit Court upheld the District Court finding of jurisdiction. Under the terms of a contract, coal is shipped F.O.B. to the Montana Decker mine. Commonwealth Edison accepted delivery for 5 years prior to Edison's invocation of force majeure provisions of the purchase agreement. The finding that Edison transacted business within the state and the assertion of jurisdiction under Rule 4B(1)(a), M.R.Civ.P., comports with the Montana Supreme Court's reading of long-arm statute. Decker Coal Co. v. Commonwealth Edison Co., 805 F2d 834 (9th Cir. 1986), 43 St. Rep. 337 (1985).

Known Out-of-State Address — No Tolling of Statute of Limitations: When persons involved in a tort who were residents of the state at its occurrence subsequently moved to another state, and plaintiff insurance company was aware of their address, the Statute of Limitations didn't toll due to absence from the state under 27-2-402 because Montana District Courts had jurisdiction under Rule 4B(1), M.R.Civ.P., and process could be served under this rule. Beedie v. Shelley, 187 M 556, 610 P2d 713 (1980).

Jurisdiction — Attaches When: Jurisdiction of court attaches at time of personal service of complaint and summons; personal service of summons and complaint in divorce action precluded and made a nullity a subsequent divorce entered founded upon service by publication. Sowerwine v. Sowerwine, 145 M 81, 399 P2d 233 (1965).

Service by Court Officer Not Required: It is not necessary that a summons be served by an officer of the court. Kipp v. Burton, 29 M 96, 74 P 85 (1903).

Service by Minor: Service of summons by one who was not of the age required by statute, though defective, would not make void or subject to collateral attack a judgment rendered by a court having jurisdiction of the subject matter and parties, and keeping within the limits of its power. Burke v. Inter-State S&L Ass'n, 25 M 315, 64 P 879 (1901).

SUBSECTION (2) — AGENT RECEIVING SERVICE

Service Upon Limited Liability Company Not Constituting Service Upon Individual Company Members — No Joinder of Member Solely for Executing on Judgment Against Company: Plaintiff obtained a judgment against a limited liability company, but when plaintiff discovered that the company had no assets to levy against, plaintiff moved to levy judgment against defendant personally. The motion was dismissed without prejudice, and plaintiff appealed, but the Supreme Court affirmed. Although defendant knew of the lawsuit involving the company, defendant was not separately served, and service upon the company did not constitute service upon the individual members of the company. Further, the District Court did not err in refusing to join defendant after judgment was rendered solely for the purpose of executing judgment because doing so would have deprived defendant of the due process right to notice and the opportunity to be heard. Ioerger v. Reiner, 2005 MT 155, 327 M 424, 114 P3d 1028 (2005), following S-W Co. v. Schwenk, 173 M 481, 568 P2d 145 (1977), Hadford v. Credit Bureau of Havre, Inc., 1998 MT 179, 289 M 529, 962 P2d 1198 (1998), Mtn. W. Bank v. Mine & Mill Hydraulics, Inc., 2003 MT 35, 314 M 248, 64 P3d 1048 (2003), and Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Lack of Small Claims Court Jurisdiction Over Out-of-State Corporation Whose Managing Agent Could Not Be Served: Under 25-35-502, the Small Claims Court has jurisdiction of certain claims if the defendant can be served in the county where the action commenced. Here, Aladdin Steel Products, Inc. (Aladdin), a Washington corporation with no office or registered agent in Montana, could not be served in Lincoln County, Montana, so the Small Claims Court lacked jurisdiction. Petersen's argument that process could have been served in Lincoln County on Aladdin's warranty service representative or sales representative failed for lack of evidence that either of those representatives was a managing agent or general agent for purposes of service of process. Petersen v. Aladdin Steel Prod., Inc., 1999 MT 262, 296 M 394, 989 P2d 385, 56 St. Rep. 1061 (1999), following State ex rel. Schmidt v. District Court, 111 M 16, 105 P2d 677 (1940).

Petition for Judicial Review of Contested Case — Service on Parties Under Rule 5(b) Held Sufficient: Ashmore brought a claim before the Human Rights Commission, alleging that she had been discriminated against by Hilands Golf Club because of her gender, in violation of

49-2-304. The Commission found in favor of Ashmore and awarded her relief. Hilands filed a petition for judicial review pursuant to 2-4-702 and served copies of the petition by mail upon counsel for the Commission and Hilands. No summons was served with the petition, and no service was made upon the Attorney General. Ashmore filed a motion to dismiss under Rule 12(b), M.R.Civ.P., alleging that no jurisdiction had been obtained over the Commission by service of a summons upon the Attorney General, contrary to the holding in Fife v. Martin, 261 M 471, 863 P2d 403 (1993). The District Court granted the motion. The Supreme Court reversed, overruling Fife and holding that because judicial review pursuant to 2-4-702 is in the nature of an appeal, in which jurisdiction over the parties has already been established, service of a summons with the petition is unnecessary and holding that the petition may be served upon the parties by mail under Rule 5(b), M.R.Civ.P. The Supreme Court noted that it was sufficient to mail a copy of the petition upon the parties and the agency, whether or not the agency had been a party to the administrative proceeding. Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469, 53 St. Rep. 664 (1996).

Judicial Review of Agency Paternity Action — Failure to Serve Attorney General and Agency as Real Party in Interest — Service Void — Lack of Jurisdiction: The Child Support Enforcement Division (CSED) sought to compel Fife to submit to paternity testing for purposes of determining child support obligations. Fife sought judicial review of the administrative action by serving process by mail upon the mother and CSED but failed to properly name CSED as respondent or to serve the Attorney General or CSED in the manner required under the provisions of this rule. The District Court correctly held that it was without jurisdiction and properly dismissed the petition for judicial review for failure to effectuate valid service of process. Fife v. Martin, 261 M 471, 863 P2d 403, 50 St. Rep. 1414 (1993), overruled in Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469, 53 St. Rep. 664 (1996).

No Service on Corporate Agent: Registered agent for a small corporation moved to California where he was personally served with process. Agent contended that he had been personally served but that neither the corporation or the registered agent had been served. The Supreme Court held that service of process was adequate to confer jurisdiction over the corporation even though only one copy of the documents was served on the defendant corporate officer as both an individual and an officer. There were no allegations that the corporate officer was being misled by the service. Richland Nat'l Bank & Trust v. Swenson, 249 M 410, 816 P2d 1045, 48 St. Rep. 730 (1991).

Service Upon Corporation — Proper Agent: The doctrine of ostensible agency appears to have no application when it becomes involved with the question whether service of process has been legally made upon a "managing or general agent". Further, service upon a former employee of a company was not service upon the company itself and default judgment was vacated and set aside. Kraus v. Treasure Belt Min. Co., 146 M 432, 408 P2d 151 (1965).

"Managing Agent" Defined: A representative of a foreign corporation who in his territory in the state attended to all the company's business, making sales, keeping accounts of customers, making collections, and adjusting complaints for damaged goods under direction of the company, and who was paid a regular salary, was its managing agent upon whom, under section 93-3007, R.C.M. 1947 (superseded by Rule 4D, M.R.Civ.P.), service of summons could properly be made in an action against the corporation. State ex rel. Schmidt v. District Court, 111 M 16, 105 P2d 677 (1940), followed in Petersen v. Aladdin Steel Prod., Inc., 1999 MT 262, 296 M 394, 989 P2d 385, 56 St. Rep. 1061 (1999), and distinguished in Minnehoma Fin. Co. v. Van Oosten, 198 F. Supp. 200 (D.C. Mont. 1961).

Artifice to Obtain Service: Procuring service on business agent by representation over phone by attorney that he was a laundryman from Anaconda, asking if agent was in position to serve him, thereby inducing agent into jurisdiction of court, did not constitute an abuse of legal process or invalidate the service since the agent was already in the state and the misrepresentation did not induce agent to come to the state. State ex rel. Taylor Laundry Co. v. District Court, 102 M 274, 57 P2d 772 (1936).

"Business Agent" Defined: Under former law, the "business agent" of a foreign corporation must be one who stands in the shoes of the corporation in relation to the particular business managed, conducted, or controlled by him for it, must have in fact a representative capacity and derivative authority, and if such be the character of his agency the law will impute authority to him notwithstanding denial thereof. He need not be resident, but must be attending to business in state when served. State ex rel. Taylor Laundry Co. v. District Court, 102 M 274, 57 P2d 772 (1936).

"Business Agent" Defined — Continuous Course of Business: Under former law, a representative of a foreign corporation contacting customers, supervising installation, adjusting

and repairing machinery sold, and accepting old machinery as part payment on purchase price on new sales in a continuous course of business is a "business agent" under this section. Isolated transactions do not constitute a doing of business. State ex rel. Taylor Laundry Co. v. District Court, 102 M 274, 57 P2d 772 (1936).

Sheriff's Averments as to Service Upon Trustee: A return upon a summons that the officer served the same upon one C, "a trustee being the defendant named in said summons", is fatally defective in failing to show a service upon the corporation. Mathias v. White Sulphur Springs Ass'n, 17 M 542, 43 P 921 (1896).

Sheriff's Averments as to Agency: Where the record on appeal failed to show any service of summons on the defendant, and there was simply a return of the Sheriff, reciting that he had personally served the summons on B, he being the agent of the defendant, there was no compliance with the statute in regard to the manner of service. Davidson v. Clark, 7 M 100, 14 P 663 (1887).

SUBSECTION (2) — SERVICE UPON FOREIGN CORPORATIONS

"Doing Business" Defined: "Doing business" in the state by a foreign corporation within the meaning of section 93-3007, R.C.M. 1947 (superseded by Rule 4D, M.R.Civ.P.), prescribing the manner in which such corporations should be served with summons, meant conducting business in such a way and to such an extent as to warrant the inference that it has subjected itself to the jurisdiction of the state, the section contemplating a more or less continuous course of business. An isolated transaction (a sale of machinery) did not bring the corporation within the section. State ex rel. Am. Laundry Mach. Co. v. District Court, 98 M 278, 41 P2d 26 (1934).

Service Upon Agent Ineffective as to Corporation: Where a foreign corporation was not doing business within the state, did not maintain a local office or have a resident agent, and therefore could not be served with summons in the manner prescribed in this section (now subsection (2)(e) of Rule 4D, M.R.Civ.P.), service upon its alleged managing or business agent (a nonresident and temporarily in the state) was ineffectual as to the corporation. State ex rel. Am. Laundry Mach. Co. v. District Court, 98 M 278, 41 P2d 26 (1934).

SUBSECTION (2) — MOTION TO QUASH SERVICE

Statements Tending to Show Corporate Status: A recital in motion to quash service that "defendant was and is not a joint stock company or association" is a negative pregnant which, standing alone, indicates that defendant was a corporation. Reference to defendant throughout the complaint, as well as in the Sheriff's return, as Northwestern Engineering "Company" was sufficient prima facie to show that it was a corporation, in absence of showing to the contrary, the burden of showing which was upon movant. State ex rel. NW. Eng'r Co. v. District Court, 114 M 179, 133 P2d 594 (1943).

Statements as Showing a Defense to Action: Statements made in an affidavit in support of a motion to quash service of process upon a representative of a foreign corporation in an action against him and the corporation for his negligence raising the question of the scope of his employment at the time of the alleged negligence, tended to show a defense, and had nothing to do with service of summons, and the further statement that he had been discharged "on or about" the day of service was insufficient to show that his discharge came prior to service. State ex rel. Schmidt v. District Court, 111 M 16, 105 P2d 677 (1940).

SUBSECTION (2) — MISCELLANEOUS CASES

Service of Process as Exercise of Discretion in Charge of Threat in Official Matters: Deputies attempted to serve civil process on Keating at his home. Keating threatened the officers and was convicted of threats in official matters under 45-7-102. On appeal, Keating contended that service of process was not a discretionary function that could serve as the basis of a charge of threats in official matters. The Supreme Court noted that the statutory definition of threats in official matters speaks to a threat made for the purpose of influencing an exercise of discretion by a public servant but does not speak to a discretionary function. The fact that service of process is a statutory duty under 7-32-2121, rather than a discretionary function, does not relate to the issue of whether service of process involves an exercise of discretion under 45-7-102. Under this rule, personal service of process can be accomplished wherever and whenever the person to be served can be found. The Sheriff's Department uses a variety of discretionary methods of serving process. Thus, service of process clearly involves the power of choice among several courses of action, constituting a sufficient exercise of discretion to form a basis for charges of threats in official matters. St. v. Keating, 285 M 463, 949 P2d 251, 54 St. Rep. 1250 (1997).

Default Judgment Void for Failure of Substitute Service: The District Court was correct in setting aside the default judgment against Western Supply, Inc., as void under Rule 60(b)(4),

M.R.Civ.P., for failure of service of process when the fatal flaw in the service was not merely in a lack of due diligence, but also in the failure to submit a proper and sufficient affidavit in compliance with Rule 4D(2)(f), M.R.Civ.P., in support of substituted service on the Secretary of State. Jurisdiction cannot be acquired without strict compliance with the statute. Shields v. Pirkle Refrigerated Freightlines, Inc., 181 M 37, 591 P2d 1120 (1979), followed in Ihnot v. Ihnot, 2000 MT 77, 299 M 137, 999 P2d 303, 57 St. Rep. 338 (2000).

Service of Process: Due to the attorney's representation of defendant in a closely related action, which necessarily implied a duty to protect his client's interests against this type of action, service of process on her attorney was valid as service on defendant within the meaning of Rule 4D(2)(a), M.R.Civ.P. Doble v. Talbott, 180 M 166, 589 P2d 994 (1979).

Service Possible — Statute of Limitations Not Tolled: Absence of alleged tortfeasor from state did not toll Statute of Limitations where it was possible to obtain service during the entire 3-year period, under Rule 4D(2)(a) initially and under Rule 4D(3) after he left the state. State ex rel. McGhee v. District Court, 162 M 31, 508 P2d 130 (1973).

"Association" Defined: Contention that the word "association" as used in section 93-3007, R.C.M. 1947 (superseded by Rule 4D, M.R.Civ.P.), must be considered modified by the word "joint-stock" was without merit. State ex rel. Cook v. District Court, 102 M 424, 58 P2d 273 (1936).

Service Upon Chairman of Trustees as Sufficient; Service of notice upon the chairman of a board of school trustees, directed to the board, is sufficient as against the contention that it should have been served upon each member thereof. State ex rel. Stephens v. Keaster, 82 M 126, 266 P 387 (1928).

Two or More Defendants in Same County: Where all the defendants in an action to quiet title, residing in the same county, were served with summons, and one defendant was served with a copy of the complaint as required by section 93-3006, R.C.M. 1947 (superseded by Rule 4D, M.R.Civ.P.), the fact that such defendant filed a disclaimer of any interest in the land did not affect the service on the other defendants, there being nothing to show that he was not made a defendant in good faith. Mantle v. Casey, 31 M 408, 78 P 591 (1904).

SUBSECTION (3) — MISCELLANEOUS CASES

Failure to Comply With Service Requirements — Prejudice Shown: The Supreme Court will uphold the jurisdiction of a District Court despite a failure to comply with all mandatory service requirements only when the plaintiff affirmatively shows that there is absolutely no possibility of prejudice from the failure. Sink v. Squire, 236 M 269, 769 P2d 706, 46 St. Rep. 352 (1989).

Service Possible — Statute of Limitations Not Tolled: Absence of alleged tortfeasor from state did not toll Statute of Limitations where it was possible to obtain service during the entire 3-year period, under Rule 4D(2)(a) initially and under Rule 4D(3) after he left the state. State ex rel. McGhee v. District Court, 162 M 31, 508 P2d 130 (1973).

Day of Service — Personal Service Subsequent to Order for Publication: Where, after the making of an order for publication of summons upon a nonresident defendant, the summons is personally served, the service does not become complete until the day on which the fourth publication would have been made if plaintiff had proceeded under the order of publication, and the date of personal service is considered the date of the first publication for the purpose of computing the time of service. Reynolds v. Gladys Belle Oil Co., 75 M 332, 243 P 576 (1926).

SUBSECTION (5) — AFFIDAVIT

Insufficient Service — Judgment Void — Error in Dismissal of Action to Set Aside Default Judgment: In March of 1995, John conveyed a farm and residence to his brother Richard by quitclaim deed. One year later, after arranging for another person to farm the property and live in the residence, Richard left for the Philippines to be married. One month later, John filed an action seeking to cancel the quitclaim deed, serving the summons and complaint upon Richard by publication because John stated that he was unable to determine Richard's address. Default judgment was entered for John 2 months later. In 1999, Richard moved to set aside the default judgment, alleging that service by publication and the resulting judgment were void because of extrinsic fraud by John and because John did not comply with the service requirements of subsection (5)(e) of this rule. The District Court dismissed Richard's action, and he appealed. The Supreme Court held that the District Court abused its discretion in dismissing Richard's claim. The District Court did not provide any findings of fact, conclusions of law, memorandum, or legal authority for its decision. Insufficient service of process is an ample ground to vacate a default judgment. Because of the absence of any hearing or oral argument in the matter, an unsupported cursory order, and an overall undeveloped record, the Supreme Court remanded for a hearing to

address whether Richard's claim for relief under Rule 60(b), M.R.Civ.P., was filed within a reasonable time. Ihnot v. Ihnot, 2000 MT 77, 299 M 137, 999 P2d 303, 57 St. Rep. 338 (2000). See also Shields v. Pirkle Refrigerated Freightlines, Inc., 181 M 37, 591 P2d 1120 (1979), and In re Marriage of Fonk/Ulsher, 260 M 379, 860 P2d 145, 50 St. Rep. 1112 (1993).

Marriage Dissolution — Insufficient Service of Process Based on Insufficient Affidavit: An affidavit of the husband's lawyer stating that the husband had not heard from his wife was insufficient in that it did not state that the wife was out of state or was concealing herself or that a diligent inquiry had been made as to her whereabouts. Because the affidavit did not allege diligent inquiry, it was not sufficient evidence of diligent inquiry, and service by publication based on the affidavit was insufficient service of process. The District Court abused its discretion in refusing to vacate the default judgment and an order to convey real property. In re Marriage of Shikany, 268 M 493, 887 P2d 153, 51 St. Rep. 1031 (1994).

Failure to Set Forth Facts Showing Nonresidence — Defective Affidavit for Publication — Quiet Title Actions Void: Plaintiffs brought an action against Rosebud County, claiming that they were entitled to a royalty interest in certain property. The Supreme Court held two previous quiet title actions void because complete service was not achieved under the law (now repealed) that provided for service by publication since in each action, an affidavit was required to show that the defendant resided out of state. Citing Aronow v. Anderson, 110 M 484, 104 P2d 104 (1940), the Supreme Court held that the affidavit in this case was insufficient because it failed to recite the facts supporting the conclusion that the defendant resided out of state and failed to allege the facts describing the search for the defendant. The quiet title actions were thus void for lack of jurisdiction. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

Failure of Affidavit for Service by Publication to State "Residence of the Defendant Is Unknown": In an action to procure a tax deed, an affidavit for publication stating that defendant could not be found in the State of Montana did not satisfy the requirement of Rule 4D(5)(e), M.R.Civ.P. (Title 25, ch. 20). The key fact required in an affidavit for publication is that the affidavit state that the residence of defendant is unknown. The affidavit was thus insufficient, and service was insufficient to obtain jurisdiction over defendant. Therefore, she could collaterally attack the judgment against her in the action for procurement of a tax deed by bringing a separate action. It was reversible error for the lower court to grant summary judgment against her in her separate action on the ground that her case was barred by res judicata as a result of the judgment against her. Kahle v. Smithers, 225 M 452, 733 P2d 844, 44 St. Rep. 394 (1987).

Absence From State — Facts to Be Alleged: In order that absence from the state be sufficient ground for publishing summons, there must be a prolonged or protracted absence amounting to a departure, as distinguished from a mere temporary absence, i.e., facts must be stated from which the conclusion can be reached that there was no intention of immediate return, as well as facts supporting the conclusion that defendant is absent from the state, particularly where the affidavit states that his residence is in the state. Aronow v. Bishop, 112 M 611, 120 P2d 423 (1941).

Affidavit by Attorney Upon Information and Belief Sufficient: If an affidavit for publication of service of notice of a proceeding to determine heirship set forth the ultimate facts which form the bases for such service, it is sufficient, and where it is made by the attorney for foreign heirs it may be made on information and belief. In re Baxter's Estate, 98 M 291, 39 P2d 186 (1934), distinguished in Aronow v. Anderson, 110 M 484, 104 P2d 2 (1940).

Affidavit Upon Information Sufficient: An affidavit for the publication of summons, where the defendant resides out of the state, is sufficient, although the statements that the defendant is a nonresident, that the plaintiff has a cause of action against him, and that he is a necessary or proper party to the action, are made upon information and belief. Smith v. Collis, 42 M 350, 112 P 1070 (1910).

Publication of Summons — Sufficiency of Affidavit: The Clerk of the District Court being a ministerial officer, and having no power to pass judicially upon the sufficiency of an affidavit filed as a basis for the publication of a summons, it is not necessary that the affidavit should set forth the probative facts, as before a judicial officer, but it is sufficient if it sets forth substantially in the language of the statute enough of the ultimate facts recited in the statute as reasons for the publication of the summons. Ervin v. Milne, 17 M 494, 43 P 706 (1896), distinguishing Alderson v. Marshall, 7 M 288, 16 P 576 (1888), and Palmer v. McMaster, 8 M 186, 19 P 585 (1888), distinguished in Aronow v. Anderson, 110 M 484, 104 P2d 2 (1940).

SUBSECTION (5) — JURISDICTION IN PERSONAM

Promissory Note — Action to Compel Surrender as in Personam: An action by the purchaser of personal property to compel the seller, a nonresident, to surrender promissory notes was an action in personam, and the fact that the notes were in the possession of a local attorney did not change the character of the action where the attorney was not made a party to the action and the notes were not impounded by court process. The court did not obtain jurisdiction by substituted service of summons and its judgment rendered on default of defendant was void. Winnett Times Publishing Co. v. Berg, 82 M 141, 265 P 710 (1928).

In Personam Actions — Service by Publication Not Warranted: Service by publication does not warrant a judgment in a proceeding strictly in personam. Gassert v. Strong, 38 M 18, 98 P 497 (1908).

Publication Under Statute — Common-Law Service Not Abrogated: A general statute providing for the publication of summons in civil actions does not abrogate the common-law rule which required personal service of summons in actions in personam. Silver Camp Min. Co. v. Dickert, 31 M 488, 78 P 967 (1904).

SUBSECTION (5) — MISCELLANEOUS CASES

Jurisdiction at Time of Service — Voidable Judgment: Jurisdiction of the court attaches at the time of personal service of the complaint and summons, so that a prematurely entered default judgment is voidable and not void. Sowerwine v. Sowerwine, 145 M 81, 399 P2d 233 (1965).

Original Summons — No Requirement for Filing: There is no provision which requires that the original summons with the return thereon must first be filed with the clerk of the court before an order of publication may be obtained. Clinton v. Miller, 124 M 463, 226 P2d 487 (1951), distinguished in Bentley v. Rosebud County, 230 F2d 1 (1956).

Specific Performance as Action in Personam: A suit for specific performance of a contract to convey real property is a suit in personam and service cannot be had by publication. State ex rel. Miller v. District Court, 120 M 423, 186 P2d 506 (1947).

Proof of Issuance of Summons: Where the record did not directly show the issuance of a summons for publication, but did show that a summons was published in the paper reciting the general purpose of the action as required by section 93-3015, R.C.M. 1947 (superseded by Rule 4D, M.R.Civ.P.), judgment was not subject to attack on the ground that the record did not affirmatively show issuance of such summons. Smith v. Hamill, 111 M 585, 112 P2d 195 (1941).

Sunday Publication Approved: Publication of summons "at least once a week for four successive weeks" could, under section 93-3014, R.C.M. 1947 (superseded by Rule 4D(5)(c), M.R.Civ.P.), be accomplished by publication on four successive Sundays. State ex rel. Fisher v. District Court, 110 M 61, 99 P2d 211 (1940).

Constructive Service — Statute to Be Observed: A more accurate observance of statutory provisions relative to service of summons is required in the case of constructive service than in personal service, and the presumption in favor of jurisdiction upon rendition of judgment is not as strong when the judgment is based upon constructive service as when based upon personal service. Holt v. Sather, 81 M 442, 264 P 108 (1928).

Action on Corporate Stock as Quasi in Rem: An action against a nonresident holding the legal title to corporate stock, in the possession of a third person in the state, to establish and enforce a trust therein, is one quasi in rem, and service by publication was sufficient to enable the District Court to determine the relative rights of the parties to the stock. Gassert v. Strong, 38 M 18, 98 P 497 (1908).

SUBSECTION (7) — AMENDMENT

Failure to Serve Original Summons Cured by Service of Amended Summons — Failure to Obtain Leave of Court to Amend Summons and Remove Party From Summons Not Fatal to Service of Process: Schmitz filed a pro se action for medical malpractice against Vasquez and Sanz on April 5, 1994. On April 1, 1997, after determining that her claim against Sanz had not gone through the Montana Medical Legal Panel procedure, Schmitz amended her complaint without permission of the District Court and, through counsel, filed the amended complaint. A new summons was issued by the Clerk of District Court on April 1, 1997, and was served on Vasquez the same day. The amended complaint and the new summons were identical to those previously filed and issued except that they did not include any claim against or notice to Sanz. The District Court dismissed the suit because the original summons had not been served within 3 years of its issuance, as required by Rule 41(e), M.R.Civ.P. Relying upon Yarborough v. Glacier County, 285 M 494, 948 P2d 1181 (1997), and distinguishing Ass'n of Unit Owners v. Big Sky,

224 M 142, 729 P2d 469 (1986), and Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364 (1996), the Supreme Court held that since the amended complaint and new summons had only the effect of deleting Sanz as a defendant, Vasquez received the same notice from the amended complaint and second summons that he would have received from the first complaint and summons and therefore was not prejudiced by Schmitz's failure to serve the first complaint within 3 years and failure to obtain leave of court to amend the summons by removing Sanz as a defendant. For these reasons and because the purpose of the Montana Rules of Civil Procedure is to obtain a just, speedy, and inexpensive determination of every action, the Supreme Court held that Schmitz complied with the substance and purpose of Rule 41(e) and that the District Court erred in dismissing the suit. Schmitz v. Vasquez, 1998 MT 314, 292 M 164, 970 M 1039, 55 St. Rep. 1288 (1998).

Defective Notice of Property Forfeiture — Relation Back of Curative Amendment — Due Process Violated: Notice of seizure of automobile and intent to institute forfeiture proceedings under Title 44, ch. 12, was in violation of due process and deprived the court of jurisdiction to enter a default judgment against the owner, who did not answer the allegations, when the notice did not inform the owner that he must answer within 20 days or face default judgment. After the 45 days for filing the notice had passed, the notice could not be amended to cure the defect. The amendment could not relate back to the original timely filing so as to make the amendment timely, because: (1) the forfeiture statute is an exception to the rule that property may not be seized without a prior factfinding hearing and the statute's safeguards should thus be rigidly adhered to and strictly construed; and (2) allowing an amendment as requested by the state under Rule 4D(7), M.R.Civ.P., which provides for amendment of process in the court's discretion unless it clearly appears that the person served would suffer material prejudice to his substantial rights, would (assuming the Rule is applicable to this forfeiture proceeding) significantly prejudice the owner's rights. St. v. 1978 LTD II, 216 M 401, 701 P2d 1365, 42 St. Rep. 901 (1985).

Altering Summons Not Material Prejudice: Without leave of the court an attorney was without authority to alter a summons by substituting his name for that of the former attorney's, deleting a plaintiff's name, adding a plaintiff's name, and adding a middle initial to a plaintiff's name. However, once leave of the court was requested, the court abused its discretion by not allowing the amendment, as material prejudice would not have resulted. The function of the summons is to give notice, and the amendment sought would have given the defendant a more accurate picture of the action being brought against him. Larango v. Lovely, 196 M 43, 637 P2d 517, 38 St. Rep. 2107 (1981), distinguished in Ass'n of Unit Owners of the Deer Lodge Condominium v. Big Sky of Mont., Inc., 224 M 142, 729 P2d 469, 43 St. Rep. 2084 (1986), and Schmitz v. Vasquez, 1998 MT 314, 292 M 164, 970 P2d 1039, 55 St. Rep. 1288 (1998).

Jurisdiction Dependent Upon Actual Service: The question of jurisdiction over a defendant is dependent upon the fact of service of summons, not upon the proof thereof. A defective return of proof of service may be amended to conform to the truth, not for the purpose of validating a void judgment but to show that the judgment was never void. State ex rel. Duckworth v. District Court, 107 M 97, 80 P2d 367 (1938).

Proof of Service — Supplementation by Affidavit: Where at the time a divorce case against defendant wife who resided in Canada was heard, regularity of proof of service of summons upon her was attacked as defective, but return of service was later supplemented by an affidavit of service in due form, filed with Clerk of District Court and certified to the Supreme Court, the trial court was clothed with jurisdiction. State ex rel. Duckworth v. District Court, 107 M 97, 80 P2d 367 (1938).

SUBSECTION (8) — PROOF OF SERVICE

Sufficiency of Notice of Default: A contract for deed did not require that notice be dated in any certain way, except to specify that service was complete on deposit in a post office. Appellant asserted that the notice of default was invalid because the copy he received was undated. However, he acknowledged receiving the notice by certified mail, and there was nothing to indicate prejudice to him by a failure to date it. LeClair v. Reiter, 233 M 332, 760 P2d 740, 45 St. Rep. 1531 (1988).

Admission of Service by Foreign Corporation: Appearance and waiver executed by a foreign corporation, not qualified to do business in Montana, acknowledging receipt of amended complaint filed by plaintiff sufficiently complied with the requirements of section 93-3018, R.C.M. 1947 (superseded by Rule 4D, M.R.Civ.P.), concerning proof of admission of service. Greene Plumbing & Heating Co. v. Morris, 144 M 234, 395 P2d 252 (1964).

Finding of Court — Case of Insufficient Service: Where the names of two defendants had been filled in on a printed return form on the back of a summons, before the words "a copy of said summons", making it appear that joint service was made with one copy of summons, but sufficient charge for two services appeared in the costs blank, the ambiguity and alleged lack of service were negatived by the court's findings of fact that summons was "duly and regularly served upon the defendants and each of them" and the presumption that official duty has been properly performed. E. J. Lander & Co. v. Brown, 110 M 128, 99 P2d 217 (1940).

Proof of Service by Person Appointed by the Court: When service of summons in an action pending in a Justice's Court is made by a person appointed by the Justice, proof of service must be made by affidavit. One so appointed is not a constable and cannot prove service of process by a certificate. Layton v. Trapp, 20 M 453, 52 P 208 (1898).

SUBSECTION (9)
CONTENTS OF AFFIDAVIT OF PERSONAL SERVICE

Irregularity of Service — Voidable Judgment: The failure of the affidavit of service to show the competency of the person making the service constitutes only an irregularity, rendering the judgment voidable and not void, and is not subject to collateral attack. State ex rel. Smith v. District Court, 55 M 602, 179 P 831 (1919).

Service by Minor — Judgment Irregular Only: Where an affidavit of service of summons omitted the statement that the person serving the same was over 18 years of age, a judgment rendered thereon was not void on its face, so as to be subject to collateral attack, the judgment roll showing no want of jurisdiction, but merely irregularity in obtaining it. Burke v. Inter-State S&L Ass'n, 25 M 315, 64 P 879 (1901), distinguished in Jenkins v. Carroll, 42 M 302, 112 P 1064 (1910).

Law Review Articles

Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 346 (1981).

Developing Theories of State Jurisdiction Over Indians: The Dominance of the Preemption Analysis, Lynaugh, 38 Mont. L. Rev. 63 (1977).

Personal Jurisdiction Over Non-Residents and Montana's New Rule 4B, Towe, 24 Mont. L. Rev. 3 (1962).

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Substituted Service on a Non-Resident Vendor of Montana Land, Tingle, 13 Mont. L. Rev. 64 (1952).

Comment on the Case of Hagerty v. Sherburne Mercantile Co., 120 M 386, 186 P2d 884 (1947), Spanglo, 10 Mont. L. Rev. 95 (1949).

Substituted Service on Resident Motorists, McNamer, 1 Mont. L. Rev. 51 (1940).

Collateral References

Abatement and Revival *key* 30; Corporations *key* 507(1), et seq., 668(1), et seq.; Infants *key* 89; Insane Persons *key* 95; Judgment *key* 237(2); Process *key* 50 through 111, 127 through 139, 161 through 165; States *key* 204.

1 C.J.S. Abatement and Revival §91; 19 C.J.S. Corporations §§721 through 735; 43 C.J.S. Infants §153; 49 C.J.S. Judgments §33; 56 C.J.S. Mental Health §§275 through 278; 72 C.J.S. Process §§33 through 91; 81A C.J.S. States §226.

62B Am. Jur. 2d Process §§105 through 138.

Construction and application of phrase "usual place of abode", or similar terms, in statutes relating to service of process. 32 ALR 3d 112.

Jurisdiction on constructive or substituted service, in suit for divorce or alimony, to reach property within state. 10 ALR 3d 212.

Place or manner of delivering or depositing papers under statutes permitting service of process by leaving copy at usual place of abode or residence. 87 ALR 2d 1163.

Propriety of service of process in an in personam action on resident minor defendant whose only guardian is a nonresident and cannot be served validly either within or without state. 86 ALR 2d 1193.

Manner of service of process upon foreign corporation which has withdrawn from state. 86 ALR 2d 1000.

Holding directors', officers', stockholders', or sales meetings or conventions in a state by a foreign corporation as subjecting it to service of process. 84 ALR 2d 412.

Failure to make return as affecting validity of service or court's jurisdiction. 82 ALR 2d 668.

Who is "managing agent" of domestic corporation within statute providing for service of summons or process thereon. 71 ALR 2d 178.

Service on nonresident of notice of proceeding for modification of decree for alimony, by publication or other form of constructive service. 62 ALR 2d 544.

Construction and application of statutes providing for constructive or substituted service of process on nonresident motorists. 53 ALR 2d 1164; 138 ALR 1464; 125 ALR 457; 96 ALR 594; 82 ALR 768.

Sufficiency of affidavit made by attorney or other person on behalf of plaintiff for purpose of service by publication. 47 ALR 2d 423.

Difference between date of affidavit for service by publication and date of filing or of order for publication as affecting validity of service. 46 ALR 2d 1364.

Service of process on person in military service by serving person at civilian abode or residence, or leaving copy there. 46 ALR 2d 1239.

Application of doctrine of idem sonans or the like to substituted or constructive service of process. 45 ALR 2d 1090.

Amendment as permissible to cure omission of signature of issuing officer on civil process or summons. 37 ALR 2d 928.

Who is an "agent authorized by appointment" to receive service of process within purview of Federal Rules of Civil Procedure. 26 ALR 2d 1086.

Sufficiency of affidavit as to due diligence in attempting to learn whereabouts of party to litigation, for the purpose of obtaining service by publication. 21 ALR 2d 929.

Ownership or control by foreign corporation of stock of other corporation as constituting doing business within state. 18 ALR 2d 187.

Foreign corporation's purchase within state of goods to be shipped into other state or country as doing business within state for purposes of service of process. 12 ALR 2d 1439.

What amounts to doing business in a state within statute providing for service of process in action against nonresident, natural person, or persons doing business in state. 10 ALR 2d 200.

Necessity, in service by leaving process at place of abode, etc., of leaving a copy of summons for each party sought to be served. 8 ALR 2d 343.

Constructive service of process against nonresident in suit for specific performance of contract relating to real property within state. 173 ALR 985; 93 ALR 621.

Statute providing for service of process upon designated state official, in action against foreign corporation, as applicable to action based on transaction outside of state. 162 ALR 1424; 145 ALR 630.

Untrue statement in affidavit upon which publication of summons is based as subjecting judgment or finding to collateral attack. 159 ALR 574.

Constructive service of process on nonresident alien enemies. 158 ALR 1450; 156 ALR 1448; 155 ALR 1451; 153 ALR 1419; 152 ALR 1451; 149 ALR 1454; 148 ALR 1386; 147 ALR 1309; 137 ALR 1361.

Summons as amendable to cure error or omission in naming or describing court or judge, or place of court's convening. 154 ALR 1019.

Acknowledgment of service by deputy or other subordinate of public officer named in statute as to service of process in action against foreign corporation. 148 ALR 975.

Solicitation within state of orders for goods to be shipped from other state as doing business within state within statute providing for service of process. 146 ALR 941; 101 ALR 126; 60 ALR 994.

What suits at domicile of corporation involving corporate stock or rights and obligations incident thereto are in rem, jurisdiction in which may rest upon constructive service of process against nonresidents. 145 ALR 1393.

Construction of provisions of statutes as to constructive or substituted service on nonresident motorists, regarding mailing copy of complaint. 138 ALR 1475; 125 ALR 468; 96 ALR 597; 82 ALR 772.

Who is member of family within statute relating to service of process by leaving copy with member of family. 136 ALR 1505.

Action or proceeding which directly or indirectly seeks to establish liability of, or to recover judgment against, executor, administrator, or other fiduciary, residing outside state, as one in personam or in rem, as regards acquisition of jurisdiction upon constructive or substituted service of process. 136 ALR 621.

Substituted service, service by publication, or service out of the state, in action in personam against resident or domestic corporation, as contrary to due process of law. 132 ALR 1361; 126 ALR 1474.

Amendment of process by changing or correcting mistake in name of party. 124 ALR 86.

Amendment of process by changing description or characterization of party from corporation to individual, partnership, or other association, or vice versa. 121 ALR 1325.

Service on corporate officer doing business in state. 113 ALR 36.

Who, other than public official, may be served with process in action against foreign corporation doing business in state. 113 ALR 9.

Service of process on bank after appointment of conservator. 107 ALR 1431; 92 ALR 1258; 91 ALR 234.

Constitutionality of statute providing for substituted or constructive service upon nonresident in action for tort in connection with automobile. 99 ALR 130.

Service of summons by mail in proceedings to purge voters' registration lists. 96 ALR 1041.

Service of process upon actual agent of foreign corporation in action based on transactions outside of state. 96 ALR 366; 30 ALR 255.

Foreign transportation corporation as subject to service of process in state in which it merely solicits interstate business. 95 ALR 1478; 46 ALR 570.

Power of state to provide for service, other than personal, of process upon nonresident individual doing business within the state so as to subject him to judgment in personam. 91 ALR 1327.

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in action against foreign corporation as regards communications to corporation of fact of service. 89 ALR 658.

Domicile or status of national corporation for purpose of service of process in action in state court. 88 ALR 876; 69 ALR 1351.

May presence of bonds or other evidence of indebtedness or title within state sustain jurisdiction to determine rights or obligations in them in proceeding quasi in rem on substituted service on parties affected. 87 ALR 485.

May suit for injunction against nonresident rest upon constructive service or service out of state. 69 ALR 1038.

Jurisdiction of suit to remove cloud or to quiet title upon constructive service of process against nonresident. 51 ALR 754.

Service of process upon agent of party by estoppel or implication of law. 30 ALR 176.

What suits at domicile of corporation involving corporate stock or rights and obligations incident thereto are in rem, jurisdiction in which may rest upon constructive service of process against nonresidents. 14 ALR 1393.

Publication of notice on Sunday as contravening statute prohibiting service of process on Sunday. 13 ALR 669.

Validity of statutory provision for attorneys' fees in favor of nonresident served by publication. 11 ALR 896, supplemented by 90 ALR 530.

Appointment of receiver for railroad as affecting service of process on agent or employee in action against company. 9 ALR 228.

Effect of federal control of public utilities on service of process. 4 ALR 1715, supplemented by 8 ALR 987; 10 ALR 975; 11 ALR 1455; 19 ALR 697; 52 ALR 327.

Rule 4E. Time limit for issuance and service of process.

Compiler's Comments

1999 Amendment: In (1) inserted third sentence concerning filing summons and effect of failure to file summons. Amendment effective January 1, 2000.

Case Notes

CASES DECIDED UNDER FORMER RULE 41(E)

Failure to Serve Summons Within Three Years Requiring Dismissal With Prejudice of Same Federal Court Action if Plaintiff Voluntarily Dismisses State Court Action After Three Years: The U.S. District Court certified to the Montana Supreme Court the question of whether a plaintiff's failure to serve summons within 3 years as required under former Rule 41(e), M.R.Civ.P. (repealed and replaced with this rule), required dismissal with prejudice of the same claim in federal court upon motion of the defendant if the plaintiff voluntarily dismissed the state court action after 3 years pursuant to Rule 41(a), M.R.Civ.P. In determining which rule prevailed under the facts of the present case, the Supreme Court noted that the plain language of Rule 41(a)(1) allows a plaintiff to dismiss without prejudice prior to an appearance by a defendant. However, if a plaintiff was allowed to dismiss a case without prejudice after the 3-year time period for service of summons in former Rule 41(e) had run, then Rule 41(e) would be meaningless and in conflict with the purpose of that rule to require diligent prosecution, because

an inactive plaintiff would be thus rewarded by doing nothing for over 3 years even though that plaintiff was evidently pursuing a complaint. Former Rule 41(e) allowed a defendant to know that when a complaint was brought but service of summons was not accomplished within 3 years, the complaint would be dismissed with prejudice. Therefore, if a plaintiff moves to dismiss a complaint without prejudice under Rule 41(a)(1), but does so after the 3-year time period in former Rule 41(e) has passed, the plaintiff's dismissal is with prejudice and must be given res judicata effect. Rich v. St. Farm Mut. Auto. Ins. Co., 2003 MT 51, 314 M 338, 66 P3d 274 (2003). See also First Call, Inc. v. Capitol Answering Serv., Inc., 271 M 425, 898 P2d 96 (1995).

Applicability of Fictitious Name Statute and Misnomer Rule to Similarly Named Defendants — Relation Back of Amended Complaint: Molina was injured on a construction site, and filed a complaint against Panco, Inc., a Washington corporation that he believed to be the general contractor, for failing to supervise the job site and to provide a safe place to work. Molina also named fictitious defendants John Does I-III in the complaint. After the complaint was served but before Panco, Inc., filed a responsive pleading, Molina learned that there were two different corporations in Washington with similar names, so he filed an amended complaint naming the true contractor, Panco Construction, Inc., and retaining the additional fictitious defendants. Panco Construction, Inc., then filed its answer and moved for summary judgment, listing as an affirmative defense that the action was barred by the statute of limitations because the amended complaint was filed 3 months and 3 days after the limitation for negligence claims in 27-2-204. Molina asserted that the statute of limitations did not apply because under 25-5-103, a fictitiously named defendant is party to the action from its commencement so the statute of limitations stops running as to the fictitious party on the date that the original complaint is filed. Molina also contended that under Rule 15(c), M.R.Civ.P. (Title 25, ch. 20), an amended complaint relates back to the date of the original complaint when the amended complaint revolves around the same operative facts as the original complaint. Molina then moved to amend the complaint, asking that the District Court rule that the amended complaint sufficed to substitute Panco Construction, Inc., for John Doe I or, alternatively, that Molina be allowed to file a second amended complaint substituting Panco Construction, Inc., for John Doe I. Molina then moved to dismiss Panco, Inc., as a defendant. The District Court subsequently granted the motion of Panco Construction, Inc., for summary judgment without ruling on Molina's motion to amend the complaint. Molina appealed, contending that Panco Construction, Inc., was not a new party to the action, but rather a presently identified, formerly fictitiously named defendant that should be considered a party from the filing of the original complaint. Panco Construction, Inc., argued that: (1) Molina had attempted to entirely replace a mistakenly named defendant with a correctly named defendant without meeting the notice requirements of Rule 15(c), M.R.Civ.P.; (2) it was not a fictitiously named defendant under 25-5-103 because due diligence on Molina's part would have revealed the true identity of the defendant; and (3) Molina was precluded from arguing the applicability of subsection (2) of this rule on appeal because the issue was never raised in District Court. The Supreme Court reversed based on the District Court's incorrect assumption that it orally granted Molina's motion to file an amended complaint and on its failure to rule on the motion to amend the complaint. The case was remanded for consideration of the motion to amend the complaint in conjunction with subsection (2) of this rule, and of the effect that this rule may or may not have on 25-5-103, the fictitious name statute, and Rule 15(c), M.R.Civ.P., the misnomer rule. Molina v. Panco Constr. Inc., 2002 MT 136, 310 M 185, 49 P3d 570 (2002). On remand, the District Court concluded that Molina was not ignorant of defendant's name because, even though Molina was misinformed by the Washington Secretary of State, he nevertheless knew defendant's true corporate name, so summary judgment was granted to defendant. On appeal, the Supreme Court disagreed and remanded again. Under a liberal interpretation of 25-5-103, Molina was allowed to substitute defendant's real name for one of the John Doe defendants in the original complaint because he had no reason to believe that the wrong name had been supplied by the Washington Secretary of State, and even though he knew that the identity of the defendant whom he sought to name from the outset was the general contractor of the job on which he was injured, he relied on the incorrect information and thus was ignorant of the contractor's true legal name at the time that the complaint was filed. Molina v. Panco Constr., Inc., 2004 MT 198, 322 M 268, 95 P3d 687 (2004).

No Excusable Neglect Exception for Failure to Issue Summons During Required Twelve-Month Period: Otto's attorney stated that because of an understandable error by a legal secretary, no summonses were issued during the required 12-month period. The attorney argued that because the new rule allows 3 years to issue the summonses, the Supreme Court should adopt an excusable neglect rule and not dismiss the plaintiff's suit since the summonses were served within 3 years. The Supreme Court distinguished the case before it from Yarborough v.

Glacier County, 285 M 494, 948 P2d 1181 (1997), Schmitz v. Vasquez, 292 M 164, 970 P2d 1039 (1998), and Quamme v. Jodsaas, 292 M 342, 970 P2d 1049 (1998). The Supreme Court held that in those cases, substitute summonses were allowed to be issued under various circumstances because the substitute summonses were basically identical to the original summonses that had been issued during the required 12-month period. The Supreme Court held that dismissal was proper in the case before it because the former rule required the summonses to be issued within the 12-month period, which the plaintiff had failed to do, and the Supreme Court stated that it would not adopt an excusable neglect exception. Otto v. Dept. of Fish, Wildlife, and Parks, 2000 MT 333, 303 M 86, 15 P3d 402, 57 St. Rep. 1406 (2000).

Procedural Rules Apply to All Litigants and Not Unconstitutional When Applied to Employees' Claims: Otto's attorney argued that Art. II, sec. 16, Mont. Const., precluded limitations on claims by employees against persons other than their employer or fellow employees and that therefore dismissal of the plaintiff's suit because of the 12-month time period required by former Rule 41(e), M.R.Civ.P., to have a summons issued was an unconstitutional limitation on the plaintiff employee's right to bring an action. The Supreme Court held that the plaintiff's case had been properly dismissed because the former Rule 41(e) was a procedural rule that applied equally to all litigants and that to adopt the plaintiff's logic would mean that no rules leading to dismissal of an employee's action would be constitutional, including statutes of limitation. Otto v. Dept. of Fish, Wildlife, and Parks, 2000 MT 333, 303 M 86, 15 P3d 402, 57 St. Rep. 1406 (2000).

Failure to Meet Former Rule 41(e) Filing Deadline — Dismissal Proper: Janow filed a negligence complaint and demand for a jury trial on May 22, 1996, and summonses were issued the same day. However, Janow did not serve the complaint or file proof of service until May 25, 1999, more than 3 years after the action was commenced. Defendant moved to dismiss pursuant to Rule 41(e), M.R.Civ.P. (replaced with this rule). Dismissal was granted. Janow argued on appeal that the complaint should not have been dismissed because of the preference given to trying cases on their merits, contending that the dismissal order should be reversed because she acted diligently in attempting to comply with the rule, because the parties were involved in negotiations at the time that defendants were served with summonses, and because her ultimate motive was to avoid litigation altogether. The Supreme Court was not persuaded. Former Rule 41(e), M.R.Civ.P., contained no exceptions to the requirement that summonses be filed with the Clerk of Court within 3 years. Dismissal for failure to meet the deadline for filing proof of service was proper. Janow v. Conoco Pipe Line Co., 2000 MT 242, 301 M 402, 10 P3d 79, 57 St. Rep. 1014 (2000), following Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364 (1996).

Rule 4E Applicable to Complaints Filed After January 1, 2000: Janow filed a negligence complaint and demand for a jury trial on May 22, 1996, and summonses were issued the same day. However, Janow did not serve the complaint or file proof of service until May 25, 1999, more than 3 years after the action was commenced. Defendant moved to dismiss pursuant to Rule 41(e), M.R.Civ.P., which was replaced with this rule on January 1, 2000. Dismissal was granted. Janow argued on appeal that the court applied the wrong rule when considering whether to dismiss the complaint and that because the amendment to the rule was procedural rather than substantive, this rule could have been applied. The Supreme Court held that the District Court properly applied Rule 41(e) because the effective date of the amendment specifically provided that this rule applies only to cases in which the original complaint was filed on or after January 1, 2000. Janow v. Conoco Pipe Line Co., 2000 MT 242, 301 M 402, 10 P3d 79, 57 St. Rep. 1014 (2000).

Faxed Return of Service of Summons Received on Evening of Final Day of Filing Considered Timely — Courts Always Open: White filed a complaint September 8, 1995, and summons was served on Klosterman September 8, 1998. The Sheriff's dispatcher faxed the return of service to the Clerk of Court at 8:23 p.m. the same day. The District Court held that the return of service was late because it was not filed with the Clerk of Court by 5 p.m. on the last day that filing was permitted. However, the Supreme Court found nothing in the plain language of the judicial rules of procedure or any Montana authority that provides those requirements. Rather, Rule 41(e), M.R.Civ.P. (Title 25, ch. 20), requires that return of service be filed within 3 years; Rule 5(e), M.R.Civ.P., allows filing by facsimile or other electronic means; 25-3-501 gives faxed documents the same force and effect as an original; Rule 77(a), M.R.Civ.P., requires that District Courts always be open for filing; and 1-1-301 provides that each day ends at midnight. The District Court's decision was reversed on grounds that filing was timely. White v. Klosterman, 1999 MT 316, 297 M 259, 990 P2d 1249, 56 St. Rep. 1265 (1999).

Failure to Serve Original Summons Cured by Service of Amended Summons — Failure to Obtain Leave of Court to Amend Summons and Remove Party From Summons Not Fatal to

Service of Process: Schmitz filed a pro se action for medical malpractice against Vasquez and Sanz on April 5, 1994. On April 1, 1997, after determining that her claim against Sanz had not gone through the Montana Medical Legal Panel procedure, Schmitz amended her complaint without permission of the District Court and, through counsel, filed the amended complaint. A new summons was issued by the Clerk of District Court on April 1, 1997, and was served on Vasquez the same day. The amended complaint and the new summons were identical to those previously filed and issued except that they did not include any claim against or notice to Sanz. The District Court dismissed the suit because the original summons had not been served within 3 years of its issuance, as required by Rule 41(e) (replaced by Rule 4E), M.R.Civ.P. Relying upon Yarborough v. Glacier County, 285 M 494, 948 P2d 1181 (1997), and distinguishing Ass'n of Unit Owners v. Big Sky, 224 M 142, 729 P2d 469 (1986), and Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364 (1996), the Supreme Court held that since the amended complaint and new summons had only the effect of deleting Sanz as a defendant, Vasquez received the same notice from the amended complaint and second summons that he would have received from the first complaint and summons and therefore was not prejudiced by Schmitz's failure to serve the first complaint within 3 years and failure to obtain leave of court to amend the summons by removing Sanz as a defendant. For these reasons and because the purpose of the Montana Rules of Civil Procedure is to obtain a just, speedy, and inexpensive determination of every action, the Supreme Court held that Schmitz complied with the substance and purpose of Rule 41(e) (replaced by Rule 4E) and that the District Court erred in dismissing the suit. Schmitz v. Vasquez, 1998 MT 314, 292 M 164, 970 P2d 1039, 55 St. Rep. 1288 (1998).

Failure to Provide Sufficient Notice to Hold Defendant Liable for Prior Default Judgment — Amendment of Complaint to Include Alleged Business Alter Ego Denied — Summons Untimely: Hadford obtained a default judgment against Big Sky Billing Service, Inc. (Big Sky), in a wrongful discharge action but named neither Big Sky director in the complaint. After learning that Big Sky had no assets, Hadford filed a complaint against Credit Bureau of Havre, Inc. (Credit Bureau), and John Does I through IV, alleging that Big Sky was the alter ego of Credit Bureau and that Credit Bureau was thus liable for the default judgment obtained against Big Sky. A summons was issued and served on Credit Bureau but not on the John Does. Credit Bureau sought summary dismissal, contending that it had not received sufficient notice of the wrongful discharge action to be held personally liable for the default amount, and submitted a supporting affidavit that Credit Bureau was not the alter ego of Big Sky. Hadford moved to amend the complaint to substitute the Credit Bureau director for a John Doe. The trial court granted Credit Bureau's request for summary dismissal and denied Hadford's motion to amend the complaint. Distinguishing numerous cases regarding service of a parent corporation as constituting notice to subsidiaries or affiliates, the Supreme Court held that the lack of service of summons barred Hadford from holding Credit Bureau liable for the default judgment and that notice to Big Sky did not constitute notice to Credit Bureau. Further, because no summons was issued on any of the John Doe defendants within 1 year of commencement of the action, as required by Rule 41(e) (replaced by Rule 4E), M.R.Civ.P., the motion to amend the complaint to substitute a party was untimely and properly denied, and the action was dismissed. Hadford v. Credit Bureau of Havre, Inc., 1998 MT 179, 289 M 529, 962 P2d 1198, 55 St. Rep. 727 (1998), followed in Reisdorff v. Yellowstone County, 1999 MT 280, 296 M 525, 989 P2d 850, 56 St. Rep. 1128 (1999).

Return of Service of Process Not Filed With Clerk of Court Within Three Years — Dismissal With Prejudice Proper: When a return of service of process was filed with the Clerk of Court 3 years and 8 days after commencement of Eddleman's cause of action, rather than within 3 years as required by the plain language of this rule, dismissal of the complaint with prejudice was proper. Eddleman v. Aetna Life Ins. Co., 1998 MT 52, 288 M 50, 955 P2d 646, 55 St. Rep. 216 (1998), following Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364 (1996).

Delay in Issuing Original Summons — Serving of Additional Summons Held Not to Affect Time for Service of Original Summons: David Black, his wife Susan, their minor child, and the parties' defunct business sued Pierce Flooring and others for civil damages stemming from criminal acts of vandalism taken against the plaintiffs' competing business. The Blacks filed their original complaint on October 21, 1988, and a summons was issued the same day. A subsequent summons was issued on October 23, 1989, but was never served. A third summons was issued on February 28, 1990, which was served in March of 1990. On receipt of the summons served in March of 1990, the defendants, on March 27, 1990, filed a motion to dismiss, arguing that they had been served with a summons that was issued more than 1 year after the filing of the complaint, in violation of Rule 41(e) (replaced with Rule 4E), M.R.Civ.P. After the defendants made their motion to dismiss, the Blacks served on the defendants the original summons issued

on October 21, 1988. The District Court ruled that the defective February 28, 1990, summons was cured by the service of the original October 21, 1988, summons. The Supreme Court affirmed, stating that it had held in First Call, Inc. v. Capitol Answering Serv., Inc., 271 M 425, 898 P2d 96 (1995), that failure to serve a summons within the required 3 years meant that a complaint had to be dismissed and that in this case, the original summons was served within the required 3 years. The Supreme Court held that the issuance of the intervening summons did not nullify the original summons. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Duplicate Summons Issued More Than One Year After Commencement of Action — Substance and Purpose of Rule Met: Yarborough filed a complaint in District Court on July 8, 1993, alleging breach of contract in June 1991 and requested acknowledgment of service by the Glacier County Attorney on February 14, 1994. On July 9, 1993, the County Attorney responded by letter that he would not accept service and that the summons and complaint would have to be personally served on the chairman of the County Commissioners. Sometime subsequent to February 15, 1994, the original summons was lost. Yarborough's attorney then sent a duplicate of the original summons to the Clerk of the District Court and requested that it be reissued. The duplicate summons, identical to the original summons, was issued June 23, 1995, and was served on the Glacier County Commissioners on October 3, 1995. On October 18, 1995, Glacier County moved for dismissal of the complaint, based on Yarborough's failure to serve the summons and complaint as required by Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., contending that the duplicate summons was not issued within 1 year from the commencement of the action and was therefore untimely. Following the decisions in Ass'n of Unit Owners v. Big Sky, 224 M 142, 729 P2d 469 (1986), Busch v. Atkinson, 278 M 478, 925 P2d 874 (1996), and Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364 (1996), the District Court held that Rule 41(e) (replaced with Rule 4E) must be applied literally and ordered Yarborough's complaint dismissed with prejudice. On appeal, Yarborough cited Larango v. Lovely, 196 M 43, 637 P2d 517 (1981), arguing that the Montana Rules of Civil Procedure should be construed to facilitate the resolution of disputes on their merits rather than arguable procedural irregularities and that it was inconsistent with the rule to hold that merely because the original piece of paper, which was timely issued, was lost after the first year from its issuance, timely service could not be satisfied by substitution of an identical copy. The Supreme Court reversed and distinguished Ass'n of Unit Owners, Busch, and Haugen, holding that by serving, within 3 years, an identical copy of an original summons that was issued within 1 year, the substance and literal purpose of Rule 41(e) (replaced with Rule 4E) was complied with and that to require more would exalt form over substance and do nothing to further the resolution of controversies on their merits. Yarborough v. Glacier County, 285 M 494, 948 P2d 1181, 54 St. Rep. 1274 (1997), followed in Schmitz v. Vasquez, 1998 MT 314, 292 M 164, 970 P2d 1039, 55 St. Rep. 1288 (1998).

Dismissal for Failure to Timely File Proof of Service of Summons: The District Court properly dismissed the complaint for failure of plaintiffs to file proof of service of the summons with the Clerk of the Court within 3 years after commencement of the action, as required by Rule 41(e) (replaced with Rule 4E), M.R.Civ.P. Livingston v. Treasure County, 239 M 511, 781 P2d 1129 (1989), which held that filing the proof of service is a mere formality and a ministerial act and that plaintiff's failure to file it with the clerk within 3 years of commencement of the action does not require dismissal of the action, was overruled. The rule is clear and unambiguous, and permitting a plaintiff to disregard the rule is prejudicial to the defendant and defeats the rule's purpose of promoting the diligent prosecution of claims. Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364, 53 St. Rep. 1024 (1996), distinguished in Schmitz v. Vasquez, 1998 MT 314, 292 M 164, 970 P2d 1039, 55 St. Rep. 1288 (1998), and followed in Janow v. Conoco Pipe Line Co., 2000 MT 242, 301 M 402, 10 P3d 79, 57 St. Rep. 1014 (2000).

Dismissal for Failure to Issue Summons Within Year After Action Commenced: Rule 4C(1), M.R.Civ.P., requires the clerk to forthwith issue a summons upon the filing of a complaint. It is mandatory and leaves no room for interpretation. It does not require claimant or claimant's attorney to request or direct issuance. The lower court's dismissal under Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., which requires dismissal if the summons is not issued within a year after commencement of the action, was reversed, and the case was remanded. The failure to issue the summons resulted directly from the clerk's failure to perform a duty required by rule. However, the court stated that Rule 4C(1) did not comport with the accepted usual practice, which was for the attorney filing the complaint to prepare the summons and direct the clerk to issue it. The court stated that it intended to amend the rule to conform it to the practice. (See 1997 amendment to Rule 4C(1).) Busch v. Atkinson, 278 M 478, 925 P2d 874, 53 St. Rep. 1020 (1996).

Failure to File Summons for Dismissed Complaint — Summons Served After Second Complaint Filed: A complaint filed on April 16, 1992, was voluntarily dismissed without prejudice on August 3, 1993. A second complaint was filed on December 13, 1993. Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., requires a summons to be filed within 3 years of the filing of the complaint. Failure to serve the summons on the first complaint before the first complaint's voluntary dismissal did not bar the second complaint because the summons on the second complaint was served within 3 years of the filing of the first complaint. Webb v. T.D., 275 M 243, 912 P2d 202, 53 St. Rep. 117 (1996).

Failure to Serve Summons Within Three Years to Result in Case Being Dismissed With Prejudice: First Call filed a suit against Capital Answering Service but failed to serve the summons within 3 years of its issuance. Prior to the running of the statute of limitations, Capital Answering Service moved to have the complaint dismissed on the basis that the summons had not been served within the required 3 years. The lower court dismissed the complaint but without prejudice, and First Call refiled before the statute of limitations cut off its cause of action. The Supreme Court reversed its holdings in Whitcraft v. Semenza, 145 M 94, 399 P2d 757 (1965), and State ex rel. Equity Supply Co. v. District Court, 159 M 34, 494 P2d 911 (1972), and held that a failure to serve a summons within the required 3 years means that the complaint must be dismissed with prejudice. First Call, Inc. v. Capital Answering Serv., Inc., 271 M 425, 898 P2d 1215, 52 St. Rep. 496 (1995), followed in Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Failure to Issue Summons Within One Year of Commencement of Action — Dismissal Required: Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., is to ensure that actions are timely prosecuted and requires dismissal of an action when a summons is not issued within 1 year of the commencement of an action, and the failure to issue a summons within that time entitles a defendant to a dismissal. An action may be further prosecuted under Rule 41(e) (replaced with Rule 4E) if a defendant appears within 3 years of the commencement of the action even though a summons has not been timely issued. However, a motion to dismiss does not serve as an appearance or a basis for further prosecution. Sinclair v. Big Bud Mfg. Co., 262 M 363, 865 P2d 264, 50 St. Rep. 1598 (1993).

Prohibition on Addition of New Defendant More Than Three Years After Commencement of Action: It was clear from the evidence that plaintiffs knew the origin of realty misrepresentations on October 17, 1986, but failed to join the realty company as a party defendant until December 28, 1989, more than 3 years later. The District Court properly invoked Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., in prohibiting as untimely the addition of the company as defendant in the action absent any legal excuse or reason from plaintiffs to invoke the equity of the court for the failure to act within the required timeframe. Courchane v. Kuntz, 246 M 216, 806 P2d 12, 47 St. Rep. 1894 (1990).

Showing of Good Cause Required to Excuse Failure to File Return: Failure to file a return within 3 years after commencement of an action, as required under Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., may be excused only upon a showing of good cause. The fact that plaintiff served defendant on the last permissible day but failed to file the return with the clerk until about 1 month after the 3-year deadline demonstrated sufficient good cause in light of the fact that failure to file did not hinder or delay prosecution of the action or affect the validity of service. Livingston v. Treasure County, 239 M 511, 781 P2d 1129, 46 St. Rep. 1873 (1989), overruled in Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364, 53 St. Rep. 1024 (1996). Haugen was distinguished in Schmitz v. Vasquez, 1998 MT 314, 292 M 164, 970 P2d 1039, 55 St. Rep. 1288 (1998).

Failure to Name Defendants in Original Summons — "Duplicate Summons" Not Allowed — Insufficient Service: Defendants were named in a January 18, 1983, complaint, but no summons was issued at that time. A February 18, 1983, amended complaint was filed, but the summons issued at that time did not name six defendants. About 15 months after the original summons was issued, additional summonses marked "duplicate summons" were served on the six defendants. The Supreme Court found nothing in the rules providing for "duplicate summons"; therefore, the attempted service on the six defendants provided insufficient notice because of the absence of defendants' names in the properly issued February 18 summons and because the 1-year limitation of service in Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., was not met. Ass'n of Unit Owners of the Deer Lodge Condominium v. Big Sky of Mont., Inc., 224 M 142, 729 P2d 469, 43 St. Rep. 2084 (1986), distinguished in Schmitz v. Vasquez, 1998 MT 314, 292 M 164, 970 P2d 1039, 55 St. Rep. 1288 (1998).

Fictitiously Named Defendants: In dicta, the Supreme Court indicated fictitiously named defendants under 25-5-103, not identified and summoned or served within the times provided in

Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., are entitled to dismissal. Sooy v. Petrolane Steel Gas, Inc., 218 M 418, 708 P2d 1014, 42 St. Rep. 1702 (1985).

Amendment of Summons Not Issued Within One Year — Relation Back to Original Issuance: When the court quashed a summons because it had been altered without leave of the court, failed to rule upon the motion to reconsider its quashing, and failed to rule upon the motion to allow amendment of the summons, the passage of over 1 year's time precluded the effective issuance of a summons and provided grounds for dismissal. However, since material prejudice would not have resulted, the District Court should have allowed amendment of the summons relating back to the original date of issuance. Larango v. Lovely, 196 M 43, 637 P2d 517, 38 St. Rep. 2107 (1981), distinguished in Ass'n of Unit Owners of the Deer Lodge Condominium v. Big Sky of Mont., Inc., 224 M 142, 729 P2d 469, 43 St. Rep. 2084 (1986), and Schmitz v. Vasquez, 1998 MT 314, 292 M 164, 970 P2d 1039, 55 St. Rep. 1288 (1998). Big Sky was followed in MacPheat v. Schauf, 1998 MT 250, 291 M 182, 969 P2d 265, 55 St. Rep. 1032 (1998).

Rule Not Applicable to Service of Petitions on Agency for Judicial Review of Administrative Decisions: The 3-year time limit provided in Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., is not applicable to service of a petition for judicial review in District Court of an adverse administrative hearing provided by 2-4-702. That section specifically requires prompt service and therefore is an express exception within the meaning of 2-4-106, relating to the applicability of civil procedure rules regarding service in the Montana Administrative Procedure Act. Rierson v. St., 188 M 522, 614 P2d 1021 (1980).

Order Setting Aside Default — Appealability: The Supreme Court adopted for Montana the rule followed in the majority of jurisdictions that an order granting a motion to vacate a default judgment is nonappealable, but held that when a default judgment is vacated for failure to serve process within the time period required by Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., the order of the District Court vacating the default judgment amounts to a final judgment from which an appeal can be taken. Shields v. Pirkle Refrigerated Freightlines, Inc., 181 M 37, 591 P2d 1120 (1979), overruled in part in Roberts v. Empire Fire & Marine Ins. Co., 276 M 225, 915 P2d 872, 53 St. Rep. 359 (1996).

Effect of Statute Regarding Reversal on Appeal — Delay in Prosecution — Refiling of Claim: Statute regarding time for service of summons after reversal on appeal does not operate to save a claim when the failure to have summons issued within the prescribed period of limitations has occurred. Therefore, order of dismissal operated as a bar to another suit on the same claim. State ex rel. Equity Supply Co. v. District Court, 159 M 34, 494 P2d 911 (1972).

Failure to Serve Summons as Failure to Prosecute: Dismissal under Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., for failure to have summons issued within 1 year after commencement of the action is a dismissal for neglect to prosecute within the meaning of 27-2-407. Section 27-2-407 does not operate to permit the commencement of a new action after expiration of the Statute of Limitations. State ex rel. Equity Supply Co. v. District Court, 159 M 34, 494 P2d 911 (1972), overruled, as to refiling a complaint prior to expiration of the statute of limitations, in First Call, Inc. v. Capital Answering Serv., Inc., 271 M 425, 898 P2d 1215, 52 St. Rep. 496 (1995).

No Application to Probate Matters: Rule does not apply to service of summons in suit on rejected claim in probate which is governed exclusively by statute providing for contesting rejected claims in probate. Werning v. McFarland, 149 M 137, 423 P2d 851 (1967).

Failure to Serve Summons — Effect — Rule Not in Effect: Notwithstanding the fact that the rules were not in effect, the court exceeded its jurisdiction in denying motion to quash the service of summons when it was not served and returned within 3 years. State ex rel. Belwin, Inc. v. Davison, 148 M 345, 420 P2d 842 (1966).

Motion to Quash Improperly Denied: District Court exceeded its jurisdiction in denying motion to quash summons and dismiss action where the summons had not been served and returned within the 3 years required by Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., prior to 1965 amendment. State ex rel. Belwin, Inc. v. Davison, 148 M 345, 420 P2d 842 (1966).

Application to Pending Actions: Even though there was a lapse of a year between repeal of section 93-4705, R.C.M. 1947, and adoption of Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., which is identical, application of Rule 41(e) (replaced with Rule 4E) to a pending action in which return was made more than 3 years after commencement of the action was proper since not only was a reasonable time allowed before the effective date of the change, but the information was widely distributed. Whitcraft v. Semenza, 145 M 94, 399 P2d 757 (1965).

Dismissal No Bar to Renewal of Claim: A judgment is not res judicata unless it is on the merits, so that a dismissal under Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., since it is not a Statute of Limitations, does not constitute a bar to another suit on the same claim. Whitcraft v. Semenza, 145 M 94, 399 P2d 757 (1965), overruled, as to refiling a complaint prior to expiration

of the statute of limitations, in First Call, Inc. v. Capital Answering Serv., Inc., 271 M 425, 898 P2d 1215, 52 St. Rep. 496 (1995).

How Raised — by Motion: Where return was made more than 3 years after commencement of action, Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., since it is not a Statute of Limitations, could be raised by motion under Rule 12(b) rather than pleaded as an affirmative defense. Whitcraft v. Semenza, 145 M 94, 399 P2d 757 (1965).

Claim Not Reinstated by Repeal of Former Law: An action that was subject to dismissal for failure to serve the summons within the 3 years specified by section 93-4705, R.C.M. 1947 (superseded by Rule 41(e) (replaced with Rule 4E), M.R.Civ.P.), was not reinstated by the subsequent repeal of section 93-4705. State ex rel. Baldwin v. District Court, 142 M 64, 381 P2d 473 (1963).

No Discretion to Disregard Rule: Where actions were commenced and the summons in each case was issued and served within the period and time limit fixed and allowed by express statutes, the trial court has no "discretion" to disregard the rules of practice and procedure so prescribed and attempt to shorten the time allowed for the performance of the acts. Kujich v. Lillie, 127 M 125, 260 P2d 383 (1953).

Alias Summons Issued — Original Could Be Served: Where the original summons was brought back to the clerk's office without a return and received by the clerk, marked as filed, and an alias summons thereupon issued and served upon defendant, the original had lost none of its force, could still be served until expiration of 3 years, and had not been made functus officio, although an ex parte application for permission to withdraw it for service might be required. State ex rel. Montgomery Ward & Co. v. District Court, 115 M 521, 146 P2d 1012 (1944).

Law Review Articles

Does It Have to Be This Hard? Rule 41(e) in Montana, Ford, 60 Mont. L. Rev. 285 (1999).

Rule 5. Service and filing of pleadings and other papers

Case Notes

Equating Motion for Reconsideration to Motion to Alter or Amend: Miller filed a motion for reconsideration of the District Court's grant of the defendant's motion for summary judgment. Miller's motion for reconsideration was denied, and he appealed the summary judgment order, not within 30 days of entry of the summary judgment but within 30 days of the denial of the motion for reconsideration. The defendant moved for dismissal of the appeal on the grounds that it had not been timely filed. Miller argued that the motion for reconsideration stopped the running of the 30-day requirement and that the 30-day requirement started to run again from the time that the motion to reconsider was denied. Miller based his argument on the holding in Easley v. Burlington N. RR, 234 M 290, 762 P2d 870 (1988), which stated that although a motion for reconsideration is not specifically referred to in Rule 59(g), M.R.Civ.P., it can be equated to a motion to alter or amend a judgment. The Supreme Court held that it would allow Miller's appeal because of his reliance on Easley but that any future motion to reconsider would not be treated as equivalent to a motion to alter or amend unless the motion contains statements or allegations demonstrating that the motion is equivalent to a motion to alter or amend. Miller v. Herbert, 272 M 132, 900 P2d 273, 52 St. Rep. 655 (1995), overruling in part Easley v. Burlington N. RR, 234 M 290, 762 P2d 870 (1988).

Notice of Hearing of Default Judgment — No Conflict Between Uniform District Court Rules and Rules of Civil Procedure: The controlling rules relating to the entry of default judgments are found in Rule 55, M.R.Civ.P., and, with respect to service, are found in this rule and Rule 6, M.R.Civ.P. The Uniform District Court Rules do not enlarge, vary, or control the provisions of the Montana Rules of Civil Procedure. Fed. S&L Ins. Corp. v. Anderson, 233 M 339, 760 P2d 80, 45 St. Rep. 1537 (1988).

Rule 5(a). Service — when required.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 5(a), as amended 1963.

Explanation of change: The words "affected thereby" stricken out by the amendment, introduced a problem of interpretation. The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules.

ADVISORY COMMITTEE'S COMMENT
ON DECEMBER 31, 1975, AMENDMENT

The foregoing Amendment will bring this sub-section into line with Rule 5(a) FRCP.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical to the first paragraph of the Federal Rule.

Amendment: The amendment of September 29, 1967, inserted "Except as otherwise provided in these rules" at the beginning of the first sentence; deleted "affected thereby, but" at the end of the first sentence, making the remainder of the original sentence into the second sentence.

The 1975 amendment inserted "every paper relating to discovery required to be served upon a party unless the Court otherwise orders" in the first sentence.

Case Notes

Personal Service on Defendant or Defendant's Counsel Not Required for Execution Sales: Mikelson argued that Rule 81(c), M.R.Civ.P., and this rule, when read together, required that notice of a Sheriff's sale of Mikelson's property be served personally on Mikelson or his counsel. However, those rules deal with notice within District Court proceedings and do not relate to notice in execution sales, which are governed by 25-13-701. Nothing in 25-13-701 requires that notice of an execution sale be served personally on Mikelson or his counsel. Bank of Baker v. Mikelson Land Co., 1999 MT 76, 294 M 64, 979 P2d 180, 56 St. Rep. 315 (1999).

Guardianship Proceeding — Failure of District Court to Make Record Held Violation of Statute — Ex Parte Hearing Held Violation of Due Process: A District Court twice appointed the same temporary guardians for Kathleen Klos pursuant to 72-5-317, once in writing and once by making an oral order with no documentation of the hearing or order except a minute entry made by the Clerk of Court. In the second proceeding, counsel representing the guardians had actual notice, in the form of two letters, that Klos was represented by an attorney for the Montana Advocacy Program but failed to serve that attorney with notice of the hearing. The Supreme Court held that: (1) in failing to make a record of the proceedings and to enter a written order with findings of fact, the District Court violated the plain language of 72-5-317; (2) although 72-5-317 does authorize an ex parte hearing, that authorization applies only in emergency circumstances that were not present in this case and the failure to provide notice therefore also violates 72-5-317; and (3) the failure of the guardians' counsel to serve notice on Klos's attorney violated Klos's right to due process of law provided by Art. II, sec. 17, Mont. Const. In re Klos, 284 M 197, 943 P2d 1277, 54 St. Rep. 843 (1997).

Notice of Entry of Judgment Not Filed — Time for Appeal Not to Run: Under this rule, when the appellant is a political subdivision of the state, the notice of appeal must be filed within 60 days from the entry of judgment or from the service of notice of entry of judgment. The time for filing an appeal does not begin to run until the prevailing party serves a notice of entry of judgment. If the prevailing party does not serve a notice of entry of judgment, the time for appeal never begins to run. Buckley v. Wordal, 262 M 306, 865 P2d 240, 50 St. Rep. 1570 (1993), following In re Marriage of Robertson, 237 M 406, 773 P2d 1213 (1989).

Notice and Hearing Required: Plaintiff changed attorneys during a proceeding. The order substituting counsel provided for attorney fees to the original counsel. It was error for the District Court to award fees without notice to the plaintiff and without providing an opportunity for a hearing. Bink v. First Bank West, Great Falls, Inc., 246 M 414, 804 P2d 384, 48 St. Rep. 17 (1991).

Custody Proceedings — Court-Appointed Attorney for Child — Service Required: While the appointment of an attorney to represent children in custody matters is discretionary with the court under 40-4-205, once an attorney has been appointed, it is required that he or she be served with all orders, pleadings, motions, notices, and other papers pertinent to the action. Further, the attorney must actively represent the children and be given an opportunity to present all evidence concerning the best interests of the children. In re Marriage of Hammill, 225 M 263, 732 P2d 403, 44 St. Rep. 220 (1987).

Notice of Denial of Motion Not Required — Appeal Period: Appellant's posttrial motion for a new trial was considered denied upon failure of the District Court to rule on it for 45 days, under Rule 59(d), M.R.Civ.P. No notice of such denial is required under Rule 5, M.R.Civ.P. The 30-day period for appeal under Rule 5, M.R.App.P., begins to run upon expiration of the 45-day period of Rule 59(d). Mortensen Constr. Co. v. Burlington N., Inc., 218 M 415, 708 P2d 1006, 42 St. Rep. 1699 (1985).

Notice of Subsequent Proceedings: If a party "appears" by filing a motion he is entitled to notice of all subsequent proceedings. Big Spring v. Blackfeet Tribe of the Blackfeet Indian Reservation, 175 M 258, 573 P2d 655 (1978).

Notice of Order Requesting Attorney Fees: When a party requested attorney fees pursuant to Rule 37(c), M.R.Civ.P., and failed to apply by motion with notice to opposing party, but incorporated it within proposed findings of fact and conclusions of law, there was insufficient notice. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

Notice of Entry of Judgment Omitted — Effect: The date of service of notice of entry of judgment is the arbitrary point in time from which the time limits for appeal begin to run. If no notice of entry of judgment has been served upon the losing party, the right to appeal has not expired. Haywood v. Sedillo, 167 M 101, 535 P2d 1014 (1975).

Premature Notice — Effect: Under former law, notice of motion for a new trial given 10 days before entry of judgment is premature and therefore ineffective as a basis for the motion. Power & Bros. v. Turner, 37 M 521, 97 P 950 (1908), distinguished in Kenyon-Noble Lumber Co. v. School District, 40 M 123, 105 P 551 (1909).

Response to Document as Waiver of Objections to Service: The objection that a bill of exceptions (abolished, see Rules 7(c), 46, M.R.Civ.P., and section 25-31-503, now repealed) was not served in the manner provided by law is waived by presenting amendments to the proposed bill. The purpose of the statute is to insure that the person upon whom service is sought shall actually receive, if possible, the document to be served. When a party appears and presents and has allowed his amendments to a proposed bill of exceptions, he is not in a position to say that he has never actually received a copy of the same. Fordham v. N. Pac. Ry., 30 M 421, 76 P 1040 (1904).

Collateral References

Motions *key* 18 through 23; Notice *key* 9, 10; Pleading *key* 331 through 340.

60 C.J.S. Motions and Orders §§11, 13 through 19; 66 C.J.S. Notice §18; 71 C.J.S. Pleading §§576 through 583.

Generally, see 58 Am. Jur. 2d Notice.

Rule 5(b). Service — how made.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Mailing to Attorney of Record and Party's Last-Known Address Considered Adequate Notice — Personal Service Not Required: After 11 years passed from the time that a dissolution decree was entered, the wife moved to obtain her share of the husband's retirement benefits as ordered in the decree. Notice of the action was sent to the husband's last attorney of record, who filed a motion to dismiss, and by mail to the husband's last-known address in Hawaii. The husband contended that personal service was required because so much time had passed since the decree and because the attorney-client relationship was stale. However, the husband cited no authorities for the argument that personal service was required because the passage of time concluded the attorney-client relationship or that service requirements were modified based upon the last date of activity in a case. The attorney was clearly acting as the husband's attorney, and the decree was intended to extend to the issue of retirement, which had only recently occurred. Thus, under this rule, service was perfected and complete upon mailing a copy to the husband's last attorney of record and to the husband's last-known address. In re Marriage of Weber, 2004 MT 206, 322 M 324, 95 P3d 694 (2004).

Abuse of Discretion in Failure to Reference Statutory Judicial Review Provisions in Administrative Order Addressing Child Support Enforcement — Due Process Violation Constituting Reversible Error: The mother filed a petition with the Child Support Enforcement Division (CSED) for assistance in obtaining child support from the father. CSED initiated an administrative action to determine the amount of support owing, and an administrative law

judge conducted a contested case hearing on the issue and entered an order establishing the father's current and past-due child support obligation. The order included a paragraph notifying the parents of their statutory right to petition for judicial review of the administrative decision under Title 2, ch. 4, part 7 (MAPA), but did not reference 40-5-253, which contains more specific procedural requirements for appealing from an administrative decision in a child support enforcement case than the provisions in MAPA. The father filed a petition for judicial review and mailed copies to the mother and CSED but failed to properly serve the parties as required in 40-5-253. The District Court concluded that it lacked subject matter jurisdiction because the father failed to comply with 40-5-253. The court dismissed the petition. The father moved the court to amend or reconsider the petition, contending that the application of 40-5-253 violated his due process rights because he did not receive sufficient notice of the procedures by which to obtain judicial review of the administrative decision. The motion was denied, but the court nevertheless subsequently entered another order correcting the clerical error by adding a reference to 40-5-253 to the notice provision of the earlier order and then granted CSED's motion to dismiss. The father appealed. The Supreme Court noted that proper service of a petition for judicial review was a threshold requirement for the District Court to obtain jurisdiction in this case and that under Title 2, ch. 4, part 7, a petition for judicial review may be properly served by mailing copies to the agency and other parties, but there is no requirement that a summons be issued and served in conjunction with the petition. By filing the petition for judicial review and mailing copies to the mother and CSED, the father fulfilled the service requirements of MAPA and Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469 (1996). However, specific statutory requirements prevail over general provisions such as those in MAPA, and the Supreme Court agreed that the portion of the notice informing the father that MAPA would govern the proceedings was misleading, absent any reference to the different, specific procedural requirements for CSED actions under 40-5-253. The Supreme Court adopted federal interpretations of the due process notice requirements in this regard, which provide that the opportunity to be heard is not meaningful if the notice provided does not accurately inform the person to whom it is given of how to take advantage of that opportunity. The notice provisions in the administrative order did not provide father with adequate notice to meet due process requirements, so application of 40-5-253 would violate the father's due process rights. Under these unique circumstances, it was required that the father's petition for judicial review must be governed by the service requirements of MAPA and Hilands. Those requirements were met, so the District Court did acquire subject matter jurisdiction and abused its discretion in dismissing the father's petition for judicial review based on his failure to comply with 40-5-253. The case was reversed for further proceedings under MAPA. Pickens v. Shelton-Thompson, 2000 MT 131, 300 M 16, 3 P3d 603, 57 St. Rep. 543 (2000), followed in In re Support Obligation of McGurran v. Dept. of Public Health and Human Services, 2003 MT 145, 316 M 188, 70 P3d 734 (2003). See also Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L Ed 2d 865, 70 S Ct 652 (1950), Gonzales v. Sullivan, 914 F2d 1197 (9th Cir. 1990), Walters v. Reno, 145 F3d 1032 (9th Cir. 1998), and City of W. Covina v. Perkins, 525 US 234, 142 L Ed 2d 636, 119 S Ct 678 (1999).

Guardianship Proceeding — Failure of District Court to Make Record Held Violation of Statute — Ex Parte Hearing Held Violation of Due Process: A District Court twice appointed the same temporary guardians for Kathleen Klos pursuant to 72-5-317, once in writing and once by making an oral order with no documentation of the hearing or order except a minute entry made by the Clerk of Court. In the second proceeding, counsel representing the guardians had actual notice, in the form of two letters, that Klos was represented by an attorney for the Montana Advocacy Program but failed to serve that attorney with notice of the hearing. The Supreme Court held that: (1) in failing to make a record of the proceedings and to enter a written order with findings of fact, the District Court violated the plain language of 72-5-317; (2) although 72-5-317 does authorize an ex parte hearing, that authorization applies only in emergency circumstances that were not present in this case and the failure to provide notice therefore also violates 72-5-317; and (3) the failure of the guardians' counsel to serve notice on Klos's attorney violated Klos's right to due process of law provided by Art. II, sec. 17, Mont. Const. In re Klos, 284 M 197, 943 P2d 1277, 54 St. Rep. 843 (1997).

Petition for Judicial Review of Contested Case — Service on Parties Under This Rule Held Sufficient: Ashmore brought a claim before the Human Rights Commission, alleging that she had been discriminated against by Hilands Golf Club because of her gender, in violation of 49-2-304. The Commission found in favor of Ashmore and awarded her relief. Hilands filed a petition for judicial review pursuant to 2-4-702 and served copies of the petition by mail upon counsel for the Commission and Hilands. No summons was served with the petition, and no service was made upon the Attorney General. Ashmore filed a motion to dismiss under Rule

12(b), M.R.Civ.P., alleging that no jurisdiction had been obtained over the Commission by service of a summons upon the Attorney General, contrary to the holding in Fife v. Martin, 261 M 471, 863 P2d 403 (1993). The District Court granted the motion. The Supreme Court reversed, overruling Fife and holding that because judicial review pursuant to 2-4-702 is in the nature of an appeal, in which jurisdiction over the parties has already been established, service of a summons with the petition is unnecessary and holding that the petition may be served upon the parties by mail under this rule. The Supreme Court noted that it was sufficient to mail a copy of the petition upon the parties and the agency, whether or not the agency had been a party to the administrative proceeding. Hilands Golf Club v. Ashmore, 277 M 324, 922 P2d 469, 53 St. Rep. 664 (1996).

Amended Complaint Served With Original Summons and Complaint — Personal Jurisdiction Acquired: Where the defendant implement company sought to set aside a default judgment obtained against it by arguing that service of an amended complaint with the original summons and complaint constituted defective service and deprived the District Court of personal jurisdiction, the Supreme Court held that since service of the original summons and complaint was properly made, the only issue was whether the amendment was properly made. Because Rule 4C does not require a summons to be served with an amended complaint and because the amended complaint may be served by delivering a copy to the party and may be filed within a reasonable time after service, the simultaneous service of the amended complaint did not deprive the District Court of jurisdiction over the defendant. Elk Run Ranch v. Green Line Implement Co., 205 M 413, 668 P2d 258, 40 St. Rep. 1397 (1983).

Failure to Serve Attorney — Not Reversible Error: The defendant failed to serve the plaintiff's attorney in violation of Rule 5(b), M.R.Civ.P. Whether this is reversible error depends on the facts. The defendant's motion was set for hearing the same day as one of the plaintiff's motion. The two motions did not pertain to identical issues, but both motions pertained to the same divorce decree and property settlement agreement. No attempt was made to get a continuance. The plaintiff was allowed to testify fully as to his financial affairs, and he has pointed to no evidence on appeal which was not before the trial court. The plaintiff was not prejudiced by the lack of service on his attorney. Phennicie v. Phennicie, 185 M 120, 604 P2d 787 (1979).

Service of Amended Complaint — Consent of Counsel Unnecessary: Whether or not counsel agreed to accept service for his clients was immaterial. Service of an amended complaint is required to be made on the attorney. A reasonable time must be given for responsive pleadings before default, however. State ex rel. Leavitt v. District Court, 172 M 12, 560 P2d 517 (1977).

Service by Mail Complete Upon Mailing: Service of a memorandum of costs was complete when it was deposited in the post office addressed to the opponent's counsel. Herdegen v. Oxarart, 141 M 464, 378 P2d 655 (1963).

Waiver of Defective Service by Mail: Where defendants, seeking a change of place of trial, served the moving papers upon plaintiff by mail but the postage thereon was insufficient, the plaintiff by paying what was due thereon and retaining the enclosures instead of returning them promptly, waived all objection to the defect of service, and the court properly denied his motion to strike the papers from the files. Helena Adjustment Co. v. Predivich, 98 M 162, 37 P2d 651 (1934).

Clerk or Person in Charge of Office: Constructive service of a statement on motion for a new trial, by delivery thereof to a person who, although at one time a stenographer in the office of the attorney upon whom service was attempted to be made, was not then in his office or in charge of it, but employed elsewhere, was insufficient. Nord v. Boston & Mont. Consol. Copper & Silver Min. Co., 33 M 464, 84 P 1116 (1906).

Collateral References

58 Am. Jur. 2d Notice §§32 through 40.

Rule 5(c). Service — numerous defendants.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Rule 5(d). Filing; certificate of service.

Advisory Committee Notes

1993 Amendment: The amendments conform the rule to the 1991 amendments of the Federal Rule in part.

1988 Amendment: The amendment conforms the rule to the 1987 Montana Uniform District Court Rules, effective on May 1, 1987, in which Rule 4 provides that discovery materials will not be routinely filed. The third sentence adds the provision for filing after obtaining a court order.

Compiler's Comments

1993 Amendment: In first sentence, after "party", inserted "together with a certificate of service" and after "court" deleted "either before service or"; at end of last sentence, after "filed", deleted "in conformance with Rule 45(d)(1)"; and made minor changes in style.

Identity With Federal Rule: Through May 1, 1990, this rule was still identical to the Federal Rule. On August 1, 1980, an amendment to Federal Rule 5(d) took effect allowing statements and other material obtained through discovery procedure to be exempted from the filing requirement. The 1988 amendment has no counterpart in the Federal Rule.

1988 Amendment: At end of first sentence inserted exception clause; inserted second sentence concerning attaching documents to motions; inserted third sentence concerning ex parte request for filing; and inserted fourth sentence concerning proof of service. Amendment effective November 1, 1988.

Case Notes

Amended Complaint Served With Original Summons and Complaint — Personal Jurisdiction Acquired: Where the defendant implement company sought to set aside a default judgment obtained against it by arguing that service of an amended complaint with the original summons and complaint constituted defective service and deprived the District Court of personal jurisdiction, the Supreme Court held that since service of the original summons and complaint was properly made, the only issue was whether the amendment was properly made. Because Rule 4C does not require a summons to be served with an amended complaint and because the amended complaint may be served by delivering a copy to the party and may be filed within a reasonable time after service, the simultaneous service of the amended complaint did not deprive the District Court of jurisdiction over the defendant. Elk Run Ranch v. Green Line Implement Co., 205 M 413, 668 P2d 258, 40 St. Rep. 1397 (1983).

Rule 5(e). Filing with the court defined.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform the rule to the 1991 amendments of the Federal Rule in part.

Compiler's Comments

1993 Amendment: In first sentence, after "filing of", deleted "pleadings and other"; and inserted last sentence concerning facsimile filing.

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Faxed Return of Service of Summons Received on Evening of Final Day of Filing Considered Timely — Courts Always Open: White filed a complaint September 8, 1995, and summons was served on Klosterman September 8, 1998. The Sheriff's dispatcher faxed the return of service to the Clerk of Court at 8:23 p.m. the same day. The District Court held that the return of service was late because it was not filed with the Clerk of Court by 5 p.m. on the last day that filing was permitted. However, the Supreme Court found nothing in the plain language of the judicial rules of procedure or any Montana authority that provides those requirements. Rather, Rule 41(e), M.R.Civ.P., requires that return of service be filed within 3 years; this rule allows filing by facsimile or other electronic means; 25-3-501 gives faxed documents the same force and effect as an original; Rule 77(a), M.R.Civ.P., requires that District Courts always be open for filing; and 1-1-301 provides that each day ends at midnight. The District Court's decision was reversed on grounds that filing was timely. White v. Klosterman, 1999 MT 316, 297 M 259, 990 P2d 1249, 56 St. Rep. 1265 (1999).

Motion to Disqualify Other Party's Attorney Does Not Stay Sixty-Day Requirement for Judge to Rule on Motion to Vacate Default Judgment: Johnson's attorney obtained a default judgment

on behalf of his client, and when an attorney appeared for the defendant and moved to have the default judgment set aside, Johnson's attorney moved to have the attorney disqualified because the trial court judge was related to a member of the defense attorney's law firm. The judge recused himself, and the new judge entered an order setting aside the default judgment. The Supreme Court held that the 60-day period for the lower court to rule on the motion to vacate ran from the time that the motion was filed, not from the time that the second judge assumed jurisdiction, and because the time had expired, the motion to vacate was considered denied. The lower court did not have jurisdiction over the issue and could not thereafter set aside the default judgment. Johnson v. Eagles Lodge Aerie 3913, 284 M 474, 945 P2d 62, 54 St. Rep. 984 (1997).

Complaint Mailed Early but Filed Late Barred: Plaintiffs mailed their complaint from Anaconda to Deer Lodge on February 23. The statute of limitations expired on February 28, but the complaint was not filed with the Clerk of Court until March 1. Plaintiffs contended that timely mailing substantially met the statutory deadline. Under Rule 5(e), M.R.Civ.P., filing is not complete until a complaint is placed in the custody of the Clerk of Court. The burden of vigilance was on plaintiffs to monitor timely delivery and filing, and the complaint was properly dismissed. Schaffer v. Champion Home Builders Co., 229 M 533, 747 P2d 872, 44 St. Rep. 2196 (1987).

Rule 5(f). Proof of service.

Commission and Advisory Committee Notes

COMMISSION NOTE

Subdivision (f), which is similar to the rule in some federal courts and in several state courts, has been added to the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Due Process Violations — Default Set Aside: On the basis of the total circumstances surrounding the proceedings defendant tribe was denied a meaningful opportunity to appear and be heard. Late return of proof of service of summons could have contributed to the tribe's failure to appear and, coupled with other circumstances, was "good cause" to set aside a default. Big Spring v. Blackfeet Tribe of the Blackfeet Indian Reservation, 175 M 258, 573 P2d 655 (1978).

Duty of Process Servers: Henceforth it shall be the duty of all process servers, be it the Sheriff or private persons, to strictly comply with Rule 5(f), M.R.Civ.P. It is the duty of the process server to return the summons to the clerk of the court within 10 days after service, and this duty shall only be excused under circumstances which constitute "good cause". "Good cause" shall relate only to the difficulty which the process server has in filing the papers with the appropriate clerk of court. Big Spring v. Blackfeet Tribe of the Blackfeet Indian Reservation, 175 M 258, 573 P2d 655 (1978).

Rule 6. Time

Case Notes

Oral Pronouncement of Guilt and Delayed Sentencing — Appeal Improper Pending Final Judgment: Following a nonjury trial on February 5, the Justice of the Peace orally pronounced defendant guilty of DUI and driving while the privilege to do so was suspended or revoked and ordered defendant to obtain an alcohol evaluation and return for sentencing February 26. On February 7, the Justice's Court issued a written order and mailed it to the prospective parties. On February 11, defendant filed a notice of appeal with the District Court, and the case was transferred on March 11. On March 28, the state filed a motion to dismiss on the basis that the appeal was premature because defendant had not been sentenced. On April 1, the District Court dismissed and remanded the case back to Justice's Court for sentencing before defendant had an opportunity to respond with a brief. An appeal cannot be utilized until judgment has been fully rendered. Dismissal was proper because the District Court lacked subject matter jurisdiction absent final judgment by the Justice's Court. St. v. Wilson, 252 M 264, 827 P2d 1286, 49 St. Rep. 243 (1992).

Notice of Hearing of Default Judgment — No Conflict Between Uniform District Court Rules and Rules of Civil Procedure: The controlling rules relating to the entry of default judgments are found in Rule 55, M.R.Civ.P., and, with respect to service, are found in Rule 5, M.R.Civ.P., and this rule. The Uniform District Court Rules do not enlarge, vary, or control the provisions of the Montana Rules of Civil Procedure. Fed. S&L Ins. Corp. v. Anderson, 233 M 339, 760 P2d 80, 45 St. Rep. 1537 (1988).

Rule 6(a). Computation.

Advisory Committee Notes

1988 Amendment: The amendment conforms the rule to the 1985 amendment of the Federal Rules.

Compiler's Comments

Identity With Federal Rule: The first sentences of the State and Federal Rule are substantially the same, except for inclusion of "by the local rules of any district court" and a minor grammatical difference in the Federal Rule. The second and third sentences are the same in both versions. The last sentence of the State Rule does not appear in the Federal Rule, and the last sentence of the Federal Rule (enumerating legal holidays) does not appear in the State Rule. This comparison is applicable as of May 1, 1990.

1988 Amendment: At end of first sentence substituted "or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days" for "in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday"; and in second sentence increased time from 7 to 11 days. Amendment effective November 1, 1988.

Case Notes

Statute of Limitations Calculated as Ending One Day Prior to Start Day in Next Calendar Year: Plaintiff was injured on December 24, 1999, and plaintiff filed a complaint on December 26, 2002, contending that because December 25, 2002, was a holiday, the 3-year statute of limitations in 27-2-204 extended to December 26, 2002, so the complaint was timely filed. The District Court held that the complaint was time-barred and granted defendant summary judgment on the pleadings. On appeal, the Supreme Court affirmed. Generally, a statute of limitations begins to run when a claim or cause of action accrues. Plaintiff's cause of action accrued on December 24, 1999, the date of injury. Under this rule, the day of the event is not included in computing any period of time, so the statute of limitations was counted from December 25, 1999. A year is defined as a calendar year, which is a 365-day period starting on a given day and ending on the date 1 day prior to the start day in the next calendar year. Thus, plaintiff's cause of action began on December 25, 1999, and ended on December 24, 2002, which was neither a weekend day nor a legal holiday. The statute of limitations was properly calculated, and summary judgment was proper because plaintiff's complaint was not timely filed. Bosch v. Town Pump, Inc., 2004 MT 330, 324 M 138, 102 P3d 32 (2004).

Calculating Time for Service of Motion — Days Before Saturday Christmas and New Year's Day Not Holidays: Burlington Northern alleged that it had timely served its motion for a new trial, thereby tolling the 30-day period for appealing the jury verdict in favor of Dunkelberger. The railroad argued that Christmas and New Year's Day had fallen on Saturday and, since the courts were closed on the preceding Fridays, those Fridays were holidays and were not to be counted in determining whether the motion for new trial had been served within the required 10 days. The Supreme Court held that the fact that those Fridays were holidays for state workers did not make them statutory holidays and that those Fridays counted as part of the 10-day period. Dunkelberger v. Burlington N. RR Co., 265 M 243, 876 P2d 218, 51 St. Rep. 499 (1994).

Relationship Between Rules 6(a) and 6(e) Clarified — Motion to Amend Judgment: Park Plaza prevailed in the underlying legal action and served its notice of entry of judgment on April 6. Service was made by mail. Montana Rail Link (MRL) filed its motion for a new trial and motion to amend the findings, conclusions, and judgment on April 20. The District Court denied the motion within the applicable 45-day period, and MRL filed its notice of appeal within 30 days after denial. Park Plaza moved to dismiss the appeal as untimely because the motion to amend was untimely. The Supreme Court upheld the timeliness of the motion to amend and the notice of appeal. Citing In re Marriage of Schmitz, 255 M 159, 841 P2d 496 (1992), the Supreme Court held that when service of notice is made by mail, first the 3 days allowed under Rule 6(e), M.R.Civ.P., are counted, then the number of days within which action is to be taken are counted (in this case, 10 days for filing under Rule 59(g), M.R.Civ.P.), and then, because the period is less

than 11 days, Saturdays, Sundays, and holidays are excluded. DeTienne Assoc. Ltd. Partnership v. Mont. Rail Link, Inc., 261 M 238, 862 P2d 1106, 50 St. Rep. 1138 (1993).

Ineffective Appeal After Motion to Alter or Amend Judgment — Failure to Cure Results in Dismissal: On April 30, Grounds filed a motion to alter or amend a judgment partially granting her former husband's (Coward's) posttrial motions. On May 17, before Grounds' motion was ruled upon, Coward filed a notice of appeal from the disposition of his pretrial motions. The Supreme Court held that under this rule, the day the order was issued on his motions is not to be counted and that because the time for serving a motion to alter or amend judgment is less than the 11 days referred to in this rule, intervening Saturdays and Sundays are not counted. Therefore, the District Court could still rule on Grounds' motion. Under Rule 5(a)(4), M.R.App.P. (Title 25, ch. 21), Coward filed a premature notice of appeal and should have waited until Grounds' motion was disposed of or considered denied. Failure of Coward to file a new notice of appeal after Grounds' motion was considered denied means that his own appeal must be dismissed. In re Marriage of Grounds & Coward, 256 M 397, 846 P2d 1034, 50 St. Rep. 114 (1993).

Time Allowed for Filing Motion for New Trial: Rule 59(b), M.R.Civ.P., provides that a Rule 59(a), M.R.Civ.P., motion for a new trial must be filed within 10 days after service of notice of entry of judgment. The day of mailing is excluded under this rule. Because notice of entry of judgment was served by mail, 3 days are added under Rule 6(e), M.R.Civ.P. The combined total of days allowed under Rules 59(b) and 6(e), M.R.Civ.P., is 13 days. In re Marriage of Schmitz, 255 M 159, 841 P2d 496, 49 St. Rep. 919 (1992).

Computation of Notice Period for Default Judgment — General Rule Regarding Procedural Defects: Defendant claimed that insufficient notice had been given under Rule 55(b)(2), M.R.Civ.P., for judgment by default when the notice period was computed under this rule. Service was made upon defendant's counsel by mail. The question arose as to whether the rules intend that the noncourt days excluded under this rule apply to additional days granted by virtue of mailing under Rule 6(e). The Supreme Court declined to rule on the question, instead affirming the default judgment on the grounds that: (1) defendant had ample notice of hearing; (2) the case was on the docket for more than 16 months after service of complaint and summons, but defendant took no other action except for a motion to dismiss; (3) defendant never answered the complaint; and (4) defendant did not allege or tender any proof that he had a meritorious defense to the suit for mortgage foreclosure. The court cited the general rule that a procedural defect with respect to notice of a default judgment must be considered with other factors before the judgment may be set aside. Therefore, even if notice was considered insufficient, in this case the other factors so outweighed the procedural defect as to require sustaining entry of the default judgment. Fed. S&L Ins. Corp. v. Anderson, 233 M 339, 760 P2d 80, 45 St. Rep. 1537 (1988).

Uniform Rules for District Courts — Time Limit for Filing Brief in Support of Rule 12 Motion: In an action for strict liability in tort for personal injuries, defendant filed a motion for change of venue on November 17, 1982, and a brief in support of the motion on November 24, 1982. The motion was denied by the District Court for failure to file a supporting brief within 5 days, the time limit allowed by Rule II of the Uniform Rules for District Courts of Montana. The Supreme Court reversed and remanded the case to District Court, ruling that under Rule 6(a), M.R.Civ.P., three of the days intervening between the time of filing of the motion and the time of filing of the brief are excluded from the calculation of the maximum permissible time, so the filing of the brief was timely. Tanniehill v. Remington Arms Co., 207 M 501, 675 P2d 948, 41 St. Rep. 103 (1984).

Date of Notice Not Included: The defendant failed to make a payment on a contract for deed, and on January 14 the plaintiff sent notice of default. On March 14, a second notice of default and intent to accelerate payment was given to the defendant. The contract required payment within 60 days of the first notice. Defendant argued that the second notice was mailed before the 60-day cure period expired, making the notice defective. The time began to run on January 15. Defendant therefore had 17 days in January, 29 days in February, and 14 days in March for a total of 60 days. Since the March 14 notice was not effective until the next day, the defendant had his full 60 days. SAS Partnership v. Schafer, 200 M 478, 653 P2d 834, 39 St. Rep. 1883 (1982).

Timeliness of Motion for Necessary Litigation Costs: Defendant/respondent filed a motion for determination of necessary expenses of litigation under 70-30-306. He filed the motion 11 calendar days after a jury verdict was rendered in his favor. Plaintiff filed a motion to retax costs on the ground that respondent's motion was untimely filed under the "5 days after the verdict" clause of 25-10-501. Held, Rule 6(a) and (e), M.R.Civ.P., eliminating Saturdays and Sundays and granting 3 business days, must be given effect since defendant was required to take some "action by virtue of papers served upon him by mail" and since defendant was served by mail. Defendant's motion was timely filed. St. v. Helehan, 189 M 339, 615 P2d 925 (1980).

Eminent Domain — Time for Appeal of Commissioners' Report When Last Day of Period Falls on a Sunday: In computing the time period for the purpose of appealing the report of the commissioners in an eminent domain proceeding as provided for in 70-30-304, the Montana Rules of Civil Procedure provide for an extension if the last day of the period falls on a Sunday. St. v. Rogers, 184 M 181, 602 P2d 560 (1979).

Motion for a New Trial — Time for Notice of Appeal: A judgment was entered against the appellant May 31. On June 6, appellant mailed a motion for a new trial and for extension of the time for filing briefs. On June 11, the District Court gave appellant until June 25 to file its brief, which appellant did on that date. On July 20, the District Court denied appellant's motion for a new trial without hearing, and on August 2 the appellant mailed his notice of appeal. Under these circumstances the notice of appeal was timely filed, since the filing of appellant's motion for a new trial suspended the running of the time in which to file a notice of appeal and the District Court's order extending the time for filing supporting briefs must by necessary implication extend the time for ruling on that motion. The 10-day period for ruling on the motion did not begin to run until the appellant's brief was filed within the time period allowed by the court. The motion for a new trial was automatically denied when it was not acted upon within 15 days. Appellant thereafter had 30 days in which to file its notice of appeal, which was done on August 3. Britton v. Burlington N., Inc., 184 M 107, 601 P2d 1192 (1979).

Timely Filing of Petition — Exclusion of Weekends: The filing of a petition for temporary investigative authority and protective services as to children who may be abused and neglected was timely and proper because of the exclusion of intermediate Saturdays, Sundays, and holidays from the computation time. In re T.Y.K., 183 M 91, 598 P2d 593 (1979).

Notice of Entry of Judgment Served by Mail — Expiration of Deadline on Sunday — Effect on Time for Appeal: Where, following a condemnation award by the commissioners, notice of the award was mailed to the plaintiff Highway Department (now Department of Transportation) on June 15 and notice of appeal from that award was mailed to the Clerk of District Court on July 16, the District Court erred in dismissing the appeal for failure to file a timely notice of appeal. Under Rule 6(e), M.R.Civ.P., the notice of the commissioners' award did not become effective until June 18. Thus, the 30-day appeal period would normally expire on July 18, but as that was a Sunday, time for appeal expired on July 19, under Rule 6(a), M.R.Civ.P. St. v. Helehan, 171 M 473, 559 P2d 817 (1977).

Application to Statute of Limitations: Complaint filed 3 years and 1 day after act in suit governed by 3-year Statute of Limitations was timely where last day of 3-year period was Sunday. Grey v. Silver Bow County, 149 M 213, 425 P2d 819 (1967).

Notice Requirement — Violation Not Prejudicial: Although the 3-day notice requirement for a default judgment was violated because weekends are excluded from the computation of time, the court was not in error for refusing to set aside a default judgment due to a violation of the notice requirement when the violation was not prejudicial. Williams v. Superior Homes, Inc., 148 M 38, 417 P2d 92 (1966).

Time for Filing Bill of Costs: Where judgment of nonsuit was entered by defendant on May 31, 1960, memorandum of costs, served by mail postmarked June 5, 1960, met the requirements of 25-10-501 since June 5 was the fifth day. In the computation of the time the first day is excluded. Davis v. Trobough, 139 M 322, 363 P2d 727 (1961).

Collateral References

Motions *key* 10; Pleading *key* 333; Time *key* 1 through 15.

60 C.J.S. Motions and Orders §8; 71 C.J.S. Pleading §§570, 573; 86 C.J.S. Time §§1 through 17.

74 Am. Jur. 2d Time §13, et seq.

When is office of clerk of court inaccessible due to weather or other conditions for purpose of computing time period for filing papers under Rule 6(a) of federal Rules of Civil Procedure. 135 ALR Fed. 259.

Rule 6(b). Enlargement.

Advisory Committee Notes

Advisory Committee's Note to May 21, 1969, Amendment: Reference to "59(f)" is added to conform with amendments to Rule 59.

Advisory Committee's Note to October 9, 1984, Amendment: The reference to Rule 59(g) conforms to a renumbering of the subparagraph as a result of the addition of another subparagraph by the 1975 Amendment to the Montana Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule, except that the final clause of the Federal Rule contains a reference to Rule 74(a), which has not been carried over into the Montana Rules and the Montana Rule contains a reference to Rule 59(g) not found in the Federal Rule.

Amendment: The amendment of October 9, 1984, inserted reference to Rule 50(c)(2), and changed internal reference from Rule 59(f) to Rule 59(g).

Case Notes

Discretion of District Court to Grant Enlargement of Time to Respond to Motion: The wife filed a motion to enforce the pension provisions of a dissolution decree, and the husband moved for an enlargement of time nearly a month later. The District Court declined to grant the enlargement because there was nothing to indicate that the husband's failure to respond within the required 10 days was the result of excusable neglect. On appeal, the husband contended that under Rules 6 and 11, M.R.Civ.P., he was entitled to an enlargement of time in order to reply to the motion to enforce. The Supreme Court disagreed and affirmed. Parties are not entitled to an enlargement of time; rather, the granting of an enlargement of time is within the discretion of the District Court, which in this case found the husband's arguments unpersuasive. In re Marriage of Weber, 2004 MT 206, 322 M 324, 95 P3d 694 (2004).

Extension of Time Deadline by Rule Inapplicable to Administrative Law Judge's Decision — Dismissal for Lack of Subject Matter Jurisdiction Proper: The mother petitioned for judicial review of an order by an administrative law judge regarding her child support action. The Child Support Enforcement Division moved to dismiss the petition on grounds that it was not timely filed pursuant to 2-4-702 and that, as a result, the District Court lacked subject matter jurisdiction to hear the case. The mother filed a motion under this rule, seeking an enlargement of time in which to file the petition, asserting that her failure to file the petition within the 30-day deadline was the result of excusable neglect. The motion was denied. The mother then filed for relief under Rule 60(b), M.R.Civ.P., and that motion was also denied. The mother appealed from the denial of both motions. The Supreme Court held that this rule, by its terms, applies only to acts required by the Montana Rules of Civil Procedure or by court order, but does not apply to acts required within a statutory framework, such as that established in 2-4-702. Thus, this rule does not apply, either by its terms or by analogy, to petitions for judicial review of administrative proceedings because applying the rule in that manner would extend the jurisdiction of District Courts beyond that allowed by the statute. Further, Rule 60(b) does not provide a basis for relief in this case because the District Court was automatically deprived of jurisdiction once the 30-day period expired, and Rule 60(b) cannot be applied to revest jurisdiction where none existed in the first place. Dismissal of the mother's petition was not an abuse of discretion, and the District Court order was affirmed. In re Support of McGurran, 1999 MT 192, 295 M 357, 983 P2d 968, 56 St. Rep. 741 (1999).

Time for Appeal Not Tolled During Extra Time Granted to File Brief in Support of Posttrial Motion: A District Court cannot grant extensions under Rule 59(g), M.R.Civ.P., for additional briefing time and must rule on a Rule 59(g) motion to amend a judgment within the time allotted without regard to the status of the briefing. If the court does not rule on the motion within the allotted time, the motion is considered denied. The court's grant of a 16-day extension of time in which to file a brief in support of the motion did not suspend for 16 days the time allotted for appeal. Failure to file a notice of appeal within the allotted time was an absolute jurisdictional bar to Montana Supreme Court consideration of the appeal. Challinor v. Glacier Nat'l Bank, 283 M 342, 943 P2d 83, 54 St. Rep. 520 (1997).

Continuance of Water Use Case Properly Denied: On October 7, 4 days before a scheduled hearing on charges of contempt of the order of a Water Commissioner, counsel for relator sent a letter notifying the court that his schedule would prevent him from appearing and requesting that the hearing be continued until November 4 or 18, approximately 1 month later. However, the court properly denied the request in light of the fact that the continuance would have left relator in sole possession and use of all waters of the creek for over a month at a time when very little remained of the irrigation season. Marks v. District Court, 239 M 428, 781 P2d 249, 46 St. Rep. 1804 (1989).

No Error to Grant Extension for Filing of Findings and Conclusions — No Prejudice Shown: The trial court did not commit error when it granted an ex parte request of the mother to have additional time to file her proposed findings and conclusions in a child custody dispute because the father failed to show how his substantial rights were prejudiced. Duffey v. Duffey, 193 M 241, 631 P2d 697, 38 St. Rep. 1105 (1981).

Violation of Montana Rules of Civil Procedure — Effect: Since counsel for petitioner violated Rule 77(d), M.R.Civ.P., by giving notice of entry of judgment himself rather than having the clerk of court serve notice of entry of judgment, opposing counsel was not required to adhere to the 30-day period for filing of notice of appeal until proper service was made. The court committed no error in denying petitioner's motion to strike all posttrial motions as untimely. Pierce Packing Co. v. District Court, 177 M 51, 579 P2d 760 (1978).

Special Statute Controls General — Bill of Exceptions: Since section 93-3905, R.C.M. 1947 (superseded by Rule 6(b), M.R.Civ.P.), was a general one while 25-1-301 is specific and, prior to the 1981 amendment, pertained to bills of exceptions (exceptions abolished, see Rules 7(c), 46, M.R.Civ.P., and 25-31-503, now repealed), the latter section controls under the rule of construction that the provisions of a special statute control those of a general statute relating to the same subject matter. Hutchinson v. Burton, 126 M 279, 247 P2d 987 (1952).

Collateral References

Power of trial court indirectly to extend time for appeal. 149 ALR 740.

Time for filing petition for removal of action from state to federal court as affected by extension of time for pleading. 108 ALR 966.

Rule 6(c). Unaffected by expiration of term.

Compiler's Comments

Identity With Federal Rule: This rule is identical with the previous Federal Rule. The Federal Rule was rescinded February 28, 1966, effective July 1, 1966.

Rule 6(d). For motions — affidavits.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

Refusal to Consider Untimely Filed Affidavits — No Error Found: A seller of real property sought summary judgment in an action based on the contract of purchase, and the buyer's attorney failed to file an affidavit and brief opposing the seller's motion for summary judgment until the day of the hearing. The seller's counsel pointed out the untimeliness of the filing, and the trial court refused to consider the affidavit. On appeal no abuse of discretion was found. The Supreme Court noted, too, the unwarranted delays caused by the buyer previously in the case and the lack of any compelling excuse for the untimely filing. Marcus Daly Mem. Hosp. v. Borkoski, 191 M 366, 624 P2d 997, 38 St. Rep. 322 (1981).

Deficient Motion: A motion to set aside default and dismiss a libel complaint was deficient for failure to comply with notice requirements for service made by mail. Big Spring v. Blackfeet Tribe of the Blackfeet Indian Reservation, 175 M 258, 573 P2d 655 (1978).

Appearance as Waiver of Lack of Notice: One who appears generally to resist a motion to amend a complaint after judgment rendered, and does not resist such motion on the merits, is presumed to have submitted himself to the jurisdiction of the court for all purposes of the motion, and is estopped to claim that he did not have sufficient notice. Eadie v. Eadie, 44 M 391, 120 P 239 (1911).

Collateral References

Motions *key* 10, 18 through 23.

60 C.J.S. Motions and Orders §§8, 13 through 19.

Rule 6(e). Additional time after service by mail.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Relationship Between Rules 6(a) and 6(e) Clarified — Motion to Amend Judgment: Park Plaza prevailed in the underlying legal action and served its notice of entry of judgment on April 6. Service was made by mail. Montana Rail Link (MRL) filed its motion for a new trial and motion to amend the findings, conclusions, and judgment on April 20. The District Court denied the motion within the applicable 45-day period, and MRL filed its notice of appeal within 30 days after denial. Park Plaza moved to dismiss the appeal as untimely because the motion to amend was untimely. The Supreme Court upheld the timeliness of the motion to amend and the notice of appeal. Citing In re Marriage of Schmitz, 255 M 159, 841 P2d 496 (1992), the Supreme Court held that when service of notice is made by mail, first the 3 days allowed under this rule are counted, then the number of days within which action is to be taken are counted (in this case, 10 days for filing under Rule 59(g), M.R.Civ.P.), and then, because the period is less than 11 days, Saturdays, Sundays, and holidays are excluded. DeTienne Assoc. Ltd. Partnership v. Mont. Rail Link, Inc., 261 M 238, 862 P2d 1106, 50 St. Rep. 1138 (1993).

Time for Filing of Petition for Judicial Review — Time of "Service" of Final Agency Decision Defined: Following proceedings in an administrative action before the Public Service Commission, the Commission mailed a copy of its decision to MCI on May 19, 1992, but MCI did not receive the decision until May 21, 1992. On June 19, 1992, MCI filed its petition for judicial review under 2-4-702. The District Court dismissed the petition as being untimely filed. The Supreme Court held that 2-4-702 did not define the time of "service" at which the 30-day period for filing a petition for review began to run. Section 2-4-106 requires that this rule be applied to define when service by mail is complete for administrative decisions. This rule requires that when service is made by mail, an additional 3 days must be added to the time for taking action. Thus, the time for judicial review began to run on May 23, and MCI's petition was filed within the 30-day time period provided by 2-4-702. MCI Telecommunications Corp. v. Dept. of Public Service Regulation, 260 M 175, 858 P2d 364, 50 St. Rep. 989 (1993), distinguished in In re Support of McGurran, 1999 MT 192, 295 M 357, 983 P2d 968, 56 St. Rep. 741 (1999).

Time Allowed for Filing Motion for New Trial: Rule 59(b), M.R.Civ.P., provides that a Rule 59(a), M.R.Civ.P., motion for a new trial must be filed within 10 days after service of notice of entry of judgment. The day of mailing is excluded under Rule 6(a), M.R.Civ.P. Because notice of entry of judgment was served by mail, 3 days are added under this rule. The combined total of days allowed under Rule 59(b), M.R.Civ.P., and this rule is 13 days. In re Marriage of Schmitz, 255 M 159, 841 P2d 496, 49 St. Rep. 919 (1992).

Rendition of Judgment as Commencement of Time for Appeal From Justice's to District Court: Sections 25-33-101 and 25-33-102, rather than this rule or a former rule of the Justice's Court, exclusively govern the time for filing a notice of appeal from Justice's Court to District Court. The time for appeal commences with rendition of the judgment of the Justice's Court and runs for 30 days, as provided in 25-33-102. Grimes Motors, Inc. v. Nascimento, 244 M 147, 796 P2d 576, 47 St. Rep. 1536 (1990).

Computation of Notice Period for Default Judgment — General Rule Regarding Procedural Defects: Defendant claimed that insufficient notice had been given under Rule 55(b)(2), M.R.Civ.P., for judgment by default when the notice period was computed under Rule 6(a), M.R.Civ.P. Service was made upon defendant's counsel by mail. The question arose as to whether the rules intend that the noncourt days excluded under Rule 6(a) apply to additional days granted by virtue of mailing under this rule. The Supreme Court declined to rule on the question, instead affirming the default judgment on the grounds that: (1) defendant had ample notice of hearing; (2) the case was on the docket for more than 16 months after service of complaint and summons, but defendant took no other action except for a motion to dismiss; (3) defendant never answered the complaint; and (4) defendant did not allege or tender any proof that he had a meritorious defense to the suit for mortgage foreclosure. The court cited the general rule that a procedural defect with respect to notice of a default judgment must be considered with other factors before the judgment may be set aside. Therefore, even if notice was considered insufficient, in this case the other factors so outweighed the procedural defect as to require sustaining entry of the default judgment. Fed. S&L Ins. Corp. v. Anderson, 233 M 339, 760 P2d 80, 45 St. Rep. 1537 (1988).

Motion for New Trial — Service of Notice of Entry of Judgment by Mail: Notice of entry of judgment was mailed to the parties on May 21, 1980. Twelve days later the respondent filed a motion to amend findings and judgment and a motion for a new trial. Because service of a notice of entry of judgment by mail is not effective until 3 days after the mailing, the motions were timely. Wilson v. Wilson, 198 M 147, 645 P2d 393, 39 St. Rep. 828 (1982).

Extension of Hearing Date on Motion to Amend — Compliance With Time Requirements: The wife appealed from an amended decree dissolving her marriage, establishing child custody and support and dividing the property of the marriage. The appellant filed and served a motion to amend the judgment. Including the 3 days allowed under Rule 6(e), M.R.Civ.P., for mailing, the hearing on that motion was either required to be held within 13 days or to be continued by the court within 13 days. The District Court entered an order setting a hearing date on the appellant's and respondent's motions to amend, which order was filed on the last day of the 13-day period. The order constituted a continuation of the hearing date on the motions to alter or amend. That order did set a hearing date within a 30-day period required by Rule 59(d), M.R.Civ.P. The District Court then ruled on the motions to alter or amend within 5 days following the hearing. Therefore, the District Court's actions regarding the petitioner's motions to alter or amend the original decree complied with the time requirements of the rule. The amending order of the District Court was therefore valid. Tefft v. Tefft, 192 M 456, 628 P2d 1094, 38 St. Rep. 837 (1981).

Timeliness of Motion for Necessary Litigation Costs: Defendant/respondent filed a motion for determination of necessary expenses of litigation under 70-30-306. He filed the motion 11 calendar days after a jury verdict was rendered in his favor. Plaintiff filed a motion to retax costs on the ground that respondent's motion was untimely filed under the "5 days after the verdict" clause of 25-10-501. Held, Rule 6(a) and (e), M.R.Civ.P., eliminating Saturdays and Sundays and granting 3 business days, must be given effect since defendant was required to take some "action by virtue of papers served upon him by mail" and since defendant was served by mail. Defendant's motion was timely filed. St. v. Helehan, 189 M 339, 615 P2d 925 (1980).

Eminent Domain — Time for Appeal When Notice of Commissioners' Report Received by Mail: In computing the time period for the purpose of appealing the report of the commissioners in an eminent domain proceeding as provided for in 70-30-304, the Montana Rules of Civil Procedure provide for a 3-day extension if the notice is mailed. St. v. Rogers, 184 M 181, 602 P2d 560 (1979).

Deficient Motion: A motion to set aside default and dismiss a libel complaint was deficient for failure to comply with notice requirements for service made by mail. Big Spring v. Blackfeet Tribe of the Blackfeet Indian Reservation, 175 M 258, 573 P2d 655 (1978).

Notice of Entry of Judgment Served by Mail — Expiration of Deadline on Sunday — Effect on Time for Appeal: Where, following a condemnation award by the commissioners, notice of the award was mailed to the plaintiff Highway Department (now Department of Transportation) on June 15 and notice of appeal from that award was mailed to the Clerk of District Court on July 16, the District Court erred in dismissing the appeal for failure to file a timely notice of appeal. Under Rule 6(e), M.R.Civ.P., the notice of the commissioners' award did not become effective until June 18. Thus, the 30-day appeal period would normally expire on July 18, but as that was a Sunday, time for appeal expired on July 19, under Rule 6(a), M.R.Civ.P. St. v. Helehan, 171 M 473, 559 P2d 817 (1977).

Notice of Entry of Judgment Served by Mail — Effect on Time for Appeal: Where, following a judgment for the defendants, one of whom was the City of Lewistown, the defendants served notice of entry of the judgment upon the plaintiffs by mail on June 13, that notice, for purposes of calculating the 60-day time for appeal under Rule 5, M.R.App.P., became effective on June 16, by operation of Rule 6(e), M.R.Civ.P. A notice of appeal filed on August 13 was therefore timely filed 2 days before the 60-day time limit had expired. Lewistown Propane Co. v. Util. Builders, Inc., 170 M 292, 552 P2d 1100 (1976).

III. Pleadings and Motions

Rule 7. Pleadings allowed — form of motions

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 7(a). Pleadings.

Commission Notes

The rule is identical with the Federal Rule, except that in subdivision (a) the clause "if leave is given under Rule 14 to summon a person who was not an original party" is changed to read "if a person who was not an original party is summoned under Rule 14." This change conforms to the proposed amended Federal Rules, and as stated by the Federal Advisory Committee, "The amendment conforms to the change now proposed in Rule 14(a), eliminating the necessity for leave to serve a third-party complaint."

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still the same in substance as the Federal Rule, as amended in 1963. The 1963 amendment of the Federal Rule adopted the proposal referred to in the commission notes above, thus making the Federal Rule substantially the same as the Montana Rule.

Case Notes

General 501
Reply to Counterclaim 501

GENERAL

Controverting Admissions Not Allowed in Pleadings: It is well settled that parties are bound by and estopped from controverting admissions in their pleadings. Audit Serv., Inc. v. Frontier-West, Inc., 252 M 142, 827 P2d 1242, 49 St. Rep. 186 (1992). See also Grimsley v. Spencer, 206 M 184, 670 P2d 85 (1983), and Fey v. A.A. Oil Corp., 129 M 300, 285 P2d 578 (1955).

Supersedeas Bond in Excess of Judgment Amount — Discharge of Obligation: Real property that was the subject of the contract was in control of the District Court. Judgment amount was $28,398.67, but a supersedeas bond was set at $34,408.83, approximately $6,000 in excess of the judgment. The Supreme Court used the power vested in it under this rule to exonerate and discharge the obligation on the bond for the amount in excess of $6,000. Aveco Properties, Inc. v. Nicholson, 229 M 417, 747 P2d 1358, 44 St. Rep. 2098 (1987).

Preliminary Pleadings — Public's Right to Know: In a defamation case, an affirmative defense based on the privilege under 27-1-804(4) extends to newspaper accounts of preliminary pleadings. The Supreme Court acknowledged that the public has a right to know what happens in the judicial system, including the filing of civil suits. Cox v. Lee Enterprises, Inc., 222 M 527, 723 P2d 238, 43 St. Rep. 1476 (1986), followed, with respect to Commission on Practice investigation, in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Initial Pleadings — Dissolution of Marriage: In an action for dissolution of marriage the first two pleadings, the petition and response, are governed not by this rule but by the Uniform Marriage and Divorce Act at 40-4-103(3). Any further pleadings involved in a dissolution are specifically governed by the Montana Rules of Civil Procedure. Knudson v. Knudson, 186 M 8, 606 P2d 130 (1980).

Satisfied Judgment Obviates Appeal: When a judgment is paid, it is beyond review. Otherwise, the requirement of a supersedeas bond and stay order is meaningless. Gallatin Trust & Sav. Bank v. Foster, 154 M 185, 461 P2d 452 (1969).

Reply — When Mandatory: Plaintiff had no duty to reply to an affirmative defense. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965).

No Cross Bill Allowed: In this state there is no such pleading as a cross bill. Alywin v. Morley, 41 M 191, 108 P 778 (1910).

Pleading by Defendant — Answer Only Allowed: The only pleading of facts on the part of the defendant is the answer, irrespective of whether the action is one at law or in equity, since there is now but one form of civil action known to our law, as provided in 25-1-101. Gilchrist v. Hore, 34 M 443, 87 P 443 (1906).

Statute of Limitations to Be Pleaded in Answer: The defense of the Statute of Limitations can be made available only by answer or reply. Wastl v. Mont. Union Ry., 24 M 159, 61 P 9 (1900).

Estoppel to Assert Counterclaim — No Reply Required: A defendant, to entitle himself to a motion for judgment for want of a reply to a counterclaim, must plead it as such, and is estopped from asserting that matter which in his answer he denominates "an equitable defense" is in fact a counterclaim. Babcock v. Maxwell, 21 M 507, 54 P 943 (1898).

REPLY TO COUNTERCLAIM

Failure to File Timely Reply to Counterclaim — Default Judgment Proper: The District Court directed plaintiff to respond to a counterclaim within 10 days. Plaintiff failed to comply within the designated time, so default judgment was entered against plaintiff, and plaintiff appealed on grounds that the default judgment should be set aside under Rule 60(b), M.R.Civ.P. The Supreme Court disagreed. As an attorney, plaintiff was sufficiently literate and intelligent to understand the document presented by opposing counsel and to respond accordingly. Any mistake complained of by plaintiff did not rise to a level warranting setting aside of the default judgment. Plaintiff did not meet the burden of proof under Rule 60(b) to set aside the judgment and did not establish any abuse of discretion by the trial court, so the default judgment was affirmed. Tschida v. Rowe, 2003 MT 192, 316 M 503, 74 P3d 1043 (2003).

Reply to Answer Not Required: A plaintiff is not required to reply to an answer where not specifically ordered to do so by the court, nor is it mandatory to reply to an affirmative defense of a release, since under Rule 8(d), where no responsive pleading is required, the averment is considered denied. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965), followed in Kelly v. Widner, 236 M 523, 771 P2d 142, 46 St. Rep. 591 (1989).

Reply Not Basis for Recovery: In action for specific performance of contract for assignment of leases, in which defense was impossibility of performance because leases had been terminated when defendant entered into contract with owner of land for purchase, a reply admitting such termination of the leases and praying for the assignment of such contracts of purchase was an abandonment of the original cause of action and sought to enforce a different contract and therefore could not be the basis for any recovery. Rachou v. McQuitty, 125 M 1, 229 P2d 965 (1951).

Reply Not Amended Complaint: The reply, being merely responsive to matters alleged affirmatively in the answer, cannot perform the office of amending the complaint, nor itself become the basis of recovery. Crenshaw v. Crenshaw, 120 M 190, 182 P2d 477 (1947); Buhler v. Loftus, 53 M 546, 165 P 601 (1917); Doornbos v. Thomas, 50 M 370, 147 P 277 (1915); Waite v. Shoemaker & Co., 50 M 264, 146 P 736 (1915); Manuel v. Turner, 36 M 512, 93 P 808 (1908); Thornton v. Kaufman, 35 M 181, 88 P 796 (1907).

Reply Not to Aid Complaint: A reply may aid the answer but it cannot aid the complaint by supplying an omission therein or broadening its scope by adding to it a new ground of relief. State ex rel. Barron v. District Court, 119 M 344, 174 P2d 809 (1946).

Reply to Join Issue With Answer: The office of a reply is to meet the allegations of new matter in the answer, that is, to join issue upon the counterclaim or new matter of defense alleged in the answer or to avoid it. State ex rel. Barron v. District Court, 119 M 344, 174 P2d 809 (1946).

Function of Reply: The function of a reply was, under section 93-3601, R.C.M. 1947 (superseded by Rule 7(a), M.R.Civ.P.), to join issue on a counterclaim or new matter by way of defense appearing in the answer, and therein the plaintiff could set up "any new matter, not inconsistent with the complaint, constituting a defense to such counterclaim or new matter in the answer", or to avoid the effect of new matter alleged as a defense. Ahlquist v. Mulvaney Realty Co., 116 M 6, 152 P2d 137 (1944); Buhler v. Loftus, 53 M 546, 165 P 601 (1917).

Conditions Precedent and Subsequent — No Conflict in Complaint and Reply: Plaintiff in an action to recover on an insurance policy covering an automobile against loss by fire alleged in his complaint that he had complied with all the conditions of the policy to be kept and performed by him. The answer set up the special defense that the policy had become void because the insured had mortgaged the car without the assent of the insurer contrary to the provisions of the policy. By reply plaintiff pleaded waiver and estoppel. The averments in the complaint as to performance by plaintiff referred only to conditions precedent, while the reply dealt with a condition subsequent which defendant could waive if it saw fit, and the reply did not conflict with the complaint. McCarthy v. Employers' Fire Ins. Co., 97 M 540, 37 P2d 579 (1934).

Reply Not to Supplement or Contradict Complaint: The reply cannot aid the complaint by supplying omissions therein or broadening its scope by adding new grounds of relief, nor is plaintiff permitted to take a position inconsistent with that taken in the complaint. If such allegations are made in the reply they constitute a departure from the cause of action stated in the complaint. McCarthy v. Employers' Fire Ins. Co., 97 M 540, 37 P2d 579 (1934).

New Allegations Not Counterclaim: Where the complaint in an action for waste demands a money judgment only, and the defendant asks that his title be quieted as against the plaintiff, nothing in his answer partaking of the nature of an affirmative cause of action or counterclaim, and the reply demanding, among other things, that the plaintiff have her title quieted as against the defendant, it is error to render judgment in favor of the plaintiff for the possession of the land and quieting her title, the pleadings not justifying such a decree. Erbes v. Smith, 35 M 38, 88 P 568 (1907).

Reply — General Principles: The only pleading of facts by plaintiff to an answer is a reply, which may allege new matter, not inconsistent with the complaint, constituting a defense to the counterclaim or new matter in the answer. Every allegation of new matter in a reply is considered denied. Gilchrist v. Hore, 34 M 443, 87 P 443 (1906).

Judgment Obtainable Without Reply: A plaintiff may have judgment without a replication if the new matter in the answer states no defense, or only such as might have been raised under a general denial in the answer. Babcock v. Maxwell, 29 M 31, 74 P 64 (1903).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Pleading *key* 38 ½ through 186.
71 C.J.S. Pleading §§94 through 158.
61A Am. Jur. 2d Pleading §§111 through 117, 180.

Rule 7(b). Motions and other papers.

Advisory Committee Note

Advisory Committee's Note to October 9, 1984, Amendment: The amendment conforms the rule to the 1983 Amendment of the Federal Rule. For a discussion of the amendment see the advisory committee note to the Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule. On August 1, 1983, an amendment to the Federal Rule's subdivision (b) became effective, expressly requiring all motions to be signed in accordance with Federal Rule 11. The October 9, 1984, amendment of Rule 7 by the Montana Supreme Court results in this rule again being identical with the Federal Rule.

Amendment: The amendment of October 9, 1984, in (2) after "captions" deleted "signing"; and inserted (3).

Case Notes

Modification of Child Support Not Properly Before Trial Court Following Withdrawal of Motion — No Error in Not Considering Modification: As part of an action for contempt of court, the wife moved for a modification of child support but subsequently withdrew the motion before the husband filed a response. The husband did not object to the withdrawal and did not file an independent motion to modify support. When the contempt action came up for hearing, the husband argued that he had experienced a substantial change of circumstances and requested permission to present evidence regarding child support, despite the fact that the wife's motion to consider the issue had been withdrawn. The husband later asserted that the District Court erred in not considering modification of support. The Supreme Court disagreed. A plaintiff may, with proper notice, withdraw a child support modification motion, and absent another specific independent motion for modification, no error is ascribed to the trial court for failing to consider an issue not properly before it. In re Marriage of Crone, 2003 MT 238, 317 M 256, 77 P3d 167 (2003).

No Error in City Court's Denial of Motion for Continuance After Similar Motions Granted: Over 2 years after charges were filed and after numerous motions of continuance were granted, a trial date was set pursuant to Robertson's motion for continuance to permit him to make travel arrangements after moving to California. Three weeks before trial, Robertson again moved for a continuance on the same grounds, but the City Court declined to grant it, and Robertson was tried in absentia. However, it was Robertson, not the court, who caused the trial to go forward without him. Not only did he have ample time to arrange for an appearance in Montana, but rescheduling trial dates upon motion is within the trial court's discretion and will be affirmed absent a showing that the court abused its discretion by acting arbitrarily without conscientious judgment or exceeding the bounds of reason, resulting in substantial injustice. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000). See also Campbell v. Canty, 1998 MT 278, 291 M 398, 969 P2d 268 (1998).

No Pretrial Determination Regarding Whether Statement Admissible for Impeachment Purposes — Waiver of Right to Object to Admissibility: At the time of arrest, Harris admitted an act of sexual intercourse with his adopted daughter. Prior to trial, Harris moved to suppress the statement on grounds that it was involuntary and obtained in violation of his fifth amendment rights under the United States Constitution. The District Court agreed that the statement could not be used, but expressly stated that its limited suppression order did not address whether it could be used by the state for impeachment purposes in the event that Harris testified, essentially reserving its ruling for a later time, as authorized in 46-13-104. Harris's testimony about the statement during direct examination brought the statement into evidence by his own volition, constituting waiver of the right to appeal the admissibility of the statement for use as impeachment. St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), distinguishing St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996), and St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Motion In Limine Sufficient to Preserve Objection for Appeal: Defendant's motion in limine to exclude testimony regarding certain chemicals in his blood and bottles of prescription medication found in his car was sufficient to preserve the objection for appeal. The propriety of

the admission of the evidence is a proper issue for the Supreme Court on appeal. St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

Motion for New Trial Not Denied When Opposing Party's Argument Based on Semantics: Riverview Lounge argued that Peck's motion for a new trial should have been denied because Peck's attorney listed the alleged particular grounds for a new trial under a section of his motion designated "Brief" rather than under the section designated "Motion". The Supreme Court held that such a technical flaw was not fatal to Peck's motion and that the lower court did not abuse its discretion in granting the motion. Peck v. Riverview Lounge, Inc., 272 M 152, 900 P2d 270, 52 St. Rep. 678 (1995).

DNA Evidence — General Objection in Motion In Limine Insufficient to Preserve Objection for Purposes of Appeal: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence that was combined with standard serological evidence to provide a combined statistical estimate of the probability that Weeks was the father of a child of his stepdaughter. Weeks objected to the combined evidence but not on a foundation basis. The state argued that Weeks waived any objection that he had to the combined evidence, but Weeks contended that his motion in limine preserved an objection to the evidence. The Supreme Court held that Weeks's motion in limine, which did not specify any reasons or authorities why the evidence should be excluded, did not contain an objection to the combined statistical evidence but simply concluded that the DNA evidence was prejudicial. The Supreme Court held that this objection was insufficient to preserve the issue for appeal. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995), followed in St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996).

Lack of Supporting Brief and Notice of Motion — Ruling Not Invalidated: Coward made a motion to alter or amend judgment but failed to file a supporting brief within 5 days and failed to give notice to Grounds that the motion would be heard along with the hearing on her motion for contempt. These omissions notwithstanding, the District Court partially granted Coward's motion. The Supreme Court held that the District Court did not abuse its discretion. Citing Maberry v. Gueths, 238 M 304, 777 P2d 1285 (1989), the Supreme Court said that even though failure to file a brief is an admission that the motion is not well taken, the District Court still has discretion whether to grant the motion. The parties were also invited to propose a briefing schedule and/or evidentiary hearing date to present supplemental arguments, but failed to do so. Under these circumstances, the District Court did not abuse its discretion. In re Marriage of Grounds & Coward, 256 M 397, 846 P2d 1034, 50 St. Rep. 114 (1993).

Appeal of Grant of New Trial Made After Second Trial — Moot by Failure to Object or Timely Appeal: Following a trial on the distribution of marital property, wife requested and the District Court ordered a new trial. Husband waited until after the second trial to object to the order, contending that the court abused its discretion in granting a new trial because: (1) wife was incorrectly allowed to argue matters additional to those raised in the motion for a new trial; (2) the court did not rule on his motion to reconsider the order granting a new trial; and (3) the court did not state with particularity the reasons for granting a new trial. The Supreme Court held that husband's grounds for appeal must fail because he failed to object or bring an appeal in a timely fashion. The question of the propriety of the trial court's order is one that should have been considered earlier and was rendered moot by the fact that the second trial had already occurred. Husband's attempt to raise the issue for the first time on appeal was barred by the doctrine of laches. In re Marriage of Danelson, 253 M 310, 833 P2d 215, 49 St. Rep. 597 (1992).

Amicus Curiae Brief — Discretion of Court: The right to be heard as amicus curiae is within the discretion of the District Court. Eberl v. Scofield, 244 M 515, 798 P2d 536, 47 St. Rep. 1780 (1990).

No Ruling on Motion In Limine Prior to Trial — Waiver of Objection: Plaintiff presented District Court with a motion in limine during pretrial conference, seeking to preclude defendant's mention at trial of a collateral source of insurance. The court reserved ruling on the matter. Plaintiff did not request a ruling prior to trial, object during trial, or present the court with any motions for mistrial or to strike the alleged testimony when insurance was first mentioned by defendant at trial. Failure to object or request corrective action after the subject was mentioned constituted a waiver of objection on the issue. Stewart v. Fisher, 235 M 432, 767 P2d 1321, 46 St. Rep. 116 (1989).

Separate Trials as Abuse of Discretion — No Written Order or Minute Entry on Motion to Bifurcate: The District Court declined to bifurcate a trial so as to determine separately whether the insured intentionally caused a fire and whether the insurer committed a breach of good faith, based on the mistaken impression that a District Court Judge earlier in jurisdiction had denied bifurcation. Although all the parties assumed such an order was made, the record disclosed no

order, and the insurer neither procured a written order granting or denying the motion nor caused a minute entry to be made of the disposition of the motion. The Supreme Court found that under the insured's tort claim, the issues of fact regarding the insurer's violations of the Unfair Claims Settlement Act were so inextricably woven with the insurer's claim of arson that their separation would be an abuse of discretion resulting in extended and needless litigation. A trial court cannot be put in error on matters not brought to its attention by notice or otherwise. Section 33-18-241 was held not to apply, both because of the statutory effective date and because this case involved a first-party rather than a third-party claim. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Motion Mistitled — Time for Filing Appeal: When the state filed a motion for rehearing of the District Court's order reinstating respondent's driver's license pursuant to Rule 60(b), M.R.Civ.P., on the basis that the Division of Motor Vehicles should be relieved from the order, even though the motion was mistitled, the state obviously was making a Rule 60(b) motion for relief from a District Court order. The request for a rehearing was tangential to the real purpose of the motion. The full time for appeal commences to run upon the granting or denying of the motion, rather than from the date of the order from which the state appeals. Despite defects in the motion, the state identified with particularity the grounds for its motion and the relief sought; therefore, the flaws are not grounds for dismissal of the appeal. In re Petition of Burnham, 217 M 513, 705 P2d 603, 42 St. Rep. 1342 (1985).

Motion Granted Without Notice Held Not Prejudicial — Doctrine of "Compensatory Error": In an action from which nonresident defendants were dismissed for lack of jurisdiction, the trial court's granting of plaintiffs' motions to add parties to the suits without prior notice to the defendants was held not prejudicial to the defendants. The issue was first raised on appeal, and the Supreme Court refused to consider it under the doctrine of "compensatory error". Knoepke v. SW. Ry., 190 M 238, 620 P2d 1185, 37 St. Rep. 1910 (1980).

No Responsive Pleading Required: Section 40-4-106 (renumbered 40-4-121) does not require a response but merely limits the time within which a response may be filed. This construction is required both by the permissive terms of the provision and by reference to 40-4-103 and Rule 7(b), M.R.Civ.P., regarding the form of motions. A motion is not a pleading and does not require responsive pleadings, hence the husband's failure to file a response under 40-4-106 (renumbered 40-4-121) did not render the motion an order. Houtchens v. Houtchens, 181 M 70, 592 P2d 158 (1979).

Notice of Subsequent Proceedings: If a party "appears" by filing a motion he is entitled to notice of all subsequent proceedings. Big Spring v. Blackfeet Tribe of the Blackfeet Indian Reservation, 175 M 258, 573 P2d 655 (1978).

Motion for New Trial Inadequate — Failure to State Facts and Circumstances Relied Upon: Defendants' motion for new trial was inadequate and defective in its essential elements because it merely recited the statutory language of 25-11-102 without stating with particularity the precise facts or circumstances being relied upon in support of their motion. Mont. Williams Double Diamond Corp. v. Hill, 175 M 248, 573 P2d 649 (1978).

Order Granting Attorney Fees — Failure of Notice: When a party requested attorney fees pursuant to Rule 37(c), M.R.Civ.P., and failed to apply by motion with notice to opposing party, but incorporated it within proposed findings of fact and conclusions of law, there was insufficient notice. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

Specificity of Motion for New Trial: When a motion for a new trial merely stated the conclusory language of the statute providing for new trials, the motion was defective in its essential respects in that it failed to meet recognized statutory requirements. Halsey v. Uithof, 166 M 319, 532 P2d 686 (1975).

Court Required to Rule on Motion Before It: When a timely and proper motion for a change of place of trial is pending, the court has no jurisdiction except first to rule on the motion for change of place of trial. Johnson v. Clark, 131 M 454, 311 P2d 772 (1957), modified in Hopkins v. Scottie Homes, Inc., 180 M 498, 591 P2d 230 (1979), in which it was determined that a court may properly consider facts set forth in affidavits that are filed subsequent to the original complaint when ruling on a motion to change venue, and in I.S.C. Distrib., Inc. v. Trevor, 259 M 460, 856 P2d 977, 50 St. Rep. 880 (1993), in which it was held that in fairness to the party moving for change of venue, the lower court may not consider an amended complaint for purposes of determining whether to grant or deny a venue motion but may look to affidavits submitted subsequent to the original complaint.

Countermotions as Bad Practice: Since ordinarily no question not open on the hearing of the original or main motion is presented for decision by a motion to quash, dismiss, deny, or strike from the files or records the original motion or by a demurrer (demurrer abolished by Rule 7(c),

M.R.Civ.P., and 25-31-503, now repealed) to such original motion, such motion or demurrer is regarded as superfluous, frivolous, confusing, and bad practice. State ex rel. McVay v. District Court, 126 M 382, 251 P2d 840 (1953).

Motion Not an Action: As a motion is not an action but simply an application for an order, it is not subject to the general rules of pleading. State ex rel. McVay v. District Court, 126 M 382, 251 P2d 840 (1953).

Sufficiency of Motion — Motion Not a Pleading: A motion is but an application for an order, is not a pleading, does not require an answer, and is not subject to the general rules which regulate pleadings. If it fairly apprises the court of the grounds upon which relief is sought it is sufficient. Paramount Publix Corp. v. Boucher, 93 M 340, 19 P2d 223 (1933); Hall v. Hall, 70 M 460, 226 P 469 (1924).

When Notice of Motion Required: Though the Codes do not prescribe all the instances in which notice of a motion must be given, the general rule, in the absence of a more particular rule, is that a party interested in resisting the relief sought by motion is entitled to notice and an opportunity to be heard. Vande Veegaete v. Vande Veegaete, 79 M 68, 255 P 348 (1927).

Lack of Specificity of Motion for Change of Venue — Motion Properly Denied: The burden is upon the party moving for a change of venue to disclose the facts which entitle him to the change. Where defendant instead of setting forth the facts entitling him to a change on the ground that the contract was to be performed in his county, simply alleged a conclusion to that effect, that his place of business was in that county and that he had been served with summons there, the motion was properly denied. Courtney v. Gordon, 74 M 408, 241 P 233 (1925).

Collateral References

Motions *key* 1, 14.

60 C.J.S. Motions and Orders §§3, 10, 13 through 19.

56 Am. Jur. 2d Motions, Rules, and Orders §§1, 2, et seq.

Motion in original action as proper remedy to avoid release or satisfaction of judgment. 9 ALR 2d 558, 561.

Rule 7(c). Demurrers, pleas, etc., abolished.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

Motion to Dismiss — Equivalent of Demurrer: A motion to dismiss under Rule 12(b) is equivalent to the use of a demurrer which was abolished by Rule 7(c). Payne v. Mtn. States Tel. & Tel. Co., 142 M 406, 385 P2d 100 (1963).

Rule 8. General rules of pleading

Case Notes

Fraudulently Obtained Independent Contractor Exemption First Raised in Opposition to Affirmative Defense and Motion for Summary Judgment: A worker fell from a carport roof that she was painting and sued the contractor who hired her and the people who hired the contractor to paint the house, claiming failure to provide a safe workplace and workers' compensation insurance. The defendants who hired the contractor pleaded the affirmative defense that the worker was an independent contractor, and the worker responded that the approved application for an independent contractor exemption was fraudulently obtained. Although Rule 9(b), M.R.Civ.P., requires a claim of fraud to be pleaded with particularity, in this case, evidence of fraud raised by the worker in her brief in opposition to summary judgment was properly before the court and should have been considered in the summary judgment proceeding. Gonzales v. Walchuk, 2002 MT 262, 312 M 240, 59 P3d 377 (2002).

District Court Jurisdiction to Decide Constructive Fraud Based on Pleadings and Final Pretrial Order: Plaintiffs filed a claim for misrepresentation and failure to disclose concerning the sale of an irrigation system. Defendants contended that plaintiffs did not notify them by pleadings or evidence at trial that plaintiffs were claiming that a false impression was created regarding the condition of the field at pivot three, arguing that the complaint concerned defects and misrepresentations related to the irrigation system, not to the land, and that the District Court thus lacked jurisdiction to enter judgment on the issue of the land rather than the irrigation system. A District Court does not have jurisdiction to grant relief outside of the issues presented by the pleadings unless the parties stipulate that other questions be considered or the pleadings are amended to conform to the proof. However, in this case, the pleadings and the final pretrial order, which cited misrepresentation of or failure to disclose problems with both the

deficient irrigation system and the erosion of the river bank near pivot three, gave defendants sufficient notice of the disputed issues to vest the District Court with issue jurisdiction. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Improper Grant of Summary Judgment on Basis That Prior Default Judgment Barred Further Claim Under Insurance Policy: Generally, under Rule 55, M.R.Civ.P., a default judgment based on one party's failure to answer under this rule permits the nondefaulting party to assert that all factual allegations in the pleadings are considered admitted in ascertaining liability. This general rule is an exception to an overriding principle that cases are to be tried on the merits and that judgments by default are not favored. Construing the interplay between the two procedural rules, the Supreme Court adopted the general rule in 6 Moore's Fed. Prac. 55.10 (2nd Ed. 1966) that although at "the time of entry of default, the facts alleged by the plaintiff in the complaint are deemed admitted", plaintiff's conclusions of law are not considered established. Further, although not factually identical to the present case, under Aldrich & Co. v. Donovan, 238 M 431, 778 P2d 397, 46 St. Rep. 1393 (1989), the deemed admissions resulting from one party's failure to respond to an amended counterclaim, because of a technicality, cannot sustain a claim for fraud in a subsequent motion for summary judgment. Here, plaintiff's husband's arson, fraud, concealment, misrepresentation, and false swearing were considered by the District Court to have been admitted through an otherwise valid default judgment based on the husband's failure to answer or appear, barring the wife's subsequent claim for insurance coverage and warranting summary judgment for the insurance company. The Supreme Court reversed, holding that the determination whether the husband committed each of these acts is a conclusion of law that can be reached only after applying particular rules of law to specific findings of fact and cannot be "deemed admitted" through a default judgment absent any legitimate evidence in the record. Lane v. Farmers Union Ins., 1999 MT 252, 296 M 267, 989 P2d 309, 56 St. Rep. 990 (1999). See also Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965), and Maulding v. Hardman, 257 M 18, 847 P2d 292, 50 St. Rep. 141 (1993).

Form of Pleadings When Information in Exclusive Control of Culpable Party: Plaintiff was injured on the job but did not know whether there was a meritorious cause of action or whether there were any culpable parties. He argued that he could not file a complaint and conduct discovery under the Rule 11, M.R.Civ.P., requirement of certification that the complaint be grounded in fact because the information needed to certify the facts was in the exclusive control of the potentially culpable parties. However, Rule 11 only requires that a party make reasonable inquiry and then certify based on knowledge, information, and belief. Rule 11 does not require a guarantee or certification that every detailed fact has been thoroughly investigated and found to be correct. The Supreme Court cited the practices of joinder of parties and the filing of a fictitious "Doe" pleading as alternative ways to commence an action under such circumstances. Temple v. Chevron U.S.A. Inc., 254 M 455, 840 P2d 561, 49 St. Rep. 661 (1992).

Legal Malpractice Complaint — Upheld Under Liberal Rules of Pleading: A construction company filed a complaint against an attorney alleging legal malpractice in the attorney's representation of the company in two civil suits. The complaint alleged: (1) the company had hired the attorney to act as its legal counsel; (2) the attorney, while so acting, had failed to file answers to two complaints filed against the company; (3) those failures resulted in default judgments against the company; and (4) the company suffered damages of $50,000 and demanded relief in that amount. The attorney moved to dismiss the action on the grounds that the complaint failed to state a cause of action because the complaint did not specifically allege that had it not been for the negligence of the attorney, the company would have won the lawsuits. The District Court dismissed the suit and was reversed by the Supreme Court. The Supreme Court ruled that under Montana's liberal rules of pleading, the complaint was sufficient. R.H. Schwartz Constr. Specialties, Inc. v. Hanrahan, 207 M 105, 672 P2d 1116, 40 St. Rep. 1926 (1983).

No Jurisdiction Over Issues Not Presented in Pleadings: Where the plaintiff church was granted a tax exemption by the Department of Revenue for some but not all of the plaintiff's real property and brought a quiet title action to determine its ownership and the tax-exempt status of that portion of the property for which it had not been granted an exemption, the District Court erred in removing the exemption originally granted by the Department of Revenue. Under the rationale of Heller v. Osburnsen, 162 M 182, 510 P2d 13 (1973), and Nat'l Sur. Corp. v. Kruse, 121 M 202, 192 P2d 317 (1948), the District Court had jurisdiction only over those issues raised in the pleadings, and the exempt status of lots 10 through 16 was not at issue in the case. Consequently, the District Court had no jurisdiction to remove the tax-exempt status for those

lots belonging to the plaintiff. Old Fashion Baptist Church v. Dept. of Revenue, 206 M 451, 671 P2d 625, 40 St. Rep. 1774 (1983).

Insurance Coverage — Material Misrepresentation — Burden of Proof: Plaintiff sued for damages in a diversity case for defendant's failure to pay for removal of a cancerous kidney under the terms of an insurance policy. Defendant conceded that the condition was covered by the policy but defended its refusal to pay on the ground that there had been a material misrepresentation in the application for insurance. The court held that the policy cannot be voided unless the applicant knew that his representation was untrue and that the burden of proving a misrepresentation that will void an insurance policy is on the defendant. Conflicting testimony and evidence were presented. The court was unable to find that the evidence preponderated against plaintiff and ordered payment of the claim. Warner v. First Farwest Life Ins. Corp., 37 St. Rep. 2110 (D.C. Mont. 1980) (apparently not reported in Federal Supplement).

Liberal Construction of Complaint: Although the language used in a complaint may be unclear, the presumption is that no absurd or unreasonable result was intended and the claim will be looked at as a whole in order to sustain it. Hidden Hollow Ranch v. Collins, 146 M 321, 406 P2d 365 (1965).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 8(a). Claims for relief.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule, except for the omission of the requirement in subdivision (a) of a statement of the grounds upon which the court's jurisdiction depends. This is unnecessary in suits in district courts in this state, which are the only courts to which these rules apply, since they are courts of general jurisdiction.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 508
Actions for Libel and Slander. 514

GENERAL

No Waiver of Attorney Fees by Injured Third-Party Claimant Who Prevails in Insurance Coverage Action on Remand: Following remand in Christensen v. Mtn. W. Farm Bureau Mut. Ins. Co., 2000 MT 378, 303 M 493, 22 P3d 624 (2000), the Christensens requested attorney fees incurred in the declaratory judgment action. The District Court denied the request, and the Christensens appealed. Defendant insurer argued that because the Christensens never requested attorney fees in their motion for summary judgment or in their first appeal, their right to attorney fees was waived. This rule requires that a party give notice of facts that the party expects to prove, and the facts must disclose the presence of all elements necessary to make out a claim. In this case, the defendant insurer had notice of the Christensens' desire to seek attorney fees because that relief was specifically prayed for in the initial petition for declaratory judgment, and defendant successfully defended against that request in District Court. However, the Christensens did not prevail until the case was remanded, so waiting to file a motion for attorney fees until prevailing on appeal was proper. Thus, the Christensens did not waive their entitlement to attorney fees. Mtn. W. Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, 315 M 231, 69 P3d 652 (2003), following Kunst v. Pass, 1998 M 71, 288 M 264, 957 P2d 1 (1998).

Error in Summary Dismissal of Improperly Pleaded Claims: Green Tree Financial Corporation (Green Tree) as "lender" and Larson, doing business as Majestic Homes, Inc. (Majestic), as "approved dealer" had an arrangement for purposes of making federal housing loans pursuant to federal Housing and Urban Development (HUD) regulations. Majestic sued for breach of contract and for noncontract tort damages. The District Court held that no contractual relationship existed and dismissed the noncontract claims as improperly pleaded. The Supreme Court reversed, holding that a contract was in force, and reinstated the underlying noncontract

tort damage claims without commenting on their merit, noting that although the complaint was not a model of notice pleading, the allegations were sufficiently precise and well supported to provide Green Tree with the factual basis for the tort claims against it. The claims should not have been dismissed by summary judgment based simply on the manner in which they were pleaded. Larson v. Green Tree Financial Corp., 1999 MT 157, 295 M 110, 983 P2d 357, 56 St. Rep. 618 (1999), following Kunst v. Pass, 1998 MT 71, 288 M 264, 957 P2d 1, 55 St. Rep. 289 (1998). See also Linn v. City County Health Dept., 1999 MT 235, 296 M 145, 988 P2d 302, 56 St. Rep. 922 (1999).

Damages for Carbon Monoxide Poisoning — Applicability of Landlord and Tenant Act to Third Parties — Act Sufficiently Pleaded — Fees Payable Though Not Specifically Requested: Kunst, a guest at the apartment leased by Erpenbach, and Erpenbach were granted a directed verdict as to liability in their suit against Pass, the landlord, that both were poisoned by carbon monoxide in the apartment building. The jury returned an award of $5,000 to each plaintiff. The District Court Judge, who had taken over the case from a judge who had retired after hearing the case, denied attorney fees on the basis that the previous judge concluded that Pass was liable only under a "general theory of negligence". The Supreme Court reviewed the record and determined that the former judge had in fact left open the issue of whether The Montana Residential Landlord and Tenant Act of 1977 applied. The Supreme Court pointed out that the complaint either made reference in every count to the Act or incorporated the Act by reference and that a review of the record showed that the plaintiffs had also moved for a directed verdict pursuant to the Act. Although the District Court didn't expressly hold that Pass had violated the Act, the Supreme Court held that as a matter of law, Pass had violated certain provisions of the Act. The Supreme Court also held that a third party, such as Kunst, was covered by the Act because: (1) a third party is an "aggrieved party", as used in 70-24-401, as demonstrated by the official comments to the corresponding section of the Uniform Residential Landlord and Tenant Act; (2) Oregon, with a similar statute, includes third parties as aggrieved parties; and (3) the official comments to the Uniform Residential Landlord and Tenant Act also demonstrate that the standards contained in the Act apply more broadly than only to persons who have a contract with the landlord. Because the Act applies, the Supreme Court held that the attorney fee provisions contained in 70-24-442 also apply. In response to the defendants' argument that the complaint did not specifically request payment of attorney fees, the Supreme Court responded that: (1) the Montana Rules of Civil Procedure require only notice pleading and that because the action was brought pursuant to the Act and the Act contains a provision for attorney fees, it should have been apparent to the defendants that they could be ordered to pay fees; (2) the defendants' argument that they had no opportunity to defend against the claim for fees was without merit; and (3) the plaintiffs were a "prevailing party", the motion for fees was timely filed because it was done immediately after the District Court granted the plaintiffs' motion for a directed verdict, and there is no statutory time limit in Montana in which to file a motion for fees, as there is a time limit in 25-10-501 to file a motion for costs. Because fees were denied by the District Court for a legal reason and the District Court misconstrued the law, the Supreme Court remanded the case to the District Court in order for the District Court to exercise its discretion in awarding fees. Kunst v. Pass, 1998 MT 71, 288 M 264, 957 P2d 1, 55 St. Rep. 289 (1998).

Constructive Fraud Pleading — "Inartful" Pleading Held Sufficient — Relationship Between Rule 9(b) and This Rule: Berg was sued by the State Fund in a complaint that pleaded constructive fraud in three paragraphs that incorporated previous counts of the complaint by reference. Berg alleged that the constructive fraud count did not comply with the requirements of Rule 9(b), M.R.Civ.P., that all of the elements of the constructive fraud claim be pleaded with "particularity" because all of the elements of constructive fraud were not pleaded. The Supreme Court held that the "particularity" requirements of Rule 9(b) do not negate, and must be read in conjunction with, the provisions of this rule requiring a short and plain statement. The Supreme Court noted that Berg was able to sufficiently understand the state's pleading, that he made a responsive pleading denying the allegation of constructive fraud, that the State Fund pleading must be understood in its context of the facts of the case, and that there were no contradictory statements or statements made "on information and belief" in any of the State Fund's statements in its complaint. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Failure to Replead in Accordance With Rules — Dismissal With Prejudice Warranted — Exhaustion of All Sanctions Not Required: After a contract action against Nystroms was dismissed, Nystroms brought an action against the plaintiffs and their counsel, consisting of 76 paragraphs in 26 pages, alleging malicious fraudulent prosecution, intentional abuse of process, and unlawful intentional infliction of emotional distress. The District Court determined that the

complaint was vindictive, argumentative, and repetitive and directed Nystroms to replead in accordance to Rules 8 and 12, M.R.Civ.P. Nystroms then filed an amended complaint of 130 paragraphs in 43 pages including previous allegations and adding allegations of interference with business relations and conspiracy. The District Court dismissed with prejudice under Rule 41(b), M.R.Civ.P., for failure to comply with the court's order. The Supreme Court affirmed, holding that even though there may have been other less severe remedies available to the District Court, that court did not abuse its discretion in dismissing the complaint with prejudice. The Nystroms' counsel had warning that failure to replead in accordance with the Rules of Civil Procedure could result in dismissal. The District Court could have reasonably concluded that there was no other adequate remedy available to the District Court and the defendant under the circumstances. Nystrom v. Melcher, 262 M 151, 864 P2d 754, 50 St. Rep. 1488 (1993).

Failure to Amend Complaint — Dismissal Proper: Kudloff brought an action against the city of Billings, alleging that the city had wrongfully annexed his property. Two years later, the city moved to have the wrongful annexation claim dismissed because Kudloff no longer owned the property and was without standing to pursue the claim. Kudloff argued that he had sold the property in order to mitigate damages and was still entitled to recover for losses he alleged were due to the forced sale of his property. The Supreme Court ruled that the lower court had properly dismissed the claim because Kudloff had not amended his complaint and the purpose of a complaint and subsequent amendments is to provide adequate notice to the defendant of the nature of the action that must be defended against. Kudloff v. Billings, 260 M 371, 860 P2d 140, 50 St. Rep. 1108 (1993).

Pleading Three Separate Causes Under One Set of Facts: An employee set forth all factual allegations, followed by separate statements of three causes of action: wrongful discharge, breach of express and implied contract, and breach of the covenant of good faith and fair dealing. All of the factual allegations were essentially incorporated into each cause. An employee sufficiently indicated the intent to plead the causes as separate and independent. Mere joinder of alternative or inconsistent claims does not require dismissal of an otherwise legitimate claim, nor does the Wrongful Discharge From Employment Act limit a claimant's right to plead an independent cause of action in conjunction with a claim under the Act. Beasley v. Semitool, Inc., 258 M 258, 853 P2d 84, 50 St. Rep. 522 (1993).

Subject Matter Jurisdiction of District Court to Determine Liability of Coemployee: Section 27-1-703 provides that to the extent a coemployee has immunity from liability under the Workers' Compensation Act, a trier of fact cannot consider or determine negligence by the coemployee. The existence of immunity must be determined by the District Court. No statute or rule requires pleading the inapplicability of the Workers' Compensation Act because the jurisdiction of the District Court over common-law personal injury claims is indisputable. Brown v. Ehlert, 255 M 140, 841 P2d 510, 49 St. Rep. 940 (1992), distinguishing Mitchell v. Banking Corp. of Mont., 83 M 581, 273 P 1055 (1929), and Massey v. Selensky, 212 M 68, 685 P2d 938 (1984).

Plaintiff Allowed to File Amended Complaint for Personal Injuries: The District Court dismissed the plaintiff's original complaint but granted her 10 days to file an amended complaint. In the amended complaint, the plaintiff alleged the same basic fact pattern but attributed her injuries to the active negligence rather than passive negligence of an employee of the defendant. The lower court again dismissed the action, this time on the basis that the plaintiff had based her claim on newly alleged facts and that the statute of limitations had run. The Supreme Court reversed, stating that the same basic fact pattern had been set out in both complaints and that the original complaint and the amended complaint stated an adequate claim, meeting the requirement that pleadings be simple, concise, and direct. Thomas v. St., 239 M 38, 778 P2d 900, 46 St. Rep. 1494 (1989).

Failure to State Plaintiff's County of Residence in Body of Complaint — Venue Determination: It was not fatal to plaintiff's complaint to fail to state in its body the place of plaintiff's residence when the residence was set out in the signature. The District Court properly determined residence for venue purposes based on the signature and plaintiff's affidavit. Kendall v. St., 231 M 316, 752 P2d 1091, 45 St. Rep. 646 (1988).

Conversion of Investment by Investment Advisor — Claim: Amended complaint was sufficient to constitute a claim for relief based on conversion where it alleged plaintiff invested approximately $32,000 through defendant investment firm in the Franklin Money Fund, that the firm wrongfully and without authority removed the money from the fund and placed it in the Kemper Cash Equivalent Fund, and that plaintiff was damaged by the firm's actions in the amount of $1,500, as he had to secure the services of an attorney and expend time, effort, and

funds in pursuit of his property. Gebhardt v. D. A. Davidson & Co., 203 M 384, 661 P2d 855, 40 St. Rep. 521 (1983).

Sale of Interest in Land Subject to Purchase Option — Sufficiency of Claim Attaching: A sufficient claim for relief was stated in an action for specific performance by lessors of a purchase option where lessee alleged that he notified lessors of his intention to exercise the option the next month and that lessors purported to convey the minerals under the land to their children without consideration and in clear violation of the terms of the option, under which, upon sale to lessee, the lessee was to receive one-half of any oil and mineral rights. Willson v. Taylor, 194 M 123, 634 P2d 1180, 38 St. Rep. 1606 (1981).

Sufficiency of Complaint for Breach of Purchase Option: In lessee's suit for specific performance of sale under lease with option to purchase, the complaint sufficiently stated a claim where it alleged that plaintiff notified lessors of his exercise of the option, that the downpayment required by the lease had been tendered, and that lessors had alienated part of the land, placed additional encumbrances on it, endeavored to frustrate the purchase, and intended to refuse to perform. Willson v. Taylor, 194 M 123, 634 P2d 1180, 38 St. Rep. 1606 (1981).

Complaint Construed in Favor of Plaintiff: For purposes of the motion to dismiss, the complaint is to be construed in the light most favorable to plaintiff and its allegations taken as true. Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979).

Failure to Plead Proper Theory — Bar to Evidence: When sellers of land argued that the buyers misled them as to the effect of an escrow agreement and warranty deed, estoppel had no application since the court found that sellers possessed a copy of the instruments for a considerable length of time and had ample opportunity to examine them. Furthermore, since sellers failed to plead fraud by amending their pleadings, they were not entitled to present parol evidence to show that these instruments constituted an acceptance of the land under the doctrine of estoppel. Tschache v. Barclay, 172 M 415, 564 P2d 1299 (1977).

Libel — Insufficient Complaint: Complaint for libel alleging that defendant, while acting within the course and scope of his employment caused employer to terminate plaintiff's contract, was a contradiction and was insufficient to allege libel or interference with contract. Baillie v. Rollins, 165 M 516, 530 P2d 440 (1974).

New Complaint Following Dismissal: "Amended complaint" filed under original cause number, was a valid, initial complaint where it satisfied requirements of notice despite fact that previous complaint had been withdrawn and dismissed without prejudice. Butte Country Club v. Metropolitan Sanitary & Storm Sewer District, 164 M 74, 519 P2d 408 (1974).

Notice Pleading: Where pleading titled "Amended Complaint" which satisfied notice and other requirements of statute was filed, it was a valid initial complaint under modern rules of notice pleading. Butte Country Club v. Metropolitan Sanitary & Storm Sewer District, 164 M 74, 519 P2d 408 (1974). See also Kunst v. Pass, 1998 MT 71, 288 M 264, 957 P2d 1, 55 St. Rep. 289 (1998).

Rule Requires Only Notice Pleading: The rules are essentially notice pleading statutes rather than the more formal fact pleading statutes. Brothers v. Surplus Tractor Parts Corp., 161 M 412, 506 P2d 1362 (1973).

Relation Back of Amendment — Avoidance of Statute of Limitations: Although the Statute of Limitations is an affirmative defense that need not be negated in the complaint, the court should consider whether a motion to amend a complaint relates back to the original complaint and so avoids the bar of the Statute of Limitations. Prentice Lumber Co. v. Hukill, 161 M 8, 504 P2d 277 (1972).

Failure to Plead Claim — Bar to Judgment: Where plaintiff failed to plead claim for deficiency judgment on balance remaining after sale of repossessed vehicles, no deficiency judgment could be rendered and the pleadings could not be amended to conform even though evidence had been received which might have supported such a judgment. Gallatin Trust & Sav. Bank v. Darrah, 152 M 256, 448 P2d 734 (1968).

Failure to State a Claim — Terms of Pleading: Mere absence of certain terms of act does not cause a complaint to be bad by failing to state a claim upon which relief can be granted. A short and plain statement of the claim, in whatever words, suffices. Williams v. Superior Homes, Inc., 148 M 38, 417 P2d 92 (1966).

Alternative Relief — Separate Claims on Note and Mortgage: Upon default in an action against the unconditional guarantors of a note and to foreclose mortgage securing the note, the holder of the note may properly proceed at its option against either security in the same action. Bozeman Deaconess Foundation v. Cowgill, 143 M 98, 387 P2d 435 (1963).

Optional Claims — Alternate Relief: Holder of note secured by contracts of unconditional guarantee and real estate mortgage may plead alternatively as to theory of recovery with court

having authority under the rules to dispense with any claim left unadjudicated. Bozeman Deaconess Foundation v. Cowgill, 143 M 98, 387 P2d 435 (1963).

Creation and Maintenance of Nuisance — Failure to State a Claim: A complaint endeavoring to set out the creation and maintenance of a public nuisance was insufficient to state a claim upon which relief could be granted where it set out the construction of mill by defendant in 1954, yet alleged the incorporation of defendant company in 1956, and purported to show the measure of damages to the plaintiffs based on the value of the property before the mill was established and the value of the property at the time the complaint was filed in 1962. Rambur v. Diehl Lumber Co., 142 M 175, 382 P2d 552 (1963).

Failure to State a Claim — Dismissal of Complaint Held Proper: Where plaintiffs elected not to amend their complaint, but to stand on it, and there was nothing in the record to indicate that there was any set of circumstances which would admit of their stating a claim upon which relief could be granted under the complaint, the court properly sustained defendant's motion to dismiss the complaint. Rambur v. Diehl Lumber Co., 142 M 175, 382 P2d 552 (1963).

Sufficiency of Pleading — Failure to State a Claim: A complaint must state something more than facts which, at the most, only hint at a right to relief. Court properly dismissed complaint for failure to state a claim upon which relief could be granted. Rambur v. Diehl Lumber Co., 142 M 175, 382 P2d 552 (1963), followed in Treutel v. Jacobs, 240 M 405, 784 P2d 915, 46 St. Rep. 2233 (1989), and Ryan v. Bozeman, 279 M 507, 928 P2d 228, 53 St. Rep. 1258 (1996). Treutel v. Jacobs was followed in Mysse v. Martens, 279 M 253, 926 P2d 765, 53 St. Rep. 1139 (1996). Ryan v. Bozeman was followed in Oliver v. Stimson Lumber Co., 1999 MT 328, 297 M 336, 993 P2d 11, 56 St. Rep. 1303 (1999).

Variance Between Testimony and Complaint: Where complaint alleged that plaintiff had earned $2,956 while working for the defendant, and the defendant proved payment of this amount to plaintiff, it was error to permit plaintiff to testify that there was still another $2,956 due him. It confronted defendant with a cause of action not pleaded. Johns v. Modern Home Crafters, Inc., 134 M 76, 328 P2d 641 (1958).

Sufficiency of Complaint — Action on Account: It is not necessary to allege the items constituting an account, but an allegation that an indebtedness is owing from defendant to plaintiff for the balance due on "stumpage from timber purchased of and from the plaintiff" which upon demand the defendant failed and still fails to pay, is sufficient to allege the ultimate facts required to state a cause of action. Ballenger v. Tillman, 133 M 369, 324 P2d 1045 (1958).

Action on Commercial Paper — Necessary Allegations: It is a fundamental rule of pleading in actions on bills and notes that the plaintiff must allege facts showing title or right to sue. In an action by the payee named in the instrument, however, a formal allegation that he is still the owner and holder is unnecessary if the execution of the instrument, its delivery to the plaintiff, and the default of the maker or acceptor are alleged. Parkinson v. Diefenderfer, 128 M 547, 280 P2d 424 (1955).

Statement of Legal Conclusion Subject to Dismissal: Statement that the defendant "wrongfully failed to perform his official duty to supply the plaintiff with license blanks" in a suit for damages against the state Fish and Game Warden was a bald conclusion of law and insufficient to withstand general demurrer. Meinecke v. McFarland, 122 M 515, 206 P2d 1012 (1949).

Divorce Action — Allegation of Desertion: In a divorce action a complaint charging desertion must be sufficiently informative as to matters of time and place of desertion as to reasonably inform the defendant of the charge. Hosking v. Hosking, 120 M 437, 186 P2d 503 (1947).

Divorce Action — Necessary Allegations: In divorce action complaint must do more than allege ground of divorce in language of the statute and must allege the particular facts relied upon as a cause of action. Crenshaw v. Crenshaw, 120 M 190, 182 P2d 477 (1947), explained in Hosking v. Hosking, 120 M 437, 186 P2d 503 (1947).

Purpose of Pleading — Notification of Facts: The object of pleading is to notify the adverse party of the facts which the pleader expects to prove, and for that reason the allegation of such facts must be made with that certainty which will enable the opponent to prepare his evidence to meet the alleged facts. Story Gold Dredging Co. v. Wilson, 99 M 347, 42 P2d 1003 (1935); Kozasa v. N. Pac. Ry., 61 M 233, 201 P 682 (1921).

Action for Personal Injuries — Liberal Construction of Complaint: Under the more modern doctrine of liberal construction of pleadings, the complaint in an action for damages arising out of an automobile accident, alleging that defendant operated his machine "in such a negligent, careless and unlawful manner" as to run into a child lawfully in an alley, was sufficient as against the objection that the particular acts of negligence relied upon were not alleged. Johnson

v. Herring, 89 M 156, 295 P 1100 (1931), distinguished in Linney v. Chicago, Milwaukee, St. Paul & Pac. R.R., 94 M 229, 21 P2d 1101 (1933).

Complaint Stating Ultimate Facts as Sufficient: If the complaint states ultimate facts and not conclusions of law drawn from facts, in ordinary and concise language, so that the man on the street may know what is charged therein, it is immune to a general demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) or to an objection to the introduction of testimony on the ground that it does not state a cause of action. Wells-Dickey Co. v. Embody, 82 M 150, 266 P 869 (1928).

Sufficiency of Complaint — Breach of Contract: A complaint stating the facts constituting a contract imposing a duty upon defendant, its breach and resulting damages, in ordinary and concise language, is sufficient and proof against a general demurrer. Borgeas v. Oreg. Short Line R.R., 73 M 407, 236 P 1069 (1925).

Complaint for Wrongful Death Held Sufficient: Complaint in an action against a street railway company alleging that the motorman of defendant carelessly, negligently, etc., ran his car on a city street at a rate of speed prohibited by ordinance and without ringing the bell at a crossing and as a proximate result thereof ran over and killed plaintiff's decedent, was sufficient as against the objection that it stated mere legal conclusions, the facts and circumstances constituting the negligence being matter of proof and not of averment. McManus v. Butte Elec. Ry., 68 M 379, 219 P 241 (1923).

Sufficiency of Complaint — All Elements to Be Alleged: Whatever may be the nature of the cause of action upon which a plaintiff seeks to recover, he must allege in his complaint facts disclosing the presence of all the elements necessary to make it out. Union Bank & Trust Co. v. Himmelbauer, 68 M 42, 216 P 791 (1923); Griffin v. Chicago, Milwaukee & St. Paul Ry., 67 M 386, 216 P 765 (1923); Chealey v. Purdy, 54 M 489, 171 P 926 (1918).

Sufficiency of Complaint — Legal Theory Immaterial: A complaint will be held sufficient if a cause of action is stated upon any theory. Griffin v. Chicago, Milwaukee & St. Paul Ry., 67 M 386, 216 P 765 (1923).

Legal Conclusions Alleged — Complaint for Injunction: To state a cause of action for an injunction the complaint must disclose the facts from which the court may draw the conclusion that plaintiff has no plain, speedy, and adequate remedy at law, the bare statement that plaintiff has no such remedy being insufficient, it being no more than the averment of a conclusion. State ex rel. Stephens v. Zuck, 67 M 324, 215 P 806 (1923).

Form of Action Immaterial: The form in which an action is brought is immaterial, for if upon any view of the case made plaintiff is entitled to relief, the pleading will be sustained and the character of the action determined from the nature of the grievance rather than from the form of the declaration. Samuell v. Moore Mercantile Co., 62 M 232, 204 P 376 (1922).

Sufficiency of Complaint — Complaint to Relate to Proof: A complaint which leaves to surmise and conjecture the course of proof that will be offered in support of it, and obliges the court, as well as the opposing party, to accept the pleader's bare statement, is defective. Mont. Amusement Sec. Co. v. Goldwyn Distrib. Corp., 56 M 215, 182 P 119 (1919).

Superfluous Allegations: If the facts stated disclose a violation of the statute and the resulting damage, the complaint is not rendered insufficient because it contains other allegations which might have been omitted. Kelley v. John R. Daily Co., 56 M 63, 181 P 326 (1919).

Allegation of Damages — Sufficiency: To state a cause of action for rescission of a contract for fraud, plaintiff need not allege that he suffered pecuniary loss, the statement that he suffered damage or injury being sufficient. Stillwell v. Rankin, 55 M 130, 174 P 186 (1918).

Legal Conclusions Alleged — Fraud in Sheriff's Sale: The complaint in a suit to set aside a judgment and vacate the Sheriff's sale, which alleged that the claim forming the basis of the judgment was a "pretense and fraudulent", and "in fraud of the rights" of plaintiffs, but did not set forth the facts upon which the charges of wrongdoing were grounded, was insufficient, such statements consisting of bald conclusions. Brandt v. McIntosh, 47 M 70, 130 P 413 (1913).

Sufficiency of Pleading Action for Slip — Fall: A complaint against a city for personal injuries received from falling on a sidewalk, obstructed with accumulations of ice and snow, will not support a judgment where it fails to allege facts showing that the city had notice of the obstruction for a sufficient length of time before the injury to have given it a reasonable opportunity to prevent accidents. McEnaney v. Butte, 43 M 526, 117 P 893 (1911), distinguished in Robinson v. F.W. Woolworth Co., 80 M 431, 261 P 253 (1927).

Common-Law Pleading: If the phraseology of any common-law count is adequate in the particular case to bring the pleader within the statutory rule, then his pleading is sufficient; otherwise it is not. Truro v. Passmore, 38 M 544, 100 P 966 (1909).

Legal Conclusions Alleged — Negligence of City: A complaint in an action against a city for damages alleged to have been sustained by reason of a defective sidewalk, which merely stated that the city had negligently placed the sidewalk in an unsafe, dangerous, and defective condition, and permitted it to remain so, but failed to specify in what respect the walk was unsafe, dangerous, or defective, did not state facts sufficient to show negligence on the part of the city. The allegation amounted to a bare legal conclusion of the pleader. Pullen v. Butte, 38 M 194, 99 P 290 (1909), distinguished in Stevens v. Butte, 107 M 354, 85 P2d 339 (1938). See Forquer v. North, 42 M 272, 112 P 439 (1910).

ACTIONS FOR LIBEL AND SLANDER

Libel — Insufficient Complaint: Complaint for libel, alleging that defendant while acting within the course and scope of his employment caused employer to terminate plaintiff's contract, was a contradiction and was insufficient to allege libel or interference with contract. Baillie v. Rollins, 165 M 516, 530 P2d 440 (1974).

Libel of Corporation — Sufficiency of Complaint: Complaint by private corporation for libel was sufficient where it charged that the publication was made of and concerning it. Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F. Supp. 274 (D.C. Mont. 1958).

Reference to Plaintiff — Sufficiency of Allegations: While, before recovery of damages in a slander action is permissible, it must appear that at least one person of those who heard the defamatory statement knew that plaintiff was meant, plaintiff is not required to so allege in the complaint but may prove such fact under the general allegation that the statement was made of and concerning plaintiff. Kosonen v. Waara, 87 M 24, 285 P 668 (1930).

Allegations of Readers' Understanding: In an action for libel founded on an article in a newspaper concerning a certain class of attorneys styled as "shysters" and referring to incidents occurring at a certain inquest, without, however, naming plaintiff or mentioning any individual in particular, which article was libelous per se, the complaint alleging that the matter printed was published "of and concerning the plaintiff" and that readers of the paper understood that plaintiff was the person alluded to, was sufficient to permit of proof showing that plaintiff was the person concerning whom the article was published, and was not demurrable. Nolan v. Standard Publishing Co., 67 M 212, 216 P 571 (1923).

Words Clearly Defamatory: When the words are unequivocal in their import and obviously defamatory, it is not necessary to employ colloquium or innuendo to explain their application and meaning. However, if the words be of doubtful significance, or derive their libelous character not from their own intrinsic force, but from extraneous facts, it is necessary to allege the meaning intended, or set forth such extraneous facts by proper averments. Paxton v. Woodward, 31 M 195, 78 P 215 (1904).

Law Review Articles

Crenshaw—Divorces in a Twilight Zone, Pope, 9 Mont. L. Rev. 1 (1948).

Collateral References

Damages *key* 141; Judgment *key* 207; Libel and Slander *key* 79, et seq.; Pleading *key* 10 through 33, 38 ½ through 75, 139, 146.

25 C.J.S. Damages §129, et seq.; 49 C.J.S. Judgments §§39 through 41, 70; 53 C.J.S. Libel and Slander §128, et seq.; 71 C.J.S. Pleading §§66 through 80, 94 through 158.

50 Am. Jur. 2d Libel and Slander §430, et seq.; 61A Am. Jur. 2d Pleading §§130 through 144.

Existence and nature of cause of action for equitable bill of discovery. 37 ALR 5th 645.

Rule 8(b). Defenses — form of denials.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Answer Pleading Insufficient Knowledge Creates Factual Dispute Subject to Trial — Disposition of Trial Issues by TRO Prohibited — Verified Complaint Not Basis for Agreed Facts

— *Denial of Due Process:* After a writ of execution was issued against certain property belonging to her husband, Nancy filed a verified complaint against the Sheriff who would execute on the property. She also filed a petition for a temporary restraining order (TRO), claiming to be a tenant by the entirety in the property subject to execution. The District Court issued the TRO and, at a later show cause hearing, discussed the underlying law with counsel but took no testimony. The Sheriff then filed his answer, pleading insufficient knowledge to admit or deny. A creditor was later allowed to intervene. The creditor's answer also pleaded insufficient knowledge, but his brief took a position opposing Nancy's view of the law applicable to ownership of the property. Nancy then responded with a brief in which she asked the District Court to allow oral argument and reiterated her view of the law. The District Court issued findings and conclusions and quashed the writ of execution, relying upon the "undisputed" facts alleged in Nancy's verified complaint. The Supreme Court reversed, noting that under this rule, the effect of pleading insufficient knowledge is to deny a plaintiff's allegations. The Sheriff's and intervenor's answers pleading insufficient knowledge put into issue the allegations in Nancy's complaint. The only way that those issues of fact could be resolved, short of a trial on the merits, was by a motion for summary judgment or judgment on the pleadings, neither of which was made. The Supreme Court also noted that there was no discovery and no hearing at which facts were determined because there was no testimony taken by the District Court. Citing Porter v. K&S Partnership, 192 M 175, 627 P2d 836 (1981), and Knudson v. McDunn, 271 M 61, 894 P2d 295 (1995), the Supreme Court held that a District Court may not determine, in proceedings on a preliminary injunction or a temporary restraining order, those issues that may arise in a trial on the merits. In this case, the District Court negated Nancy's burden of proof and, without notice, precluded discovery and deprived the Sheriff and the intervenor of the opportunity to disprove Nancy's allegations concerning her right of ownership in the property, thereby depriving the Sheriff and intervenor of their right to procedural due process under the Montana Constitution. For these reasons, the Supreme Court reversed the District Court and remanded for proceedings consistent with the Supreme Court's opinion. Lurie v. Sheriff, 284 M 287, 944 P2d 205, 54 St. Rep. 847 (1997).

Denial of Contractual Liability by Both Defendant Entities — Claims Put in Issue — Burden of Proof — Proposed Findings to Be Based Upon Evidence — No Evidence of Intent to Mislead as Basis for Relief From Judgment: Wright Oil sued Goodrich for petroleum products allegedly delivered but not paid for. Goodrich denied liability, claiming that the products were for the use of West Yellowstone Snowmobile Rentals, Inc. (WYSR), which owned Westgate Texaco, operated by Goodrich. Wright Oil amended its complaint to include WYSR, and after a bench trial, the District Court held against Goodrich because no evidence had been presented proving a contract between WYSR and Wright Oil. Wright Oil then filed a motion for relief from judgment under Rule 60(b)(6), M.R.Civ.P. (Title 25, ch. 20), seeking relief from the District Court's failure to hold against WYSR. On the basis of evidence not presented at trial, the District Court granted the motion and ordered an evidentiary hearing to reopen the case against WYSR regarding WYSR's contractual liability to Wright Oil. WYSR appealed. The Supreme Court held that the District Court incorrectly granted the motion because the circumstances of the District Court's failure to hold WYSR liable for the debt to Wright Oil were not so extraordinary as to warrant relief from judgment under Rule 60(b)(6). The Supreme Court noted that WYSR's denial of its liability put the allegation of its contractual liability at issue under this rule and that under 26-1-401 and 26-1-402, Wright Oil had the burden of going forward with the evidence of WYSR's contractual liability but failed to present evidence of a contractual relationship between WYSR and Wright Oil. The fact that Goodrich alleged that WYSR was liable for the debt could not, the Supreme Court held, be taken as an admission by WYSR that it was liable for the amounts due. Further, the Supreme Court noted that Wright Oil should not have been surprised by WYSR's proposed findings of fact that it was not liable for the debt because under Rule 52(a), M.R.Civ.P., a party's proposed findings of fact must be supported by the evidence, and Wright Oil failed to produce that evidence of liability. Wright Oil & Tire Co. v. Goodrich, 284 M 6, 942 P2d 128, 54 St. Rep. 811 (1997).

Defendant's Duty to Set Out Specific Defenses Not Raised by General Denials: The same principles of fairness and notice that require a plaintiff to set forth the basis of a claim require a defendant to shoulder a corresponding duty to set out not merely general denials as appropriate but also those specific defenses not raised by general denials by which the defendant seeks to avoid liability, rather than merely to controvert plaintiff's factual allegations. Brown v. Ehlert, 255 M 140, 841 P2d 510, 49 St. Rep. 940 (1992).

Reliance on Contract Terms — Not Affirmative Defense: The plaintiffs' insurance policy contained a clause that required implementing an appraisal procedure if the parties could not

agree on the amount of loss. The policy also stated that no legal action could be initiated until there was full compliance with the terms of the policy. The insurer invoked the appraisal clause, but the plaintiffs refused to submit to the procedure and instead filed suit for damages and bad faith against the insurer. The Supreme Court held that summary judgment in favor of the insurer was appropriate in light of the clear language of the policy, and the court further held that the terms of the policy were a negative defense and did not have to be affirmatively set out in the defendants' answer. Dunn v. Way, 241 M 208, 786 P2d 649, 47 St. Rep. 213 (1990).

Lack of Agency as Negative Defense: Lack of agency is a negative rather than affirmative defense. Sterrett v. Milk River Prod. Credit Ass'n, 234 M 459, 764 P2d 467, 45 St. Rep. 2048 (1988), following Porto v. Peden, 233 F. Supp. 178 (W.D. Pa. 1964). See also Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

"Material" Allegations Denied: Where answer denied each and every "material" allegation of the complaint and plaintiff went to trial thereon without objection, each and all allegations in the complaint were material and the plaintiff was required to make proof of such material allegations so pleaded by him. Maass v. Patterson, 122 M 394, 204 P2d 1040 (1949).

Waiver of Objections to Pleadings: Objections to the form of denials are waived by going to trial without first challenging the pleading by motion, demurrer, or other timely and proper objection. Maass v. Patterson, 122 M 394, 204 P2d 1040 (1949).

Lack of Sufficient Information — No Admission Because of General Denial: A denial in an answer to the effect that defendant has not sufficient information as to a given paragraph in the complaint to form a belief and therefore denies the same may not be said to be an admission of the matter set forth therein, where the pleading closed with a general denial of all matters and things in the complaint not specifically denied, admitted, or qualified, the general denial thus covering the allegations of the paragraph. Nelson v. Stukey, 89 M 277, 300 P 287 (1931).

Effect of General Denial: The effect of a general denial is to put in issue every material allegation constituting the cause of action alleged, and thus to cast upon the plaintiff the burden of establishing by his evidence, prima facie at least, the presence of every element of it and hence his right to recover. Swords v. Occident Elevator Co., 72 M 189, 232 P 189 (1924); Chealey v. Purdy, 54 M 489, 171 P 926 (1918).

Action on Promissory Note — Lack of Information: In an action to enforce payment of a promissory note, a denial of knowledge or information sufficient to form a belief as to the truth of an allegation that the note has not been paid raises an issue. The allegation of nonpayment is a material and essential allegation in an action of this character. First Nat'l Bank v. Silver, 45 M 231, 122 P 584 (1912).

Admissions in Answer — Proof Unnecessary: An allegation in an answer that a fact, stated in the complaint as true, is true, or the affirmative statement therein of a fact which is likewise pleaded in the complaint, is an admission of the truth of the allegation of the complaint, and proof thereof is not necessary. O'Donnell v. Butte, 44 M 97, 119 P 281 (1911).

Specific and General Denials Allowed: A defendant may deny generally or specifically certain allegations of the complaint, and may, as to other allegations, deny any knowledge or information thereof sufficient to form a belief, and may admit other allegations, and may put still others, or all others, in issue by a general denial. Pengelly v. Peeler, 39 M 26, 101 P 147 (1909).

Allegation of Insufficient Knowledge: An allegation in the answer that "defendants have not sufficient knowledge or information to form a belief . . . and therefore deny the same" was in substantial compliance with section 93-3401, R.C.M. 1947 (superseded by Rule 8(b), M.R.Civ.P.). Milwaukee Gold Extraction Co. v. Gordon, 37 M 209, 95 P 995 (1908).

Denial on Information and Belief: The provisions of section 93-3401, R.C.M. 1947 (superseded by Rule 8(b), M.R.Civ.P.), relative to denial on information and belief, applied to any and all allegations in a complaint. Hence, an allegation in the complaint of a corporation that plaintiff was and is a corporation was put in issue by such a denial. Milwaukee Gold Extraction Co. v. Gordon, 37 M 209, 95 P 995 (1908).

Law Review Articles

Montana Supreme Court Survey, Williams, 48 Mont. L. Rev. 335 (1984).

Collateral References

Pleading *key* 13, 76, 80, 87, 88, 121, 122.

71 C.J.S. Pleading §§183 through 196.

61A Am. Jur. 2d Pleading §§278 through 286.

Necessity of pleading of damage to establish fraud as defense to action on contract. 91 ALR 2d 356.

General denial as raising issue with respect to mitigation of damages in tort action other than libel and slander. 75 ALR 2d 473.

General denial in action by third person against alleged partners as putting in issue existence of partnership. 68 ALR 2d 555.

General denial in civil action for assault and battery as raising issue of self-defense or other justification. 67 ALR 2d 405.

Joinder in defamation action, of denial and plea of truth of statement. 21 ALR 2d 813.

Necessity and sufficiency of pleading custom or usage. 151 ALR 324.

Rule 8(c). Affirmative defenses.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

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GENERAL

Absence of Evidence of Rescission, Release, Waiver, or Accord and Satisfaction of Contract — Reversal Warranted: Plaintiffs owned shares in defendant's corporation and sought to sell the shares back to the corporation. The corporation sent a letter offering to purchase the shares for $64,933.60, and plaintiffs were instructed that to accept the offer, they were to sign the back of the stock certificate and mail it to the corporation. Plaintiffs did so, but included with the certificate a letter stating that by accepting the offer, plaintiffs reserved their rights under federal and state law. The corporation found the language unacceptable and declined to purchase the shares, instead returning the certificate to plaintiffs. Concerned about possessing a signed stock certificate, plaintiffs ultimately visited the corporation and surrendered the endorsed certificate in exchange for a new one. Plaintiffs then brought a breach of contract suit claiming $64,933.60 in damages, asserting that the corporation had breached its offer to repurchase the stock. The corporation denied that a contract offer existed, arguing that plaintiffs' reply was not an acceptance but rather a counteroffer, and asserted that even if a contract did exist, plaintiffs had waived their rights under it by forfeiting the endorsed certificate in favor of a new one and by failing to immediately assert their rights under the contract. A jury found that the corporation had breached its contract, causing damages in the amount of $64,933.60, but then entered a verdict for the corporation on grounds that the corporation had proved at least one of its affirmative defenses of rescission, release, waiver, or accord and satisfaction. On appeal, the Supreme Court noted that only in rare cases should a jury verdict be set aside but reversed the verdict nevertheless on grounds that, even drawing all legitimate inferences in favor of the corporation, there was a complete absence of probative evidence supporting any of the corporation's affirmative defenses. The case was remanded for entry of judgment of $64,933.60 in favor of plaintiffs. Benson v. Diverse Computer Corp., 2004 MT 114, 321 M 140, 89 P3d 981 (2004), followed in Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004).

Strict Liability Statute — Only Enumerated Defenses Available: If a strict liability statute does not expressly provide for a particular defense, that defense may not be raised. Madrid v. District Court, 2002 MT 291, 312 M 517, 60 P3d 438 (2002).

Failure to Assert Timeliness as Affirmative Defense in Construction Lien Case Not Constituting Waiver of Issue — Burden on Lien Claimant to Establish Validity of Lien: Keating entered an agreement with Helena Coach House Partnership (Partnership) to purchase a Helena motel. The Burnses agreed to renovate the motel for Keating. Keating left the Helena area in January 1996 after leasing the motel to another party. On April 1, 1996, the Burnses filed construction liens for $48,539.19 and $7,403.30. Keating subsequently defaulted on the

agreement to purchase the motel by allowing liens to encumber the property and by failing to pay property taxes, so the Partnership repossessed the motel and posted a cash construction lien bond in order to sell a portion of the motel property. The Burnses then filed a complaint against the Partnership, asserting that the action was commenced within the time prescribed by 71-3-562 and seeking judgment against the bond pursuant to 71-3-553. The Partnership admitted that the Burnses filed notices of liens and that the action was filed within 2 years of those filings, but denied that the filings constituted a valid lien. The District Court agreed, concluding that the liens were invalid because they were not timely filed. On appeal, the Burnses contended that the Partnership waived the issue of timeliness by failing to affirmatively plead the issue, relying on Brown v. Ehlert, 255 M 140, 841 P2d 510 (1992), for the proposition that the timeliness of a construction lien is an affirmative defense required to be pleaded affirmatively pursuant to this rule. The Supreme Court held that Brown v. Ehlert did not support the contention that the timeliness of a construction lien must be affirmatively pleaded. Rather, the defense of timeliness went to the merits of the complaint because timeliness was an element of the claim, and the Partnership's pleading of timeliness did not implicate considerations of fairness or surprise for the Burnses, who were on notice under the 90-day filing requirement in 71-3-535 that they had to establish the validity of their liens. The Partnership's specific denial that the liens were valid was a negative defense that warned the Burnses that they had to prove the validity of the liens as part of their prima facie case, and the Partnership's answer appropriately underscored the Burnses' burden of proof. Thus, the Partnership did not have to affirmatively plead the timeliness issue. The District Court properly concluded that the liens were not valid because the Burnses failed to satisfy the procedural requirement that their liens be timely filed, so the Burnses could not avail themselves of the remedies in the construction lien statutes. Burns v. A Cash Constr. Lien Bond, 2000 MT 233, 301 M 304, 8 P3d 795, 57 St. Rep. 966 (2000).

Lack of Justification in Relying on Allegedly False Information — Claim of Negligent Misrepresentation Properly Dismissed: Following termination from employment with Bitterroot International Systems, Inc. (Bitterroot), Knutson sought to exercise his buyout rights under the shareholders' agreement. Bitterroot refused to pay and sought rescission on grounds of negligent misrepresentation, alleging that Bitterroot relied on Knutson's allegedly false information regarding the value of stock acquired through purchase of another company. However, the definition of negligent misrepresentation set out in St. Bank of Townsend v. Maryann's, Inc., 204 M 21, 664 P2d 295 (1983), requires that the party asserting that defense was justified in relying on the allegedly false information. In this case, Spencer, majority shareholder and president of both Bitterroot and the company that was acquired, knew the respective values of both companies and their stocks and knew that the book values were disparate at the time of the transaction. Thus, Spencer's assertion that he was misled by Knutson was neither credible nor supported by the record, and the District Court correctly dismissed Spencer's claim of negligent misrepresentation. Knutson v. Bitterroot Int'l Sys., Inc., 2000 MT 203, 300 M 511, 5 P3d 554, 57 St. Rep. 800 (2000).

Mistaken Valuation of Stock Insufficient Grounds for Rescission of Contract: Following termination from employment with Bitterroot International Systems, Inc. (Bitterroot), Knutson sought to exercise his buyout rights under the shareholders' agreement. Bitterroot refused to pay and sought rescission on grounds of mistake of fact, arguing that both parties had mistakenly valued stock exchanged during the purchase of another business. The District Court could not rescind a validly formed contract simply because Bitterroot undervalued the stock. A mutual mistake as to value is not necessarily sufficient to rescind a contract (see 17A C.J.S. Contracts §149). The District Court did not err in dismissing the affirmative defense of mistake of fact because the law does not protect a business from its improvident valuation of stock. Knutson v. Bitterroot Int'l Sys., Inc., 2000 MT 203, 300 M 511, 5 P3d 554, 57 St. Rep. 800 (2000).

Misvaluation of Corporate Stock Not Constituting Breach of Fiduciary Duty: Following termination from employment with Bitterroot International Systems, Inc. (Bitterroot), Knutson sought to exercise his buyout rights under the shareholders' agreement. Bitterroot refused to pay and sought rescission on grounds that Knutson breached his fiduciary duty to Bitterroot, arguing that Knutson's mistaken valuation of stock acquired during the purchase of another business constituted a breach of that duty. Bitterroot did not contend that Knutson acted in bad faith, but only that he was wrong about the stock value. Applying the standard in 35-1-443, the Supreme Court found that Knutson's inaccurate stock valuation did not constitute a breach of fiduciary duty and that the District Court did not err in dismissing Bitterroot's claim that Knutson breached his fiduciary obligation. Knutson v. Bitterroot Int'l Sys., Inc., 2000 MT 203,

300 M 511, 5 P3d 554, 57 St. Rep. 800 (2000). See also 18A Am. Jur. 2d Corporations §451 and 18B Am. Jur. 2d Corporations §1705.

Reciprocal Rights and Obligations Considered Sufficient Consideration to Sustain Shareholders' Agreement: Following his termination from employment with Bitterroot International Systems, Inc. (Bitterroot), Knutson sought to exercise his buyout rights under the shareholders' agreement. Bitterroot refused to pay on grounds of insufficient consideration, contending that the essential consideration for the shareholders' agreement was the exchange of stocks of equal value—an argument based on the premise that the stock exchange and the shareholders' agreement were one agreement. However, the shareholders' agreement was enforceable independent of the stock exchange between the parties, and the creation of reciprocal rights and obligations among the shareholders was sufficient consideration to sustain the shareholders' agreement; thus, the District Court did not err in concluding that the consideration was sufficient. Knutson v. Bitterroot Int'l Sys., Inc., 2000 MT 203, 300 M 511, 5 P3d 554, 57 St. Rep. 800 (2000).

Defense of Statute of Frauds Raised Sua Sponte by District Court Reversed — Defense to Be Raised by "Party": State Farm Insurance Company, as a subrogee of Estabrook, sued Baden for negligent damage to Estabrook's vehicle and obtained a default judgment. State Farm then sought a default judgment against codefendant Clark, but the District Court, because of the amount of fees requested by State Farm's counsel, reviewed the facts of the case and, sua sponte, raised the issue of the statute of limitations with State Farm's counsel. The District Court then denied the motion for default judgment against Clark, set aside the default judgment against Baden, and dismissed the complaint with prejudice. Citing Bennett v. Dow Chem. Co., 220 M 117, 713 P2d 992 (1986), and cases from other jurisdictions, the Supreme Court held that because subsection (c) of this rule provides for the raising of affirmative defenses by a "party", the defense of the statute of limitations should not have been raised sua sponte by the District Court. The Supreme Court reasoned that because it had held in Bennett that the affirmative defense of the statute of limitations had to be raised by answer and not by motion, the court must also conclude that a party's waiver of the defense could not be suspended, sua sponte, by the District Court when the affected party had not only failed to file a motion but had failed to appear at all. Estabrook v. Baden, 284 M 419, 943 P2d 1334, 54 St. Rep. 947 (1997).

Assumption of Risk Inapplicable to Contract Action — Harmless Error: Garrison sued Averill, a real estate broker, in contract for defrauding him by failing to disclose the true facts concerning an easement on real property purchased by Garrison. The District Court found that Garrison had "assumed the risk" of subsequent damages by failing to read the terms of the easement. The Supreme Court held that assumption of risk is ordinarily a tort term associated with personal injury actions, but held that because the District Court did not continue with any more analysis or conclusion after its reference to assumption of risk and because the District Court found that Averill did not breach his duty of care to Garrison, the reference by the District Court to assumption of risk was harmless error. Garrison v. Averill, 282 M 508, 938 P2d 702, 54 St. Rep. 454 (1997).

Failure to Assert Discharge of Debt by Bankruptcy in Earlier Action as Waiver and Res Judicata in Subsequent Action: Loney was sued by his law firm for fees owed for representing him in bankruptcy proceedings. Loney failed to answer the complaint, and a default judgment was entered. Loney subsequently filed a complaint to have the judgment declared void on the basis that the debt had been discharged in bankruptcy. The Supreme Court held that Loney had been required to assert the discharge of the debt in bankruptcy as an affirmative defense when the law firm sued him. Therefore, he had waived that defense and could not now assert it in his claim against the firm. The Supreme Court also held that Loney could have litigated the issue of the discharge of the debt when the law firm sued him. Therefore, he was barred by the doctrine of res judicata from litigating that issue again in his suit to have the firm's judgment voided. Loney v. Milodragovich, Dale & Dye, P.C., 273 M 506, 905 P2d 158, 52 St. Rep. 1093 (1995), followed in Balyeat Law, P.C. v. Hatch, 284 M 1, 942 P2d 716, 54 St. Rep. 780 (1997).

Evidence of When Life Begins and Biblical or Moral Justification Inadmissible as Criminal Defense: As a defense, defendants who blocked access to an abortion clinic sought to introduce evidence of when life begins, as well as biblical and moral justification for their actions. Evidence of when life begins was properly excluded by the trial court absent any citation to a defense to which the evidence might be relevant. Further, defendants' individual religious and moral beliefs were neither included in nor relevant to any allowable statutory defense. Personal beliefs do not provide legal justification for or immunize a person from the consequences of acts that violate state criminal laws. Missoula v. Asbury, 265 M 14, 873 P2d 936, 51 St. Rep. 383 (1994), distinguishing Strzelczyk v. Jett, 264 M 153, 870 P2d 730, 51 St. Rep. 206 (1994).

Search and Seizure — Complaint for Return of Photographs Not Properly Pleaded: John and Jane Doe brought an action for invasion of privacy stemming from execution of a search warrant. They claimed that the search was overbroad in that agents searched an envelope and found nude photos when they were searching for evidence of tax evasion. The complaint contained a statement that three of the photographs were missing. The parties' brief referred only to a single count for invasion of privacy. The Supreme Court held that these references were insufficient to put the defendants and the District Court on notice that Does were alleging a specific seizure by one of the named defendants and did not constitute an independent basis for a claim for invasion of privacy. Doe v. St., 256 M 348, 846 P2d 1018, 50 St. Rep. 105 (1993).

Defendant's Duty to Set Out Specific Defenses Not Raised by General Denials: The same principles of fairness and notice that require a plaintiff to set forth the basis of a claim require a defendant to shoulder a corresponding duty to set out not merely general denials as appropriate but also those specific defenses not raised by general denials by which the defendant seeks to avoid liability, rather than merely to controvert plaintiff's factual allegations. Brown v. Ehlert, 255 M 140, 841 P2d 510, 49 St. Rep. 940 (1992).

Workers' Compensation Exclusivity and Coemployee Immunity Matters to Be Pleaded Affirmatively — Timeliness: Workers' compensation exclusivity and coemployee immunity are matters of avoidance that, pursuant to this rule, must be pleaded affirmatively. When these matters were raised only after plaintiff's case in chief rather than in initial pleadings, after opportunity for discovery, or at the pretrial conference, the procedure did not provide appropriate notice to plaintiff or apprise the District Court that the issues were before it. Consideration of the matters was thus waived as not timely raised. Brown v. Ehlert, 255 M 140, 841 P2d 510, 49 St. Rep. 940 (1992).

Exclusion of Evidence on Suretyship Defense on Grounds of Surprise — Adequate Opportunity to Raise Defense, Yet No Notice Given: Challinors sought to introduce evidence concerning a "suretyship defense" for the first time at trial. Glacier National Bank (Glacier) repeatedly objected on the basis of surprise. The trial court gave Challinors ample opportunity to demonstrate that notice concerning this legal theory had been given to Glacier during discovery or at any other time. Upon finding that notice had not been given, the court considered possible prejudice to Glacier. The issue Challinors sought to raise would have changed the entire complexion of the lawsuit. In light of the lack of notice prior to trial of the intent to raise the issue and in light of Glacier's timely objections, it was not an abuse of the court's discretion in not allowing Challinors to present the evidence. Glacier Nat'l Bank v. Challinor, 253 M 412, 833 P2d 1046, 49 St. Rep. 503 (1992).

Fire of Unknown Origin — Res Ipsa Loquitur Inapplicable: The doctrine of res ipsa loquitur is not usually applicable in cases of fires of unknown origin, which may occur in the absence of negligence. Valley Properties Ltd. Partnership v. Steadman's Hardware, Inc., 251 M 242, 824 P2d 250, 49 St. Rep. 13 (1992), following Wright v. U.S., 472 F. Supp. 1153 (D.C. Mont. 1979).

Advice of Counsel as Affirmative Defense — When Jury Instruction Warranted: In order to warrant an instruction on the affirmative defense of advice of counsel, defendant must establish prima facie that he fully and fairly presented to counsel all facts within his knowledge. It is insufficient for defendant to describe the factual allegations underlying the prosecution and then testify generally that all facts were conveyed to the prosecutor. Rather, defendant must specifically testify as to the details of the information conveyed to the prosecutor at that time. Hill v. Burlingame, 244 M 246, 797 P2d 925, 47 St. Rep. 1580 (1990), citing Cornner v. Hamilton, 62 M 239, 204 P 489 (1922).

Lack of Agency as Negative Defense: Lack of agency is a negative rather than affirmative defense. Sterrett v. Milk River Prod. Credit Ass'n, 234 M 459, 764 P2d 467, 45 St. Rep. 2048 (1988), following Porto v. Peden, 233 F. Supp. 178 (W.D. Pa. 1964). See also Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85 (1983).

Assumption of Risk Not Pleaded: Assumption of risk is an affirmative defense, and in a case where it was not pleaded affirmatively, the District Court did not err in refusing to instruct the jury on assumption of risk. Samuelson v. A.A. Quality Constr., Inc., 230 M 220, 749 P2d 73, 45 St. Rep. 157 (1988).

Affirmative Defenses in Initial Action as Basis for Later Complaint — Res Judicata: In response to a bank's initial action to collect on defaulted loans, affirmative defenses were raised alleging creditor misconduct. In a second action, this time against the bank, the same allegations were raised again in greater detail. The Supreme Court found that the answer and affirmative defenses raised in the initial action indicated a knowledge of all facts necessary to raise the issue as compulsory counterclaims in the first action; therefore, the second complaint was barred by res judicata. First Bank v. District Court, 226 M 515, 737 P2d 1132, 44 St. Rep. 861 (1987).

Applicability of Affirmative Defenses to Question of Separate Trials: Affirmative defenses which do not go to the merits of defendant's claim, for example, a defense of a Statute of Limitations or a lack of jurisdiction, may lend themselves to bifurcation, but affirmative defenses which dispute the merits of a claim on issues of fact do not. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Wrongful Conversion Claim Not Properly Raised: The Supreme Court found it unnecessary to address appellants' claim of wrongful conversion by Northwestern Bank. Such an allegation should have been raised as either an affirmative defense or a counterclaim. Appellants failed to plead it as either. Therefore, it was not considered by the trial court and will not be considered on appeal. NW. Bank of Lewistown v. Estate of Coppedge, 219 M 473, 713 P2d 523, 43 St. Rep. 102 (1986).

Findings of Court in Error — No Waiver of Indemnity Reimbursement From State: Appellant contracted with the state to build a segment of highway. Respondent subcontracted with appellant to do certain concrete work on bridges. The state designed cuts through a mountainous area that were too steep and had to be redone for stability. This delayed the project and the availability of concrete, increasing costs of construction. Appellant entered a supplemental agreement with the state that purported to waive claims for extra costs. The Supreme Court reversed the lower court finding that this provision precluded appellant from indemnity reimbursement from the state for extra money paid to respondent because of the delay. Under the waiver provision, the contractor could still claim expenses from conditions not within the knowledge of the parties at execution of the agreement. Unavailability of concrete because of delay was such a condition. The court noted that the judgment against the state was subject to 18-1-404. E.F. Matelich Constr. Co. v. Goodfellow Bros., Inc., 217 M 29, 702 P2d 967, 42 St. Rep. 1004 (1985).

Summary Judgment Granting Attorneys Amount Billed Under Retainer Agreement: On appeal from summary judgment granting attorneys amount billed under retainer agreement, the Supreme Court held that when an attorney entered into a contingent fee arrangement based on a percentage of the judgment or award recovered by the client, there was no genuine issue of material fact as to the amount owing. The total amount recovered properly included interest, and the attorney was entitled not only to a percentage of the actual damages recovered but also to a percentage of the prejudgment and postjudgment interest recovered. Although the court agreed to treat appellants' counterclaim as an affirmative defense, it held that the affirmative defense did not foreclose a summary judgment determination of attorney fees. Smith v. Howery, 217 M 23, 701 P2d 1381, 42 St. Rep. 995 (1985).

Alleged Fraudulent Sale of Property With Title Defects — Not Pleaded in Answer: The Supreme Court rejected vendee's contention that it was justified in withholding payments on land sale contract because vendors were guilty of fraud and misrepresentation for selling property with incurable defects in the title. The court noted that the record does not support vendee's contention of incurable defects, that vendee's pleadings contain no such affirmative defense, and that the court will not consider on appeal issues that have not been raised below. Scheitlin v. R. & D. Minerals, 217 M 8, 701 P2d 1388, 42 St. Rep. 986 (1985).

Release Applicable to Claims for Attorney Fees and Bad Faith in Settlement: Where the plaintiff retained counsel to force the defendant insurance company to settle an automobile liability claim and later signed a release of the company when it settled the claim, the District Court did not err in granting summary judgment to the insurance company on the issue of the company's liability for the plaintiff's attorney fees and bad faith in settlement of the claim. The plaintiff's obligation to pay the attorney fees arose prior to the signing of the release, and recovery is therefore precluded by the release. Moreover, while the plaintiff claims it was not his intent to release the company from his claim for bad faith, the release applies to all claims arising out of the occurrence and the plaintiff's intent, unknown to the defendant, therefore is not controlling. Richardson v. Safeco Ins. Co., 206 M 73, 669 P2d 1073, 40 St. Rep. 1515 (1983).

Waiver of Provision in Collective Bargaining Agreement Not Affirmatively Pleaded: A declaratory judgment action was brought to construe a collective bargaining agreement. The plaintiff filed a motion for summary judgment. The defendant opposed the motion and filed an affidavit in support of its opposition. The plaintiff argued that the affidavit submitted by defendant was inadmissible as a violation of the parol evidence rule. The trial court concluded that no material factual issue existed but denied the motion because of waiver by the plaintiff. The waiver issue was addressed in the affidavit but not in any of the other pleadings. The Supreme Court held that the waiver issue was not properly before the trial court and ordered the trial court to reconsider its denial of the motion for summary judgment. The Supreme Court also

said that the defendant could amend its answer to affirmatively plead waiver. Butte Teachers' Union v. Bd. of Trustees, 201 M 482, 655 P2d 146, 39 St. Rep. 2248 (1982).

Proof Allowed on Affirmative Defense Not Pleaded: In a quiet title action, defendant filed a general denial as well as a cross-claim. Plaintiff replied to the cross-claim. This rule prevented defendant from pleading further and asserting the affirmative defense of estoppel. He was entitled to present evidence on that issue, because where there has been no opportunity to allege estoppel, it may be put into evidence as if alleged. Sawyer-Adecor Int'l, Inc. v. Anglin, 198 M 440, 646 P2d 1194, 39 St. Rep. 1118 (1982).

Forfeiture: Forfeiture is an affirmative defense which must be pleaded. Sun Dial Land Co., Inc. v. Gold Creek Ranches, Inc., 198 M 247, 645 P2d 936, 39 St. Rep. 908 (1982).

Denial of Negligence — Pleading "Defective Equipment" Not Required: In a negligence action for wrongful death resulting from an airplane crash, the defendant denied the pilot's negligence. By so denying, the defendant was entitled to offer proof establishing another cause for the crash. Testimony regarding defective equipment was properly admitted, although not raised in the pleadings. Tompkins v. NW. Union Trust Co. of Helena, 198 M 170, 645 P2d 402, 39 St. Rep. 845 (1982).

Failure of Consideration: Where defendant in counterclaim action failed to affirmatively plead a failure of consideration or plead facts substantiating a failure of consideration, he is precluded from pursuing such a defense. Chandler v. Madsen, 197 M 234, 642 P2d 1028, 39 St. Rep. 508 (1982), followed in Nimmick v. Hart, 248 M 1, 808 P2d 481, 48 St. Rep. 293 (1991).

Application of Comparative Negligence Law to Assumption of Risk: U.S. District Court found that Montana law is unclear as to absorption of the former affirmative defense of assumption of risk into the comparative negligence law but that latest Montana cases indicate assumption of risk has been abolished as an absolute defense and that it was therefore error to instruct jury on assumption of risk question. However, since defendants contended assumption of risk was absolute defense and requested the erroneous instruction, they invited the error; hence, motion for judgment notwithstanding, the verdict and motion to amend judgment must be denied. Ingram v. Dick-Char, Inc., 39 St. Rep. 96 (D.C. Mont. 1982) (apparently not reported in Federal Supplement).

Concurrent Negligence: Plaintiff tenants alleged that a fire which destroyed the building was caused by the landlord's negligence, and there was evidence that the fire started in rooms leased by one of the tenants. An instruction that when the negligent conduct of two or more persons contributes concurrently as the proximate causes of an injury, the conduct of each person is a proximate cause of the injury, regardless of the extent to which each contributes to the injury, and that a cause is concurrent if it was operative at the moment of the injury and acted with another cause to produce the injury was fairly designed to meet an issue raised by the evidence, and it was not error to give the instruction. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Timeliness of Appeal of Decision of County Commission — When Properly Raised as Affirmative Defense: County Commissioners created a planning and zoning district and a complaint was filed in response seeking declaratory judgment, but filing was not made within the 30-day time limit of 76-2-110. Neither landowner intervenors nor the county officers raised that section as an affirmative defense. Some time later, at the "total hearing", the defendants filed a motion to dismiss the appeal based on the time limitations in 76-2-110. The District Court denied this motion and was upheld on appeal. The Supreme Court said the proper method of raising the question of a timely appeal is by an affirmative defense pleaded in an answer to a complaint. Mont. Wildlife Fed'n v. Sager, 190 M 247, 620 P2d 1189, 37 St. Rep. 1897 (1980).

Invalidity of Marriage as Affirmative Defense — Burden of Proof: Where, following a Mexican wedding ceremony between the parties, the respondent sought a decree of divorce and child support, the appellant's contention that the marriage was invalid should have been raised by affirmative defense. The appellant had the burden of proof to overcome the respondent's allegation that the marriage was lawful. Wilson v. Wilson, 186 M 290, 607 P2d 539 (1980).

General Release of Tortfeasor — Effect: From the date of this decision the law of Montana on the effect of a general release of a tortfeasor on the liability of a joint tortfeasor will follow the position of the Restatement (Second) of Tort. Section 885, "the release of one joint tortfeasor is not a release of any other joint tortfeasor unless the document is intended to release the other tortfeasors, or the payment is full compensation or the release expressly so provides". Unless a release specifically states otherwise, a finder of fact may consider the intent of the parties in making a release. Kussler v. Burlington N., Inc., 186 M 82, 606 P2d 520 (1980).

New Defense on Appeal: Defense not pleaded or proved in District Court by state agency in wage conflict cannot be raised on appeal. Massa v. Dept. of Social and Rehabilitation Services, 172 M 60, 560 P2d 895 (1977).

Waiver of Breach of Warranty Refuted by Evidence: Defense of waiver of breach of warranty was refuted by evidence that the plaintiff, although retaining defective computer for nearly 8 months, made numerous complaints resulting in almost daily service calls and shutdowns for repairs. Lovely v. Burroughs Corp., 165 M 209, 527 P2d 557 (1974).

Partial Payment — Burden of Proof: Partial payment by special deposit was an affirmative defense which debtor had burden of proving in suit on note; that burden of proof required that it be shown that payment was made on the particular obligation in controversy. Baker Nat'l Bank v. Lestar, 153 M 45, 453 P2d 774 (1969).

Unavoidable Accident — Rule Inapplicable: Unavoidable accident is not among defenses that must be pleaded affirmatively and is covered under general denial of negligence. Graham v. Rolandson, 150 M 270, 435 P2d 263 (1967).

Allegation of Fraud Not Pleaded Properly Ignored: Allegation that plaintiff's title to motor vehicle in claim and delivery action based on fraud was properly ignored when that defense was not set forth as an affirmative defense or with particularity. Interstate Mfg. Co. v. Interstate Prod., 146 M 449, 408 P2d 478 (1965).

Rule as Statute of Limitations: Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., is procedural and not a Statute of Limitations which, under Rule 8(c), M.R.Civ.P., must be affirmatively pleaded as a defense. A dismissal can be raised by motion under Rule 12, M.R.Civ.P. The hiatus between the repeal of the former section dealing with failure to serve summons and enactment of Rule 41(e) (replaced with Rule 4E) did not vitiate the validity of the dismissal or restart computation of time. Whitcraft v. Semenza, 145 M 94, 399 P2d 757 (1965).

Payment to Be Pleaded: Payment is new matter constituting a defense and to be available as such must be pleaded. It cannot be proven under a general denial, either in bar or mitigation of recovery. Davis v. Sullivan Gold Min. Co., 103 M 452, 62 P2d 1292 (1936).

Military Immunity to Be Pleaded: Where a militia officer is sued for destroying private property without the owner's consent, and without compensating the owner therefor, he must, if he would make justification for his defense, plead the same specially. Herlihy v. Donohue, 52 M 601, 161 P 164 (1916).

Quiet Title Demand Properly Ignored: The demand made by the defendant in his answer, filed in an action for waste, that his title be quieted, which demand was not based upon a properly pleaded cause of action or counterclaim, should have been disregarded. Erbes v. Smith, 35 M 38, 88 P 568 (1907).

CONTRIBUTORY NEGLIGENCE

Defense of Comparative Negligence Inapplicable to Medical Malpractice Case When Patient's Pretreatment Behavior Furnishes Need for Care That Later Becomes Subject of Malpractice Claim: Plaintiff's daughter had asthma, was allergic to horses, and had a long history of breathing difficulties, but nevertheless went horseback riding. She stopped breathing and collapsed, ultimately suffering irreversible brain damage and death. The mother sued the physicians at the hospitals where the daughter was taken for treatment, alleging that the physicians were negligent in failing to intubate the daughter immediately and that the physicians' negligence caused the daughter's injury and death. The physicians argued that the daughter had already suffered a severe brain injury because of oxygen deprivation brought on by her asthma and that it was her own negligence, not that of the physicians, that caused her death. The District Court allowed the physicians to present arguments and jury instructions on comparative negligence. In assisting a jury to decide a case involving a patient's fault as a defense in a medical malpractice case, it is necessary to first clarify the sequence of events in relation to the interwoven doctrines of contributory or comparative negligence, proximate cause, and avoidable consequences (see Bryant v. Calontone, 669 A2d 286 (N.J. Super. Ct. App. Div. 1996). The temporal headings under which the patient's conduct is to be examined are: (1) the pretreatment period; (2) the treatment period during which the alleged malpractice occurred; and (3) the postmalpractice period. A patient's conduct before seeking medical treatment is merely a factor that a physician should consider in treating the patient. When the patient's negligent act merely precedes that of the physician and provides the occasion for medical treatment, contributory negligence is not a permissible defense and the physician's negligent act is considered an intervening act that does not bar a patient from recovering (see Durphy v. Kaiser, 698 A2d 459 (D.C. 1977). In the present case, the patient's actions were clearly pretreatment conduct and not to be considered as evidence of fault that could offset any negligent

conduct by the physicians. Thus, the Supreme Court held that the District Court abused its discretion in giving instructions on comparative negligence because in a medical malpractice action, jury instructions on a patient's comparative negligence are appropriate only when the patient's negligent conduct occurs contemporaneous with or subsequent to treatment. Further, allowing evidence of the daughter's prior acts denied the mother a fair and impartial trial, and the District Court also abused its discretion in failing to grant the mother's motion for a mistrial, constituting reversible error. Harding v. Deiss, 2000 MT 169, 300 M 312, 3 P3d 1286, 57 St. Rep. 696 (2000), followed, with regard to treatment at an accident scene by law enforcement personnel responding to allegedly negligent conduct of DUI that occurred prior to the accident, in Cutler v. Jim Gilman Excavating, Inc., 2003 MT 314, 318 M 255, 80 P3d 1203 (2003).

Admissibility of Evidence to Rebut Affirmative Defense — "Plain Visibility" of Oncoming Train: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train and sought damages. In basing its defense on Mickelson's comparative negligence in failing to see the train, MRL was allowed to allege and represent to the jury that the train was plainly visible, in part because of its yellow blinking light, thereby triggering Mickelson's alleged duty to stop for the train. Mickelson sought to refute that contention by offering testimony that the train's lighting configuration did not make the train visible to approaching motorists, but the evidence was held inadmissible on grounds that MRL met federal requirements regarding lighting and thus could not be held liable for its particular lighting configuration. However, Mickelson's evidence was not offered to impose liability upon MRL for failing to change its lighting configuration, but rather to demonstrate that, contrary to MRL's experts, the lighting configuration did not make the train so plainly visible that Mickelson was comparatively negligent for failing to see it. Under Pitasi v. Stratton Corp., 968 F2d 1558 (2nd Cir. 1992), evidence that is not admissible to prove culpability may nevertheless be introduced to rebut an affirmative defense. By denying Mickelson the right to rebut MRL's evidence in support of its contention that Mickelson was comparatively negligent, the trial court essentially directed a verdict in favor of MRL on the comparative negligence issue, which was an abuse of the court's discretion, constituting reversible error. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000), distinguishing Marshall v. Burlington N., Inc., 720 F2d 1149 (9th Cir. 1983), and Herold v. Burlington N., Inc., 761 F2d 1241 (8th Cir. 1985).

Loss of Consortium Claim Independent as to Damages, but Derivative as to Liability: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train. His spouse and children sought damages for loss of consortium. The District Court held that the loss of consortium claims should be reduced by the percentage of negligence attributed to Mickelson. When a plaintiff's contributory negligence is determined to be not greater than the tortfeasor's negligence, then damages for loss of consortium, being independent and not contingent upon the rights or liabilities of a parent or spouse, may not be reduced by the other spouse's negligence. However, because the language in 27-1-702 provides that any damages allowed must be diminished in the proportion to the amount of negligence attributable to the person recovering, a loss of consortium claim is considered independent as to damages and derivative as to liability. In other words, a defendant must be more liable for a plaintiff's injuries than the plaintiff before there can be any recovery, whether it is on the plaintiff's personal injury claim or on a loss of consortium claim stemming from those injuries. For example, if plaintiff is determined to be 50% or less contributorily negligent for plaintiff's injuries, then a spouse or child could recover 100% of a loss of consortium claim; however, if plaintiff is determined to be 51% or more contributorily negligent for plaintiff's injuries, then a spouse or child would recover nothing on a loss of consortium claim. Therefore, the Supreme Court directed that, on retrial, any contributory negligence attributable to Mickelson could not be imputed to the spouse and children to reduce a loss of consortium award, but if Mickelson was found more liable than MRL, there could be no recovery for loss of consortium. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000), following Herold v. Burlington N., Inc., 761 F2d 1241 (8th Cir. 1985).

Classification of Nuisances — Per Se or Per Accidens — Absolute or Qualified: A nuisance action may be based upon conduct of a defendant that is either intentional, negligent, reckless, or ultrahazardous. Thus, negligence is merely one type of conduct upon which liability for nuisance may be based. In general, a nuisance may be classified as either a nuisance per se or at law or as a nuisance per accidens or in fact. A nuisance per se is an inherently injurious act, occupation, or structure that is a nuisance at all times and under any circumstances, without regard to location or surroundings. A nuisance per accidens is one that becomes a nuisance by virtue of circumstances and surroundings. In turn, nuisances may be classified as either absolute or qualified. An absolute nuisance, similar to a nuisance per se, is a nuisance the substance of

which is not negligence and that obviously exposes a person to probable injury. A qualified nuisance is a nuisance dependent on negligence that consists of anything done lawfully but so negligently or carelessly done or permitted as to create a potential and unreasonable risk of harm, which in due course results in injury to another. When determining how a plaintiff can bring a nuisance action against a defendant who is engaged in a statutorily authorized endeavor, when 27-30-101(2) indicates that authorized activities may not be considered a nuisance, the Supreme Court held that the plaintiff must show, pursuant to a particularized assessment of the authorizing statute, that: (1) the defendant completely exceeded its statutory authority, resulting in a nuisance; or (2) the defendant was negligent in carrying out its statutory authority, resulting in a qualified nuisance. In the present case, the city of Thompson Falls was statutorily authorized to construct the city's storm and sewer drain system, which Barnes alleged to be a nuisance. Given a verdict of no negligence, the city was not negligent in its operation or maintenance of the storm drain behind Barnes's duplex and thus would not have been liable for a qualified nuisance because of the incidental flooding of Barnes's property. Therefore, the District Court did not abuse its discretion in refusing Barnes's proposed instructions on nuisance because the instructions constituted a misstatement of the law. Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999), citing 58 Am. Jur. 2d Nuisances §9 and 66 C.J.S. Nuisances §§3, 5.

Nuisance Action — Contributory Negligence as Defense: The Supreme Court cited 58 Am. Jur. 2d Nuisances 221 in holding that contributory negligence can be a defense in a nuisance action. Wilhelm v. Great Falls, 225 M 251, 732 P2d 1315, 44 St. Rep. 211 (1987), clarified, with regard to the distinction between an absolute nuisance and a qualified nuisance, in Barnes v. Thompson Falls, 1999 MT 77, 294 M 76, 979 P2d 1275, 56 St. Rep. 321 (1999).

Availability of Affirmative Defenses to Railroad — Absolute Liability: Plaintiff was employed by a subsidiary of Burlington Northern and was injured in an accident involving Burlington's railroad cars. The Supreme Court decided the federal Safety Appliance Act applied despite the fact that the railroad cars involved in the accident were on a siding where loading operations were handled by the subsidiary. Noting that the U.S. Supreme Court has declared that the question of whether a railroad can assert contributory negligence or assumption of risk as defense in a case involving a nonrailroad employee depends entirely on state law, the Supreme Court cited its 1966 holding that, where the theory of absolute liability applies, liability is established when it is proved that a statute has been violated and there is a proximate cause connection between the violation and the resulting injuries. Proximate cause in a case under the Safety Appliance Act is decided using the definition that prevails under state law. Comparing the 1966 case under the scaffolding law with this case, the Supreme Court denied the defendant the two defenses. The Supreme Court also noted that railroad employees are entitled to a more liberal standard imposing liability than nonrailroad employees. Reynolds v. Burlington N., 190 M 383, 621 P2d 1028, 37 St. Rep. 1883 (1980).

Last Clear Chance — Application: The doctrine of last clear chance has application to a case not only where defendant actually saw plaintiff in a position of peril in time to avoid the injury by the exercise of reasonable care but also to a case where in the exercise of reasonable care he should or could have discovered plaintiff in his perilous position in time to avoid the injury. Sorrels v. Ryan, 129 M 29, 281 P2d 1028 (1955).

Contributory Negligence Not Admission: A plea of contributory negligence does not admit the truth of particular allegations stated in the complaint, where the answer also contains a general or specific denial of those allegations. Day v. Kelly, 50 M 306, 146 P 930 (1915). See also Nelson v. N. Pac. Ry., 50 M 516, 148 P 388 (1915); Lewis v. Steele, 52 M 300, 157 P 575 (1916).

LACHES

Improper for District Court to Look Beyond Language of Amended Judgment Decree When Judgment Not Ambiguous or Obscure: Following remand of Harland v. Anderson, 169 M 447, 548 P2d 613 (1976), which awarded defendant summary judgment on plaintiff's claims for a prescriptive easement across defendant's property, the District Court took up plaintiff's alternative request to condemn an easement across defendant's land for plaintiff's use. In 1983, the court granted plaintiff an unrestricted easement, and defendant moved to amend the judgment to provide compensation for the taking of the easement, but the motion was denied. The parties then entered a stipulation providing $7,500 for defendant's attorney fees and costs, and the parties agreed not to appeal the amended judgment. The stipulation was approved. Almost 20 years later, plaintiffs commenced litigation seeking declaratory and injunctive relief on grounds that defendant had wrongfully interfered with the 1983 unrestricted easement. Defendant claimed that the 1983 right-of-way was limited to agricultural and grazing purposes

and moved for summary judgment on grounds of res judicata, judicial estoppel, laches, and waiver. The District Court concluded that the language of the 1983 amended judgment implied that the findings and conclusions were necessary to the judgment, so the court reviewed the 1983 findings and conclusions, concluded that the easement was restricted to agricultural and grazing purposes, granted defendant summary judgment on res judicata grounds, and dismissed plaintiffs' summary judgment motion and claim with prejudice. On appeal, plaintiffs asserted that the District Court erred in looking beyond the plain language of the 1983 amended judgment. The Supreme Court cited Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), for the holding that a District Court may refer to the entire record in an original case when construing a decree that is obscure or ambiguous, but that when the language of the decree is plain, there is no need to construe it or to resort to pleadings or evidence. In this case, the 1983 decree clearly and unambiguously granted plaintiff an unrestricted easement across defendant's ranch, and it was error for the District Court to look beyond the face of the decree instead of accepting it at face value and speculating as to the reasoning behind the particular result. Thus, summary judgment for defendant was reversed, and the District Court was ordered to enter summary judgment for plaintiffs. Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004).

Time and Prejudice Elements of Laches — Liability for Payment of Child's Medical Expenses Under Dissolution Decree: After a lapse of 6 years, the mother filed to require the father to pay for medical treatment and consultant fees as contemplated in the parties' dissolution decree. The father contended that payment was precluded by laches because of the substantial delay in filing the motion. The Supreme Court noted that laches is not simply a matter of elapsed time; it is also a question of the inequity of permitting a claim to be enforced. For laches to apply, there must be both a showing of lack of diligence by the party against whom laches is asserted and prejudice to the party asserting the defense, requiring case-by-case analysis. Here, the father knew that the child received medical treatment, how much it cost, that the services were not covered by insurance, and that he was obligated to pay a portion of the bill. Thus, the father was not prejudiced by the 6-year delay, so laches did not apply. However, the father was not aware that the consultant bill existed and never had a chance to submit the bill to insurance or pay the bill, so he was prejudiced by the 6-year delay in advising him of that additional bill, and the claim for the consultant bill was therefore barred by laches. In re Marriage of Deist, 2003 MT 263, 317 M 427, 77 P3d 525 (2003).

Challenge to Term Limits Barred by Doctrine of Laches: Constitutional Initiative No. 64, which in 1992 enacted term limits for various elective offices, was challenged in 2002 on several grounds by two state senators whose terms were affected by the limits. The Supreme Court did not address the merits of the claims because it held that they were barred by the doctrine of laches. Laches is a concept of equity that can apply when a person is negligent in asserting a right, and exists when there has been an unexplainable delay of such duration or character as to render the enforcement of an asserted right inequitable. Laches is appropriate when a party is actually or presumptively aware of the party's rights, but fails to act. In order to apply laches, a showing must be made that the passage of time has prejudiced the party asserting laches or has rendered the enforcement of a right inequitable. To allow plaintiffs' challenge 9 years after the enactment of the initiative would prejudice those who relied on its presumptive validity, and raise a question of the inequity of permitting the claim to be enforced. The court noted that voters still retain the right to repeal the term limits provision, by initiative or through legislative referendum, but that the point had been reached at which a claim asserting that voters failed to follow the proper procedures in enacting the constitutional initiative was simply too late. Cole v. State ex rel. Brown, 2002 MT 32, 308 M 265, 42 P3d 760 (2002).

Laches Applicable to Claim for "Equitable Easement": Murrays purchased property from Countryman Creek Ranch, a partnership formed to sell recreational homesites in a subdivision along the Yellowstone River. The original declaration contained covenants applicable to some property designated as a "common area", which was to be used by all property owners. Later, a ranchette was purchased by the partnership along the river, and a dispute arose as to whether homesite owners had any intangible, undefined rights in this property similar to the "common area" property. An amendment was made to the subdivision declaration to clarify the rights of the property owners with regard to this property. In 1980, Murrays filed a complaint with the Montana Realty Board (now the Board of Realty Regulation) because of their belief that they had an intangible, undefined right in the ranchette property, but the complaint was resolved against Murrays. In 1989, Murrays filed an action in District Court, which the court determined was barred by laches. The Supreme Court affirmed, holding that because Murrays had a dispute since at least 1980 as to any undefined rights in the ranchette property but did not take action for

9 years, the claim was barred by laches. Murray v. Countryman Creek Ranch, 254 M 432, 838 P2d 431, 49 St. Rep. 854 (1992).

Appeal of Grant of New Trial Made After Second Trial — Moot by Failure to Object or Timely Appeal: Following a trial on the distribution of marital property, wife requested and the District Court ordered a new trial. Husband waited until after the second trial to object to the order, contending that the court abused its discretion in granting a new trial because: (1) wife was incorrectly allowed to argue matters additional to those raised in the motion for a new trial; (2) the court did not rule on his motion to reconsider the order granting a new trial; and (3) the court did not state with particularity the reasons for granting a new trial. The Supreme Court held that husband's grounds for appeal must fail because he failed to object or bring an appeal in a timely fashion. The question of the propriety of the trial court's order is one that should have been considered earlier and was rendered moot by the fact that the second trial had already occurred. Husband's attempt to raise the issue for the first time on appeal was barred by the doctrine of laches. In re Marriage of Danelson, 253 M 310, 833 P2d 215, 49 St. Rep. 597 (1992).

Defense of Laches to Quiet Title Action Unavailable Without Valid Claim to Royalty: Defendants in an action to quiet title to a royalty interest raised the defense of laches. The Supreme Court held that laches is a question of the inequity that would result if a claim were to be permitted to be enforced. Because the defendants had always held their title subject to the plaintiffs' royalty interest, no inequity would result if the plaintiffs' claim was enforced. Because the defendants lacked a valid claim to the royalty, the court also held that the defendants lacked standing to assert the defense of laches. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

No Demonstration of Inequitable Delay — Laches Inapplicable: As part of their contract for purchase of property, the Undems agreed not to sell or convey the property without Larson's written consent. The Undems sold the property in October 1984 without Larson's consent. The last payment on the contract was tendered in December 1986, and Larson filed suit for breach of contract in October 1987. Finding no demonstration of an inequitable delay on Larson's part, the District Court properly held that Larson's claim was not barred by laches. Larson v. Undem, 246 M 336, 805 P2d 1318, 47 St. Rep. 2088 (1990).

Prejudice and Lack of Diligence as Elements of Laches: For laches to be applied, the court must find lack of diligence by the party against whom the defense is asserted and prejudice to the party asserting the defense. Gue v. Olds, 245 M 117, 799 P2d 543, 47 St. Rep. 1906 (1990). See also Coalition for Canyon Preservation v. Bowers, 632 F2d 774 (9th Cir. 1980).

Claim for Past Salary Barred by Laches: The plaintiff initiated a claim for sums due for conversion compensation brought about by a change of contract entered into by the plaintiff and university 17 years prior to the suit. The Supreme Court ruled that the claim was barred by the equitable doctrine of laches due to the unexplained delay in bringing the suit that was of such duration or character as to render the enforcement of the asserted right inequitable. Sperry v. Mont. St. Univ., 239 M 25, 778 P2d 895, 46 St. Rep. 1482 (1989).

Failure to Assert Rights Under Will for Seven Years — Jury Instructions — Equity Issues in Discretion of District Court: Plaintiffs who waited 7 years to assert their rights under decedent's will were not entitled to proposed instructions relating to laches and equitable estoppel. The District Court refused the instructions, and the Supreme Court affirmed. The determination of equitable issues rests solely within the discretion of the District Court. Equity aids the vigilant. The plaintiffs were not entitled to the aid of equity. Tope v. Taylor, 235 M 124, 768 P2d 845, 45 St. Rep. 2242 (1988).

Failure to Ascertain Property Status for Nearly Forty Years — Laches Applicable: The trial court properly applied laches in a quiet title case where appellants "slept on their rights by not ascertaining the status of their property for nearly 40 years", then claimed the warranty deed had been materially altered to deprive them of their mineral rights. Absence from the state was not an excuse for sleeping on their rights. Benson v. Diehl, 228 M 199, 745 P2d 315, 44 St. Rep. 1455 (1987).

Delays Resulting From Bureaucratic and Legal Snafus — Laches Inapplicable: In a marital status discrimination case involving an antinepotism policy, where 9 years elapsed from the time the claim arose, laches did not apply since the delays were not the fault of plaintiff or any one body but rather were the cumulative result of one bureaucratic or legal snafu after another. Hulett v. Bozeman School District, 228 M 71, 740 P2d 1132, 44 St. Rep. 1351 (1987).

Rescission Barred by Laches: The Supreme Court held that plaintiffs' inability to completely restore defendants to their original condition would not alone foreclose rescission as a remedy. Plaintiffs had notice of circumstances that should have put them on inquiry of possible fraud at the time of sale in 1977 and in 1978 when the net income did not reflect earlier representations.

Nevertheless, plaintiffs continued to make payments and operate the business without complaint until 1981. The court held that these facts constituted laches, or a failure to use reasonable diligence to rescind promptly on the part of the plaintiffs. Since the time period between notice of possible fraud and filing of a complaint exceeded the 2-year Statute of Limitations for fraud, the District Court erred in permitting the jury to consider rescission as a remedy for the plaintiffs. McGregor v. Cushman/Mommer, 220 M 98, 714 P2d 536, 43 St. Rep. 206 (1986).

Failure to Assert Royalty Interest in Tax Deed Land — Laches:

A tax deed issued to the county in 1930 without affidavits setting forth the statutorily requisite statements as to notice to the owner and as to occupancy was void. The county sold the land to A.O., reserving a 6 ¼% royalty interest. Plaintiff children of the original owner who had lost the land for failure to pay taxes quitclaimed all their interest in the land to A.O.'s successors, reserving their claim to and interest in the 6 ¼% royalty claimed by the county, and in turn A.O.'s successors conveyed to plaintiffs all of the successors' interest in that royalty. Plaintiffs' conveyance cleared the title of any insufficiency in the tax deed proceedings but did not convey or give up plaintiffs' claim to the 6 ¼% royalty interest. Plaintiffs' redemption argument failed because they had never attempted a redemption. After analyzing nine factors relating to laches, the court ruled that laches barred plaintiffs' claim to the county's royalty interest. Richardson v. Richland County, 219 M 48, 711 P2d 777, 42 St. Rep. 1834 (1985), followed in Filler v. Richland County, 247 M 285, 806 P2d 537, 48 St. Rep. 200 (1991). (The court also stated that King v. Rosebud County, 193 M 268, 631 P2d 711, 38 St. Rep. 1145 (1981), in which the court concluded that laches was inapplicable because laches did not commence until oil was produced and royalties earned, was incomplete in its laches analysis because the court overlooked the inchoate ownership of the royalty interest.)

County's tax deed was void for insufficient notice of the tax sale and failure to give notice of application for a tax deed to the owners of the property. The county had deeded the land to Swigart, reserving a 6 ¼% royalty interest. Swigart, using a statutory proceeding, applied for and received a deed confirming the tax deed. The confirmation deed did not mention the county's 6 ¼% royalty interest. The confirmation deed was void for failure to give sufficient notice to the owners who had lost the land to the county or to their successors in interest. The two original owners had each had an undivided one-half interest in the land. Plaintiff heirs of one of the original owners sued to quiet title to the county's 6 ¼% royalty interest and then quitclaimed to Swigart's heirs all plaintiffs' interest in the land, reserving a 6 ¼% royalty interest. In return, Swigart's heirs quitclaimed the 6 ¼% royalty interest to plaintiffs. Plaintiffs' quitclaim to Swigart's heirs did not convey or give up any claim plaintiffs had to or any interest they had in the 6 ¼% royalty interest. The court analyzed 10 factors relating to laches and ruled that laches barred plaintiffs' claim and that the 6 ¼% royalty interest was vested in the county. Anderson v. Richland County, 219 M 60, 711 P2d 784, 42 St. Rep. 1843 (1985).

Laches Not Established: The Supreme Court held in Castillo v. Kunnemann, 197 M 190, 642 P2d 1019 (1982), that Kunnemann, the original owner of a 160-acre parcel of land, had reserved certain water and ditch rights when he conveyed the land to Franks, and that Franks, therefore, had not conveyed any of these water rights to the Castillos and the Cotants when they each purchased subdivided portions of the original parcel from Franks. Following the Supreme Court's decision, the Cotants and Castillos sued Franks for breach of contract, fraud, and in the case of the Cotants, for breach of warranty. Franks asserted that these actions were barred by laches. On appeal of this second case, the Supreme Court rejected Franks' argument for the following reasons: (1) plaintiffs had acted reasonably promptly in suing Kunnemann for the rights that Franks contended had been conveyed to them; (2) plaintiffs filed this action 3 ½ months after the Supreme Court rejected their claim against Kunnemann; and (3) plaintiffs' demands are not stale. They have not been lax in enforcing their rights, and they have not acquiesced in the loss of denial of their rights. Castillo v. Franks, 213 M 232, 690 P2d 425, 41 St. Rep. 2071 (1984).

Laches — Elements — Questioning One's Right to Real Property: The length of time during which rights are not asserted is not the only factor to be considered in determining whether laches applies. There must be negligence in asserting a right and an unexplained delay that would render enforcement of the asserted right inequitable. Plaintiff here did not have to seek judicial determination of her right to a one-half mineral interest in land until that right was questioned. There was no harm to defendants as they were unaware of their possible claim to the one-half interest until lessee of plaintiff's interest raised a title question. Peterson v. Hopkins, 210 M 429, 684 P2d 1061, 41 St. Rep. 1140 (1984).

Laches Defense Unavailable — First Raised on Appeal: Laches could not be raised for the first time on appeal as a defense to action for rescission of contract for the sale of a ranch because it is an affirmative defense that must be set forth in the answer. Deist v. Wachholz, 208 M 207, 678 P2d 188, 41 St. Rep. 286 (1984).

Raise in Loan's Interest Rate Allowed by Contract — Challenge Barred by Laches: In June of 1979 credit union mailed to borrower under a written contract for an open-ended revolving credit plan a notice that pursuant to its contract right it was raising the interest rate. The credit union gave borrower the choice of accepting the raise or paying in full by July 15, 1979. Borrower made payments through October of 1981 and during that month sued, claiming that the credit union breached the contract. It would be inequitable to allow the suit when the credit union had for more than 2 years relied on borrower's acquiescence to the raise. The claim was barred by laches. Shimsky v. Valley Credit Union, 208 M 186, 676 P2d 1308, 41 St. Rep. 258 (1984).

Failure to Assert Claim in Accordance With Terms of Dismissal and Death of a Party — Laches Applicable: Where a former action brought in another state between the parties was dismissed upon stipulation that it could be brought in Montana courts by June 13, 1981, and the case was not filed in Montana until July 2, 1981, one of the parties having subsequently died, the District Court did not err in dismissing the case. It was barred by the doctrine of laches as set forth in Riley v. Blacker, 51 M 364, 152 P 758 (1915), and subsequent cases. Wellman v. Wellman, 205 M 504, 668 P2d 1060, 40 St. Rep. 1459 (1983).

Laches Raised on Appeal: Defendants cannot raise laches as a defense on appeal. Laches must be raised as an affirmative defense upon filing of an answer. Moschelle v. Hulse, 190 M 532, 622 P2d 155, 37 St. Rep. 1506 (1980).

Objection to Termination of Trust Barred by Laches: Where 4 years after appellant's appointment as trustee appellant objected to the termination of a trust on the grounds that the decree of distribution made 32 years earlier was based on fraud and offered no reasonable explanation for his failure to earlier file an objection, the appellant would be barred by laches from objecting to the petition for termination of the trust. Estate of Wallace v. McAlear, 186 M 18, 606 P2d 136 (1980).

Enforcement of Easement — Laches: The plaintiff had no duty to seek judicial enforcement of an easement by prescription until the easement's benefits were in jeopardy as a result of defendants' actions. Thus, plaintiff was not barred by the doctrine of laches. Mtn. View Cemetery v. Granger, 175 M 351, 574 P2d 254 (1978).

Laches: Unlike the Statute of Limitations, laches begins to run when the trust is created by operation of law. Johnson v. Johnson, 172 M 150, 561 P2d 917 (1977).

Laches and Statute of Limitations Adequately Pleaded: Plaintiffs' suit for rescission was barred by laches and their action for damages for breach of contract was barred by the 4-year Statute of Limitations. Since defendant's affirmative defenses revealed that plaintiffs had adequate notice of the defenses of laches and Statute of Limitations, although not specifically denominated as such, summary judgment was properly granted to defendants. Brabender v. Kit Mfg. Co., 174 M 63, 568 P2d 547 (1977).

Laches Not Pleaded — Effect: Defendant who failed to plead laches as an affirmative defense in his answer waived such defense and could not raise the issue in a posttrial motion to dismiss. Hansen v. Kiernan, 159 M 448, 499 P2d 787 (1972).

STATUTE OF FRAUDS

Landowner Subdivision Rights Precluded by Restrictive Covenants — No Oral Contract Without Consideration — Statute of Frauds Applied: Plaintiffs subdivided about 80 acres into a 40-acre water ski lake and five residential lots. Restrictive covenants provided that no more than six landowners would be allowed to use the lake, that five landowners would be owners of lots in the subdivision, and that one landowner would be the owner of a single family dwelling built on property immediately west of the lake. Plaintiffs initially intended to build on the west side of the lake and become the sixth landowner but changed their minds, sold the west side property, and decided to build on the south side instead. Four of the five landowners filed an affidavit that when they purchased their lots, they understood that plaintiffs would be the sixth landowner and that they had orally approved the relocation of plaintiffs' residence to the south shore. After plaintiffs' home was built on the south side, they sought a declaratory judgment that they were the sixth landowner under the restrictive covenants and thus had the right to use the lake. One dissenting landowner opposed the declaratory judgment and moved for summary judgment on grounds that the restrictive covenants prohibited plaintiffs from use of the lake. The District Court agreed and granted summary judgment. On appeal, the Supreme Court agreed that there was no evidence of consideration given to the landowners for modification of the covenants and

that as a result, the modification benefited plaintiffs only. The right to use the lake ran with the land and was therefore a real property interest, and under the statute of frauds, any transfer of the right from one parcel to another had to be in writing or altered by an executed oral agreement. However, without consideration, there could be no oral contract, and without an oral contract, there could be no executed oral contract. Plaintiffs' argument that because they relied on oral agreements, equitable estoppel should prohibit defendants from denying plaintiffs' use of the lake also failed because equitable estoppel does not apply under the statute of frauds except when the statute would operate to perpetuate a fraud. The District Court was affirmed. Hanson v. Water Ski Mania Estates, 2005 MT 47, 326 M 154, 108 P3d 481 (2005).

Defense of Statute of Frauds Raised Sua Sponte by District Court Reversed — Defense to Be Raised by "Party": State Farm Insurance Company, as a subrogee of Estabrook, sued Baden for negligent damage to Estabrook's vehicle and obtained a default judgment. State Farm then sought a default judgment against codefendant Clark, but the District Court, because of the amount of fees requested by State Farm's counsel, reviewed the facts of the case and, sua sponte, raised the issue of the statute of limitations with State Farm's counsel. The District Court then denied the motion for default judgment against Clark, set aside the default judgment against Baden, and dismissed the complaint with prejudice. Citing Bennett v. Dow Chem. Co., 220 M 117, 713 P2d 992 (1986), and cases from other jurisdictions, the Supreme Court held that because subsection (c) of this rule provides for the raising of affirmative defenses by a "party", the defense of the statute of limitations should not have been raised sua sponte by the District Court. The Supreme Court reasoned that because it had held in Bennett that the affirmative defense of the statute of limitations had to be raised by answer and not by motion, the court must also conclude that a party's waiver of the defense could not be suspended, sua sponte, by the District Court when the affected party had not only failed to file a motion but had failed to appear at all. Estabrook v. Baden, 284 M 419, 943 P2d 1334, 54 St. Rep. 947 (1997).

Failure to Plead Statute of Frauds: A defendant's failure to mention the Statute of Frauds in the pleadings precludes its consideration. Peretti v. St. Bd. of Education, 464 F. Supp. 784 (D.C. Mont. 1979).

Statute of Frauds Not Pleaded: Defendant failed to raise the Statute of Frauds defense in his pleadings; therefore he could not maintain it on appeal. Mont. Seeds, Inc. v. Holliday, 178 M 119, 582 P2d 1223 (1978).

Statute of Frauds — Partition: When Statute of Frauds was not raised as defense at court level in partition action, it will not be considered for the first time on appeal. Johnson v. Johnson, 172 M 150, 560 P2d 1331 (1977).

STATUTE OF LIMITATIONS

Failure to Raise Statute of Limitations Defense in Original Pleadings — Defense Waived: A doctor filed wage claims against a health care facility in 1999 as a counterclaim against the facility's claim against the doctor for failing to sign outstanding warrants in 1997. The facility then claimed that the doctor was time-barred for failing to raise the wage claim within the statute of limitations in 39-3-207. The District Court concurred and held that the doctor's claim was not timely filed. On appeal, the doctor asserted that the facility could not first raise the statute of limitations defense in its posttrial memorandum because a statute of limitations defense is an affirmative defense that must be raised in the original pleadings. The Supreme Court agreed. The facility failed to raise the issue in its original pleadings and was thus barred from raising the defense on appeal. Marias Healthcare Serv., Inc. v. Turenne, 2001 MT 127, 305 M 419, 28 P3d 491 (2001).

Pleading of Statute of Limitations Superseded by Pretrial Order: In response to a civil action brought against him by the State Fund, Berg pleaded the affirmative defense of the statute of limitations. Later, in response to interrogatories propounded by the State Fund, Berg indicated that it was his intent to drop the defense of the statute of limitations and did not object to the failure of a pretrial order to include the statute of limitations as an issue. After judgment against him, Berg raised the defense of the statute of limitations on appeal. Citing Zimmerman v. Robertson, 259 M 105, 854 P2d 338 (1993), the Supreme Court held that Berg had waived the defense of the statute of limitations and that the pretrial order superseded the pleading and governed the subsequent course of the civil action. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

No Affirmative Act of Concealment by Defendant That Would Toll Statute of Limitations: HKM had been hired to design a pipeline project and was subsequently sued for negligence by the general contractor for damages because of delays caused by pipe installed pursuant to HKM's specifications. The jury returned a verdict in favor of the general contractor. HKM then filed suit

against the pipe manufacturer for indemnification for the amount for which HKM had been found liable. HKM alleged that the manufacturer had fraudulently misrepresented the characteristics of the pipe that HKM had purchased. The Supreme Court held that as early as April 18, 1986, HKM had been aware that the manufacturer had taken an inconsistent position as to the characteristics of the pipe and therefore there had been no affirmative act of concealment on the manufacturer's part that would toll the running of the statute of limitations. Therefore, HKM's cause of action was barred by the 2-year statute of limitations. HKM Associates v. NW. Pipe Fittings, Inc., 272 M 187, 900 P2d 302, 52 St. Rep. 692 (1995).

Relation Back — Joinder of Additional Parties Not Barred by Statute of Limitations: Berlin sued Boedecker, and 7 ½ years after the transaction that was the basis of the suit joined Boedecker Resources, Inc., of which Boedecker was the owner. Boedecker argued that the joinder of the corporation was precluded by the statute of limitations. The Supreme Court held that under Rule 15(c), M.R.Civ.P., parties may be dropped or added at any time and that when so added, the addition relates back to the date of filing of the original action. In this case, the requirements of Rule 15(c) were fulfilled because the party to be joined was involved in the transaction at issue, the original action was filed within the period of time for bringing suit against the party to be joined, the party sued in the original action was acting as an agent for the party to be joined, and Boedecker had extensively intermingled his funds with those of the corporation. The joined party was therefore not prejudiced by a lack of notice. Berlin v. Boedecker, 268 M 444, 887 P2d 1180, 51 St. Rep. 569 (1994).

Amendment of Answer at End of Trial — Discretion of Court to Allow Amended Pleadings to Conform to Evidence: At the end of trial, the District Court allowed defendants to amend their answer to raise a statute of limitations defense to plaintiff's fraud claim. Plaintiff contended that defendants' waived their statute of limitations defense by failing to set it forth in the pleadings. However, nothing in this rule precludes the trial court from allowing a party to amend the pleadings to conform to the evidence under Rule 15(b), M.R.Civ.P. Keller v. Dooling, 248 M 535, 813 P2d 437, 48 St. Rep. 554 (1991).

Statute of Limitations Defense — Raised Only by Answer: A codefendant, Rancher's Agra Services, Inc. (Rancher's), requested the Supreme Court to order the District Court to enter summary judgment by reason of the running of the Statute of Limitations in Rancher's favor. Rule 8(c), M.R.Civ.P. (Title 25, ch. 20), provides that a defense of the running of the Statute of Limitations is an affirmative defense and can only be raised by answer. Rancher's never filed an answer or provided the Supreme Court with any reason for failing to do so. The request was denied. Bennett v. Dow Chem. Co., 220 M 117, 713 P2d 992, 43 St. Rep. 221 (1986), followed in Estabrook v. Baden, 284 M 419, 943 P2d 1334, 54 St. Rep. 947 (1997).

Raising Statute of Limitations and Estoppel in Motion — When Allowed: The affirmative defenses of the Statute of Limitations and estoppel by judgment may be raised in a motion to dismiss rather than in the answer when the complaint on its face shows that the claim is barred by the Statute of Limitations and the judgment relied on for the estoppel by judgment defense was made in the same court that is asked to pass on the motion. Beckman v. Chamberlain, 673 P2d 480, 40 St. Rep. 2044 (1983) (apparently not reported in Montana Reports).

Raising for First Time on Appeal Disallowed: Statute of Limitations defense was an affirmative defense and could not be raised in Supreme Court when it was not raised in District Court. Taylor v. Dept. of Fish, Wildlife, & Parks, 205 M 85, 666 P2d 1228, 40 St. Rep. 1112 (1983). For application to cases of personal injury, see Bennett v. Dow Chem. Co., 220 M 117, 713 P2d 992, 43 St. Rep. 221 (1986).

Conflicting Evidence on Time of Accrual: The question of whether an action is barred by the Statute of Limitations is for the jury to decide when there is conflicting evidence as to when the cause of action accrued. Hill v. Squibb & Sons, 181 M 199, 592 P2d 1383 (1979).

Laches and Statute of Limitations Adequately Pleaded: Plaintiffs' suit for rescission was barred by laches and their action for damages for breach of contract was barred by the 4-year Statute of Limitations. Since defendant's affirmative defenses revealed that plaintiffs had adequate notice of the defenses of laches and Statute of Limitations, although not specifically denominated as such, summary judgment was properly granted to defendants. Brabender v. Kit Mfg. Co., 174 M 63, 568 P2d 547 (1977).

Pleadings Versus Motion to Dismiss: Defendant was not entitled to raise Statute of Limitations by motion to dismiss since Statute of Limitations defense is to be pleaded affirmatively. Butte Country Club v. Metropolitan Sanitary & Storm Sewer District, 164 M 74, 519 P2d 408 (1974).

Waiver of Statute of Limitations — Injury to Real Property: Where plaintiff filed complaint alleging injury to real property more than 2 years after injury occurred, defendants waived

defense of Statute of Limitations when they failed to plead it affirmatively. Butte Country Club v. Metropolitan Sanitary & Storm Sewer District, 164 M 74, 519 P2d 408 (1974).

Reply to Answer Pleading Statute: No reply need be filed to an answer pleading the Statute of Limitations where plaintiff, in an action on a note, set forth in the complaint that interest had been paid on the note within the statutory period, thus tolling the statute. Matteson v. Ackerson, 104 M 239, 66 P2d 797 (1937).

Claim Against Estate — No Requirement to Plead Statute: While it is the general rule that the bar of the Statute of Limitations can be raised only by answer, where it appears to the court in an action against an executor or administrator to recover on a rejected claim that the claim, or a part of it, is barred, it must so hold though the defendant fails to interpose such defense. Pincus v. Davis, 95 M 375, 26 P2d 986 (1933).

Statute to Be Pleaded by Answer Only: The objection that an action was not commenced within the time limited by law can be taken only by answer, and defendant has the burden of proving it as alleged. Reed v. Richardson, 94 M 34, 20 P2d 1054 (1933); Stagg v. Stagg, 90 M 180, 300 P 539 (1931); Bielenberg v. Higgins, 85 M 56, 277 P 631 (1929).

Compliance With Statute to Be Pleaded by Plaintiff: The rule that the objection that an action was not commenced in time can be taken only by answer does not apply to an action to enforce a statutory liability by the exercise of a right granted by statute and which did not exist at common law. In such a case the limitation of time prescribed is of the essence of the right itself and plaintiff must in his complaint show that the action was commenced within the proper time, else the pleading is subject to a general demurrer. Mitchell v. Banking Corp. of Mont., 83 M 581, 273 P 1055 (1929).

Basis for Waiver — Choice of Defendant: The Legislature has left it entirely optional with the party against whom a cause of action is alleged to avail himself of the Statute of Limitations or to forbear it. If he omits to invoke it at the proper time and in the proper way, it does not avail him under any circumstances, even though the cause of action alleged against him is completely barred. It is of no concern to the court or to the public that this is so, whether the omission is the result of oversight or of a prior agreement of the adversary party. Adams v. Stenehjam, 50 M 232, 146 P 469 (1914), distinguished in Thielbar Realties, Inc. v. Nat'l Union Fire Ins. Co., 91 M 525, 9 P2d 469 (1932); Parchen v. Chessman, 49 M 326, 142 P 631 (1914).

Statute to Be Pleaded — Waiver: The bar of the Statute of Limitations can be raised only by answer and is waived by the failure to interpose it as a defense. State ex rel. Kolbow v. District Court, 38 M 415, 100 P 207 (1909); Grogan v. Valley Trading Co., 30 M 229, 76 P 211 (1904).

RES JUDICATA

Second Suit Based on Same Facts as Case Dismissed With Prejudice Properly Dismissed as Res Judicata: While a first employment termination claim was pending, Xu filed another claim based on the same facts. The first claim was ultimately dismissed with prejudice for Xu's failure to comply with discovery, and the District Court then summarily dismissed the second case based on res judicata and collateral estoppel. Xu appealed on grounds that it was an abuse of discretion for the District Court to dismiss the second case because the second case contained a new claim of defamation and because there was no final adjudication on the merits of the first claim. The Supreme Court disagreed. Res judicata applied not only to the issues that were raised in the first claim, but also to issues that could or should have been raised in the first litigation. Collateral estoppel applied because a dismissal with prejudice constituted an adjudication on the merits. Summary dismissal of the second case was therefore affirmed. Xu v. McLaughlin Research Institute for Biomedical Science, Inc., 2005 MT 209, 328 M 232, 119 P3d 100 (2005).

No Res Judicata Absent Final Judgment in Related Case: Brown was one of 64 prisoners who filed a complaint in 2002 alleging that the Department of Corrections improperly transferred prisoners to prisons where treatment, training, and rehabilitation opportunities were not available. While that case was pending, Brown filed suit in 2004 against the Department, alleging that his liberty interest in parole was violated because the Department transferred him to locations where he was unable to obtain the sex offender treatment required for parole eligibility. The District Court concluded that the 2004 case was barred by res judicata because Brown was a plaintiff in the 2002 case, which presented identical claims. Brown appealed, and the Supreme Court reversed and remanded. Under Audit Serv., Inc. v. Anderson, 211 M 323, 684 P2d 491 (1984), the primary requirement necessary to sustain a plea of res judicata is that there be a judgment on the merits. Because the 2002 case was still pending, dismissal of the 2004 case on res judicata grounds was error. Brown v. Dept. of Corrections, 2005 MT 58, 326 M 231, 108 P3d 498 (2005).

Relitigating Issues Raised in Bankruptcy Proceeding Barred by Res Judicata: In defendants' bankruptcy proceeding, they contended that notes issued by plaintiff contained a usurious interest rate and were prompted by fraud. The Bankruptcy Court determined that the notes were valid, enforceable, and unaffected by usury or fraud. During plaintiff's subsequent collection proceeding in District Court, defendants sought to amend their answer to allege usury, but the District Court held that the Bankruptcy Court's judgment barred defendants' claim under res judicata and granted summary judgment for plaintiff. On appeal, the Supreme Court affirmed. The Bankruptcy Court's judgment was accorded finality as to the issues raised or that could fairly have been raised in the adversary proceeding. Defendants were not precluded from litigating any of their defenses to the notes in the bankruptcy proceeding and thus were barred from relitigating the usury issue in District Court. Absent a genuine issue of material fact relating to defendants' default on the notes, summary judgment for plaintiff was proper. Olympic Coast Inv., Inc. v. Wright, 2005 MT 4, 325 M 307, 105 P3d 743 (2005), following Fox v. 7L Bar Ranch Co., 198 M 201, 645 P2d 929 (1982), and distinguishing Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604 (1993).

Order That Spouse Maintain Insurance and Pay Medical Bills as Part of Property Agreement — Spouse Liable Absent Insurance Termination Date: As part of the parties' property settlement in 1990, the husband Glenn agreed to maintain insurance for his ex-wife through his employer and to pay any medical bills not covered by insurance. There was no termination date applied to Glenn's obligation. Pursuant to federal law, Glenn's employer was allowed to maintain insurance on the former spouse for only 3 years, and after that time, the insurance lapsed. In 1994, Glenn then stipulated that he would provide insurance under a new policy, but again no termination date was specified. Glenn eventually retired and continued to pay premiums for several months, but the new policy also lapsed, at which point the ex-wife filed a contempt petition requiring that Glenn pay her medical bills and provide insurance pursuant to the stipulation. Glenn sought a ruling that he was no longer required to pay, arguing that pursuant to the dissolution decree, his liability to provide insurance and pay uncovered medical bills should have ended when coverage could no longer be provided through his employer. The District Court determined that the issue was barred by res judicata and held for the ex-wife. Glenn appealed, but the Supreme Court affirmed. Glenn could, and perhaps should, have raised the issue relating to the duration of his obligation when he stipulated to providing insurance in 1994, but failed to do so. Instead, he entered a stipulation to continue to provide insurance coverage with no termination date, so Glenn was barred from raising the issue by the doctrine of res judicata. In re Marriage of Kolczak, 2004 MT 241, 322 M 520, 97 P3d 1091 (2004).

No Error in Denial of Motion to Amend Pleadings to Address Previously Decided Statutory Constitutionality: In Geil v. Missoula Irrigation District, 2002 MT 269, 312 M 320, 59 P3d 398 (2002), the Supreme Court held that a process allowing a landowner to petition for exclusion from an irrigation district was constitutional. The dissent in Geil suggested an additional constitutional argument that was not previously considered, so the irrigation district attempted to amend the pleadings, but the motion was denied. On appeal, the Supreme Court noted that although leave to file amendments to pleadings should be freely granted, a District Court also has discretion to deny amendments to pleadings when justice requires and that denial of a motion to amend will be upheld absent an abuse of that discretion. Noting the length of the proceeding and the fact that the irrigation district brought the new constitutional argument only after the dissent brought it to its attention, the Supreme Court determined that Geil had addressed the constitutionality issues, so further constitutional arguments were barred by res judicata and collateral estoppel. Thus, the District Court did not abuse its discretion in denying the irrigation district's effort to amend the pleadings, and the District Court was affirmed. RSG Holdings v. Missoula Irrigation District, 2004 MT 214, 322 M 369, 96 P3d 1131 (2004). See also Geil v. Missoula Irrigation District, 2004 MT 217, 322 M 388, 96 P3d 1127 (2004), and Petitioners I-549 v. Missoula Irrigation District, 2005 MT 100, 326 M 527, 111 P3d 664 (2005).

Legal Malpractice Claim by Estate Not Barred by Res Judicata, Equitable Estoppel, or Judicial Estoppel: A personal representative brought a legal malpractice damage suit on behalf of the estate against an attorney who drafted a trust document and will. The trust beneficiaries brought a separate suit against the trustee. The District Court granted summary judgment for the attorney on grounds of res judicata, equitable estoppel, and judicial estoppel. On appeal, the Supreme Court reversed. Res judicata and collateral estoppel did not apply because the subject matter and parties in the beneficiaries' suit were different. Equitable estoppel did not apply because the defendants did not present any evidence to establish that they relied on an act by the personal representative or changed their position for the worse because of that act. Judicial estoppel did not apply because the judicial admission in this case referred only to plaintiffs' legal

theory and not to an unequivocal statement of fact and because of the absence of any evidence that defendants were misled by a judicial admission. Thus, summary judgment was inappropriate. Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Legal Malpractice Claim Timely Filed — Summary Judgment Inappropriate When Date of Discovery and Accrual Disputed: The Watkins estate filed a legal malpractice claim against an attorney who set up the trust. The District Court found that the 3-year statute of limitations had run on filing the suit and granted summary judgment for the attorney. On appeal, the Supreme Court reversed. After concluding that the statute of limitations does not begin to run until both the discovery rule and the accrual rule have been satisfied, the court examined the applicability of both rules. The claim was filed in 1997, but the estate did not discover the attorney's negligence until 1995, which was excusable because: (1) the trustee relied on the fiduciary relationship and trusted that the attorney's assertion that the trust was revocable was correct, even though it was irrevocable; (2) of the complexity of the estate plan, which was difficult even for experts to understand and was beyond the understanding of a layperson; and (3) the attorney may have fraudulently concealed the malpractice. Further, because the trustee continued to treat the trust as revocable in reliance on the attorney's advice, the estate did not sustain any actual damages until the irrevocable nature of the trust was discovered and trust beneficiaries brought suit to remove the trustee in 1996, well within the statute of limitations. The attorney's contention that res judicata and estoppel barred the present suit because the beneficiaries also maintained a separate suit for damages also failed because neither the parties nor the issues were the same. Summary judgment was thus improper, and the case was remanded. Estate of Watkins v. Hedman, Hileman & Lacosta, 2004 MT 143, 321 M 419, 91 P3d 1264 (2004), following Uhler v. Doak, 268 M 191, 885 P2d 1297 (1994). See also Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Improper for District Court to Look Beyond Language of Amended Judgment Decree When Judgment Not Ambiguous or Obscure: Following remand of Harland v. Anderson, 169 M 447, 548 P2d 613 (1976), which awarded defendant summary judgment on plaintiff's claims for a prescriptive easement across defendant's property, the District Court took up plaintiff's alternative request to condemn an easement across defendant's land for plaintiff's use. In 1983, the court granted plaintiff an unrestricted easement, and defendant moved to amend the judgment to provide compensation for the taking of the easement, but the motion was denied. The parties then entered a stipulation providing $7,500 for defendant's attorney fees and costs, and the parties agreed not to appeal the amended judgment. The stipulation was approved. Almost 20 years later, plaintiffs commenced litigation seeking declaratory and injunctive relief on grounds that defendant had wrongfully interfered with the 1983 unrestricted easement. Defendant claimed that the 1983 right-of-way was limited to agricultural and grazing purposes and moved for summary judgment on grounds of res judicata, judicial estoppel, laches, and waiver. The District Court concluded that the language of the 1983 amended judgment implied that the findings and conclusions were necessary to the judgment, so the court reviewed the 1983 findings and conclusions, concluded that the easement was restricted to agricultural and grazing purposes, granted defendant summary judgment on res judicata grounds, and dismissed plaintiffs' summary judgment motion and claim with prejudice. On appeal, plaintiffs asserted that the District Court erred in looking beyond the plain language of the 1983 amended judgment. The Supreme Court cited Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), for the holding that a District Court may refer to the entire record in an original case when construing a decree that is obscure or ambiguous, but that when the language of the decree is plain, there is no need to construe it or to resort to pleadings or evidence. In this case, the 1983 decree clearly and unambiguously granted plaintiff an unrestricted easement across defendant's ranch, and it was error for the District Court to look beyond the face of the decree instead of accepting it at face value and speculating as to the reasoning behind the particular result. Thus, summary judgment for defendant was reversed, and the District Court was ordered to enter summary judgment for plaintiffs. Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004).

Improper Assumption That Defense Verdict in Underlying Negligence Action Precludes Subsequent Unfair Trade Practices Claims — Reversible Error: Plaintiff was involved in an automobile accident when an employee of the Goosebill Ranch struck a vehicle driven by the Cloutiers and then struck plaintiff's vehicle, which was pushed across an intersection and collided with a truck that was proceeding through the intersection. Plaintiff sued Goosebill Ranch for negligence, but the jury returned a verdict for the ranch, and plaintiff appealed. The Cloutiers also sued Goosebill Ranch in a separate action, and in that case, the jury found that the ranch was negligent and awarded the damages to the Cloutiers. The damages were paid by the

defendant insurance company. While appeal of plaintiff's negligence case was pending, plaintiff settled, and the judgment against plaintiff was released as part of the settlement, but plaintiff reserved the right to bring a bad faith action against that insurer. Plaintiff then brought an unfair trade practices claim against the insurers, asserting violation of 33-18-242 and alleging claims for outrage or intentional infliction of severe emotional distress. The District Court held that the initial jury verdict for Goosebill Ranch provided the insurers with a reasonable basis defense to plaintiff's subsequent unfair trade practices claim and that plaintiff could not bring a statutory bad faith action claiming liability was reasonably clear when the jury had decided the opposite, so plaintiff's claim was dismissed. On appeal, the Supreme Court reversed. The District Court's assumption that the unfair trade practices claim sought to relitigate the underlying claim and that the issues in both claims were the same was incorrect because the issues were in fact separate. An unfair trade practices claim is considered an independent cause of action. The District Court's reasoning that an unfair trade practices claimant must first establish liability in an underlying claim and that an adverse jury verdict defeats the claim was also erroneous because under 33-18-242, a settlement of the underlying claim is sufficient to allow an unfair trade practices claim, and a defense verdict in the underlying negligence suit was not tantamount to a finding that the insurer did not engage in unfair trade practices. Further, a ruling that a defense verdict provided a reasonable basis defense to a subsequent unfair trade practices claim as a matter of law was also erroneous because insurers would then be encouraged to obtain defense verdicts at any cost to shield themselves from subsequent unfair trade practices claims. Thus, a defense verdict in the underlying negligence claim did not collaterally estop plaintiff from pursuing an unfair trade practices claim. Last, plaintiff's failure to raise the issue of insurer misconduct in a Rule 60(b), M.R.Civ.P., motion in the underlying negligence case did not preclude pursuit of an unfair trade practices claim because the unfair trade practices claims were not litigated in the underlying case and were not issues that should have been litigated in the negligence suit for personal injuries. Graf v. Cont. W. Ins. Co., 2004 MT 105, 321 M 65, 89 P3d 22 (2004). See also Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834 (2000), and Rausch v. Hogan, 2001 MT 123, 305 M 382, 28 P3d 460 (2001).

No Appeal of Final Judgment of Property Boundary Dispute — Appeal Barred by Res Judicata: The District Court ordered the Clerk of Court to file a certificate of survey of plaintiffs' land in compliance with a previous judgment and required that the survey not exceed 1 acre. Plaintiffs appealed on grounds that the District Court exceeded its jurisdiction in ordering the new survey. The Supreme Court noted that although the appeal was characterized as a jurisdictional question, the substance of the argument principally concerned the size of the new tract. However, the parties had a full and fair opportunity to litigate property boundaries, and the result was a final judgment that was never appealed or altered by the District Court through subsequent orders. Plaintiffs were attempting to undo the prior judgment, but the appeal was barred by res judicata. Johnson v. Hamilton, 2003 MT 199, 317 M 24, 75 P3d 778 (2003).

Easement Issue Resolved Against Predecessor in Interest Barred by Res Judicata and Collateral Estoppel: Plaintiffs claimed an easement by necessity over Skyline Drive. Defendants asserted that the action was barred by res judicata and collateral estoppel based on a prior District Court ruling that another property owner did not have an easement over Skyline Drive. The District Court agreed and granted summary judgment to defendants, and plaintiffs appealed. The Supreme Court affirmed. As set out in Hall v. Heckerman, 2000 MT 300, 302 M 345, 15 P3d 869 (2000), res judicata applies if: (1) the parties or their privies are the same; (2) the subject matter of the present and past action is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and to the issues between them. A form of res judicata, collateral estoppel, applies if: (1) the identical issue raised was previously decided in a prior adjudication; (2) a final judgment of the merits was issued in the prior litigation; and (3) the party against whom the plea is now asserted was a party or in privity with a party in the prior adjudication (see Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778 (2000)). In this case, plaintiffs attempted to raise an easement issue that was previously adjudicated and conclusively resolved against their predecessor in interest, so plaintiffs' claim was barred by res judicata and collateral estoppel. Kullick v. Skyline Homeowners Ass'n, Inc., 2003 MT 137, 316 M 146, 69 P3d 225 (2003).

Previously Raised but Unlitigated Alter Ego Claim Not Barred by Res Judicata: Following a dispute over the sale of irrigation equipment, H-D Irrigating and Lane sued Kimble Properties and Kimble for false representation of the irrigation equipment and damages. Kimble Properties and Kimble counterclaimed for the balance due on the equipment, alleging that H-D Irrigating was a sham and the alter ego of Lane. The alter ego claim was never pursued. The Supreme Court eventually decided the case in H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT

212, 301 M 34, 8 P3d 95 (2000), and remanded for judgment in favor of Kimble. In an effort to collect, Kimble sought to compel Lane to testify regarding the assets of H-D Irrigating, but rather than appear, Lane filed bankruptcy and received a stay on further proceedings. Kimble then filed an action to collect from Lane personally, again raising the alter ego issue. Lane asserted that the issue had been already decided in the prior litigation and sought supervisory control on res judicata grounds. After accepting supervisory control, the Supreme Court decided that res judicata did not bar Kimble's litigation of the alter ego claim. The action to pierce the H-D Irrigating corporate veil was neither previously adjudicated in District Court nor were the facts upon which the claim was based known to Kimble at the time that the counterclaim was filed or at any other time during the course of the previous action. The case was thus remanded for further proceedings on the alter ego claim. Lane v. District Court, 2003 MT 130, 316 M 55, 68 P3d 819 (2003), applying Berlin v. Boedecker, 268 M 444, 887 P2d 1180 (1994).

Res Judicata Not Bar to Petition to Withdraw From Irrigation District: The Legislature enacted legislation primarily directed at the Missoula Irrigation District (MID) allowing certain landowners to opt out of MID because they had no access to MID's water. MID argued that the petitioner's action to withdraw from MID was barred by the doctrine of res judicata because an earlier case found that all of the land within an irrigation district was susceptible to irrigation and was served by the district and therefore the petitioner could not now argue for withdrawal on the basis that the petitioner's property could not access MID's water. The Supreme Court held that res judicata did not apply because the earlier suit dealt with the establishment of an irrigation district and the current case dealt with the rights of an individual to withdraw from an irrigation district. Geil v. Missoula Irrigation District, 2002 MT 269, 312 M 320, 59 P3d 398 (2002).

Claims in Excess of Amount for Consideration in Small Claims Court Not Barred by Res Judicata From Consideration in District Court: Thornton contracted to purchase a modular home from Alpine Home Center (Alpine), agreeing to pay $3,000 down toward the $72,120 purchase price, and receiving $6,900 credit for trade-in of an older mobile home. Thornton complained of problems with the modular home necessitating $500 in repairs, and stopped payment on the downpayment check. Upon taking possession of Thornton's trade-in, Alpine discovered damage to the trade-in in the amount of $3,450, and also discovered that Thornton owed $210.09 in back taxes on the trade-in. Alpine subsequently filed a complaint in Small Claims Court for $3,000. The Small Claims Court offset the cost of Thornton's repairs against the amount of damages suffered by Alpine and awarded Alpine $2,500. Thornton did not appeal the judgment, but instead filed a complaint in District Court alleging numerous theories for relief and seeking $65,000 for consequential damages, $100,000 for punitive damages, and general damages to be determined by the District Court. The District Court dismissed Thornton's claim on grounds that the action was barred by res judicata. Thornton appealed. The Supreme Court applied the elements of res judicata as set out in Whirry v. Swanson, 254 M 248, 836 P2d 1227 (1992), concluding that the issues raised by Thornton in District Court were different from the claims raised in Small Claims Court, and pointed out that the issues could not have been raised in the lower court in any case because 25-35-502 limits Small Claims Court jurisdiction to claims not exceeding $3,000. The District Court erred in holding that res judicata barred Thornton's action, so that holding was reversed and Thornton's case was remanded for further District Court proceedings. Thornton v. Alpine Home Center, 2001 MT 310, 307 M 529, 38 P3d 855 (2001).

Injured Employee Who Receives All Allowable Benefits From Uninsured Employers' Fund Not Permitted to Also Collect Compensation From Uninsured Employer — Double Dipping Disallowed: Daughenbaugh was injured while working at the Olsons' ranch. The Olsons did not carry workers' compensation insurance on Daughenbaugh, but the parties negotiated a settlement agreement that paid Daughenbaugh's salary and medical expenses and allowed him to continue to live at the ranch and continue his duties there for a specific period of time. In turn, Daughenbaugh signed a general release and indemnification agreement releasing all claims against the Olsons and agreeing to indemnify them against any claims arising from the injury. Daughenbaugh then filed a workers' compensation claim with the state, and because the Olsons were uninsured, the uninsured employers' fund (UEF) processed the claim and paid wage loss and other benefits to Daughenbaugh. The Olsons then sought a declaratory judgment holding that the general release and indemnification agreement was valid and enforceable. Daughenbaugh responded that the agreement was unenforceable and counterclaimed that, pursuant to the independent cause of action provided in 39-71-515, he was entitled to recover from the Olsons damages in the amount of compensation that he would have received if the Olsons had been properly enrolled in a workers' compensation plan. Daughenbaugh

subsequently agreed to accept $5,000 from the Olsons for attorney fees and $38,820.88 from the UEF (inclusive of sums already paid by the UEF), acknowledging that that amount represented his full entitlement to workers' compensation benefits had the Olsons been properly enrolled in a plan, and agreed to fully release and discharge the Olsons and the UEF from all obligations and benefits under the Workers' Compensation Act. The Olsons agreed to reimburse the UEF for $38,820.88 and to pay a penalty for failure to enroll in a plan. However, Daughenbaugh reserved the counterclaim against the Olsons, alleging that he was entitled to direct compensation from the Olsons under 39-71-515. The District Court summarily dismissed the counterclaim, finding that Daughenbaugh was not entitled to receive the benefits that he would have received from the Olsons in an independent action because he had admittedly already received all those benefits to which he was entitled from the UEF. The Supreme Court agreed. Pursuant to the legislative history of 39-71-515, Neustrom v. St., 283 M 179, 939 P2d 990 (1997), and Thayer v. Uninsured Employers' Fund, 1999 MT 304, 297 M 179, 991 P2d 447 (1999), 39-71-515 does not allow for a double recovery of workers' compensation benefits. Daughenbaugh was allowed to pursue a benefit claim from the UEF and an independent action against the Olsons at the same time, but pursuant to the doctrine of res judicata, Daughenbaugh was bound by the decision of the first venue to arrive at a decision, and was not allowed to double-dip workers' compensation benefits and receive full compensation twice for the same work-related injury. Olson v. Daughenbaugh, 2001 MT 284, 307 M 371, 38 P3d 154 (2001).

Parties in Dissolution Proceeding Not Same as Parties in Abuse and Neglect Proceeding — Res Judicata Inapplicable: During marriage dissolution proceedings, the mother was granted custody of the children, but during a subsequent abuse and neglect proceeding, permanent custody was granted to the father. The mother appealed the placement on grounds that it constituted a readjudication of the earlier custody order in her favor in the dissolution action, in violation of the doctrine of res judicata. The Supreme Court disagreed. Four criteria must be met for res judicata to apply, the first of which is that the parties or their privies are the same. The mother failed to meet this criteria because in the dissolution action, the parties were the mother and father, while in the abuse and neglect proceeding, the parties were the state, the children, and the mother. Despite the fact that the state was investigating claims of abuse within the family during the dissolution action, it was not a party to that action and did not petition for investigative authority and protective services for the children until the dissolution was final. In re B.P. & A.P., 2001 MT 219, 306 M 430, 35 P3d 291 (2001).

Summary Denial of Petition for Postconviction Relief — Defendant Entitled to Hearing to Present Nonrecord-Based Ineffective Assistance of Counsel Claims: Schaff was convicted of deliberate homicide and filed a petition for postconviction relief, contending that he received ineffective assistance of counsel when forced to decide whether to accept a plea agreement after considering the matter for less than 2 hours. He claimed that with the assistance of different counsel at the hearing to withdraw the guilty plea, he could have established that the plea was not voluntary. Schaff further argued that he could not have raised the precise issue of ineffective assistance because discussions between his attorney and him were not record-based and thus could be presented only through a petition for postconviction relief. The state argued that the petition was defective because Schaff did not sufficiently specify the claim of ineffective assistance, offered no supporting information, and did not identify precisely why counsel was ineffective. The state also pointed out that Schaff had previously raised the issue of voluntariness in St. v. Schaff, 1998 MT 104, 288 M 421, 958 P2d 682 (1998), and that the issue had been decided and was barred from being raised again by the doctrine of res judicata. The Supreme Court disagreed that the voluntariness of Schaff's plea was not a proper subject for a postconviction proceeding. Although the issue of voluntariness was previously raised, Schaff did not raise the precise question of whether he had received competent advice prior to entering a plea or the question of whether he was misled to believe that he was required to proceed with the change of plea hearing with trial counsel when he was legally entitled to be represented by other counsel. The question of whether Schaff was properly advised necessarily touched on the voluntariness of the plea but was separate from it and was not part of the record in the direct appeal, nor was it the type of evidence that Schaff would be likely to present at a change of plea hearing. Rather than summarily dismiss Schaff's petition, the better course would have been for the District Court to appoint Schaff counsel and provide an opportunity for a hearing to present the ineffective assistance claims. Thus, the Supreme Court affirmed the part of the District Court's order with regard to any record-based voluntariness claims that had already been addressed by direct appeal, but reversed that part of the order that held that Schaff was procedurally barred from raising the issue of ineffective assistance of counsel in the nonrecord-based postconviction proceeding. St. v. Schaff, 2001 MT 130, 305 M 427, 28 P3d 1073

(2001). Following hearing on remand, the District Court again denied Schaff's petition for postconviction relief, and Schaff appealed on grounds of ineffective assistance of counsel, but the Supreme Court affirmed. Applying the Strickland test, the Supreme Court found that Schaff proved neither that counsel's assistance was deficient nor that counsel's performance was prejudicial to Schaff's case. An ineffective assistance claim must be grounded on facts in the record rather than on mere conclusory allegations. Schaff's claim was not supported by the record, so the petition for postconviction relief was properly denied. Schaff v. St., 2003 MT 187, 316 M 453, 73 P3d 806 (2003). See also Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233 (1999).

Collateral Estoppel Applied to Preclude Reopening Settlement Agreement Regarding Disposition of Jointly Owned Marital Property — Property Interest Not Altered by Filing of Partition Action: When the husband and wife separated, they entered a property settlement agreement dividing all their real and personal property, agreeing that they would continue to jointly own their residence, with the right of survivorship. In the decree of dissolution, the District Court affirmed that the property settlement agreement was fair and equitable. Several years after the divorce, seeking to wrap up financial affairs with her former husband, the wife moved to partition the residence and obtain an equal division of the value of the property. At trial, the husband argued that the property settlement agreement was unfair and that the wife should be denied any recovery for her interest in the residence because it was purchased prior to the marriage and because she did not contribute to the marriage financially. The wife moved in limine to preclude the husband from reopening matters that should have been raised in the divorce proceedings. The court denied her motion, reasoning that the property was not divided in the divorce and that because the partition action was an action at equity, surrounding circumstances could be considered. The court found that the filing of the partition action severed the joint tenancy, and the husband was then allowed to introduce evidence regarding the marital equities. The court ultimately concluded that the wife's interest in the residence was not compensable because she had not contributed significantly to the acquisition or improvement of the property or contributed to the parties' assets during the marriage. The wife appealed. The Supreme Court found that res judicata and equitable estoppel barred relitigation of the fairness of the joint ownership issue, which was considered and approved in the decree of dissolution. Further, the mere filing of the partition action does not sever one's interest in property. Rather, the parties' respective interests remain intact until the judgment severing the tenancy is entered. The rebuttable presumption that underlies a joint tenancy in property is equal shares, and there was nothing in the evidence to rebut that presumption and no evidence of postdecree events that would justify a different result. The husband failed to carry the burden of rebutting the presumption of equal shares, and the Supreme Court remanded for a 50-50 partition of the value of the residence. Rausch v. Hogan, 2001 MT 123, 305 M 382, 28 P3d 460 (2001).

Claim for Punitive Damages Not Precluded by Estoppel — Issues of Previous Litigation Not Identical: Finstad was injured by asbestos in defendant's mine. A jury trial resulted in a verdict for Finstad and an award of $400,000 in compensatory damages, as well as a determination that punitive damages were warranted. The District Court conducted a minitrial on the issue of punitive damages, and the jury awarded $83,000. Defendant contested the award of punitive damages and moved for dismissal on grounds that Finstad's claim was barred by collateral estoppel by virtual representation because the issue had already been litigated in two previous Lincoln County cases against defendant. Defendant contended that the issues were identical, that final judgment had been rendered, and that Finstad was a party to or in privity with a party in the previous cases and thus was virtually represented by those parties in the previous cases. The District Court denied the motion to dismiss, finding that the issues were not identical, and also ruled for Finstad on the question of estoppel by virtual representation. On appeal, the Supreme Court reviewed the record, noting that although some of the evidence and witnesses regarding the punitive damages claim were the same as in the previous cases, several significant factual distinctions and legal claims existed. Because the first element of collateral estoppel regarding identical parties was not met, the Supreme Court affirmed without reaching the question of estoppel by virtual representation. Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000), following Holtman v. 4-G's Plumbing & Heating, Inc., 264 M 432, 872 P2d 318 (1994).

Fatally Tardy Request to Set Aside Default Judgment — Elements of Res Judicata Met: Pro se plaintiff filed to set aside a default judgment entered against him over 1 ½ years earlier. The District Court dismissed the motion on grounds of res judicata, noting that plaintiff did not proceed with diligence after being personally served, having ignored the service of the initial complaint, the personal service of defendants' notice of intent to enter default and default judgment, and service of the court's entry of judgment and writ of assistance. Plaintiff argued

that as a pro se litigant, he should be accorded extra latitude. The Supreme Court noted that although pro se litigants may be given a certain amount of latitude, that latitude cannot be so wide as to prejudice the other party and that even pro se litigants are expected to adhere to procedural rules. Plaintiff's motion was fatally tardy. Citing Hollister v. Forsythe, 277 M 23, 918 P2d 665 (1996), the court found that the elements of res judicata existed because the parties were the same, the subject matter of the claim was the same, the issues were the same and related to the same subject matter, and the capacities of the persons were the same in reference to the subject matter and the issues. The District Court did not err in dismissing plaintiff's complaint pursuant to res judicata. Greenup v. Russell, 2000 MT 154, 300 M 136, 3 P3d 124, 57 St. Rep. 610 (2000).

Motion for Relief From Judgment Barred by Res Judicata — Sanctions Appropriate: McLaughlins moved for relief from judgment under Rule 60(b), M.R.Civ.P., but the motion was denied by the District Court. On appeal, McLaughlins raised 14 different reasons why the District Court's judgment following remand was void. The thrust of their argument was that the District Court failed to follow statutory law when awarding punitive damages against them. In denying the Rule 60(b) motion, the District Court noted that the issues raised by the motion had been appealed three times to the Supreme Court and affirmed each time in noncite opinions and held that the Rule 60(b) motion was dilatory in nature and without substance in law or fact. On this fourth appeal, the Supreme Court agreed, finding that all of the issues raised by the McLaughlins in their Rule 60(b) motion were barred by res judicata because they either had been previously litigated or could have been litigated in prior proceedings. Further, because the latest appeal was taken without substantial or reasonable grounds, it was frivolous pursuant to Rule 32, M.R.App.P. (Title 25, ch. 21), so sanctions in the form of reasonable costs and attorney fees were ordered to be added to the judgment against McLaughlins on remand. Bragg v. McLaughlin, 1999 MT 320, 297 M 282, 993 P2d 662, 56 St. Rep. 1276 (1999). See also Wellman v. Wellman, 198 M 42, 643 P2d 573 (1982), Searight v. Cimino, 238 M 218, 777 P2d 335, 46 St. Rep. 1217 (1989), and Loney v. Milodragovich, Dale & Dye, P.C., 273 M 506, 905 P2d 158, 52 St. Rep. 1093 (1995).

Broad Language in Complaint as Opportunity to Litigate Unfair Claims Practices Action — Res Judicata Barring Second Action — Summary Judgment Proper: The doctrine of res judicata not only precludes a party from relitigating claims that were litigated in a previous action, but under Balyeat Law, P.C. v. Hatch, 284 M 1, 942 P2d 716, 54 St. Rep. 780 (1997), res judicata will also bar an action for a claim that a party had an opportunity to, but did not, litigate in a previous action. In the present case, Fisher sued State Farm General Insurance Company (State Farm) and one of its agents for wrongfully denying coverage, alleging in the complaint that defendants were liable "for damages incurred as a result of the subject fire and the denial of coverage on theories of breach of contract, negligence, negligent misrepresentation, fraud, and any other applicable legal theories", and sought relief for money due under the insurance policy and "other further relief as the court may deem just and proper". One year later, Fisher filed a second action based on State Farm's denial of coverage, alleging failure to conduct a reasonable investigation of the claim and to attempt a good faith settlement. A few months later, State Farm presented a written offer of judgment on all claims in the original action, which Fisher accepted. Fisher then amended the second action to include allegations of a violation of the Unfair Claims Practices Act (UCPA) and sought punitive, special, and general damages. The District Court granted summary judgment for State Farm on grounds that the second action was barred by res judicata. The Supreme Court affirmed. Under the broad wording of the original complaint, Fisher clearly had the opportunity to litigate the UCPA claim. Had the claim been less broadly drafted, a judgment in the first action could not have barred the second action. However, the criteria of res judicata regarding identity of subject matter, issues, and relationship of the parties were met, and summary judgment on the second action was proper. Fisher's argument that the application of res judicata essentially negated statutory permissive joinder provisions and compelled mandatory joinder of otherwise independent causes of action was unpersuasive. Fisher v. St. Farm Gen. Ins. Co., 1999 MT 308, 297 M 201, 991 P2d 452, 56 St. Rep. 1236 (1999).

Petition for Postconviction Relief Filed With Supreme Court — No District Court Jurisdiction to Amend Pleadings on Remand: Boucher filed with the Supreme Court for postconviction relief. The Supreme Court remanded to District Court for an evidentiary hearing on whether Boucher was denied effective assistance of counsel because of counsel's failure to investigate and formulate a defense based on the victim's history of making false accusations of sexual assault. On remand, Boucher sought to offer additional evidence of ineffective counsel unrelated to the issue remanded. Although a District Court has the discretion to grant or deny a motion to amend a postconviction petition when the petition is filed with that court, in cases like this when the

petition is originally filed with the Supreme Court and remanded, the District Court does not have authority to grant leave to amend the pleadings to include allegations not included in the original petition. St. v. Boucher, 1999 MT 102, 294 M 296, 980 P2d 1058, 56 St. Rep. 431 (1999), distinguishing Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996), Hans v. St., 283 M 379, 942 P2d 674, 54 St. Rep. 654 (1997), and Bone v. St., 284 M 293, 944 P2d 734, 54 St. Rep. 890 (1997).

Petition for Postconviction Relief — Only Record-Based Claims Barred by Statute or Res Judicata: In 1993, Hagen was convicted of deliberate homicide and aggravated assault and appealed to the Montana Supreme Court, raising the issue of ineffective assistance of counsel. The Supreme Court affirmed the District Court. Hagen then filed a petition for postconviction relief, raising nine claims of ineffective assistance of counsel and argued that: (1) none of the claims could have been raised in his earlier direct appeal; (2) all claims were appropriate for his petition because an evidentiary hearing was required for all nine issues; (3) appellate counsel was ineffective in raising a particular issue in his previous direct appeal; and (4) if some or all of the claims relating to ineffective assistance of trial counsel should have been raised in his direct appeal but were not and were therefore barred, his appellate counsel provided ineffective assistance in failing to present those issues in his direct appeal. The state responded that six of Hagen's claims were procedurally barred by 46-21-105 because they could have been raised in his previous appeal, that one claim was barred by res judicata because it had been raised and decided in his previous appeal, and that three of Hagen's claims were not supported by the record or by the law and could therefore be decided on their merits without an evidentiary hearing. The District Court refused Hagen's request for an evidentiary hearing on his petition for postconviction relief and dismissed the petition, holding that the issue of ineffective assistance of counsel was raised in Hagen's direct appeal and had been decided by the Supreme Court, that Hagen's adequate remedy of appeal had been pursued, and that the petition for postconviction relief failed to state a claim for relief. Hagen appealed the dismissal of the petition to the Supreme Court. As an initial observation, the Supreme Court pointed out that although all of the issues raised by Hagen in his appeal of the District Court's denial of his petition for postconviction relief concerned ineffective assistance of counsel, not all of those claims were raised in the previous direct appeal and only those claims that were raised or that could have been raised in that previous direct appeal based upon the trial record were barred by 46-21-105(2) or the doctrine of res judicata. Citing In re Petition of Evans, 250 M 172, 819 P2d 156 (1991), and St. v. Bromgard, 273 M 20, 901 P2d 611 (1995), the Supreme Court further pointed out that those issues that are not record-based are properly brought to the Supreme Court by a petition for postconviction relief and that the District Court erred in failing to make that distinction and dismissing all of Hagen's ineffective assistance claims just because some of those claims may have been legitimately barred. The Supreme Court then individually reviewed each of Hagen's ineffective assistance claims and held that: (1) the manner in which mental evaluations of Hagen were disseminated during the trial was a matter of record and was therefore barred; (2) failure of Hagen's trial counsel to object to evidence introduced at trial was a matter of record and was therefore barred; (3) eliciting certain cross-examination testimony was based upon record evidence and was barred; (4) shifting the burden of proof during counsel's closing argument was a matter of record and barred by 46-21-105 and res judicata; (5) failure to investigate facts that could have provided a defense was properly raised in the postconviction relief petition because there could be no record evidence on this issue; (6) failure of trial counsel to present impeachment testimony was in part resolved during the appeal and was therefore res judicata and, with regard to one potential witness, was a matter of failure of trial counsel to investigate, could not be a matter of record, and therefore was not barred; (7) failure of trial counsel to properly prepare witnesses for trial was not and could not be reflected in the trial record and therefore was not barred; and (8) failure of appellate counsel to raise the ineffective assistance of trial counsel could not have been a matter of record evidence by its very nature and was therefore not barred from consideration in the postconviction relief petition. Hagen v. St., 1999 MT 8, 293 M 60, 973 P2d 233, 56 St. Rep. 33 (1999), followed in St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001). See also St. v. Schaff, 2001 MT 130, 305 M 427, 28 P3d 1073 (2001), in which the question of voluntariness of a plea because of ineffective assistance of counsel was remanded for a hearing, despite the previous disposition of other voluntariness claims on direct appeal, because discussions between defendant and counsel were not record-based and thus could be presented only through postconviction proceedings.

Failure to Follow Procedural Requirements of Individuals With Disabilities Education Act Held Not to Deny Free Appropriate Public Education — Independent Cause of Action for Misdiagnosis and Misplacement Dismissed as Barred by Res Judicata: Brian Parini was

diagnosed with a learning disability and was placed in special education pursuant to the requirements of the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. 1400, et seq. Subsequently, Brian's mother filed a petition with the Office of Public Instruction (OPI), alleging that Brian's condition had not been subjected to a 3-year reevaluation as required by IDEA and that Brian was therefore denied his right under IDEA to a free appropriate public education (FAPE). OPI found that while IDEA may not have been complied with as to certain procedural requirements, Brian was not denied a FAPE. Brian then filed a complaint with the District Court in which he alleged that OPI had erred and also asserted an independent cause of action for damages, claiming that school employees had negligently misdiagnosed and misplaced him, denying him a FAPE. Relying extensively upon federal case law interpreting and applying IDEA, the Supreme Court held that the absence of a reevaluation did not deny Brian an educational opportunity because there was no causal linkage between the absence of the reevaluation and the educational opportunity afforded to Brian. The Supreme Court also concluded, in reliance upon its opinion in B.M. v. St., 200 M 58, 649 P2d 425 (1982), and Art. X, sec. 1, Mont. Const., that Brian was entitled to bring an independent tort action for negligent misdiagnosis and misplacement. However, the Supreme Court held that because a nearly identical claim had been brought before OPI and the District Court and decided against Brian, his independent tort action was barred by the doctrine of res judicata. Parini v. Missoula County High School District No. 1, 284 M 14, 944 P2d 199, 54 St. Rep. 711 (1997).

Federal Court Wrongful Discharge Case — Dismissal on Summary Judgment Held Res Judicata as to State Court Claims: Hollister brought an action under 42 U.S.C. 1983 in federal District Court, seeking damages for being wrongfully discharged from her position with Rosebud County. The federal District Court held that Hollister did not have a sufficient property interest in her job to support an action based upon a denial of substantive due process of law and section 1983. The federal District Court therefore granted the defendant's motion for summary judgment. Hollister then filed a motion for relief from judgment in the federal District Court, pointing out that the Montana Supreme Court had since noted in Boreen v. Christiansen, 267 M 405, 884 P2d 761 (1994), that the federal District Court had misapprehended the law in her wrongful discharge suit. The state District Court dismissed, holding that it was barred, but the federal court would not reverse itself. Hollister then refiled her section 1983 claim in state District Court, but that court dismissed, holding that the federal District Court opinion was res judicata as to her section 1983 claim. The Supreme Court affirmed, noting that an identical situation occurred in Mills v. Lincoln County, 262 M 283, 864 P2d 1265 (1993). In that case, the Montana Supreme Court had also held a federal District Court opinion to be res judicata as to claims in state District Court, even though the state law had changed in the meantime. Hollister v. Forsythe, 277 M 23, 918 P2d 665, 53 St. Rep. 524 (1996).

Wrongful Discharge From Employment for Violation of Agency Rule — Suit Not Barred by Failure to Appeal Petition for Judicial Review Related to Challenge of Rule: Wadsworth, a real estate appraiser, sued the Department of Revenue for wrongful discharge from employment after being dismissed by the Department for failing to comply with the Department's conflict of interest rule. The rule prohibited Department employees from engaging in independent fee appraisals and other activities during off-duty hours. Prior to dismissal and the suit for wrongful discharge, Wadsworth had filed an administrative grievance challenging the validity of the rule. The grievance was ultimately dismissed by the District Court, and Wadsworth did not appeal. On appeal of the wrongful discharge from employment suit, the Department argued that the District Court erred in not granting the Department's motion for summary judgment based on Wadsworth's failure to appeal the petition for judicial review of the rule. The Supreme Court held that the action for wrongful discharge did not meet the criteria for application of the doctrine of res judicata. The District Court correctly denied the motion for summary judgment. Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996), distinguished in Hafner v. Dept. of Labor and Industry, 280 M 95, 929 P2d 233, 53 St. Rep. 1315 (1996).

Failure to Assert Discharge of Debt by Bankruptcy in Earlier Action as Waiver and Res Judicata in Subsequent Action: Loney was sued by his law firm for fees owed for representing him in bankruptcy proceedings. Loney failed to answer the complaint, and a default judgment was entered. Loney subsequently filed a complaint to have the judgment declared void on the basis that the debt had been discharged in bankruptcy. The Supreme Court held that Loney had been required to assert the discharge of the debt in bankruptcy as an affirmative defense when the law firm sued him. Therefore, he had waived that defense and could not now assert it in his claim against the firm. The Supreme Court also held that Loney could have litigated the issue of the discharge of the debt when the law firm sued him. Therefore, he was barred by the doctrine of res judicata from litigating that issue again in his suit to have the firm's judgment voided. Loney

v. Milodragovich, Dale & Dye, P.C., 273 M 506, 905 P2d 158, 52 St. Rep. 1093 (1995), followed in Balyeat Law, P.C. v. Hatch, 284 M 1, 942 P2d 716, 54 St. Rep. 780 (1997).

Plaintiff's Contract Action After Defendant's Prior Contract Action Barred by Res Judicata — No Attorney Fees for Defendant: A trucker obtained default judgment in Justice's Court for the failure of Greenwood to pay the full amount that the trucker charged for hauling cattle. Greenwood had claimed that the amount charged was more than agreed upon and refused to pay the difference. He also deducted an amount for the trucker's alleged injury to two steers. Greenwood's later District Court action alleging that the contract was void for an overcharge and alleging the negligent injury of the two steers was barred by res judicata. The Supreme Court also ruled that the case was not one of those rare ones in which a court could use its equitable powers to award attorney fees, which were requested by the trucker. Greenwood v. Steve Nelson Trucking, Inc., 270 M 216, 890 P2d 765, 52 St. Rep. 151 (1995), and overruled in Thornton v. Alpine Home Center, 2001 MT 310, 307 M 529, 38 P3d 855 (2001), to the extent that different claims in excess of $3,000 that could not have been raised and litigated in Small Claims Court are not barred by res judicata for subsequent consideration in District Court.

Res Judicata Inapplicable When Only Theories of Recovery and Testimony of Certain Witnesses the Same: Berlin sued Boedecker twice in actions involving fraudulent sales of royalties on oil well property. In the second suit, Boedecker argued that Berlin was precluded from litigation by the doctrine of res judicata. The prerequisites for the application of res judicata include the requirements that the subject matter and the issues of the second suit be the same as in the first suit. The Supreme Court cited In re Marriage of Stout, 216 M 342, 701 P2d 729 (1985), and held that res judicata was inapplicable because the subject matter of the suits involved different transactions or contracts and because the issues, while presenting the same theories of recovery, were not related to the same subject matter. The Supreme Court also held that it made no difference that Berlin's testimony in the second suit was the same as in the first because Berlin's testimony in the second suit was used only to describe the background to the parties' relationship and transactions. Berlin v. Boedecker, 268 M 444, 887 P2d 1180, 51 St. Rep. 569 (1994), distinguished in Balyeat Law, P.C. v. Hatch, 284 M 1, 942 P2d 716, 54 St. Rep. 780 (1997).

Clarification of "Parties or Their Privies" Element of Res Judicata: The concept of "privy" in the context of a judgment applies to one whose interest has been represented at trial. Privies are also defined as those so connected in estate, in blood, or in law as to be identified with the same interest and consequently affected with each other by litigation. However, mutual conduct between parties does not necessarily establish a shared legal interest. In this case, absent a showing of an agency relationship, the mere fact that two parties were involved in related elements of the same occurrence did not form a sufficient basis for summary judgment on the issue of privity or shared legal interest between the parties. Holtman v. 4-G's Plumbing & Heating, Inc., 264 M 432, 872 P2d 318, 51 St. Rep. 340 (1994).

Federal Court Summary Judgment Final — Subsequent State Court Action Barred as Res Judicata: Mills filed a claim in U.S. District Court against Lincoln County for negligence. The county filed a motion for summary judgment, claiming immunity under 2-9-111, and the court granted the motion. Shortly thereafter, the Legislature amended 2-9-111 to clarify that legislative immunity extended only to legislative bodies and to legislative actions taken by those bodies. Rather than filing a motion for reconsideration in federal court, Mills filed a complaint in state District Court, effectively precluding any relief from the federal system and rendering the federal court judgment final. A federal court summary judgment is a final judgment on the merits, and Mills' subsequent state action was therefore barred as res judicata. Mills v. Lincoln County, 262 M 283, 864 P2d 1265, 50 St. Rep. 1552 (1993), followed in State ex rel. Harlem Irrigation District v. District Court, 271 M 129, 894 P2d 943, 52 St. Rep. 364 (1995), and Hollister v. Forsythe, 277 M 23, 918 P2d 665, 53 St. Rep. 524 (1996).

Res Judicata Found Inapplicable to Subject Matter Jurisdiction Under Facts of Case: After protracted litigation beginning in 1977 over the use of cows for collateral for a tribal loan, the Blackfeet Tribe filed a motion to dismiss in 1986 based upon its sovereign immunity, and the District Court granted the motion in 1992. The Supreme Court held that the doctrine of res judicata, as adopted in Wellman v. Wellman, 198 M 42, 643 P2d 573 (1982), did not apply to the case. Res judicata only applies to bar the later raising of an issue if the party had a full opportunity to raise the issue and failed to do so. In this case, the Blackfeet Tribe did raise the issue as a defense in its original answer in 1977 and the issue was reserved for later consideration by the District Court's order of September 19, 1977. At no time during the subsequent 10 years did the Blackfeet Tribe have a "full opportunity" to litigate the issue of sovereign immunity. Thus, the doctrine of res judicata did not apply to this case. Wippert v. The Blackfeet Tribe, 260 M 93, 859 P2d 420, 50 St. Rep. 973 (1993).

Settlement of Estate Based on First Will Bars Probate of Second Will: In 1976, Caleb and Viola Heath executed wills creating a trust and appointed Norwest as trustee. In 1978, they both executed second wills, appointed First Trust as trustee, and revoked the first wills, trusts, and appointments. Norwest and First Trust litigated the efficacy of the respective wills and appointments until several years after Caleb's death, at which time they entered into a settlement agreement to resolve all pending litigation between Norwest, First Trust, and Caleb's and Viola's heirs. The District Court dismissed all pending litigation with prejudice and distributed Caleb's assets pursuant to the 1976 will and trust. Six months later, Tisher and Schleve, relatives of Caleb and Viola, sought to probate Viola's 1978 will and filed an action against Norwest. The District Court concluded that the action was barred by res judicata and found for Norwest on a motion for summary judgment. The Supreme Court affirmed, holding that the four prerequisites for application of res judicata were satisfied because Tisher and Schleve are privies of Caleb and Viola and because the subject matter and issues of the two legal actions were the same in that both dealt with the efficacy of the 1978 wills and trusts. Even though the issue of the efficacy of the 1978 will and trust was never actually litigated, the parties had the opportunity to litigate the issue and chose to resolve it by settlement of the case. Tisher v. Norwest Capital Management & Trust Co., Inc., 260 M 143, 859 P2d 984, 50 St. Rep. 960 (1993).

Tort and Contract Defenses in Bank's Foreclosure Action Following Borrowers' Tort Action Against Bank: In Mann I, the borrowers sued Traders State Bank for tort damages. In this case, Mann II, the bank sought foreclosure against the borrowers, who asserted both tort and contract defenses. The subject matter of the two cases is generally the same because both suits revolve around the borrower-lender banking relationship. The issues in the Mann I tort case are distinct from those inherent in the Mann II contract case. The fundamental question in the first case was whether the bank violated a standard of care, and the fundamental question in the second case is whether the mortgage, security interests, and underlying notes are valid and enforceable contracts. Therefore, res judicata does not bar the contract defenses. It was not necessary to raise the issue of the validity of the notes in Mann I; thus, res judicata did not bar the contract defenses in Mann II on the grounds that the notes' validity should have been raised in Mann I. The entire tort action occurred during the borrowers' bankruptcy proceeding, during which the debtor could not challenge the validity of the notes. By the time of Mann II, however, the bankruptcy action had been dismissed; thus, issues as to the validity of the notes had not been decided, and the borrowers could assert the contract defenses. However, the tort defenses were barred because they could have been raised in Mann I. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993), overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996).

Summary Judgment in Justice's Court as Bar to Litigation in District Court on Same Issue — Justice's Court as Court of Competent Jurisdiction for Res Judicata Purposes — No Due Process Violation: A bill collection agency brought an action in Justice's Court against Whirry for payment of a medical debt. Whirry filed a third-party complaint against Swanson, alleging that the medical debt was incurred as the result of injuries received in an automobile accident in which Swanson was negligent. Whirry moved for summary judgment against Swanson on the grounds that Swanson was solely liable for any judgment. Summary judgment was granted, and the Justice's Court entered final judgment in Whirry's favor, ordering Swanson to pay the medical debt. Whirry then filed in District Court to recover all damages incurred through Swanson's misconduct during the same accident. The District Court concluded that the Justice's Court necessarily determined Swanson's negligence in order to assign liability for Whirry's medical bills and that the matter had therefore already been litigated and was barred by res judicata. The Supreme Court agreed, holding that: (1) the four criteria for application of res judicata were met; (2) distinguishable from Boucher v. Dramstad, 522 F. Supp. 604 (D.C. Mont. 1981), the Justice's Court was a court of competent jurisdiction for determining Whirry's third-party claim; and (3) inapposite to Boyer v. Kargacin, 202 M 54, 656 P2d 197 (1982), foreclosure of the opportunity for a hearing on the merits of Whirry's case on res judicata grounds was not a violation of due process. Whirry v. Swanson, 254 M 248, 836 P2d 1227, 49 St. Rep. 764 (1992), followed in State ex rel. Harlem Irrigation District v. District Court, 271 M 129, 894 P2d 943, 52 St. Rep. 364 (1995), and overruled in Thornton v. Alpine Home Center, 2001 MT 310, 307 M 529, 38 P3d 855 (2001), to the extent that different claims in excess of $3,000 that could not have been raised and litigated in Small Claims Court are not barred by res judicata for subsequent consideration in District Court.

Res Judicata Inapplicable to Involuntary Commitment Hearing — Criterion of "Seriously Mentally Ill" Only Issue: L.B. was examined by a professional person and determined to suffer from a serious mental disorder that required treatment. Following presentation of the professional's testimony at a hearing for involuntary commitment, the District Court held that the testimony was too speculative and ordered L.B. released. After the hearing, L.B. was detained by the Sheriff's office for a short time in an attempt to find a place for him, rather than just sending him out onto the streets. During his detention, L.B. was examined by a second professional person who determined that L.B. should be involuntarily committed to the state hospital for immediate treatment, and a second petition for commitment was filed that same day. The District Court subsequently determined that L.B.'s mental illness deprived him of the ability to protect his life or health and transferred him to the state hospital for treatment. L.B. argued that the doctrine of res judicata barred consideration of the second petition. However, the District Court expressly prohibited the introduction of evidence relating to the time period prior to the first hearing; therefore, the issues were not the same in the second hearing, nor could the first order releasing L.B. be considered final and subject to res judicata. The question of whether an individual is seriously mentally ill may be brought at any time as long as the necessary statutory criteria are met. A finding at one time that an individual does not suffer from a serious mental illness is not intended to be a final and irrevocable decision on the individual's mental health. In re Mental Health of L.C.B., 253 M 1, 830 P2d 1299, 49 St. Rep. 290 (1992).

Claim Under 42 U.S.C. 1983 Not Barred by Res Judicata — Prior Summary Judgment No Bar to Consideration of Motion to Dismiss — Differing Parties: Plaintiff brought an action against the city of Great Falls to recover damages for violation of 42 U.S.C. 1983 in connection with a discharge from employment. The District Court granted the city's motion for summary judgment. Plaintiff then filed an action against her immediate supervisor, in the supervisor's official and individual capacity, making the same allegations. The supervisor moved the District Court to dismiss on the basis that the section 1983 claim was res judicata by reason of the summary judgment in the former action, and the District Court granted the motion. The Supreme Court reversed, holding that under Rule 12(b), M.R.Civ.P., the District Court's consideration of the first action was limited to consideration of the pleadings. The Supreme Court also stated that because the immediate supervisor was not a party to the first action, neither the plaintiff nor the defendant was able to present all the facts and theories in the first case that are present in the second. For these reasons, the Supreme Court held that the second action was not barred. Dagel v. Manzer, 251 M 176, 823 P2d 874, 48 St. Rep. 1166 (1991).

Failure to Show Unfair Denial of Opportunity to Have Case Heard — Res Judicata: Richland County sought to enforce a 6 ¼% oil, gas, and mineral royalty interest reserved prior to a 1937 quiet title decree by asserting that there was extrinsic fraud upon the court because plaintiff's attorney in the quiet title action, who also happened to be the Richland County Attorney, failed to appear on behalf of the county, resulting in a default judgment against the county and denying the county the opportunity to litigate the reservation. However, the county failed to produce facts to substantiate its theory that the county's interest was subverted or that the county was unfairly denied an opportunity to have its case heard. Absent such a showing, relitigation of the reservation claim was barred by res judicata. Filler v. Richland County, 247 M 285, 806 P2d 537, 48 St. Rep. 200 (1991).

Issues Fully Litigated in Federal Court — State Court Action Barred by Res Judicata and Collateral Estoppel: When the same facts and issues formed the basis of both a federal and a state court case and the case was fully litigated and final judgment was entered in federal court, dismissal by summary judgment in state court was appropriate based on the doctrines of res judicata and collateral estoppel. Gen. Motors Acceptance Corp. v. Finch, 246 M 359, 805 P2d 1331, 47 St. Rep. 2154 (1990).

Action to Enforce Land Covenant Barred by Res Judicata: The plaintiff brought an action to enforce a covenant that allowed the defendants to reside in a trailer on the property for no longer than 1 year. The defendants argued that after they had moved onto the property, the plaintiff had made representations that constituted a waiver of the covenant. The defendants were unsuccessful in the initial suit and subsequently filed a second suit, alleging that the plaintiff had fraudulently induced them to purchase the property by representing to them, prior to the sale, that he would not enforce the covenant. The Supreme Court held that the issues were similar and that the defendants had the opportunity to litigate the fraud claim in the original suit and their action was thus barred by res judicata. Turtainen v. Poulsen, 243 M 355, 792 P2d 1089, 47 St. Rep. 1028 (1990).

Agency's Unemployment Compensation Decision — Not Res Judicata in Separate Wrongful Discharge Suit: The Board of Labor Appeals ruled that the plaintiff left his employment

voluntarily and was not entitled to unemployment compensation. In a separate suit for wrongful discharge, the employer argued that the agency's decision was res judicata as to the issue of whether the plaintiff had been wrongfully discharged or had quit. The Supreme Court held that the agency's decision was not res judicata in the wrongful discharge suit in that the full panoply of issues that arises in a wrongful discharge suit is not within the realm of the agency's consideration in determining eligibility for unemployment benefits. Niles v. Weissman & Sons, Inc., 241 M 230, 786 P2d 662, 47 St. Rep. 240 (1990), following Fetherston v. ASARCO, Inc., 635 F. Supp. 1443 (D.C. Mont. 1986), and distinguishing Nasi v. Dept. of Highways, 231 M 395, 753 P2d 327 (1988).

Res Judicata Inapplicable — No Prior Final Order or Judgment: In a prior proceeding between the parties, the first court failed to rule on the wife's request for attorney fees. In a second hearing, the husband argued that the first court had implicitly denied the requested fees and that the issue was barred by res judicata. The second court ruled that the first court had never issued a final order with respect to attorney fees and therefore the request was not barred by res judicata. The second court's ruling was affirmed on appeal. In re Marriage of Lyman, 240 M 336, 783 P2d 1362, 46 St. Rep. 2174 (1989).

Res Judicata Inapplicable to Bankruptcy Court Proceedings and Federal District Court Appeal: A Bankruptcy Court dismissed with prejudice a debtor's Chapter 11 proceedings on the grounds that no plan had been filed, no assets remained in the estate, costs of administration exceeded assets, and there was no chance of reorganization. The dismissal included all adversary matters pending in relation to the Chapter 11 proceedings. The dismissal was affirmed on appeal by the U.S. District Court. Plaintiff, a third party creditor, filed a complaint in state court that set forth theories of liability based on misrepresentation, equitable estoppel, fraud, and bad faith. Plaintiff asserted that because the Bankruptcy Court decided only the issue of equitable subordination, the effect of the dismissal was to restore all parties to the status quo before the bankruptcy petition was filed. The Supreme Court found that res judicata was inapplicable to plaintiff's claim because the subject matter of the actions was not the same and the issues relating to them were not the same. Phil-Co Feeds, Inc. v. First Nat'l Bank in Havre, 238 M 414, 777 P2d 1306, 46 St. Rep. 1380 (1989).

Claim of Federal Constitution Violation in First Action and State Constitution Violation in Second: For res judicata purposes, the issues were not different when the claim in the first action was that a statute violated the federal constitution and the claim in the second action was that the statute violated the state constitution. Once a party has had full opportunity to present a claim or issue, the judgment is final as to all claims or issues that have or could have been raised. Burgess v. St., 237 M 364, 772 P2d 1272, 46 St. Rep. 870 (1989), followed in Bozeman v. AIU Ins. Co., 272 M 349, 900 P2d 296, 52 St. Rep. 823 (1995). Bozeman was distinguished in Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996).

Parties the Same When Plaintiff and Defendant in First Action Switch Places in Second: For res judicata purposes, the parties were the same when the plaintiff in the first action was the defendant in the second and the defendant in the first was the plaintiff in the second. In applying the res judicata rule, parties means all persons who have a direct interest in the subject matter of the action and a right to control the proceedings, defend, examine witnesses, and appeal. Burgess v. St., 237 M 364, 772 P2d 1272, 46 St. Rep. 870 (1989).

Question of Identical Issues as Bar to Second Action: In determining if the principle of res judicata was a bar to a second action when there was a question of whether the issues were the same, the court relied on its decision in Brannon v. Lewis & Clark County, 143 M 200, 387 P2d 706 (1963), citing Phoenix Mut. Life Ins. Co. v. Brainard, 82 M 39, 265 P 10 (1928), where it found that "[u]nless it clearly appears that the precise question involved in the second case was raised and determined in the former, the judgment is no bar to the record action". Baertsch v. Lewis & Clark County, 223 M 206, 727 P2d 504, 43 St. Rep. 1660 (1986), followed in DeMers v. Roncor, Inc., 249 M 176, 814 P2d 999, 48 St. Rep. 629 (1991), in Whirry v. Swanson, 254 M 248, 836 P2d 1227, 49 St. Rep. 764 (1992), and Slater v. Cent. Plumbing & Heating Co., 1999 MT 257, 297 M 7, 993 P2d 654, 56 St. Rep. 1023 (1999).

Barring of Action by Res Judicata — Criteria: The Supreme Court, in State ex rel. Sullivan v. School District, 100 M 468, 50 P2d 252 (1935), originally stated the criteria to be used in determining whether an action is barred by res judicata as follows: (1) the parties or their privies must be the same; (2) the subject matter of the action must be the same; (3) the issues must be the same and must relate to the same subject matter; and (4) the capacities of the persons must be the same in reference to that subject matter and to the issues between them. Since the claim by appellant in the case at bar failed as it related to criteria (2) and (3), the court upheld the District Court finding that all matters relating to a lease agreement were res judicata with the exception

of a security deposit which was not contemplated in the previous action. Geissler v. Nelson, 222 M 409, 722 P2d 632, 43 St. Rep. 1372 (1986). This criteria was applied in Searight v. Howell, 248 M 122, 809 P2d 588, 48 St. Rep. 370 (1991), Grenz v. Fire & Cas. of Conn., 255 M 121, 841 P2d 494, 49 St. Rep. 917 (1992), and in CB&F Dev. Corp. v. Culbertson St. Bank, 256 M 1, 844 P2d 5, 49 St. Rep. 1122 (1992).

Res Judicata Inapplicable — Issues Not Same: Plaintiff suffered a back injury in October 1980, underwent surgery, and was judged to have reached a stationary state. Plaintiff was given an impairment rating of 25% and in August 1981 entered a final settlement for 125 weeks of permanent and partial disability benefits. In June 1981, while employed by a different employer, plaintiff experienced a sexual incident which she characterized as a sexual assault. In September 1981, while employed by a third employer, plaintiff suffered an industrial accident. In March 1984, the Workers' Compensation Court determined that the sexual incident did not constitute a compensable injury and that plaintiff as of that date was entitled to temporary total disability benefits by reason of the September 1981 injury. The benefits were to continue until the disability ceased. In October 1984, plaintiff sought to have the settlement entered in August 1981 set aside, claiming mutual mistake of fact. The Workers' Compensation Court held that its March 1984 decision barred this issue as res judicata. On appeal, the Supreme Court held that the issues were not identical so that res judicata was inapplicable. In the first case, the question was basically one of amount. In the second case, the question went to the validity of the settlement itself. The mistake plaintiff alleged was her total disability by reason of the second industrial accident. No ruling in the first case addressed whether the settlement had to be reopened in light of the Supreme Court's decision in Holton v. F.H. Stoltze Land & Lumber Co., 195 M 263, 637 P2d 10, 38 St. Rep. 1835 (1981). The court also noted that the question of mutual mistake of fact could not have been raised in the first case. The case was reversed and remanded with directions to hear the petition on its merits. Phelan v. St. Paul Mercury Ins. Co. 220 M 296, 716 P2d 601, 43 St. Rep. 381 (1986).

Court Ruling on Use of Prior DUI Conviction — Later Civil License Revocation for Second Offense: A Justice's Court ruled that a prior DUI conviction could not be used in sentencing defendant for a second DUI offense because the prior record did not show that defendant was advised of and waived his rights before he pleaded guilty. A District Court then decided that the prior conviction could be used by the Division of Motor Vehicles in revoking defendant's license. The issues in the two causes were not the same, and therefore the prior ruling was not res judicata. Lancaster v. Dept. of Justice, 218 M 97, 706 P2d 126, 42 St. Rep. 1425 (1985).

Union-Employer Trust Fund for Employees and Union — Suing Employer in Separate Actions: A union sued an electrical contractor in federal court, claiming that the contractor failed to hire persons referred by the union and failed to require persons he hired to join the union and that persons referred who were not hired lost compensation and contributions to a benefit trust fund administered by the union and an electrical contractors' association. The assignee of the trust fund's claim against the contractor sued the contractor in a state District Court for contributions due the trust fund. The federal action was dismissed with prejudice by stipulation of the union and contractor. The state District Court then held that the state action was barred by res judicata. That ruling was erroneous, for the rights and claims sought to be enforced in the two actions were not the same and the claimants in the two actions were not in privity. Their functions and duties were different. Audit Services, Inc. v. Anderson, 211 M 323, 684 P2d 491, 41 St. Rep. 1388 (1984).

Minor Shareholder — Privy to Corporate Party: Plaintiff brought suit alleging libel, slander, contract losses, and abuse of process. The allegations had been raised earlier in Engine Rebuilders v. Seven Seas Import-Export, 189 M 236, 615 P2d 871, 37 St. Rep. 1406 (1980). At the time of that action, plaintiff, a shareholder of Seven Seas, was a minor and was dismissed from the action. Plaintiff's claim was dismissed on the basis of res judicata. The necessary criteria for applying res judicata were set out in Fox v. 7L Bar Ranch Co., 198 M 201, 645 P2d 929, 39 St. Rep. 862 (1982), as follows: (1) the parties or their privies must be the same; (2) the subject matter of the action must be the same; (3) the issues must be the same and relate to the same subject matter; and (4) the capacities of the persons must be the same in relation to the subject matter and issues between them. Plaintiff contended the parties were not the same, as he was dismissed from the original suit. The court held that, as a shareholder, he was a privy to the corporate party, Seven Seas. As privies, the decree against the corporation was conclusive against its shareholders. The only requirement is that the prior action must be adversarial in nature in order to prevent collusion between the opposing party and the corporation representing the shareholder. Brault v. Smith, 209 M 21, 679 P2d 236, 41 St. Rep. 527 (1984), followed in Nasi v. Dept. of Highways, 231 M 395, 753 P2d 327, 45 St. Rep. 710 (1988), and in St.

Medical Oxygen & Supply, Inc. v. Am. Medical Oxygen Co., 256 M 38, 844 P2d 100, 49 St. Rep. 1126 (1992).

Action to Determine Ownership of Corporate Property Precluded by Res Judicata — Identity of Subject Matter and Issues: In an action for an accounting of certain properties owned by both the plaintiff and defendant, brought after entry of an earlier default judgment against the plaintiffs in a similar action in 1971, the District Court did not err in dismissing the action as barred by the doctrine of res judicata. The doctrine of res judicata applies, and the plaintiffs are barred from asserting their claim because the case is an attempt to relitigate the 1971 action. This is true despite the plaintiffs' claims that the current action is for an accounting for events occurring after the conclusion of the former case and involves property not included in the former case, as the complaint does not support the plaintiffs' assertions and the former action was for an accounting of all property owned by the parties. Under the requirements for application of res judicata expressed in Meagher County Water District v. Walter, 169 M 358, 547 P2d 850 (1976), and Brannon v. Lewis & Clark County, 143 M 200, 387 P2d 706 (1963), the doctrine applies and the claim is therefore barred. Wellman v. Wellman, 205 M 504, 668 P2d 1060, 40 St. Rep. 1459 (1983).

Judgment Res Judicata — Precedent for Standing Subsequently Overruled: The res judicata consequences of a final unappealed judgment on the merits are not altered by the fact that the judgment may have rested on a legal principle pertaining to standing that was subsequently overruled in another case. Thus, defendants may not now avoid the effect of a final judgment by complaining that if the suit were to be brought after the time of judgment, plaintiffs would not have standing. Libby Rod & Gun Club v. Moraski, 519 F. Supp. 643, 38 St. Rep. 1213 (D.C. Mont. 1981).

Conscionability of Divorce Settlement Agreement Not Same as Sufficiency — Finding of Conscionability Not Res Judicata on Completeness of Agreement: At the conclusion of a hearing on the enforcement of his divorce settlement agreement several months after his divorce, the former husband moved to amend the finding of deficiency of the settlement agreement or, in the alternative, to grant a new trial. The motion was denied and the former husband appealed. The District Court had found in its decree of legal separation that the settlement agreement executed by the parties and incorporated into the decree was conscionable and should be approved. The husband contended on appeal that this finding was res judicata as to the issue of the marital agreement, thus barring any further requests by the wife. The Supreme Court found that the res judicata requirement of identity of issue was not met because there was sufficient dissimilarity between the issues in the two actions. The agreement disposed of the marital property but made no provision for any future support. The property disposition had no direct bearing on any contemporary agreement for obligations to be fulfilled in the near future. Res judicata, therefore, did not bar further action on any alleged agreements between the parties as to matters not involving the disposition of marital property. Harris v. Harris, 189 M 509, 616 P2d 1099, 37 St. Rep. 1696 (1980).

Defenses Not Estopped by Invalid Collateral Judgment: When a contempt citation was issued in a separate, not related action, because of defendant's violation of Writs of Attachment and Execution, it was proper in a collateral attack to show that plaintiff had failed to comply with statutory requirements for attachment of property and hence void the underlying judgment upon which the contempt was based. As a result of the error in finding the defendant in contempt, the contempt order had no preclusive effect on the present case, and it was error to strike defendant's defenses and grant plaintiff summary judgment upon the theories of res judicata, collateral estoppel, and collateral attack. Phillips v. Loberg, 186 M 331, 607 P2d 561 (1980).

Validity of Marriage Not Determined in Paternity Action: Where appellant allegedly fathered the child of the parties in 1962 and respondent subsequently sought and obtained a paternity decree against appellant in 1964 stating that the child was born "out of wedlock", a subsequent divorce action by the respondent was not barred by the doctrine of res judicata, as the validity of the parties' Mexican marriage was not material to the 1964 paternity decree and was never actually and necessarily adjudicated in the 1964 proceeding. Wilson v. Wilson, 186 M 290, 607 P2d 539 (1980).

Amendment of Complaint After Dismissal — Defense Inapplicable: Where Supreme Court affirmed dismissal of complaint by trial court on ground that complaint was unverified as required by 25-4-203 and on additional ground that complaint failed to state a claim upon which relief could be granted and a week later plaintiff filed a second verified amended complaint which eliminated confusion, the issue of res judicata was not so clear that the Supreme Court on the second appeal could say that the trial court could have found the defense of res judicata

available without an answer under Rule 8(c) or responsive pleading to present the record of the former judgment plus a statement to show why it should be treated as res judicata. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

Res Judicata as Affirmative Defense: Res judicata must be pleaded in the answer as an affirmative defense when it does not appear on the face of the complaint in order to support a dismissal on the grounds of failure to state a claim upon which relief can be granted. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

COUNTERCLAIM

Counterclaims Entered After Judgment Not Barred by Estoppel: A judgment can bar counterclaims in existence at the time the judgment was entered, but it cannot bar claims that arose after its entry. Nimmick v. Hart, 248 M 1, 808 P2d 481, 48 St. Rep. 293 (1991).

Setoff and Recoupment to Be Pleaded: The terms "setoff" and "recoupment" are sometimes included in the term "counterclaim", and must be pleaded in order to enable the court to base a judgment thereon. Galiger v. McNulty, 80 M 339, 260 P 401 (1927).

Bill of Particulars and General Denial Not Counterclaim: A defendant, whether as defendant or as garnishee, cannot avail himself of a counterclaim unless he pleads it. It cannot be asserted under a general denial of indebtedness, and the furnishing of a bill of particulars in which his claim is listed is not pleading a counterclaim. Dolenty v. Rocky Mtn. Bell Tel. Co., 41 M 105, 108 P 921 (1910).

Defenses of Garnishee — Counterclaim to Be Pleaded: Any defense that a garnishee could interpose, in an action brought against him by the defendant, may be interposed as garnishee in an action by the attaching creditor. If he relies upon a counterclaim, he must, in either case, plead it. Dolenty v. Rocky Mtn. Bell Tel. Co., 41 M 105, 108 P 921 (1910).

Counterclaim to Be Pleaded: A counterclaim must be pleaded, or it cannot be proved. Union Mercantile Co. v. Jacobs, Sultan & Co., 20 M 554, 52 P 375 (1898).

MITIGATION OF DAMAGES

No Error in Failure to Reduce Wage Loss Recovery in Human Rights Case for Failure to Mitigate: After finding that plaintiff was subjected to employment discrimination, the hearings examiner concluded that plaintiff was entitled to recover lost wages. Defendants contended that the wage loss should be reduced because plaintiff failed to take reasonable steps to mitigate the damages. The Supreme Court agreed that in a claim for lost wages before the Commission on Human Rights, a claimant must take reasonable steps toward mitigating damages. Citing Hulett v. Bozeman School District, 228 M 71, 740 P2d 1132 (1987), the court noted that plaintiff was not obligated to seek out all possible employment opportunities, but needed only to be reasonable in pursuing offers of employment. In this case, it was undisputed that plaintiff was emotionally debilitated, and although there was evidence of other reasons why plaintiff did not immediately seek new employment, plaintiff's medical testimony and testimony concerning plaintiff's loss of confidence, anxiety, and reluctance to meet new people supported the hearings examiner's findings, and the Supreme Court declined to disturb those findings. Benjamin v. Anderson, 2005 MT 123, 327 M 173, 112 P3d 1039 (2005).

Duty to Mitigate Damages — Standard Met: In a marital status discrimination case involving a school district antinepotism policy, the Supreme Court applied the standard established for the duty to mitigate damages as set out in Harrington v. Holiday Rambler Corp., 176 M 37, 575 P2d 578 (1978), that is, the duty to do what an ordinarily prudent person would do under the circumstances. The court found that after plaintiff was not hired by the school district, she applied for employment at clothing stores, jewelry stores, flower shops, doctors' offices, dentists' offices, the office of county superintendent of schools, the university, and with the school district again. Her failure to apply for teaching positions in communities surrounding Bozeman, in light of the other evidence of her seeking employment, did not constitute failure to mitigate damages. Hulett v. Bozeman School District, 228 M 71, 740 P2d 1132, 44 St. Rep. 1351 (1987).

Burden — Pleading and Proof: Matter in mitigation of damages is a defense and the burden of pleading and proving it rests with the defendant. Garden City Floral Co. v. Hunt, 126 M 537, 255 P2d 352 (1953). See also E.C.A. Envtl. Management Serv., Inc. v. Toenyes, 208 M 336, 679 P2d 213, 41 St. Rep. 388 (1984).

Partial Defense to Be Pleaded: Under a general denial in a husband's action for criminal conversation, evidence as to the general bad reputation of plaintiff's wife, being matter tending to mitigation or reduction of damages, and hence a partial defense, was not admissible since partial defenses must be specially pleaded. McKim v. Beiseker, 56 M 330, 185 P 153 (1919).

INSURANCE POLICY PROVISIONS

Waiver of Right to Deny Insurance Coverage — Independent Investigation: Where an insurance company made an independent investigation of the employee status of an insured, found that he was covered, and then later denied coverage to the detriment of the insured, reliance on the investigation constituted waiver of the right to deny coverage even if facts of the employee status were misrepresented. Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115, 43 St. Rep. 2243 (1986).

Remedy in Contract or in Tort — Motion for Separate Trials: An insurer requested a separate trial on the affirmative defenses raised by cross-claim and requested that the trial of the remaining issues raised by the insured be postponed until after the final determination of the affirmative defenses. The Supreme Court noted that the insured, having a choice of two remedies, one in contract and one in tort, elected to pursue his claim in tort. Recovery by him on his claim in tort would have the effect of barring his claim for breach of contract. If the motion for separate trials had been granted, it would have converted insured's claim for tort to one for breach of contract. Insured would then have been precluded from presenting any evidence as to consequential damages for the tort, let alone any evidence relating to punitive damages. His right to trial by jury of his tort claim, guaranteed by the seventh amendment to the U.S. Constitution and Art. II, sec. 26, Mont. Const., would have been prejudiced. Denial of the motion to bifurcate was proper. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Failure to Plead Specific Provisions of Insurance Policy — Effect: When the insured incorporates the entire insurance policy as a defense, all parties understand the exclusions relied upon and no party is misled. The provisions at issue need not be specifically pleaded and the issues may be joined by a general denial. Home Ins. Co. v. Pinski Bros., Inc., 156 M 246, 479 P2d 275 (1971).

Policy Provisions — No Pleading Required: Insurer need not affirmatively plead exceptions and exclusions from coverage contained in policy where entire policy and insurer's denial of coverage were incorporated in insured's pleadings. Home Ins. Co. v. Pinski Bros., Inc., 156 M 246, 479 P2d 274 (1971).

ESTOPPEL

Second Suit Based on Same Facts as Case Dismissed With Prejudice Properly Dismissed as Res Judicata: While a first employment termination claim was pending, Xu filed another claim based on the same facts. The first claim was ultimately dismissed with prejudice for Xu's failure to comply with discovery, and the District Court then summarily dismissed the second case based on res judicata and collateral estoppel. Xu appealed on grounds that it was an abuse of discretion for the District Court to dismiss the second case because the second case contained a new claim of defamation and because there was no final adjudication on the merits of the first claim. The Supreme Court disagreed. Res judicata applied not only to the issues that were raised in the first claim, but also to issues that could or should have been raised in the first litigation. Collateral estoppel applied because a dismissal with prejudice constituted an adjudication on the merits. Summary dismissal of the second case was therefore affirmed. Xu v. McLaughlin Research Institute for Biomedical Science, Inc., 2005 MT 209, 328 M 232, 119 P3d 100 (2005).

Doctrine of Corporation by Estoppel Versus De Facto Corporation Doctrine — Requisite Donative Intent to Show Inter Vivos Gift to Corporation by Estoppel: A church incorporated in 1998. The attorney who filed the incorporation subsequently moved out of state, and because annual reports were not filed, the Secretary of State involuntarily dissolved the church's corporate status in 2000. The church's corporate status was reinstated in 2004. The church was not aware that it was not a valid corporation when it received a gift of property in 2002, but claimed that it was nevertheless a de facto corporation able to accept the gift. The couple who donated the property claimed that because they did not know that the church was not a valid corporation, they should be allowed to revoke the gift and that the subsequent reinstatement of the church's corporate status after the couple sought to revoke the gift did not retroactively create donative intent that the couple had revoked. The Supreme Court distinguished the de facto corporation, which was abolished in 35-1-119, from the doctrine of corporation by estoppel, which provides that a party that has dealt with a corporation cannot then deny the corporation's existence. The court applied the doctrine of corporation by estoppel to this case. It would be inequitable to allow defendants to escape possible liability just because the church, acting in good faith, was involuntarily dissolved at the time that the possible liability arose. Thus, defendants were equitably estopped from denying the corporate status of the church. The couple had the requisite donative intent to meet the definition of an irrevocable inter vivos gift, and as

owner of the gifted property, the church had standing to sue. Valley Victory Church v. Sandon, 2005 MT 72, 326 M 340, 109 P3d 273 (2005).

Landowner Subdivision Rights Precluded by Restrictive Covenants — No Oral Contract Without Consideration — Statute of Frauds Applied: Plaintiffs subdivided about 80 acres into a 40-acre water ski lake and five residential lots. Restrictive covenants provided that no more than six landowners would be allowed to use the lake, that five landowners would be owners of lots in the subdivision, and that one landowner would be the owner of a single family dwelling built on property immediately west of the lake. Plaintiffs initially intended to build on the west side of the lake and become the sixth landowner but changed their minds, sold the west side property, and decided to build on the south side instead. Four of the five landowners filed an affidavit that when they purchased their lots, they understood that plaintiffs would be the sixth landowner and that they had orally approved the relocation of plaintiffs' residence to the south shore. After plaintiffs' home was built on the south side, they sought a declaratory judgment that they were the sixth landowner under the restrictive covenants and thus had the right to use the lake. One dissenting landowner opposed the declaratory judgment and moved for summary judgment on grounds that the restrictive covenants prohibited plaintiffs from use of the lake. The District Court agreed and granted summary judgment. On appeal, the Supreme Court agreed that there was no evidence of consideration given to the landowners for modification of the covenants and that as a result, the modification benefited plaintiffs only. The right to use the lake ran with the land and was therefore a real property interest, and under the statute of frauds, any transfer of the right from one parcel to another had to be in writing or altered by an executed oral agreement. However, without consideration, there could be no oral contract, and without an oral contract, there could be no executed oral contract. Plaintiffs' argument that because they relied on oral agreements, equitable estoppel should prohibit defendants from denying plaintiffs' use of the lake also failed because equitable estoppel does not apply under the statute of frauds except when the statute would operate to perpetuate a fraud. The District Court was affirmed. Hanson v. Water Ski Mania Estates, 2005 MT 47, 326 M 154, 108 P3d 481 (2005).

Misrepresentation of Value of Estate — Estoppel Applicable to Prevent Advantage From Misrepresentation: A conservator knew, but failed to mention, that an estate included annuities and jointly held property that was not included in the final estate inventory. Other parties, to their detriment, relied on the inventory as an accurate representation of the value of the estate. The District Court properly held that it would not be equitable for the conservator to take advantage of the misrepresentation of the value of the estate by reducing the distribution to the other parties. The Supreme Court held that the elements of equitable estoppel were met, and the District Court was affirmed. In re Estate of Stukey, 2004 MT 279, 323 M 241, 100 P3d 114 (2004). See also Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131 (1997).

No Error in Denial of Motion to Amend Pleadings to Address Previously Decided Statutory Constitutionality: In Geil v. Missoula Irrigation District, 2002 MT 269, 312 M 320, 59 P3d 398 (2002), the Supreme Court held that a process allowing a landowner to petition for exclusion from an irrigation district was constitutional. The dissent in Geil suggested an additional constitutional argument that was not previously considered, so the irrigation district attempted to amend the pleadings, but the motion was denied. On appeal, the Supreme Court noted that although leave to file amendments to pleadings should be freely granted, a District Court also has discretion to deny amendments to pleadings when justice requires and that denial of a motion to amend will be upheld absent an abuse of that discretion. Noting the length of the proceeding and the fact that the irrigation district brought the new constitutional argument only after the dissent brought it to its attention, the Supreme Court determined that Geil had addressed the constitutionality issues, so further constitutional arguments were barred by res judicata and collateral estoppel. Thus, the District Court did not abuse its discretion in denying the irrigation district's effort to amend the pleadings, and the District Court was affirmed. RSG Holdings v. Missoula Irrigation District, 2004 MT 214, 322 M 369, 96 P3d 1131 (2004). See also Geil v. Missoula Irrigation District, 2004 MT 217, 322 M 388, 96 P3d 1127 (2004), and Petitioners I-549 v. Missoula Irrigation District, 2005 MT 100, 326 M 527, 111 P3d 664 (2005).

Partner Estopped From Claiming Damages From Formation of Corporation Necessitated by Partner's Own Acts: As a result of one partner's refusal to sign documents necessary for a farm partnership to qualify for federal funding benefits, the remaining partners formed a separate business and qualified for the benefits. The abstaining partner then claimed damages because of formation of the new business and its subsequent leasing of partnership property. The District Court held that the partner was estopped from complaining about the new business, and on appeal, the Supreme Court affirmed. The partner knew the history and significance of the federal benefits to the partnership and yet refused to sign the necessary documentation shortly

before the deadline, which amounted to a representation or concealment of material fact, and induced the remaining partners to form the new business. The six elements of equitable estoppel as set out in Selley v. Liberty NW. Ins. Corp., 2000 MT 76, 299 M 127, 998 P2d 156 (2000), were met, and the partner was estopped from complaining that the partnership detrimentally altered its position and then denying the just and legal consequences that were caused by the partner's own conduct, act, or omission. Pankratz Farms, Inc. v. Pankratz, 2004 MT 180, 322 M 133, 95 P3d 671 (2004).

Legal Malpractice Claim by Estate Not Barred by Res Judicata, Equitable Estoppel, or Judicial Estoppel: A personal representative brought a legal malpractice damage suit on behalf of the estate against an attorney who drafted a trust document and will. The trust beneficiaries brought a separate suit against the trustee. The District Court granted summary judgment for the attorney on grounds of res judicata, equitable estoppel, and judicial estoppel. On appeal, the Supreme Court reversed. Res judicata and collateral estoppel did not apply because the subject matter and parties in the beneficiaries' suit were different. Equitable estoppel did not apply because the defendants did not present any evidence to establish that they relied on an act by the personal representative or changed their position for the worse because of that act. Judicial estoppel did not apply because the judicial admission in this case referred only to plaintiffs' legal theory and not to an unequivocal statement of fact and because of the absence of any evidence that defendants were misled by a judicial admission. Thus, summary judgment was inappropriate. Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Legal Malpractice Claim Timely Filed — Summary Judgment Inappropriate When Date of Discovery and Accrual Disputed: The Watkins estate filed a legal malpractice claim against an attorney who set up the trust. The District Court found that the 3-year statute of limitations had run on filing the suit and granted summary judgment for the attorney. On appeal, the Supreme Court reversed. After concluding that the statute of limitations does not begin to run until both the discovery rule and the accrual rule have been satisfied, the court examined the applicability of both rules. The claim was filed in 1997, but the estate did not discover the attorney's negligence until 1995, which was excusable because: (1) the trustee relied on the fiduciary relationship and trusted that the attorney's assertion that the trust was revocable was correct, even though it was irrevocable; (2) of the complexity of the estate plan, which was difficult even for experts to understand and was beyond the understanding of a layperson; and (3) the attorney may have fraudulently concealed the malpractice. Further, because the trustee continued to treat the trust as revocable in reliance on the attorney's advice, the estate did not sustain any actual damages until the irrevocable nature of the trust was discovered and trust beneficiaries brought suit to remove the trustee in 1996, well within the statute of limitations. The attorney's contention that res judicata and estoppel barred the present suit because the beneficiaries also maintained a separate suit for damages also failed because neither the parties nor the issues were the same. Summary judgment was thus improper, and the case was remanded. Estate of Watkins v. Hedman, Hileman & Lacosta, 2004 MT 143, 321 M 419, 91 P3d 1264 (2004), following Uhler v. Doak, 268 M 191, 885 P2d 1297 (1994). See also Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Improper for District Court to Look Beyond Language of Amended Judgment Decree When Judgment Not Ambiguous or Obscure: Following remand of Harland v. Anderson, 169 M 447, 548 P2d 613 (1976), which awarded defendant summary judgment on plaintiff's claims for a prescriptive easement across defendant's property, the District Court took up plaintiff's alternative request to condemn an easement across defendant's land for plaintiff's use. In 1983, the court granted plaintiff an unrestricted easement, and defendant moved to amend the judgment to provide compensation for the taking of the easement, but the motion was denied. The parties then entered a stipulation providing $7,500 for defendant's attorney fees and costs, and the parties agreed not to appeal the amended judgment. The stipulation was approved. Almost 20 years later, plaintiffs commenced litigation seeking declaratory and injunctive relief on grounds that defendant had wrongfully interfered with the 1983 unrestricted easement. Defendant claimed that the 1983 right-of-way was limited to agricultural and grazing purposes and moved for summary judgment on grounds of res judicata, judicial estoppel, laches, and waiver. The District Court concluded that the language of the 1983 amended judgment implied that the findings and conclusions were necessary to the judgment, so the court reviewed the 1983 findings and conclusions, concluded that the easement was restricted to agricultural and grazing purposes, granted defendant summary judgment on res judicata grounds, and dismissed plaintiffs' summary judgment motion and claim with prejudice. On appeal, plaintiffs asserted that the District Court erred in looking beyond the plain language of the 1983 amended judgment. The Supreme Court cited Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), for

the holding that a District Court may refer to the entire record in an original case when construing a decree that is obscure or ambiguous, but that when the language of the decree is plain, there is no need to construe it or to resort to pleadings or evidence. In this case, the 1983 decree clearly and unambiguously granted plaintiff an unrestricted easement across defendant's ranch, and it was error for the District Court to look beyond the face of the decree instead of accepting it at face value and speculating as to the reasoning behind the particular result. Thus, summary judgment for defendant was reversed, and the District Court was ordered to enter summary judgment for plaintiffs. Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004).

Improper Resolution of Disputed Issues of Material Fact Once Insurer's Duty to Defend Established — Reversible Error: A driver was injured when his vehicle struck a horse and filed a claim against Staples, who was allegedly pasturing the horse just prior to the accident. Staples then filed a third-party complaint against the horse owners, claiming that as the horse's custodian, he was an additional insured under the insurance policy of one owner and was entitled to a defense. Defendant insurer unilaterally decided that its insured was not the horse's owner and sought a declaration that it had no duty to defend or provide coverage to Staples. On cross-motions for summary judgment, the District Court found that Staples might be an insured under the policy and that defendant had a duty to defend Staples, but then went on to conclude that because the policyholder did not own the horse at the time of the accident, Staples was not a third-party insured. Therefore, summary judgment was granted to the insurer. On appeal, the Supreme Court reversed. Having correctly determined that the insurer had a duty to defend, the District Court should have ended the analysis and concluded that because the insurer breached that duty, it was estopped from denying coverage and that Staples was entitled to coverage. It was error for the District Court to then proceed to resolve disputed issues of fact in ruling on the summary judgment motion in favor of the insurer. Staples v. Farmers Union Mut. Ins. Co., 2004 MT 108, 321 M 99, 90 P3d 381 (2004), following Independent Milk & Cream Co. v. Aetna Life Ins. Co., 68 M 152, 216 P 1109 (1923), Graber v. St. Farm Fire & Cas. Co., 244 M 265, 797 P2d 214 (1990), Grindheim v. Safeco Ins. Co., 908 F. Supp. 794 (D.C. Mont. 1995), Insured Titles, Inc. v. McDonald, 275 M 111, 911 P2d 209 (1996), Farmers Union Mut. Ins. Co. v. Horton, 2003 MT 79, 315 M 43, 67 P3d 285 (2003), and Lee v. USAA Cas. Ins. Co., 2004 MT 54, 320 M 174, 86 P3d 562 (2004).

Improper Assumption That Defense Verdict in Underlying Negligence Action Precludes Subsequent Unfair Trade Practices Claims — Reversible Error: Plaintiff was involved in an automobile accident when an employee of the Goosebill Ranch struck a vehicle driven by the Cloutiers and then struck plaintiff's vehicle, which was pushed across an intersection and collided with a truck that was proceeding through the intersection. Plaintiff sued Goosebill Ranch for negligence, but the jury returned a verdict for the ranch, and plaintiff appealed. The Cloutiers also sued Goosebill Ranch in a separate action, and in that case, the jury found that the ranch was negligent and awarded the damages to the Cloutiers. The damages were paid by the defendant insurance company. While appeal of plaintiff's negligence case was pending, plaintiff settled, and the judgment against plaintiff was released as part of the settlement, but plaintiff reserved the right to bring a bad faith action against that insurer. Plaintiff then brought an unfair trade practices claim against the insurers, asserting violation of 33-18-242 and alleging claims for outrage or intentional infliction of severe emotional distress. The District Court held that the initial jury verdict for Goosebill Ranch provided the insurers with a reasonable basis defense to plaintiff's subsequent unfair trade practices claim and that plaintiff could not bring a statutory bad faith action claiming liability was reasonably clear when the jury had decided the opposite, so plaintiff's claim was dismissed. On appeal, the Supreme Court reversed. The District Court's assumption that the unfair trade practices claim sought to relitigate the underlying claim and that the issues in both claims were the same was incorrect because the issues were in fact separate. An unfair trade practices claim is considered an independent cause of action. The District Court's reasoning that an unfair trade practices claimant must first establish liability in an underlying claim and that an adverse jury verdict defeats the claim was also erroneous because under 33-18-242, a settlement of the underlying claim is sufficient to allow an unfair trade practices claim, and a defense verdict in the underlying negligence suit was not tantamount to a finding that the insurer did not engage in unfair trade practices. Further, a ruling that a defense verdict provided a reasonable basis defense to a subsequent unfair trade practices claim as a matter of law was also erroneous because insurers would then be encouraged to obtain defense verdicts at any cost to shield themselves from subsequent unfair trade practices claims. Thus, a defense verdict in the underlying negligence claim did not collaterally estop plaintiff from pursuing an unfair trade practices claim. Last, plaintiff's failure to raise the

issue of insurer misconduct in a Rule 60(b), M.R.Civ.P., motion in the underlying negligence case did not preclude pursuit of an unfair trade practices claim because the unfair trade practices claims were not litigated in the underlying case and were not issues that should have been litigated in the negligence suit for personal injuries. Graf v. Cont. W. Ins. Co., 2004 MT 105, 321 M 65, 89 P3d 22 (2004). See also Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834 (2000), and Rausch v. Hogan, 2001 MT 123, 305 M 382, 28 P3d 460 (2001).

No Requirement That Court Take as True Conclusions or Allegations With No Factual Basis or Contrary to What Has Been Adjudicated — Estoppel — Dismissal Proper: In Cowan v. Cowan, 2004 MT 68, 320 M 332, 87 P3d 443 (2004), the District Court held that a husband's parents and sister had no enforceable ownership interests in their own right to disputed marital property because any interest that they arguably had was dependent on the husband's equitable interest, which was litigated in the dissolution action in which the husband denied any interest in the property. Nevertheless, the parents and sister brought a separate action, claiming that the parents were trustors of a trust created for the husband's benefit and that the sister was a successor trustee or trust beneficiary. The District Court dismissed the complaint pursuant to Rule 12(b), M.R.Civ.P., for failure to state a claim. The parents and sister appealed, but the Supreme Court affirmed. The District Court did not consider matters outside the pleadings, which would have required that the dismissal motion be converted to a summary judgment motion, but properly considered only the complaint and incorporated documents. Moreover, the court was not under any duty to take as true legal conclusions or allegations that had no factual basis or that were contrary to what had already been adjudicated. Any purported interest in the property by the husband was barred by estoppel. The prior decision that adjudicated the husband's interest in the property extinguished any derivative claim that the parents and sister might have had, and the complaint and attached documents supported the District Court's granting of the motion to dismiss. Cowan v. Cowan, 2004 MT 97, 321 M 13, 89 P3d 6 (2004), following Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001).

Deferred Payment Plan for Child Support Arrearages Proper With Parties' Agreement but Improper for Medical Support Arrearages Absent Agreement — Estoppel: Rather than requiring immediate payment of all past-due amounts for child support and medical support, the District Court set up a deferred payment plan that required payment of current child support, an additional monthly amount for past-due child support, and an additional monthly amount for past-due medical support. The wife contended that the deferred payment plan violated 40-4-208 because the plan constituted a retroactive modification of support. The Supreme Court held in In re Marriage of Hooper & Crittendon, 247 M 322, 806 P2d 541 (1991), that the doctrine of estoppel applies to support payments if: (1) there is a substantial and continuing change in circumstances rendering the original decree inequitable; (2) there is a mutual agreement between the parties made in good faith; and (3) conduct over a period of years is consistent with the agreement. Here, the parties made an express agreement regarding the deferred payment plan, based on the husband's reduced income because of his failing business, that was followed for over 3 years. Thus, under the estoppel doctrine, the husband was entitled to rely on the wife's conduct in making the agreement. However, the parties made no agreement concerning medical support, so the District Court erred in ordering deferred payment of medical support because estoppel did not apply, and the case was remanded for judgment for the amount of past-due medical support. In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004).

Party Estopped From Asserting That Property Placed in Trust Given Prior Denial of Interest in Property: When dividing the marital estate, the District Court found that the husband had gifted a parcel of property to the wife. Title to the property was never in the husband's name, but was always held by the husband's parents or by one of his previous wives. The husband asserted that the intent in transferring the property was to establish a trust for his benefit, with the wife as trustee. However, the husband was judicially estopped from the trust argument because he had repeatedly and unequivocally denied that he had any interest in the property in a prior lawsuit against him for past-due child support. Allowing the husband to reverse his position would have substantially altered the wife's share of the marital distribution after she helped support the husband and helped add to the value of the property. No person may take advantage of the person's own wrong, and a court of equity will not aid a person who has caused title to property to be transferred to another for the purpose of defrauding creditors. Cowan v. Cowan, 2004 MT 68, 320 M 332, 87 P3d 443 (2004), following Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001). See also Cowan v. Cowan, 2004 MT 97, 321 M 13, 89 P3d 6 (2004), in which adjudication of the husband's claim in Cowan, id., was held to have extinguished any derivative claim in the property that the husband's parents and sister may have had.

Assurance of Coverage Made by Agent — Coverage Not Extended Beyond Policy Terms:

Defendant insurer claimed that plaintiffs' claims in a 2002 action were barred by collateral estoppel and res judicata because of the prior holding in Lee v. USAA Cas. Ins. Co., 2001 MT 59, 304 M 356, 22 P3d 631 (2001). Applying the test in Haines Pipeline Constr., Inc. v. Mont. Power Co., 265 M 282, 876 P2d 632 (1994), for determining whether collateral estoppel barred the present action because it might be a relitigation of the 2001 case, the Supreme Court disagreed with defendant's assertion. Plaintiffs had not previously litigated whether defendant had a duty to defend and a duty to indemnify Hoss because that issue did not arise until defendant refused to indemnify Hoss and Hoss confessed judgment. Also, the issue of whether defendant had a duty to defend and a duty to indemnify Hoss was different from the issue in the 2001 case, which concerned whether Lee was a named insured under Hoss's policy, thereby entitling Lee to underinsured motorist benefits. Because the present issue was never litigated, there was never a final judgment on the merits, so defendant's collateral estoppel and res judicata arguments were inapplicable. Lee v. USAA Cas. Ins. Co., 2004 MT 54, 320 M 174, 86 P3d 562 (2004).

Lee was injured in an accident in Louisiana while in a taxi and filed an underinsured motorist (UIM) claim pursuant to coverage provided by USAA Casualty Insurance Co. (USAA) on two vehicles that she jointly owned, with Hoss contending that she was entitled to stack coverage under the policies. Although USAA initially indicated that Lee would be entitled to UIM coverage because she was a co-owner of the vehicles, the insurer later changed its position and denied coverage on grounds that because Lee was not a named insured and as a matter of law not a "covered person" under the relevant policy provisions, USAA had no obligation to treat her as such. The District Court granted summary judgment for USAA, concluding that Lee was not an insured for purposes of UIM coverage under the express language of Hoss's policy and that Lee could not benefit from a policy to which she was not a party. On appeal, Lee contended that she was entitled to a new trial because USAA's claim adjuster initially indicated that Lee would be covered, USAA should be bound by that admission of coverage, and USAA's first answer should be a binding judicial admission as a matter of law. The Supreme Court relied on DeJonge v. Mut. of Enumclaw, 843 P2d 914 (Oreg. 1992), and Shows v. Pemberton, 868 P2d 164 (Wash. Ct. App. 1994), in holding that an assurance made by an insurance agent that a particular coverage exists, in the absence of an ambiguity, does not create or extend coverage beyond the covered risks expressly identified or excluded in the policy. Assurances or representations made as a result of confusion and misfeasance by an insurance agent do not render an otherwise unambiguous policy ambiguous as a matter of law. As a general rule, the agent's conduct may be offered to demonstrate that an ambiguity exists, particularly from the perspective of a reasonable insurance consumer. Nevertheless, in some limited instances, an assurance of coverage by an agent that conflicts with an unambiguous policy may afford an insured relief under the theories of waiver or equitable estoppel. Lee pursued the theory of estoppel in this case, but failed to prove that she relied on the agent's representation of coverage to her detriment. A judicial admission is not binding unless it is an unequivocal statement of fact, rather than a conclusion of law or the expression of an opinion. USAA admitted no material fact of consequence to the case. Thus, neither the agent's representations that coverage existed nor the first answer admitting that Lee was covered served as sufficient grounds for enforcing the policy in her favor or for estopping USAA from denying coverage. Lee v. USAA Cas. Ins. Co., 2001 MT 59, 304 M 356, 22 P3d 631 (2001), distinguishing Dion v. Nationwide Mut. Ins. Co., 22 Mont. Fed. Rep. 225 (D.C. Mont. 1997), and Boyle v. Nationwide Mut. Ins. Co., 25 Mont. Fed. Rep. 446 (D.C. Mont. 1999).

No Equitable Estoppel of Defense of Sixty-Month Claim Limit on Workers' Compensation Benefits: Following a work-related injury in 1992, Wiard did not submit a medical claim within 60 months, as required under 39-71-704(1)(d) (now (1)(e)) to avoid termination of benefits. Wiard asserted that the insurer should be equitably estopped from asserting the 60-month claim limit as a defense because if he had been advised of the 60-month limit, he would have sought medical care during that period to extend the benefits. However, Wiard had an affirmative duty to exercise his medical benefits if he reasonably needed medical care within the 60-month period, and if Wiard did not need medical care within that period, then the failure to obtain medical care could not be construed as reliance. Therefore, the insurer's defense was properly allowed. Wiard v. Liberty NW. Ins. Corp., 2003 MT 295, 318 M 132, 79 P3d 281 (2003).

Error in Failing to Consider Estoppel Related to Waiver of Right to Declare Contract Forfeiture — Summary Judgment Improper: When plaintiffs began experiencing financial problems, they notified defendants that they would not be able to make the annual payment on their property. Defendants allegedly told plaintiffs that they would have whatever time they needed to come up with the money, as long as they paid any additional interest and other expenses. Defendants subsequently sent plaintiffs a default notice and terminated the contract

for deed. Plaintiffs contended that defendants waived the right to terminate the contract and should be estopped from forfeiting the contract. The District Court dismissed the waiver and estoppel arguments as an attempt to offer parol evidence to amend the contract and granted summary judgment to defendants. However, plaintiffs were not trying to amend the contract, but rather were simply trying to show that defendants waived the right to foreclose for at least a period of time, that plaintiffs relied on the waiver, and that defendants should be estopped from foreclosure. Because material questions remained as to whether a waiver occurred, summary judgment was improper and the case was remanded for further proceedings. Danelson v. Robinson, 2003 MT 271, 317 M 462, 77 P3d 1010 (2003).

Refusal to Enforce Unsubstantiated Oral Agreement to Dismiss Claim for Prescriptive Easement — Parol Evidence Rule and Statute of Frauds Inapplicable: Defendant contended that the District Court erred in failing to estop plaintiff from asserting claims for a prescriptive easement across defendant's property because an agent of plaintiff orally agreed to dismiss the claims and defendant relied on the promise to defendant's detriment. The District Court held that the parol evidence rule and the statute of frauds prohibited admission of evidence of an oral agreement to dismiss the case because there were written temporary access agreements in place and that defendant did not offer sufficient evidence to meet either a fraud or estoppel exception to the parol evidence rule. The Supreme Court found that the trial court reached the correct result, albeit for the wrongs reasons, by automatically applying the parol evidence rule and the statute of frauds without determining whether either rule applied. Actually neither rule barred admission of the evidence in this case, so the trial court was free to consider the merits of the existence of an oral contract without defendant having to prove the elements of fraud or detrimental reliance. Nevertheless, the trial court found defendant's story of an oral agreement to be unsubstantiated and correctly refused to enforce an oral agreement based on the facts before it. Brimstone Min., Inc. v. Glaus, 2003 MT 236, 317 M 236, 77 P3d 175 (2003).

Easement Issue Resolved Against Predecessor in Interest Barred by Res Judicata and Collateral Estoppel: Plaintiffs claimed an easement by necessity over Skyline Drive. Defendants asserted that the action was barred by res judicata and collateral estoppel based on a prior District Court ruling that another property owner did not have an easement over Skyline Drive. The District Court agreed and granted summary judgment to defendants, and plaintiffs appealed. The Supreme Court affirmed. As set out in Hall v. Heckerman, 2000 MT 300, 302 M 345, 15 P3d 869 (2000), res judicata applies if: (1) the parties or their privies are the same; (2) the subject matter of the present and past action is the same; (3) the issues are the same and relate to the same subject matter; and (4) the capacities of the persons are the same in reference to the subject matter and to the issues between them. A form of res judicata, collateral estoppel, applies if: (1) the identical issue raised was previously decided in a prior adjudication; (2) a final judgment of the merits was issued in the prior litigation; and (3) the party against whom the plea is now asserted was a party or in privity with a party in the prior adjudication (see Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778 (2000)). In this case, plaintiffs attempted to raise an easement issue that was previously adjudicated and conclusively resolved against their predecessor in interest, so plaintiffs' claim was barred by res judicata and collateral estoppel. Kullick v. Skyline Homeowners Ass'n, Inc., 2003 MT 137, 316 M 146, 69 P3d 225 (2003).

No Representation or Concealment of Material Facts — Estoppel Inapplicable: Geiger contended that his employer and the uninsured employers' fund should be equitably estopped from denying compensation for Geiger's job-related injuries. The Workers' Compensation Court concluded that equitable estoppel did not apply, and the Supreme Court concurred. One of the six requirements for the application of equitable estoppel is conduct amounting to a representation or a concealment of material facts. Geiger insisted that the employer concealed the fact that the employer had discontinued paying for Geiger's workers' compensation coverage. The employer testified that Geiger was notified of the discontinuance of coverage at the time that a contract and lease were signed. The Workers' Compensation Court chose to believe the employer, and the Supreme Court declined to disturb that finding. Because Geiger knew that the employer had discontinued coverage, there was no concealment of a material fact, and Geiger's equitable estoppel argument failed. Geiger v. Uninsured Employers' Fund, 2002 MT 332, 313 M 242, 62 P3d 259 (2002).

Limited Prescriptive Easement Established — Obvious Use Viewed as Open and Notorious: Albert filed an action to determine a claim for a prescriptive easement and quiet title to a road across Hastetter's property. Hastetter raised the affirmative defense of estoppel, claiming that Albert recognized Hastetter's legitimate title to the road by requesting an easement in an earlier letter and that the use was permissive and subject to Hastetter's consent. The trial court found that Albert had a prescriptive easement that was limited to the historical use of providing access

and moving cattle to and from Albert's pasture. Hastetter appealed, but the Supreme Court affirmed. Albert established the elements for a prescriptive easement during the statutory 5-year period, and thus enjoyed the presumption that his use was adverse to Hastetter's interest. Although the servient landowner must know about and acquiesce to the user's claim of right, Montana law does not require that a prescriptive easement claimant verbally communicate a hostile intent. Open and notorious use can be established by showing that the condition of use was so obvious that the owner was not deceived and should have known of the claimant's use. Further, Albert had used the road to move cattle periodically since 1958 and had used the road to check the condition of fences and gates. Given the obvious use of the gates to control livestock, the District Court did not abuse its discretion when it refrained from scrutinizing the gates as evidence of permissive use. Albert v. Hastetter, 2002 MT 123, 310 M 82, 48 P3d 749 (2002), followed in Harding v. Savoy, 2004 MT 280, 323 M 261, 100 P3d 976 (2004).

Claim of Resulting or Constructive Trust Barred by Judicial Estoppel and Clean Hands Doctrine: The parents created a family corporation and made their four children equal, sole shareholders through transfers and gifts. When two medical malpractice suits were filed against the father, he claimed that he had no right to or control over the corporation's assets. In a separate action, two sisters instituted a shareholder derivative action and petitioned for judicial review of their brother's fiduciary duties. The brother called a special meeting to issue additional stock to himself and to transfer property back to the parents, but the sisters objected and the brother was enjoined from doing so. The parents then claimed that the property was held in a resulting or constructive trust, and the District Court ordered that the assets and stock be conveyed to the parents. The sisters appealed, and the Supreme Court reversed. Both the sisters and the plaintiffs in the medical malpractice action relied to their detriment on the father's judicial declaration that he had no right to or control over the corporate assets, and the father was thus barred by judicial estoppel and the clean hands doctrine from raising equitable claims that a resulting or constructive trust existed. Judicial estoppel binds a party to that party's judicial declarations and precludes the party from taking a position inconsistent with the previous declaration in a subsequent action or proceeding. The clean hands doctrine provides that a party must not expect relief in equity unless the party comes into court with clean hands. The evidence here showed that the parents knowingly transferred assets to the family corporation to circumvent creditors and avoid estate taxes, and the Supreme Court will not aid a party whose claim had its inception in the party's wrongdoing, whether the victim of the wrongdoing is the other party or a third party. Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001).

Elements of Judicial Estoppel: The doctrine of judicial estoppel binds a party to that party's judicial declarations and precludes the party from taking a position inconsistent with the previous declaration in a subsequent action or proceeding. Although judicial estoppel may be regarded as a form of estoppel, it is not strictly one of estoppel, but partakes rather of positive rules of procedure based on manifest justice and, to a greater or lesser degree, on considerations of the orderliness, regularity, and expedition of litigation. Those elements that are generally essential to the operation of equitable estoppel, such as reliance, injury, and prejudice to the individual, may not enter to the same extent into judicial estoppel. A party claiming that judicial estoppel bars another party from relitigating an issue must show that: (1) the estopped party had knowledge of the facts at the time that the original position was taken; (2) the estopped party succeeded in maintaining the original position; (3) the present position is inconsistent with the original position; and (4) the original position misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party. Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001). See also Rowland v. Klies, 223 M 360, 726 P2d 310 (1986), Fiedler v. Fiedler, 266 M 133, 879 P2d 675 (1994), and In re George Trust, 1999 MT 223, 296 M 56, 986 P2d 427 (1999).

Collateral Estoppel Applied to Preclude Reopening Settlement Agreement Regarding Disposition of Jointly Owned Marital Property — Property Interest Not Altered by Filing of Partition Action: When the husband and wife separated, they entered a property settlement agreement dividing all their real and personal property, agreeing that they would continue to jointly own their residence, with the right of survivorship. In the decree of dissolution, the District Court affirmed that the property settlement agreement was fair and equitable. Several years after the divorce, seeking to wrap up financial affairs with her former husband, the wife moved to partition the residence and obtain an equal division of the value of the property. At trial, the husband argued that the property settlement agreement was unfair and that the wife should be denied any recovery for her interest in the residence because it was purchased prior to the marriage and because she did not contribute to the marriage financially. The wife moved in

limine to preclude the husband from reopening matters that should have been raised in the divorce proceedings. The court denied her motion, reasoning that the property was not divided in the divorce and that because the partition action was an action at equity, surrounding circumstances could be considered. The court found that the filing of the partition action severed the joint tenancy, and the husband was then allowed to introduce evidence regarding the marital equities. The court ultimately concluded that the wife's interest in the residence was not compensable because she had not contributed significantly to the acquisition or improvement of the property or contributed to the parties' assets during the marriage. The wife appealed. The Supreme Court found that res judicata and equitable estoppel barred relitigation of the fairness of the joint ownership issue, which was considered and approved in the decree of dissolution. Further, the mere filing of the partition action does not sever one's interest in property. Rather, the parties' respective interests remain intact until the judgment severing the tenancy is entered. The rebuttable presumption that underlies a joint tenancy in property is equal shares, and there was nothing in the evidence to rebut that presumption and no evidence of postdecree events that would justify a different result. The husband failed to carry the burden of rebutting the presumption of equal shares, and the Supreme Court remanded for a 50-50 partition of the value of the residence. Rausch v. Hogan, 2001 MT 123, 305 M 382, 28 P3d 460 (2001).

Issue of Department of Labor and Industry Jurisdiction Raised in Two Separate Hearings — Collateral Estoppel Applicable — Due Process Rights Not Implicated When Party Fails to Pursue Available Remedies: The Workers' Compensation Court concluded that the Department of Labor and Industry should have allowed plaintiff to raise the argument that State Fund had improperly canceled plaintiff's policy for nonpayment of a premium as a defense to the claim by the Uninsured Employers' Fund for assessments and penalties. The court said that the issue was not barred by collateral estoppel because an order from a first hearing only determined whether the Department had subject matter jurisdiction over contract disputes between an insurance carrier and its policyholder (a determination that plaintiff did not appeal) and did not address the issue raised in a second hearing, which was whether the Department had jurisdiction to determine coverage in a proceeding seeking a penalty and indemnification. The court held that collateral estoppel did not apply because the issues in the two hearings were not identical. The court went on to hold that the Department did have jurisdiction, through its quasi-judicial power, to resolve the dispute regarding whether State Fund had rightfully canceled the policy. The Supreme Court disagreed. In the first case, a hearings officer determined that the Department did not have subject matter jurisdiction over the contractual dispute between plaintiff and State Fund, noting that proper adjudication would be in the District Court. The Department only has jurisdiction granted to it by statute, and the adjudication of insurance contracts does not fall within its jurisdiction. Plaintiff's failure to appeal the issue from the first hearing precluded it from arguing that the Department did have jurisdiction over the insurance contract dispute regarding a penalty and indemnification in the second hearing, so relitigation of the jurisdiction question in the second proceeding was barred by collateral estoppel. Further, it was error to give the Department jurisdiction to adjudicate the insurance contract dispute pursuant to its general quasi-judicial powers because an administrative agency may not assume jurisdiction without express delegation by the Legislature and there is no statutory delegation of authority to the Department to resolve contract disputes. Rather, regulation of insurance contracts is governed by the Insurance Commissioner and the relevant statutes relating to insurance disputes. The Department cannot and should not be adjudicating disputes between insurance companies and employers. The Workers' Compensation Court's conclusion that plaintiff was denied due process when it was prevented from presenting evidence relating to the insurance contract between itself and State Fund was also erroneous. Plaintiff had the opportunity to appeal the initial Department order to the Workers' Compensation Court, but failed to do so. Plaintiff also had the opportunity to pursue its remedies against State Fund in District Court, but again failed to do so. There is no denial of due process when a party fails to pursue the remedies provided. Auto Parts of Bozeman v. Employment Relations Div. Uninsured Employers' Fund, 2001 MT 72, 305 M 40, 23 P3d 193 (2001).

Equitable Estoppel Defense Defeated — Failure of Counterclaim to State Claim for Which Relief May Be Granted: The city of Whitefish sought and obtained a permanent injunction against Troy Town Pump, Inc. (Town Pump), requiring removal of a sign that violated the city's ordinance. Town Pump's defense was that the city's approval of the original building plan equitably estopped the city's claim. Alternatively, Town Pump counterclaimed for the costs of remodeling the building. In order for the city to obtain a permanent injunction, it first had to overcome Town Pump's counterclaim that it was equitably estopped from doing so. The city successfully defeated the counterclaim. Absent a legal theory upon which to base damages, the

city could not be held liable, so the District Court did not err in dismissing Town Pump's counterclaim for damages on grounds that it failed to state a claim for which relief could be granted. Whitefish v. Troy Town Pump, Inc., 2001 MT 58, 304 M 346, 21 P3d 1026 (2001).

Revocation of Prior City Approval of Building Plan Based on Incorrect Conclusion That Proposed Fascia Did Not Constitute Sign — Equitable Estoppel Inapplicable — Jurisdiction Properly Retained: The city of Whitefish adopted a master plan that included a policy providing that commercial signs are a blighting factor and that contained strict limits on the size and character of signs. Troy Town Pump, Inc. (Town Pump), submitted blueprints to the city for a new exterior, referred to as a fascia, that included lettering above an awning. The city manager reviewed the blueprints for the design before it was installed and, believing that only the written words but not the entire awning constituted a sign, approved the design and issued a building permit. When installed, the awning consisted of a band of translucent, raspberry-colored material 4 feet 11 inches high, extending about 162 feet across the entire length of the front of the building. Four rows of white fluorescent light tubes located behind the awning extended the entire length of the material and lit it from behind, and four neon lights were placed in front of the awning, which ran horizontally the entire length of the front of the building and approximately 42 feet along the rear of the building. The City Council concluded that the entire awning constituted a sign that violated the city ordinance because it was too big and directed Town Pump to remove the lighting. When Town Pump refused, the city sought an injunction prohibiting Town Pump from operating the lighting. Town Pump's defense was that the city's claims were barred under the doctrine of equitable estoppel, because the design had already been reviewed and the building permit issued. During a bench trial, the city manager testified that if he had realized that the fascia would create a lighting scheme that dwarfed the lettering and far exceeded general lighting needs, he would not have approved the building permit. The District Court issued a permanent injunction requiring removal of all lighting and reserved jurisdiction to determine whether the entire awning constituted a sign within the meaning of the ordinance, thereby justifying further injunctive relief. In a subsequent order, the court granted the city's motion for judgment on the pleadings on the counterclaim on grounds that the counterclaim failed to state a claim upon which relief could be granted. Town Pump appealed. The Supreme Court held that original approval of the building permit was based on an incorrect misrepresentation of law, not fact, that the fascia did not constitute a sign. Thus, Town Pump failed to establish the first element of equitable estoppel, which requires a misrepresentation of fact. Further examination revealed that Town Pump failed to establish even one element of equitable estoppel, dooming its defense to the city's request for an injunction. The city's broad definition of sign was intended to include not only traditional signs, but also embellishments intended to draw attention to a traditional sign or to the business itself, so the District Court did not abuse its discretion in ordering removal of the lighting. Further, under the city's broad request for relief, the court did not err in retaining jurisdiction to allow the city to return to court after the lighting was removed to consider an order requiring removal of the awning. The court simply exercised its discretion in a manner that allowed it to grant all relief necessary in the matter. Whitefish v. Troy Town Pump, Inc., 2001 MT 58, 304 M 346, 21 P3d 1026 (2001).

Liability Exemption Distinguished From Contractual Indemnification: Liss had a homeowner's policy with Safeco Insurance Co. (Safeco) that covered personal liability and medical payments to others. Liss shot Bruthers and claimed that it was an accident and that she was involuntarily intoxicated, but she was nevertheless convicted of aggravated assault after pleading nolo contendere. Bruthers was a nonresident and filed a federal action for compensation for physical injuries, emotional distress, and punitive damages, but eventually dropped the intentional tort claim. Liss gave Safeco a copy of the complaint, and Safeco provided Liss a defense under the personal liability provisions of the homeowner's policy. Safeco then filed a declaratory action, claiming that it had no duty to defend Liss in federal court or to indemnify Liss, based on its theory that: (1) Montana policy and 28-2-702 forbid the contractual indemnification of an individual for intentional and illegal acts; (2) the shooting did not constitute an occurrence as defined in the policy; (3) the intentional act and illegal act exclusions barred coverage; and (4) Liss was collaterally estopped to contest the issue based on the guilty plea. Safeco's motion was granted by summary judgment based on policy provisions excluding intentional and illegal acts from personal liability coverage and the undisputed fact that Liss pleaded guilty to aggravated assault. Both Liss and Bruthers appealed. The Supreme Court noted that a contract whose object is to exempt a person from future potential liability is clearly distinguishable from an insurance contract that indemnifies a person for another party's damages once liability is imposed. Therefore, Safeco's duty to defend and indemnify Liss could not be excused by a declaratory judgment based on public policy in 28-2-702. The question of

whether the shooting incident constituted an insurable occurrence or accident remained shrouded in material facts and was inappropriate grounds for summary judgment. The shooting did not fall within the nexus of the per se intentional act case law, absent an admission or substantial evidence establishing the intent of the insured. Lastly, Safeco presented no evidence other than Liss's guilty plea to satisfy its burden of proof that Liss either intentionally shot Bruthers or that the shooting was an illegal act, so the Supreme Court addressed whether a nolo contendere guilty plea in a criminal matter is conclusive proof of intent or illegality and precludes relitigation of the issues in a subsequent civil proceeding. The court applied the three-part collateral estoppel rule in Teitelbaum Furs, Inc. v. Dominion Ins. Co., 375 P2d 439 (Calif. 1962), and Aetna Life & Cas. Ins. Co. v. Johnson, 207 M 409, 673 P2d 1277 (1984), the second prong of which requires a final judgment on the merits. A guilty plea as a matter of law fails the test because a guilty plea does not constitute a final judgment, so in this case, the plea to aggravated assault carried no collateral estoppel effect in the subsequent civil proceedings. Summary judgment was improper, and the case was remanded. Safeco Ins. Co. of America v. Liss, 2000 MT 380, 303 M 519, 16 P3d 399, 57 St. Rep. 1621 (2000).

Parent-Child Relationship Thwarted — Equitable Estoppel Precluding Payment of Child Support: When Stiles and his wife separated, he was given responsibility for the care of his newborn son. Because Stiles was in the military at the time, he asked his sister, Cynthia, if she would care for the child for a short time while he fulfilled his duties in the Navy. Cynthia agreed, but immediately sought legal custody of the child, and physical custody of the child was ultimately granted to her by a California court. She often did not comply with court orders resulting from her custody efforts, including orders to allow Stiles visitation with the child. Stiles initially offered to pay for the child's care, but Cynthia refused any money, saying it was not needed. Nevertheless, Stiles did provide ongoing health insurance for the child. Over a decade later, Cynthia applied for and was granted public assistance, assigning any right to child support to the state. The Child Support Enforcement Division established Stiles's support obligation at $511 a month. Stiles asked Cynthia to sign a waiver of this obligation, but she refused. Stiles petitioned for judicial review, and the District Court remanded to an administrative law judge to make findings regarding Stiles's claim that Cynthia had waived her right to receive child support or that she was equitably estopped from asserting or assigning those rights. The administrative law judge found that the requisite elements of waiver and estoppel were present, and the District Court upheld the findings, holding that because Cynthia had no right to child support, she could not convey to the state rights greater than those to which she was entitled. The state appealed, asserting that the court erred when it held that estoppel and waiver applied to relieve Stiles of the obligation to provide support. The Supreme Court concluded that all six elements of equitable estoppel were met and that Cynthia had no right to receive child support from Stiles either retroactively or prospectively. Cynthia waived her right to support through her language and conduct. Nothing in the record indicated that the child's needs were not being met, and the court declined to order additional support. Although a parent is still responsible for support even in cases of voluntary relinquishment of parental rights, Stiles's relinquishment was involuntary. The court declined to hold Stiles to normal parental responsibilities under these unique circumstances, given that the child's best interests were being served, Stiles provided health insurance for the child at all times, and Stiles was thwarted by Cynthia in his attempts to have a parent-child relationship and was not attempting to exploit narrow legal technicalities to avoid undisputed court-ordered support obligations awarded at the time of dissolution. Stiles v. Dept. of Public Health and Human Services, 2000 MT 257, 301 M 482, 10 P3d 819, 57 St. Rep. 1054 (2000), distinguishing Fitzgerald v. Fitzgerald, 190 M 66, 618 P2d 867 (1980), In re Marriage of Neiss, 228 M 479, 743 P2d 1022 (1987), and In re Support of Krug, 231 M 78, 751 P2d 171 (1988).

Claim for Punitive Damages Not Precluded by Estoppel — Issues of Previous Litigation Not Identical: Finstad was injured by asbestos in defendant's mine. A jury trial resulted in a verdict for Finstad and an award of $400,000 in compensatory damages, as well as a determination that punitive damages were warranted. The District Court conducted a minitrial on the issue of punitive damages, and the jury awarded $83,000. Defendant contested the award of punitive damages and moved for dismissal on grounds that Finstad's claim was barred by collateral estoppel by virtual representation because the issue had already been litigated in two previous Lincoln County cases against defendant. Defendant contended that the issues were identical, that final judgment had been rendered, and that Finstad was a party to or in privity with a party in the previous cases and thus was virtually represented by those parties in the previous cases. The District Court denied the motion to dismiss, finding that the issues were not identical, and also ruled for Finstad on the question of estoppel by virtual representation. On appeal, the

Supreme Court reviewed the record, noting that although some of the evidence and witnesses regarding the punitive damages claim were the same as in the previous cases, several significant factual distinctions and legal claims existed. Because the first element of collateral estoppel regarding identical parties was not met, the Supreme Court affirmed without reaching the question of estoppel by virtual representation. Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000), following Holtman v. 4-G's Plumbing & Heating, Inc., 264 M 432, 872 P2d 318 (1994).

Truth Regarding Value of Stock Discoverable by Party Claiming Estoppel — Defense Not Available: Following termination from employment with Bitterroot International Systems, Inc. (Bitterroot), Knutson sought to exercise his buyout rights under the shareholders' agreement. Bitterroot refused to pay and sought rescission on grounds of equitable estoppel, arguing that stock had been mistakenly valued during the purchase of another business, that Spencer, majority shareholder and president of both Bitterroot and the company that was acquired, relied on Knutson's valuation to Spencer's detriment, and that Spencer was unaware of factors that Knutson failed to consider. Spencer may have been mistaken about the value of the stock, but he was in a position to discover all the information necessary to value it and participated in its valuation. The truth regarding the stocks' value was as discoverable to Spencer as to anyone else, and the District Court did not err in dismissing Bitterroot's defense of equitable estoppel. Knutson v. Bitterroot Int'l Sys., Inc., 2000 MT 203, 300 M 511, 5 P3d 554, 57 St. Rep. 800 (2000), following Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131 (1997).

Default Judgment Generally Carrying No Collateral Estoppel Effect: Plaintiff wife sought to recover damages that were sustained through a fire in the family home. However, plaintiff's husband's arson, fraud, concealment, misrepresentation, and false swearing were considered by the District Court to have been admitted through an otherwise valid default judgment based on the husband's failure to answer or appear. The court subsequently granted summary judgment to the insurance company on grounds that the default judgment served as a final judgment and found that plaintiff was collaterally estopped from contesting whether the husband committed the alleged acts. Applying the collateral estoppel rule in Aetna Life & Cas. Ins. Co. v. Johnson, 207 M 409, 673 P2d 1277, 41 St. Rep. 40 (1984), the Supreme Court noted that a default judgment generally carries no collateral estoppel effect. In this case, the defense was not available to the insurance company, which did not plead it in its answer, nor was the defense factored into the District Court's summary judgment order. Further, the husband's acts were never actually litigated, and he had received no opportunity to contest the issues in a prior proceeding, so the elements of collateral estoppel were not satisfied. Thus, plaintiff was not collaterally estopped from litigating any issues pertaining to whether the husband committed the alleged acts decreed by the default judgment. Lane v. Farmers Union Ins., 1999 MT 252, 296 M 267, 989 P2d 309, 56 St. Rep. 990 (1999). See also Butler v. Brownlee, 152 M 453, 451 P2d 836 (1969).

DUI Suspension or Revocation Clarified — Law of Case Doctrine and Collateral Estoppel Inapplicable — Contempt Order Refused: Sanders was arrested for a second DUI in a 5-year period and filed an action in District Court seeking review of the facts of the arrest. The District Court and the Supreme Court upheld the arrest and noted that a 6-month suspension of Sanders' license would take place. Later, after the Department of Justice refused to reinstate the license after the 6-month period expired because 61-8-402 applied and required a revocation of Sanders' license for 1 year, Sanders brought a contempt action in the District Court asking that the Department be held in contempt for failure to reinstate his license after expiration of the 6-month period. Sanders argued that the 6-month period had become the law of the case and that the failure of the Department to follow that law was a contempt of the District Court. After reviewing the records of the District Court and its own record in the previous DUI action, the Supreme Court held that the law of the case doctrine was inapplicable. Citing Haines Pipeline Constr., Inc. v. Mont. Power Co., 265 M 282, 876 P2d 632 (1994), and Scott v. Scott, 283 M 169, 939 P2d 998 (1997), the Supreme Court explained that the law of the case doctrine applies only to the rulings of a court that are necessary to the decision and, in the case of the District Court's and Supreme Court's prior ruling in Sanders' DUI conviction, a determination that only a 6-month suspension was required under 61-8-402 was not necessary to either the District Court's or the Supreme Court's prior ruling. Those rulings, the Supreme Court said, concerned only whether the arresting officer had probable cause for the arrest. Thus, the Supreme Court held, the reference to a 6-month suspension in the previous opinions was dicta, there was no law of the case determined concerning the law governing license suspension or revocation, and therefore there could be no contempt for failure to reinstate Sanders' license. The Supreme Court also held that collateral estoppel was likewise inapplicable to require the Department to reinstate the

license because collateral estoppel applies only to previously litigated issues and the period of license suspension or revocation of Sanders' license had not been previously litigated. Sanders v. St., 1998 MT 62, 288 M 143, 955 P2d 1356, 55 St. Rep. 272 (1998).

Identical Issue Element of Collateral Estoppel Not Met — Summary Judgment Improper: Collateral estoppel, or issue preclusion, bars a party to a prior lawsuit from reopening a previously litigated issue. Identity of issues is the most crucial element of collateral estoppel. In order to satisfy this element, the identical issue or precise question must have been litigated in the prior action. As part of the prior action in this case, the real estate sellers, Fadnesses, were awarded damages from the buyer, Kuntz, for mortgage foreclosure, quiet title, and fraud. Fadnesses then brought an action against the real estate agent and the title insurance agent for negligence and breach of fiduciary duty during the transaction. Although both claims arose from the same events and both sought damages related to the sale of the property, the District Court erred in granting summary judgment based on collateral estoppel because the identical issue, or precise question, was not raised and decided in the earlier litigation. The grant of summary judgment was reversed. Fadness v. Cody, 287 M 89, 951 P2d 584, 54 St. Rep. 1513 (1997).

Misrepresentation Must Be of Fact, Not Law: The Billings VFW ceased operations in 1974 and allowed its pre-1947 liquor license to lapse based on the belief that the license was nontransferable. In 1979, the VFW reopened and was issued a new nontransferable all-beverages license. In 1991, the Supreme Court held that pre-1947 liquor licenses held by fraternal and veterans' organizations were not subject to quota restrictions passed in 1949 and therefore were freely transferable. (See Helena Aerie No. 16 v. Dept. of Revenue, 251 M 77, 822 P2d 1057 (1991).) After the 1991 court decision, the VFW received an offer to purchase its pre-1947 license for $165,000. The Department of Revenue refused to reissue the lapsed license or to declare that the current license held by the VFW was freely transferable. The VFW sought a declaratory judgment that its license be characterized as freely transferable on the basis that the Department was estopped from arguing that the license was nontransferable because the VFW had let the pre-1947 license expire based on the Department's misrepresentation that under the 1949 law, the license was nontransferable. The Supreme Court held that the doctrine of equitable estoppel did not apply because the misrepresentation had to be of fact and not a misrepresentation of law. Billings Post No. 1634 v. Dept. of Revenue, 284 M 84, 943 P2d 517, 54 St. Rep. 786 (1997), following Elk Park Ranch, Inc. v. Park County, 282 M 154, 935 P2d 1131, 54 St. Rep. 293 (1997).

Failure to Plead Estoppel — Estoppel Raised in Trial Brief — No Evidence of Consent — No Motion to Amend Pleadings: Marsha sought to enforce a written conveyance of partnership property against the estate of a deceased partner by arguing that promissory and equitable estoppel prohibit the estate from claiming that the conveyance was invalid for lack of consideration. The Supreme Court held that estoppel must be pleaded and that, while estoppel was raised in Marsha's trial brief, there was no evidence in the record that the issue of estoppel was tried with the express or implicit consent of the estate and no evidence that Marsha moved to conform her answer to any estoppel evidence adduced before the District Court. For these reasons, the Supreme Court held that the District Court was correct in holding that the issue of estoppel was not correctly before it. Nitzel v. Wickman, 283 M 304, 940 P2d 451, 54 St. Rep. 684 (1997).

Failure of Counteroffer Under Statute of Frauds — Handwritten Additions by Sellers' Agent Not Subscribed by Sellers — Part Performance and Equitable Estoppel Inapplicable: After Austin rejected a counteroffer on property that he was interested in buying, the agent, Everett, went to the office of the listing agent, Young, who contacted one of the two owners of the property by telephone. That owner, Cash, said that she would consider sale of the property for an additional $5,000 but that she would first have to discuss it with her brother, the other owner. Everett then added a handwritten paragraph to the rejected counteroffer, noting the sale of all of the property for $115,000 and faxed it back to Austin. When Austin received the revised counteroffer, he believed that it had been signed by Cash and, believing that a binding contract had been made, lowered the sale price of other property that he owned in California. Cash and her brother subsequently received and accepted an offer for their property from a different buyer, whereupon the Austins filed a lis pendens against Cash's property, preventing its sale to the other buyer. The Supreme Court held that because neither the sellers nor their agents signed or initialed the handwritten addition to the counteroffer, the contract was not properly subscribed by the sellers or their agents and therefore did not satisfy the statute of frauds. The Supreme Court also held that the action of the Austins in reducing the sale price of their California properties was an act in contemplation of eventual performance of the contract and not an act of part performance itself. For this reason, part performance did not excuse the

application of the statute of frauds. The Supreme Court also held that in order for a court to order specific performance of a contract, there had to be a binding contract in the first place and held that because the additional language to the sale contract had not been subscribed, no contract existed. Finally, the Supreme Court held that promissory estoppel is inapplicable when a contract is clearly within the statute of frauds. Austin v. Cash, 274 M 54, 906 P2d 669, 52 St. Rep. 1119 (1995).

Party May Not Seek Indemnification When That Party Found Negligent in Prior Suit: HKM had been hired to design a pipeline project and was subsequently sued for negligence by the general contractor for damages because of delays caused by pipe installed pursuant to HKM's specifications. The jury returned a verdict in favor of the general contractor. HKM then filed suit against the pipe manufacturer for indemnification for the amount for which HKM had been found liable. The Supreme Court held that indemnification would turn on the question of whether or not it was HKM's negligence or some other cause that resulted in the general contractor's damages and the question of whether HKM's negligence had already been established. Therefore, HKM was estopped from raising that issue a second time. HKM Associates v. NW. Pipe Fittings, Inc., 272 M 187, 900 P2d 302, 52 St. Rep. 692 (1995).

Collateral Estoppel — Summary Judgment Properly Granted: In a prior action, the plaintiff had filed a motion for a temporary restraining order and asking the court to hold the defendant in contempt for violation of a court order enjoining the defendant from interfering with the plaintiff's access to a peat resource on the defendant's land. The court, in the prior action, found the defendant not in contempt of court for the alleged actions. In a subsequent suit, the court granted the defendant's motion for summary judgment based on collateral estoppel. On appeal, the Supreme Court found that the District Court's grant of summary judgment and dismissal of the complaint was proper when the plaintiff could not prove a cause of action without relitigation of the factual issues that had been previously resolved. Farmers Plant Aid, Inc. v. Huggans, 266 M 249, 879 P2d 1173, 51 St. Rep. 803 (1994).

Collateral Estoppel Inapplicable When Issues and Relationship of Issues to Subject Matter Not the Same: Berlin sued Boedecker twice in actions involving fraudulent sales of royalties on oil well property. In the second suit, Boedecker argued that Berlin was precluded from litigation by the doctrine of collateral estoppel. After reviewing the prerequisites for the application of collateral estoppel, including the requirement that the issues of the second suit be the same as in the first suit, the Supreme Court held that collateral estoppel was inapplicable because the cases involved different contracts between the parties. Citing Stapleton v. First Sec. Bank, 207 M 248, 675 P2d 83 (1983), the Supreme Court held that because the precise question had not been litigated in the prior action, collateral estoppel was inapplicable. Berlin v. Boedecker, 268 M 444, 887 P2d 1180, 51 St. Rep. 569 (1994).

Change in Legal Theory Not Change in Previously Established Facts and Law: The first Haines case was remanded in part by the Supreme Court because the plaintiff was no longer entitled to punitive damages because of the elimination of tort damages for breach of the covenant of good faith and fair dealing. On remand, Haines amended the complaint to allege fraud in order to recover punitive damages. The trial court stated that it would treat the case as a trial de novo because of the new legal theories being presented by the plaintiff. The trial court determined that Haines had failed to prove fraud and was not entitled to any damages, actual or punitive. The Supreme Court ruled that the facts and law established in the first case applied in the second case and that the only question was whether under the previously determined facts and law the plaintiff could prove fraud. Haines Pipeline Constr., Inc. v. Mont. Power Co., 265 M 282, 876 P2d 632, 51 St. Rep. 514 (1994), followed in Rafanelli v. Dale, 1998 MT 331, 292 M 277, 971 P2d 371, 55 St. Rep. 1346 (1998), and St. v. Boucher, 1999 MT 102, 294 M 296, 980 P2d 1058, 56 St. Rep. 431 (1999).

Claims Arising From Same Event — Identical Issue Element of Collateral Estoppel Not Met: Holtman's claims against a housing association in an initial suit and against a plumbing contractor in a subsequent suit both arose from the same event of asbestos contamination. However, the claim against the housing association alleged an intentional wrongful act, while the claim against the plumbing contractor was an issue of negligence. Therefore, even though the claims arose from the same event, the claims did not raise the identical issue or precise question. Thus, adjudication of the first suit did not bar the second suit on grounds of collateral estoppel. Holtman v. 4-G's Plumbing & Heating, Inc., 264 M 432, 872 P2d 318, 51 St. Rep. 340 (1994), followed in Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000).

Equitable Estoppel Against Discontinuation of Worker's Benefits — Element of Representation or Concealment of Material Facts Not Satisfied: After Beery was injured in a fall

from an oil rig in 1984, his employer's workers' compensation insurer, CNA Insurance Company, paid domiciliary care benefits for a period of time. Correspondence from CNA indicated that payment was being made to prevent future litigation but that CNA had reservations about the necessity for the payments and care. After Beery was evaluated by a medical panel that concluded that he did not need domiciliary care, CNA terminated benefits. The Supreme Court held that the doctrine of equitable estoppel did not apply to prevent CNA from terminating coverage because one of the criteria announced in Mellem v. Kalispell Laundry & Dry Cleaners, 237 M 439, 774 P2d 390 (1989), distinguished in Billings Post No. 1634 v. Dept. of Revenue, 284 M 84, 943 P2d 517, 54 St. Rep. 786 (1997), that there be an act amounting to a representation or concealment of material facts, had not been satisfied by Beery. Beery's reliance on a letter from the CNA adjuster that stated that the insurer did not contest Beery's right to care was taken out of context because the evidence showed that CNA did reserve the right to determine the value and extent of the care paid for. Other correspondence and the settlement agreement between the parties covering benefits during an earlier period of time support this finding. The Supreme Court also held that although Beery argues he did not have an opportunity to establish the satisfaction of all of the elements of the test for estoppel, the record shows that Beery had ample opportunity before the Workers' Compensation Court to establish the medical necessity for the care and, therefore, he cannot argue that he was put in a worse situation than he would have been in had there not been a representation or concealment. Beery v. Grace Drilling, 260 M 157, 859 P2d 429, 50 St. Rep. 980 (1993).

Elements of Collateral Estoppel: The three-prong test to determine whether collateral estoppel applies to a particular case was set forth in Boyd v. First Interstate Bank, 253 M 214, 833 P2d 149 (1992). The elements are: (1) the identical issue raised has been previously decided in a prior adjudication; (2) a final judgment on the merits was issued in the prior adjudication; and (3) the party against whom the plea is now asserted was a party or in privity with a party to the prior adjudication. The first prong, identity of the issues, is the most crucial and was not met in this case involving workers' compensation fraud. St. v. Young, 259 M 371, 856 P2d 961, 50 St. Rep. 839 (1993).

Contract Defense to Foreclosure After Borrower Promised, Pursuant to Bankruptcy Plan, Not to Contest Instruments: The borrower's statement in its bankruptcy proceeding that it would not contest the validity of notes, mortgages, or security interests of the bank in state court did not judicially estop the borrower from raising contract-related defenses to the bank's later foreclosure action based on those instruments because: (1) the bankruptcy proceeding was dismissed and the borrower thus did not succeed in the prior proceeding; and (2) the bank was not misled by the statement and allowing the borrower to change its position did not adversely affect the bank. Equitable estoppel did not apply because the bank did not rely on the statement and change its position adversely. For similar reasons, quasi-estoppel, which has not been defined by the Supreme Court but which is used interchangeably with equitable estoppel, does not apply. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993), overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996).

Jurisdiction Declined — Review of Final Division Order Barred by Collateral Estoppel: The Workers' Compensation Court dismissed Martelli's petition for total disability benefits after Martelli failed to appeal the Employment Relations Division's final order within 10 working days of mailing. Because the interplay between the issue before the court and the issue previously litigated before the Division would have required relitigation of the issue of Martelli's disability that was decided by the Division, rehearing of the issue by the court was barred by collateral estoppel and jurisdiction by the court was properly declined. Martelli v. Anaconda-Deer Lodge County, 258 M 166, 852 P2d 579, 50 St. Rep. 479 (1993).

Prior Adjudication of Common-Law Conversion as Collaterally Estopping Subsequent Claim of Statutory Conversion: Boyds contended that a previous action for common-law conversion did not collaterally estop subsequent litigation on a theory of statutory conversion. However, the prior litigation determined that Boyds had no interest in or right to checks deposited by the bank into the account of third-party defendants and that because the checks were correctly deposited, no conversion occurred. Because the subsequent cause depended on the same question of conversion that had already been determined, relitigation was properly barred by estoppel. Boyd v. First Interstate Bank of Kalispell, 253 M 214, 833 P2d 149, 49 St. Rep. 459 (1992), distinguishing Stapleton v. First Sec. Bank, 207 M 248, 675 P2d 83 (1983).

Principles of Estoppel Applicable to Employee Benefit Plans: Estoppel is available against a party when that party has made a knowing false representation or concealment of material facts

to a party ignorant of the real facts with the intention that the other party should rely on the representation and the other party actually and detrimentally relies on the representation. The principles of equitable estoppel therefore apply to employee benefit plans. Audit Serv., Inc. v. Frontier-West, Inc., 252 M 142, 827 P2d 1242, 49 St. Rep. 186 (1992), following Dockray v. Phelps Dodge Corp., 801 F2d 1149 (9th Cir. 1986).

Applicability of Judicial Estoppel to Position Contrary to Earlier Pleadings: Just as judicial estoppel applies against a party who seeks to take a position contrary to an earlier sworn affidavit, so too does the doctrine equally apply to a party who seeks to take a position contrary to his pleadings in an earlier judicial proceeding. Brown v. Small, 251 M 414, 825 P2d 1209, 49 St. Rep. 98 (1992), citing Rowland v. Klies, 223 M 360, 726 P2d 310 (1986), and Fey v. A.A. Oil Corp., 129 M 300, 285 P2d 578 (1955). See also Fiedler v. Fiedler, 266 M 133, 879 P2d 675, 51 St. Rep. 691 (1994), and Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001).

Estoppel Barring Issue of Teacher and Union Pursuing Separate Claims in Separate Forums: A terminated tenured union teacher filed an appeal under 20-3-210 at the same time the teacher's union filed a grievance alleging violation of the collective bargaining agreement. Unsatisfied with results at prior steps of the grievance procedure, the union requested arbitration, to which the school district refused to submit. Instead, the school district petitioned for an injunction to compel the union and the teacher to elect one forum in which to pursue their legal claims. The District Court denied the injunction, allowing both forums to proceed, and the school district did not appeal. Because these circumstances fulfilled the elements of the doctrine of collateral estoppel, namely that the issue had been decided in a prior adjudication, a final judgment was issued. Because the party against whom the plea was asserted was a party in the prior adjudication, the school district was estopped from further litigation on the issue of separate forums. Colstrip Faculty Ass'n, MEA/NEA v. Trustees, School District No. 19, 251 M 309, 824 P2d 1008, 49 St. Rep. 43 (1992).

Consent Agreements Not Issue Preclusive — Collateral Estoppel Inappropriate: Consent agreements do not generally have an issue preclusive effect on future litigants unless that is the intent of the parties. When an agreement lacked evidence of an intent to preclude future litigation on the issues, the requisite elements of collateral estoppel were not present and application of the doctrine was inappropriate. Linder v. Missoula County, 251 M 292, 824 P2d 1004, 49 St. Rep. 26 (1992).

No Adverse Possession of Royalty Interest by Color of Title Found — Estoppel Applied: Defendants in an action to quiet title to a royalty interest argued that they held color of title to the interest by virtue of an invalid tax deed and subsequent conveyances. However, defendants also argued that the reservation of a royalty interest by Rosebud County, their ultimate grantor, was invalid. Citing Russell v. Texas Co., 238 F2d 636 (1956), the Supreme Court held that the defendants could not attack a royalty reservation in a title under and through which defendants claimed adverse possession by color of title. The court held that defendants were estopped from attacking Rosebud County's royalty reservation and that because defendants' grant expressly subjects them to the county's reservation of a royalty interest, defendants had no color of title to their royalty. Stanford v. Rosebud County, 251 M 128, 822 P2d 1074, 48 St. Rep. 1124 (1991).

Element of Identity of Issues Not Present on Question of Collateral Estoppel — Partial Summary Judgment Properly Denied: Anderson sought judicial review of the seizure and suspension of his driver's license pursuant to 61-8-403, which limits review to three underlying issues. The District Court's findings on these issues served as the bases for making the ultimate determination of whether Anderson was entitled to a license or whether his license was subject to suspension. After the District Court found that Anderson was entitled to a license, Anderson moved for partial summary judgment on the issue of the state's civil liability based on the doctrine of collateral estoppel. However, the question of liability was never considered as part of the judicial review proceeding, so denial of the partial summary judgment motion was proper on the grounds that the crucial estoppel element of identity of issues did not exist. Anderson v. St., 250 M 18, 817 P2d 699, 48 St. Rep. 871 (1991), distinguished in Farmers Plant Aid, Inc. v. Huggans, 266 M 249, 879 P2d 1173, 51 St. Rep. 803 (1994).

Counterclaims Entered After Judgment Not Barred by Estoppel: A judgment can bar counterclaims in existence at the time the judgment was entered, but it cannot bar claims that arose after its entry. Nimmick v. Hart, 248 M 1, 808 P2d 481, 48 St. Rep. 293 (1991).

Issues Fully Litigated in Federal Court — State Court Action Barred by Res Judicata and Collateral Estoppel: When the same facts and issues formed the basis of both a federal and a state court case and the case was fully litigated and final judgment was entered in federal court, dismissal by summary judgment in state court was appropriate based on the doctrines of res

judicata and collateral estoppel. Gen. Motors Acceptance Corp. v. Finch, 246 M 359, 805 P2d 1331, 47 St. Rep. 2154 (1990).

Identity of Class Action Parties Same for Purposes of Collateral Estoppel: The plaintiffs, a condominium owners' association and its individual members, sued the state and an assistant state fire inspector for negligence in failing to discover construction defects in fireplaces in the Deer Lodge Condominiums at Big Sky, Montana, claiming that the inspector's negligence ultimately resulted in a fire that destroyed part of the condominiums. The District Court granted the defendants' motion for summary judgment, dismissing the state and the inspector. The Supreme Court held that the District Court correctly applied collateral estoppel against the plaintiffs based on previous litigation involving structural defects in the same property. The Supreme Court found that the District Court took judicial notice of the previous litigation, that the construction of the fireplaces was an issue in that previous litigation as shown by the claims in the complaint in that litigation, and that the plaintiffs in the present case knew or should have known of the defects in the fireplaces. In order to apply collateral estoppel there must be, inter alia, an identity of parties between the present case and the previous case. The Supreme Court held that the plaintiffs, suing as a class in the present case, were the same as the plaintiffs in the previous case, thus fulfilling the requirements for the application of collateral estoppel. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990).

Summary Judgment as Final Judgment on Merits for Purposes of Collateral Estoppel: The plaintiffs, a condominium owners' association and its individual members, sued the state and an assistant state fire inspector for negligence in failing to discover construction defects in fireplaces in the Deer Lodge Condominiums at Big Sky, Montana, claiming that the inspector's negligence ultimately resulted in a fire that destroyed part of the condominiums. The District Court granted the defendants' motion for summary judgment, dismissing the state and the inspector. The Supreme Court held that the District Court correctly applied collateral estoppel against the plaintiffs based on previous litigation involving structural defects in the same property. The Supreme Court found that the District Court took judicial notice of the previous litigation, that the construction of the fireplaces was an issue in that previous litigation, and that the plaintiffs in the present case knew or should have known of the defects in the fireplaces. In order to apply collateral estoppel there must be, inter alia, a final judgment on the merits in a previous case. The summary judgment to which the plaintiffs in the present case were a party, dismissing other defendants in that previous case, was a final judgment on the merits of the case. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990).

Failure to Adequately Disclose Potential Lawsuit in Bankruptcy Disclosure Statement: The plaintiffs' suit against the bank for tortious interference with their business affairs was dismissed by the lower court on the grounds that the plaintiffs were equitably estopped from bringing the action. The Supreme Court affirmed on the grounds that in a previous bankruptcy proceeding, the plaintiffs did not adequately disclose their potential action against the bank. The court further stated that the bank had agreed to a plan of reorganization containing no reference to the potential suit and it would not be fair to let the plaintiffs bring an action when the bank may not have agreed to the reorganization plan if the plan had disclosed the plaintiffs' intent to seek recovery from the bank. Cleasby v. Sec. Fed. Sav. Bank, 243 M 306, 794 P2d 697, 47 St. Rep. 1247 (1990).

Ex-Wife Not Named in Foreclosure Action Against Husband: In a prior suit, the defendant had brought a foreclosure action against the plaintiff's ex-husband but did not name the plaintiff as a party. In the first action, the court had allowed the foreclosure on the basis that an equitable mortgage existed. In the second suit, the defendant argued that the plaintiff's rights in the property had been extinguished on the basis that the original sales agreement was a contract for deed rather than an equitable mortgage. The Supreme Court ruled that the defendant was collaterally estopped from arguing that a contract for deed existed when in the first suit, a final judicial decision held that the agreement constituted an equitable mortgage. Smith v. Schweigert, 241 M 54, 785 P2d 195, 47 St. Rep. 77 (1990).

Defendants Collaterally Estopped From Asserting Counterclaim When Original and Exclusive Jurisdiction With Federal Courts: The land bank, pursuant to a foreclosure order obtained in federal bankruptcy proceedings, sued the defendants in state court for unlawful detainer. The defendants counterclaimed, alleging fraud and bad faith. The Supreme Court ruled that the defendants were collaterally estopped from bringing their counterclaims because the federal courts had exclusive and original jurisdiction over the issues presented by the defendants. Fed. Land Bank v. Reilly, 240 M 147, 783 P2d 917, 46 St. Rep. 2011 (1989).

Failure to File Notice of Entry of Judgment — Amended Complaint Allowed: Defendant, who was successful in having an action dismissed on a Rule 12(b) motion, failed to file a notice of entry of judgment. The plaintiffs' 30-day period for filing a notice of appeal did not run, the order of dismissal of the original complaint did not become final, and the District Court had jurisdiction to grant plaintiffs leave to file an amended complaint. The District Court had not lost subject matter jurisdiction. Hankinson v. Picotte, 235 M 143, 766 P2d 242, 45 St. Rep. 2259 (1988).

Failure to Assert Rights Under Will for Seven Years — Jury Instructions — Equity Issues in Discretion of District Court: Plaintiffs who waited 7 years to assert their rights under decedent's will were not entitled to proposed instructions relating to laches and equitable estoppel. The District Court refused the instructions, and the Supreme Court affirmed. The determination of equitable issues rests solely within the discretion of the District Court. Equity aids the vigilant. The plaintiffs were not entitled to the aid of equity. Tope v. Taylor, 235 M 124, 768 P2d 845, 45 St. Rep. 2242 (1988).

Paternity Contested After Adjudication of Marital Dissolution — Relitigation Barred by Collateral Estoppel: When paternity was contested in response to an action to collect past child support payments, the District Court properly ruled that the issue of paternity had previously been adjudicated during the marriage dissolution proceeding and that relitigation of the issue was barred by collateral estoppel. In re Marriage of Holland, 224 M 414, 730 P2d 410, 43 St. Rep. 2293 (1986).

Unfair Labor Practices — Due Process — Collateral Estoppel: In an action charging unfair labor practices, an employee was collaterally estopped from relitigating the issue of whether his due process rights were violated by the 3-year delay between the filing of his charges and the administrative hearing on the charges. The issue was previously decided, a final judgment was rendered, and the party against whom the claim was advanced remained the same or was privy of the earlier party. Klundt v. St., 222 M 172, 720 P2d 1181, 43 St. Rep. 1148 (1986).

Applicability of Collateral Estoppel to Judgment Made in Another State: Aetna Life Insurance Company (Aetna) contended that the Montana District Court erred in failing to give collateral estoppel effect to a South Dakota District Court judgment. Aetna asserted that the South Dakota decision, holding that Aetna was not guilty of fraud, was entitled to full faith and credit in Montana and conclusively defeated the fraud allegations. The Montana District Court apparently declined full faith and credit because that decision was on appeal to the South Dakota Supreme Court at the time of the Montana trial. The Montana Supreme Court found that this approach ignored the fact that in South Dakota a judgment on appeal can have collateral estoppel or res judicata effect; therefore, the judgment was entitled to the same effect in Montana, since the requirements for applicability of collateral estoppel outlined in Aetna Life & Cas. Ins. Co. v. Johnson, 207 M 409, 673 P2d 1277, 41 St. Rep. 40 (1984), were met. Aetna Life Ins. Co. v. McElvain, 221 M 138, 717 P2d 1081, 43 St. Rep. 697 (1986).

Prohibition on Raising for First Time on Appeal: The affirmative defense of estoppel could not be raised by defendant for the first time on appeal. Gebert Logging, Inc. v. Palin, 220 M 405, 716 P2d 200, 43 St. Rep. 481 (1986).

Siting Act Decision Not Estoppel for PSC Ratemaking Decision: In 1973, Montana Power Co. (MPC) filed an application for a certificate of environmental compatibility and public need for Colstrip Units 3 and 4 under the Montana Major Facility Siting Act. In granting the certificate, the Board of Natural Resources and Conservation (now Board of Environmental Review) found that there was a need for the energy which would be produced and that the units would serve the public interest, convenience, and necessity. After Unit 3 was completed, MPC filed an application with the Public Service Commission (PSC) to increase electric rates to reflect Unit 3 in its rate base. At the rate hearing, the PSC took evidence regarding whether Unit 3 was "used and useful". MPC moved to strike this testimony, contending the PSC was precluded from considering this by the certificate of need issued under the Siting Act. MPC filed an application for original jurisdiction and declaratory judgment or other appropriate relief with the Supreme Court. The PSC later concluded Unit 3 was not used and useful and could not be included in the rate base. MPC argued that the PSC was collaterally estopped from considering whether Unit 3 was "used and useful". The court held that the need issue determined in the siting process was not identical to the used and useful issue, therefore collateral estoppel was not applicable. MPC also argued that because of the certificate of need, the state was promissorily estopped from excluding Unit 3 from the rate base. MPC contended that issuance of a certificate of need under the Siting Act established a contractual relationship between the state and MPC. The court held that issuance of a certificate by a governmental authority to engage in conduct that would be improper without a certificate does not create a contractual relationship between the state and

the licensee. Neither the Siting Act nor the certificate of need contemplate a promise that a facility will be included in a utility's rate base. Promissory estoppel was also inapplicable. Mont. Power Co. v. P.S.C., 214 M 82, 692 P2d 432, 41 St. Rep. 2332 (1984).

No Estoppel Where Defendants Admitted Fact That They Claimed Plaintiff Was Estopped From Asserting: In June 1979, plaintiff filed a complaint for damages alleging that defendants, in July 1977, negligently caused herbicides to be sprayed in a springwater ditch leading to plaintiff's pond and that the herbicides killed 32,411 rainbow trout which plaintiff was raising in his pond for commercial resale. In his complaint, plaintiff alleged an economic loss of $17,139.60. In 1978, plaintiff had submitted an itemized claim to defendants for $5,000. In June 1981, plaintiff filed requests for admission under Rule 36(a), M.R.Civ.P. Defendants failed to respond for 1 ½ years, so the plaintiff's allegations were deemed admitted. One of those allegations was that plaintiff sustained $15,941 in damages. The District Court denied defendants' argument that plaintiff was estopped by reason of the 1978 claim from asserting damages of more than $5,000. The Supreme Court affirmed. Detert v. Lake County, 207 M 460, 674 P2d 1097, 41 St. Rep. 76 (1984).

Criminal Conviction — Collateral Estoppel to Raising Same Issue in Civil Action: Where the defendant pet shop owner was convicted of arson in setting his shop afire and the plaintiff insurer of surrounding businesses later brought a civil action, hoping to prove that the defendant owner was negligent in causing the fire, the District Court did not err in granting summary judgment for the defendant insurance company of the owner, holding that the issue of the manner in which the fire was caused (i.e., with criminal intent) had already been conclusively determined. Under the rationale of Teitelbaum Furs, Inc. v. Dominion Ins. Co., 25 Cal. Rptr. 559, 375 P2d 439 (1962), the doctrine of collateral estoppel applies to prevent the relitigation of the issue of whether the defendant owner negligently or intentionally caused the fire. Because the plaintiff insurance company was in privity with the defendant owner in the criminal action, the plaintiff is barred from relitigating that issue. Aetna Life & Cas. Co. v. Johnson, 207 M 409, 673 P2d 1277, 41 St. Rep. 40 (1984), followed, with regard to test for applicability of collateral estoppel, in Nimmick v. Hart, 248 M 1, 808 P2d 481, 48 St. Rep. 293 (1991), and Lane v. Farmers Union Ins., 1999 MT 252, 296 M 267, 989 P2d 309, 56 St. Rep. 990 (1999), and also followed in Estate of Eide v. Tabbert, 272 M 180, 900 P2d 292, 52 St. Rep. 689 (1995).

Estoppel by Judgment — Test: Plaintiff's suit against the Myllymakis failed because of a complete lack of proof on his part. He sued Chamberlain for the same alleged wrongs to the same property during the same time period. The suit was barred by estoppel by judgment. That Chamberlain was not a party to the Myllymaki suit did not preclude application of the bar, as strict mutuality of parties is no longer a necessity in such situations. The more relevant considerations are whether: (1) the party adversely affected by estoppel has had a full and fair opportunity to litigate the critical issues; (2) the assertion of estoppel by a stranger to the original judgment would create analagous results in the latter case; (3) the party affected by estoppel has sound reasons why he or she should not be bound by the previous judgment; (4) the previous judgment was the result of thorough litigation; and (5) there was an appeal from the original judgment. Beckman v. Chamberlain, 673 P2d 480, 40 St. Rep. 2044 (1983) (apparently not reported in Montana Reports), followed in Lindey's, Inc. v. Goodover, 264 M 449, 872 P2d 764, 51 St. Rep. 317 (1994).

Raising Statute of Limitations and Estoppel in Motion — When Allowed: The affirmative defenses of the Statute of Limitations and estoppel by judgment may be raised in a motion to dismiss rather than in the answer when the complaint on its face shows that the claim is barred by the Statute of Limitations and the judgment relied on for the estoppel by judgment defense was made in the same court that is asked to pass on the motion. Beckman v. Chamberlain, 673 P2d 480, 40 St. Rep. 2044 (1983) (apparently not reported in Montana Reports).

Defendant Not Judicially Estopped to Contest Facts on Appeal — Beneficial Use of Water: When the defendants, by cross-appeal in a water rights action, argued that there was insufficient evidence to support the District Court's finding of the beneficial use by the plaintiffs of 500 miner's inches of water a year, the Supreme Court held that the defendants were not estopped from raising that argument by virtue of statements in their pleadings and motions indicating recognition of plaintiffs' right to the water. Upon a thorough examination of all the pleadings and statements of attorneys at trial, the court held that the issue of the plaintiffs' beneficial use had been an issue throughout the trial, that the defendants had never changed their position in this regard, and that in any event, the plaintiffs' right to the water could not be created by an admission of the defendants but only by the plaintiffs' sustaining their burden of proof upon the issue at trial. Grimsley v. Estate of Spencer, 206 M 184, 670 P2d 85, 40 St. Rep. 1585 (1983).

Evidence of Estoppel Admitted Without Objection — Pleading Unnecessary: Although estoppel is an affirmative defense and thus should be specially pleaded, if evidence of estoppel is admitted without objection, pleading is not necessary. Sawyer-Adecor Int'l, Inc. v. Anglin, 198 M 440, 646 P2d 1194, 39 St. Rep. 1118 (1982).

Proof Allowed on Affirmative Defense Not Pleaded: In a quiet title action, defendant filed a general denial as well as a cross-claim. Plaintiff replied to the cross-claim. This rule prevented defendant from pleading further and asserting the affirmative defense of estoppel. He was entitled to present evidence on that issue, because where there has been no opportunity to allege estoppel, it may be put into evidence as if alleged. Sawyer-Adecor Int'l, Inc. v. Anglin, 198 M 440, 646 P2d 1194, 39 St. Rep. 1118 (1982).

Estoppel Inapplicable Where Claimant Has Knowledge: In an appeal from a summary judgment decreeing that a life estate claimed by appellant was void, the Supreme Court held that appellants were not barred by equitable estoppel from claiming a life estate because respondent asserting estoppel had sufficient knowledge and access to knowledge of facts underlying the contract that created the life estate. Harbeck v. Orr, 192 M 243, 627 P2d 1217, 38 St. Rep. 668 (1981).

RELEASE

Absence of Evidence of Rescission, Release, Waiver, or Accord and Satisfaction of Contract — Reversal Warranted: Plaintiffs owned shares in defendant's corporation and sought to sell the shares back to the corporation. The corporation sent a letter offering to purchase the shares for $64,933.60, and plaintiffs were instructed that to accept the offer, they were to sign the back of the stock certificate and mail it to the corporation. Plaintiffs did so, but included with the certificate a letter stating that by accepting the offer, plaintiffs reserved their rights under federal and state law. The corporation found the language unacceptable and declined to purchase the shares, instead returning the certificate to plaintiffs. Concerned about possessing a signed stock certificate, plaintiffs ultimately visited the corporation and surrendered the endorsed certificate in exchange for a new one. Plaintiffs then brought a breach of contract suit claiming $64,933.60 in damages, asserting that the corporation had breached its offer to repurchase the stock. The corporation denied that a contract offer existed, arguing that plaintiffs' reply was not an acceptance but rather a counteroffer, and asserted that even if a contract did exist, plaintiffs had waived their rights under it by forfeiting the endorsed certificate in favor of a new one and by failing to immediately assert their rights under the contract. A jury found that the corporation had breached its contract, causing damages in the amount of $64,933.60, but then entered a verdict for the corporation on grounds that the corporation had proved at least one of its affirmative defenses of rescission, release, waiver, or accord and satisfaction. On appeal, the Supreme Court noted that only in rare cases should a jury verdict be set aside but reversed the verdict nevertheless on grounds that, even drawing all legitimate inferences in favor of the corporation, there was a complete absence of probative evidence supporting any of the corporation's affirmative defenses. The case was remanded for entry of judgment of $64,933.60 in favor of plaintiffs. Benson v. Diverse Computer Corp., 2004 MT 114, 321 M 140, 89 P3d 981 (2004), followed in Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004).

Misinterpretation of Testimony Regarding Alleged Relinquishment of Claim — Reversible Error: Kane sued Morgan to recover the costs of two wells that Kane drilled on Morgan's property for which payment was not made. At one point in his testimony, Kane stated that he charged Morgan for the first 150 feet of drilling, but gave Morgan the rest of the 400-foot hole, and then said, "Yeah, I give it to him. I think I'd give it all to him." The District Court interpreted the statement as a relinquishment by Kane for payment of the entire well and compensated Kane only for the cost of the other well. Kane appealed. The Supreme Court applied the test in In re Marriage of Kotecki, 2000 MT 254, 301 M 460, 10 P3d 828 (2000), to determine if the finding was clearly erroneous: (1) whether the finding was supported by substantial evidence in the record; (2) whether the trial court misapprehended the effect of the evidence; and (3) if the first two factors are met, the Supreme Court is still left with a definite and firm conviction that a mistake was made. In this case, it was held that the District Court committed a mistake and misinterpreted Kane's testimony, so the Supreme Court reversed. Neither party interpreted the remark as a gift by Kane of the entire well. The comment was not followed up by either party during direct or cross-examination. Counsel for Morgan continued questioning both Kane and other witnesses as if Kane had not relinquished his claim, nor did Morgan assert relinquishment in the proposed findings of fact and conclusions of law. Kane v. Morgan, 2001 MT 182, 306 M 207, 32 P3d 747 (2001).

Materiality of Claim of Failure of Consideration to Contract Required Before Rescission Available as Remedy — Partial Failure of Consideration — Meltdown of Ice Cream Distributorship Agreement: Under Johnson v. Meiers, 118 M 258, 164 P2d 1012 (1946), a breach that goes to only part of the consideration, that is incidental and subordinate to the main purpose of the contract, and that may be compensated in damages does not warrant rescission. The injured party is still bound to perform that party's part of the contract, and the only remedy for the breach consists of the damages suffered from the breach. By contrast, under Van Hook v. Baum, 245 M 407, 800 P2d 151, 47 St. Rep. 1883 (1990), a party may rescind if, through the fault of the other party, consideration fails in whole or in part. In clarifying the disparate holdings, the Supreme Court noted that the term "failure of consideration", as either a claim or an affirmative defense, does not relate to the absence of consideration or whether there is good consideration for the formation of a valid, enforceable contract, but rather the term pertains to the failure of one party's performance, which then suspends or excuses the performance of the other party pursuant to the terms of a valid contract. Failure of consideration is generally synonymous with a material breach of performance of a contract, rather than whether a contract was enforceable because of the absence of the essential element of consideration. Thus, a claim or affirmative defense of failure of consideration that gives rise to the equitable remedy of rescission requires a showing by the claiming party that the other party's failure to perform was, in fact, material to the contract, and whether consideration was sufficient or good is immaterial. To reconcile this holding with 28-2-1711, the court went on to hold that failure of part of a promised performance may warrant rescission, but only if the claiming party proves that the deficient part of the other party's performance was material to the contract. If the failure to perform was not material, rescission is not an available remedy, performance cannot be excused, and the claiming party "may only be entitled to money damages for breach". Here, the District Court erred when it did not determine whether Norwood's failure to assign an ice cream distributor agreement to Service Distributing, Inc. (SDI), was material to the transaction as a whole. Absent that finding, SDI could not as a matter of law rescind the contract and be excused from further performance of its obligation to Norwood, so the case was remanded to determine whether a material breach occurred. Norwood v. Serv. Distrib., Inc., 2000 MT 4, 297 M 473, 994 P2d 25, 57 St. Rep. 8 (2000), followed in Eschenbacher v. Anderson, 2001 MT 206, 306 M 321, 34 P3d 87 (2001). See also Flaig v. Gramm, 1999 MT 181, 295 M 297, 983 P2d 396, 56 St. Rep. 710 (1999).

Exceptions to Requirement for Matching Terms in Offer Made Under Right of First Refusal: A right of first refusal does not give the rightholder the power to compel an unwilling owner to sell, but merely requires the owner, when and if a decision is made to sell, to offer the property first to the rightholder at the stipulated price. The preemptive right ripens into an option when the owner elects to sell, at which point the owner has the contractual obligation to offer the property to the optionee on the same terms and conditions as the offer made to the owner by a third party. (See 77 Am. Jur. 2d Vendor Purchaser §40 (1997).) In order that each party to the contract receives the benefit bargained for, under Miller v. LeSea Broadcasting, Inc., 87 F3d 224 (7th Cir. 1996), three exceptions to the requirement for the exact matching of terms have been recognized: (1) the grantor of the option can waive exact matching; (2) proper names need not be matched; and (3) the grantor of the option may not act in bad faith, including procuring from the third party terms that the grantor knows are unacceptable to the optionee for the purpose of discouraging exercise of the right of first refusal. As long as the conditions of the sale are commercially reasonable, imposed in good faith, and not specifically designed to defeat the right of first refusal, the optionee is obliged to match the offer if the right is to be exercised. Here, although attorneys for the parties engaged in discussions concerning whether poison pill provisions included in an offer were an attempt to dissuade exercise of the right of first refusal, the discussions were not found to impact the effective exercise of the right, so the District Court's conclusion that the right had been properly exercised was not in error. Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999). See also Story v. Bozeman, 242 M 436, 791 P2d 767, 47 St. Rep. 850 (1990), and Lee v. Shaw, 251 M 118, 822 P2d 1061 (1992).

Involuntary Satisfaction of Judgment — Request for Stay of Execution Not Required: Following entry and satisfaction of judgment in District Court, the parties were aware of a contemplated appeal, but no stay of execution was requested or supersedeas bond posted. After plaintiff acquired title to the disputed property pursuant to the judgment, defendant filed a notice of appeal and lis pendens, effectively preserving the status quo pending appeal. Plaintiff moved to dismiss, contending that by voluntarily satisfying the judgment, defendants waived their right to appeal. Applying Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996), the Supreme Court held that the parties' course of conduct illustrated the involuntary, rather than voluntary nature of the satisfaction of judgment. Because satisfaction

was involuntary, the right to appeal was not waived. Further, under Rule 7, M.R.App.P. (Title 25, ch. 21), a party may request a stay of execution, but the request is not mandatory, even though a party choosing not to seek a stay runs the risk of having the appeal become moot. Plaintiff's motion to dismiss was denied. Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Mutual Mistake of Fact Sufficient to Set Aside Release in FELA Action: A release in an action under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 through 60, may be set aside on the basis of mutual mistake of fact in executing the release. A mutual mistake of fact is sufficient to avoid a release only when the mistake goes to the nature of the injury and the mistaken belief is held by both parties. In the present case, Bevacqua signed releases purporting to settle all injury claims, but was lulled into signing because of repeated assurances by doctors who examined him at the employer's request, assured him that nothing was wrong, and authorized him to return to work. Under FELA, this mutual mistake of fact was sufficient to set aside the releases. Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998), following Callen v. Pa. RR Co., 332 US 625, 92 L Ed 242, 68 S Ct 296 (1948), and Counts v. Burlington N. RR Co., 952 F2d 1136 (9th Cir. 1991).

Conduct Constituting Waiver of Right of First Refusal to Purchase Property: After a determination by the Supreme Court in Lee v. Shaw, 251 M 118, 822 P2d 1061 (1992), that the Lees' lease-management agreement contained a valid right of first refusal to purchase ranch property, notification of intent to sell was given and extensive sale negotiations were begun to finalize purchase of the ranch. Although none of the various proposed contracts was signed by all of the parties, an agreement was reached to complete the sale on a specified closing date, thus triggering the running of the preemptive right to purchase, which was set by the agreement at 45 days. However, the Lees failed to show up for the closing, despite an extension of the closing date. The District Court properly determined that the Lees' actions constituted an intentional relinquishment of their right of first refusal and thus a waiver of that right. In re Estate of Pelzman, 261 M 461, 863 P2d 1019, 50 St. Rep. 1408 (1993).

Release of Claims for Defective Condominiums Upheld: The plaintiffs, a condominium owners' association and its individual members, sued Big Sky of Montana Realty, Inc., the successor in interest of Big Sky of Montana, Inc., for breach of warranty, strict liability, negligence, fraud, and deceptive practices in connection with a fire in the Deer Lodge Condominiums at Big Sky. The defendants claimed that the actions were barred by a fully performed release executed by the association on behalf of the plaintiffs. The plaintiffs claimed that the release did not include undisclosed defects and that it was obtained by fraud. The Supreme Court held that the language of the release was broad enough to include the claims against the defendants and that any cause of action for fraud was barred by the statutes of limitations. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990).

Plaintiff's Actions Constituting Waiver and Release of Claim for Past Salary: The plaintiff claimed that he was owed additional money in the form of conversion compensation for a period of time that had occurred 17 years prior to his filing a claim. The Supreme Court held that the plaintiff's signing of 19 1-year contracts without complaint and his acceptance of a retirement agreement containing a promise not to pursue any past wage grievances constituted a waiver and release. Sperry v. Mont. St. Univ., 239 M 25, 778 P2d 895, 46 St. Rep. 1482 (1989), followed in In re Estate of Pelzman, 261 M 461, 863 P2d 1019, 50 St. Rep. 1408 (1993), with regard to waiver of the right of first refusal to purchase property.

Challenge of Validity of Release on Basis of Unconscionability — Summary Judgment Improper: Plaintiff signed a release for personal injuries with an insurance company in exchange for $8,900. Plaintiff later sued insureds, who were granted summary judgment after pleading the affirmative defense of release. However, a release is governed by contract law and may be rescinded for the same reasons that allow rescission of a contract. Therefore, the validity of a release may be challenged on the basis of unconscionability. The Supreme Court reversed the grant of summary judgment after finding the release was unconscionable based on: (1) plaintiff's dire financial situation, lack of education and legal advice, and vulnerability; (2) substantial uncertainty as to the extent of injury and future prognosis at the time of settlement; and (3) haste in executing the release. Taken together, the circumstances raised an issue of fact whether justice was done, precluding summary judgment. Kelly v. Widner, 236 M 523, 771 P2d 142, 46 St. Rep. 591 (1989).

Cashing of Check Evidence of Full Satisfaction of Claim: In settlement of a personal injury claim, plaintiff cashed defendant's check, which action constituted a full satisfaction of the claim. Despite plaintiff's subsequent contention that he did not intend to fully and finally release

the claim, the trial court found that the check was tendered to plaintiff under such circumstances that he was bound to know it was offered in full settlement of the claim, resulting in an accord and satisfaction between the parties and a discharge of plaintiff's whole claim. A disputed, unliquidated obligation may be extinguished if the obligated party offers to exchange an amount different from or less than the obligation in full settlement of the obligation and if the party owed the obligation agrees to accept and does accept the amount offered in full settlement of the obligation. Boyer v. Ettelman, 235 M 323, 767 P2d 324, 46 St. Rep. 21 (1989), followed in Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

Separate Suits Against Copartner and Bank — Settlement With One — No Release of Other: Bank depositor sued his bank and his partner in separate actions after the partner induced the bank to change a signature card requiring both partners' signatures so that defendant partner could make withdrawals on his signature alone. Depositor did not release his claim against the bank when he settled with his partner because: (1) the claims against the two were not based entirely on the same conduct; (2) assuming the two were joint tortfeasors, any release of one might specifically exclude the other; and (3) nothing in the record indicated either a release or nonrelease of the bank. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Law Review Articles

A Primer on the Developing Doctrine of Constructive Fraud in Montana, Monhart, 52 Mont. L. Rev. 153 (1991). See footnote 172 on p. 172.

A Primer On Accord and Satisfaction, Burnham, 47 Mont. L. Rev. 1 (1986). See footnote 44 on p. 9.

Collateral References

Limitation of Actions *key* 182(1) through (7); Pleading *key* 132.

54 C.J.S. Limitation of Actions §§61, 62, 348, et seq.; 71 C.J.S. Pleading §197.

61A Am. Jur. 2d Pleading §§287 through 332.

Necessity of pleading of damage to establish fraud as defense to action on contract. 91 ALR 2d 356.

Raising defense of Statute of Limitations by demurrer, equivalent motion to dismiss, or by motion for judgment on pleadings. 61 ALR 2d 300.

Necessity of pleading assumption of risk as a defense. 59 ALR 2d 239.

Estoppel to plead Statute of Limitations. 24 ALR 2d 1413.

Pleading laches. 173 ALR 326.

Manner of pleading Statute of Frauds as defense. 158 ALR 89.

Pleading waiver, estoppel, and res judicata. 120 ALR 8.

Rule 8(d). Effect of failure to deny.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

Failure to File Timely Reply to Counterclaim — Default Judgment Proper: The District Court directed plaintiff to respond to a counterclaim within 10 days. Plaintiff failed to comply within the designated time, so default judgment was entered against plaintiff, and plaintiff appealed on grounds that the default judgment should be set aside under Rule 60(b), M.R.Civ.P. The Supreme Court disagreed. As an attorney, plaintiff was sufficiently literate and intelligent to understand the document presented by opposing counsel and to respond accordingly. Any mistake complained of by plaintiff did not rise to a level warranting setting aside of the default judgment. Plaintiff did not meet the burden of proof under Rule 60(b) to set aside the judgment and did not establish any abuse of discretion by the trial court, so the default judgment was affirmed. Tschida v. Rowe, 2003 MT 192, 316 M 503, 74 P3d 1043 (2003).

Power of Trial Court on Remand — No Provision Regarding Effect of Failure to Deny in Rules of Appellate Procedure: In 1993, Brown filed a petition for a writ of habeas corpus, arguing that prison officials had miscalculated his parole eligibility date. The Supreme Court denied that petition. In 1996, Brown filed a 42 U.S.C. 1983 complaint in District Court seeking to address alleged deprivations of his rights by prison officials under federal law, but the complaint was dismissed for failure to state a claim. The District Court concluded that the issues raised in the complaint were the same as those raised in the 1993 writ and were thus barred by collateral estoppel. Brown appealed, and in an unpublished opinion (Brown v. St., No. 96-651), the Supreme Court remanded, concluding that the District Court had mischaracterized the issues in

the 1993 writ and that three of the claims were not barred by collateral estoppel. On remand, after an unexplained delay of 4 years, the District Court dismissed Brown's remaining claims, holding that they were not cognizable under federal law. Brown appealed again, arguing that the District Court erred by granting judgment to the state without first holding a hearing and asserting that under this rule, the state's failure to respond to the issue in its brief constituted an admission that Brown was correct on the issue. However, Brown misapplied this rule to these proceedings. The Montana Rules of Appellate Procedure do not contain a similar provision regarding the effect of failure to deny. Further, the remand order did not require the District Court to hold a hearing. On remand, the trial court is free to make any order or decision in further progress of the case that is not inconsistent with the appellate court's decision. The District Court was affirmed. Brown v. St., 2002 MT 58, 309 M 106, 46 P3d 42 (2002).

Division of Marital Estate — Contention of Admission by Failure to Answer "Counterpetition": Where petitioner in an action for dissolution of marriage asked for an equitable apportionment of the marital estate and spouse in "counterpetition" asked for an award of 50% of the marital estate, petitioner had no duty to answer the "counterpetition" because entire estate was before the court for equitable distribution; thus lack of response by petitioner to "counterpetition" is not an admission by failure to deny under this rule. Knudson v. Knudson, 186 M 8, 606 P2d 130 (1980).

Admissions — No Further Proof Necessary: No further proof of heirship was required and summary judgment was proper where portion of paragraph in complaint alleging heirship was admitted in answer. Sikora v. Sikora, 160 M 27, 499 P2d 808 (1972).

No Reply to Affirmative Defenses Required: The stipulation in this rule that averments in answer to which no responsive pleading is required are denied, read in conjunction with Rule 7(a), does not compel the plaintiff to reply to an answer averring the affirmative defense of a release. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965).

Unanswered Affirmative Defenses — Effect: Defendant's contention that an unanswered affirmative defense is admitted was erroneous. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965).

Surreply as Superfluous Pleading — No Admission Made: Where plaintiff in a quiet title action in his reply set up three affirmative defenses, and defendant filed a surreply denying two of such defenses but not the third, that fact was immaterial since all allegations of new matter in a reply are to be considered controverted by the adverse party. Sherburne Mercantile Co. v. Bonds, 115 M 464, 145 P2d 827 (1944).

Reply to New Matter in Answer Not Required: An allegation of new matter in the answer, to which a reply is not required, is considered controverted. A reply is required only to allegations constituting a counterclaim. Brophy v. Downey, 26 M 252, 67 P 312 (1902).

Judgment on the Pleadings Held Proper: Judgment on the pleadings is proper when the complaint is sufficient, none of its material allegations are denied, and no affirmative matter is alleged to defeat the action. Mont. Min. Co. v. St. Louis Min. & Milling Co., 23 M 311, 58 P 870 (1899).

Collateral References

Pleading *key* 129(1) through (5), 182.
71 C.J.S. Pleading §§192 through 196.
61A Am. Jur. 2d Pleading §408.
Pleading last clear chance doctrine. 25 ALR 2d 254.

Rule 8(e). Pleading to be concise and direct — consistency.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still substantially the same as the Federal Rule. Montana omits a reference to "maritime grounds".

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Form of Pleading 573
Alternate or Inconsistent Defenses. 575

FORM OF PLEADING

Error in Allowing Amendment of Pleadings in Parental Rights Termination Case to Include New Theory — Lack of Notice Violative of Due Process Rights: During a parental rights termination hearing, the District Court allowed the state to amend the pleadings to include a new theory that the mother had abandoned her children. The mother's counsel objected for lack of notice. The state asserted that although abandonment may not have been included in the original pleadings as a separate ground for termination, there were facts in the original petition that supported a claim for abandonment and that the mother was thus on notice that the state intended to present evidence that would support a theory of abandonment. The Supreme Court disagreed. The fundamental liberty interest associated with parental rights must be protected with fundamentally fair procedures, including the due process requirement that a parent receive notice and be allowed the opportunity to be heard. Generally, a District Court cannot grant leave to amend the pleadings arbitrarily or perfunctorily, and although there are cases when the Supreme Court will allow a party to amend pleadings in order for a case to proceed efficiently on the merits, this was not one of those cases. The termination petition as a whole did not provide the mother with sufficient notice on the charge of abandonment. Although some of the facts may have been applicable to abandonment, the mother should not have been required to glean from those facts which claims the state could bring. Rather, the state was required to articulate the claims that it expected to raise, and allowing amendment of the pleadings during the hearing to include a theory of abandonment was reversible error. In re T.C. & W.C., 2001 MT 264, 307 M 244, 37 P3d 70 (2001).

Satisfaction of Elements of Estoppel as Question of Proof, Not Pleading: Poeppel asserted in District Court that he was misled by a county representative as to the proper time to file a grievance and that this act estopped the county from arguing that the request for a grievance was untimely. The county argued on appeal that the claim of estoppel was properly dismissed because Poeppel's complaint failed to allege the six elements of estoppel set forth in Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991). The question then became whether those elements must be alleged in the complaint or are factual issues of proof. Rule 9(b), M.R.Civ.P., requires particularity in pleading certain specified matters, not including estoppel, which is governed by the requirement in this rule, which states that pleadings must be simple, concise, and direct. The allegations in Poeppel's complaint, sparse and artless as they were, nevertheless put the county on notice so that a responsive pleading could be prepared. Whether Poeppel could satisfy the elements of estoppel was a question of proof, not pleadings, and the District Court erred in dismissing the grievance for failure to state a claim. The Supreme Court did not reach the question of whether the complaint was timely because resolution of that issue hinged upon whether Poeppel could prove the claim of estoppel at trial. The case was remanded for further proceedings. Poeppel v. Flathead County, 1999 MT 130, 294 M 487, 982 P2d 1007, 56 St. Rep. 525 (1999), following Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979).

Failure to Replead in Accordance With Rules — Dismissal With Prejudice Warranted — Exhaustion of All Sanctions Not Required: After a contract action against Nystroms was dismissed, Nystroms brought an action against the plaintiffs and their counsel, consisting of 76 paragraphs in 26 pages, alleging malicious fraudulent prosecution, intentional abuse of process, and unlawful intentional infliction of emotional distress. The District Court determined that the complaint was vindictive, argumentative, and repetitive and directed Nystroms to replead in accordance to Rules 8 and 12, M.R.Civ.P. Nystroms then filed an amended complaint of 130 paragraphs in 43 pages including previous allegations and adding allegations of interference with business relations and conspiracy. The District Court dismissed with prejudice under Rule 41(b), M.R.Civ.P., for failure to comply with the court's order. The Supreme Court affirmed, holding that even though there may have been other less severe remedies available to the District Court, that court did not abuse its discretion in dismissing the complaint with prejudice. The Nystroms' counsel had warning that failure to replead in accordance with the Rules of Civil Procedure could result in dismissal. The District Court could have reasonably concluded that there was no other adequate remedy available to the District Court and the defendant under the circumstances. Nystrom v. Melcher, 262 M 151, 864 P2d 754, 50 St. Rep. 1488 (1993).

Controverting Admissions Not Allowed in Pleadings: It is well settled that parties are bound by and estopped from controverting admissions in their pleadings. Audit Serv., Inc. v. Frontier-West, Inc., 252 M 142, 827 P2d 1242, 49 St. Rep. 186 (1992). See also Grimsley v. Spencer, 206 M 184, 670 P2d 85 (1983), and Fey v. A.A. Oil Corp., 129 M 300, 285 P2d 578 (1955).

Theories of Recovery Limited Through Instructions Following Filing of Amended Complaint — No Prejudice: An original complaint alleged theories of bad faith, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, and fraud. Three weeks prior to trial,

plaintiff filed an amended complaint that defendant asserted changed the theories to equitable estoppel, fraud, and bad faith. Prior to settling of instructions, the District Court, on its own motion, dismissed plaintiff's claims of equitable estoppel, fraud, bad faith, and punitive damages and allowed the case to go forward on theories of constructive fraud and negligent misrepresentation. The action by the court in limiting the theories of recovery through instructions had the effect of removing much of defendant's claimed prejudice through the allowance of the amended complaint. Phil-Co Feeds, Inc. v. First Nat'l Bank in Havre, 238 M 414, 777 P2d 1306, 46 St. Rep. 1380 (1989).

Summary Judgment Proper on Unsupported Claims of Economic Advantage, Bad Faith, Civil Conspiracy, and Punitive Damages: Plaintiff mining company by amended complaint brought claims of economic advantage, bad faith, civil conspiracy, and punitive damages. Defendant mining company filed a motion for a more definitive statement. In response, plaintiff filed a 35-page brief with 43 attached exhibits but again neglected to address defendant's request for specificity or counter defendant's legal arguments. Summary judgment was proper after a finding that plaintiff: (1) repeatedly failed to provide, with particularity, factual support for its allegations of fraud; (2) repeatedly failed to provide the District Court with a simple, concise, and direct pleading; and (3) failed to demonstrate a genuine issue of material fact, relying instead on lengthy but unsupported allegations. Monte Vista Co. v. The Anaconda Co., 231 M 522, 755 P2d 1358, 45 St. Rep. 809 (1988).

Laches and Statute of Limitations Adequately Pleaded: Plaintiffs' suit for rescission was barred by laches and their action for damages for breach of contract was barred by the 4-year Statute of Limitations. Since defendant's affirmative defenses revealed that plaintiffs had adequate notice of the defenses of laches and Statute of Limitations, although not specifically denominated as such, summary judgment was properly granted to defendants. Brabender v. Kit Mfg. Co., 174 M 63, 568 P2d 547 (1977).

Form of Pleading — Partition of Property: No particular form of pleading is necessary to seek partition of property in a divorce proceeding, and where plaintiff prayed that the court settle and adjust the property rights of the parties, including partition or sale of the property if necessary, and both sides briefed and argued the issue, there was sufficient notice to defendant and partition was proper. Hodgson v. Hodgson, 156 M 469, 482 P2d 140 (1971).

Action for Fraud — Statement of Facts Required: In an action involving fraud, the complaint must set forth the facts constituting the cause of action in ordinary and concise language, the use of such extravagant terms as "fraud", "conspiracy", and the like, unaccompanied by a statement of the facts upon which the charges of wrongdoing rest, being useless as a pleading. Min. Sec. Co. v. Wall, 99 M 596, 45 P2d 302 (1935).

Skill Required in Drafting Pleadings: The provision that the complaint must contain a statement of the cause of action relied upon in "ordinary and concise language" must not be understood as dispensing with all care and skill in framing the statement, but calls for an intelligent and accurate use of language by the pleader. Custer v. Missoula Pub. Serv. Co., 91 M 136, 6 P2d 131 (1931).

Inferences Considered Averred: In a personal injury action plaintiff need do no more in alleging the facts than set them forth in ordinary and concise language, and whatever is necessarily implied in or reasonably to be inferred from an allegation is to be taken as directly averred. Johnson v. Herring, 89 M 156, 295 P 1100 (1931).

Ultimate Facts to Be Alleged: In pleadings, only the ultimate facts and not the evidence to support those facts should be set forth in ordinary and concise language. First St. Bank v. Mussigbrod, 83 M 68, 271 P 695 (1928).

Definiteness of Complaint — Applicable Test: A complaint, to be proof against a special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed), ought at least to be sufficiently definite and certain to be on its face a bar to another suit on the same cause of action. Smallhorn v. Freeman, 61 M 137, 201 P 567 (1921).

Clear Language Required — Purpose of Rule: The rule under which the facts constituting plaintiff's cause of action must be stated in ordinary and concise language requires the facts to be stated by direct averment, so that the defendant may understand the specific acts of remissness with which he is charged and that the material issues may be framed for trial. Stricklin v. Chicago, Milwaukee & St. Paul Ry., 59 M 367, 197 P 839 (1921).

Damages to Be Clearly Stated: It would not be sufficient for a plaintiff to allege that, as the result of a fraud, he suffered damage "in an appreciable amount", or suffered "material damage", or "substantial damage". Any one of these allegations would render the pleading subject to demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed). Stillwell v. Rankin, 55 M 130, 174 P 186 (1918).

Complaint for Malpractice Rule Observed: A complaint against a physician and surgeon, for alleged malpractice in the reduction and treatment of a broken leg, contains "a statement of the facts constituting the cause of action, in ordinary and concise language", where it sets out, in traversable form, the acts or omissions of the defendant upon which the plaintiff seeks recovery, and shows that they occurred through the negligence of the defendant. Stokes v. Long, 52 M 470, 159 P 28 (1916).

Answer — New Matter Covered by Rule: The requirement that a complaint shall contain "a statement of the facts constituting the cause of action, in ordinary and concise language", applies to new matter alleged in the answer. Vaughan v. Kujath, 44 M 484, 120 P 1121 (1912).

Cause of Action to Be Stated in Ordinary Language: If the complaint did not contain a statement of the facts constituting the cause of action, in ordinary and concise language, a special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) thereto was, under the previous practice, properly sustained. Hosty v. Moulton Water Co., 39 M 310, 102 P 568 (1909).

ALTERNATE OR INCONSISTENT DEFENSES

All Parties in Equity Court Entitled to Have Their Legal Claims and Counterclaims Tried by Jury: Although, in the past, the court has purported to permit a court of equity to rule on all questions in a case, the court has never held that a court sitting in equity may try those issues of fact raised by plaintiff in a legal cause of action. The modern merger of law and equity courts and the liberal joinder provisions of the Rules of Civil Procedure force reevaluation of the traditional justification for permitting an equity court to decide legal issues. Upon timely demand, all parties are entitled to have their legal claims and counterclaims tried by jury. Gray v. Billings, 213 M 6, 689 P2d 268, 41 St. Rep. 1910 (1984). To the extent that Butler Bros. Dev. Co. v. Butler, 111 M 329, 108 P2d 1041 (1941), and its progeny have been interpreted to deny plaintiff a right to jury trial of his legal claims, the cases are overruled.

Optional Claims May Be Raised Alternatively: Holder of note secured by contracts of unconditional guarantee and real estate mortgage may plead alternatively as to theory of recovery with court having authority under the rules to dispense with any claim left unadjudicated. Bozeman Deaconess Foundation v. Cowgill, 143 M 98, 387 P2d 435 (1963).

Claim of Contributory Negligence as Admission of Negligence: In action for injuries sustained by minor bicyclist when struck by defendant's automobile traveling in same direction, where defendant denied negligence and pleaded contributory negligence, as permitted by Montana statute, and trial court repeatedly charged that to recover plaintiff must prove that defendant was negligent in one or more of the particulars alleged, instruction that defense of contributory negligence admits or at least presupposes negligence on defendant's part, though improper, was not misleading. Hazeltine v. Johnson, 92 F2d 866 (9th Cir. 1937).

Admission Not a Defense: Admission of a paragraph of the complaint in a defendant's answer is not, strictly speaking, a defense within the rule relating to pleading inconsistent defenses. State ex rel. Nagle v. Stafford, 97 M 275, 34 P2d 372 (1934); Stagg v. Stagg, 96 M 573, 32 P2d 856 (1934).

Measure of Inconsistency Allowed: Inconsistent defenses may be pleaded, provided they are not so incompatible as to render the one or the other absolutely false. The test of inconsistency of defenses is whether or not the proof of one necessarily disproves the other. When one admits a fact and the other denies it, the admission must prevail over the denial. Stagg v. Stagg, 96 M 573, 32 P2d 856 (1934); Downs v. Nihill, 87 M 145, 286 P 410 (1930).

Defenses to Foreclosure of Assigned Mortgage Allowed: A defendant may set up two or more inconsistent defenses so long as they are not so far inconsistent that, if one be true, the other must necessarily be false. Where defendant in an action for foreclosure of mortgage brought by the assignee thereof alleged payment to the payee bank without knowledge of the assignment of the note and mortgage and believing it to be the owner or that it had authority to receive payment as agent of the assignee, the two allegations were not so repugnant that refusal to compel defendant to elect upon which one of the defenses he would rely was not error. Minn. Loan & Trust Co. v. Busby, 84 M 373, 275 P 761 (1929).

Alternate Defenses — No Election Required: Since a defendant in a civil action may in his answer set forth as many defenses as he has, he may introduce evidence to sustain them, and therefore may not be required to elect in advance upon which of them he will rely. Howard v. Fraser, 83 M 194, 271 P 444 (1928).

Inconsistent Defenses — No Waiver of Proof of Loss: Under the rule of practice that defendant may set up as many defenses as he may have, even though inconsistent, provided they are not so far inconsistent with each other that if the allegations of one are true those of the other must of

necessity be false, defendant insurance company's denial of liability on grounds other than failure of proof of loss did not constitute a waiver of notice and proof of loss. Johnson v. Rocky Mtn. Fire Ins. Co., 70 M 411, 226 P 515 (1924).

Inconsistent Defenses Allowed: Although the defendant may interpose inconsistent defenses, they must not be so far inconsistent that if the allegations of one are true, the allegations of the other must of necessity be false. White v. Hagbery, 54 M 593, 172 P 1034 (1918), distinguished in McGrath v. Dubs, 127 M 101, 257 P2d 899 (1953); Chenoweth v. Great N. Ry., 50 M 481, 148 P 330 (1915); Day v. Kelly, 50 M 306, 146 P 930 (1915); O'Donnell v. Butte, 44 M 97, 119 P 281 (1911); Johnson v. Butte & Superior Copper Co., 41 M 158, 108 P 1057 (1910). But see Fraser v. Clark, 137 M 362, 352 P2d 681 (1960).

Error to Exclude Evidence on Inconsistent Defenses: Since a defendant may, under this section, interpose illogical or inconsistent defenses, it is error to exclude evidence offered in support thereof. St. Paul Mach. Mfg. Co. v. Bruce, 54 M 549, 172 P 330 (1918).

Collateral References

Pleading *key* 17, 89 through 95, 174.

71 C.J.S. Pleading §§66 through 80.

61A Am. Jur. 2d Pleading §§37 through 43.

Definiteness of plaintiff's allegations in defamation action as to defendant's malice. 76 ALR 2d 696.

Definiteness of pleadings in action involving trade secret or the like. 62 ALR 2d 512.

Inconsistency in pleading defense of assumption of risk. 59 ALR 2d 262.

Definiteness of allegations of desertion, abandonment, or living apart as ground for divorce, separation, or alimony. 57 ALR 2d 468.

Pleading in defamation action denying utterance as inconsistent with pleading defense of privilege. 51 ALR 2d 580.

Necessity and sufficiency of pleading custom or usage. 151 ALR 324.

Manner and sufficiency of pleading foreign law. 134 ALR 570.

Rule 8(f). Construction of pleadings.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

General 576
Defects in Form 577
Inferences From Allegations 578

GENERAL

Buyer's Right to Rely on Contract — Damages Pleaded for Breach: The seller argued on appeal from a verdict for the purchaser in a breach of contract action that the buyer's complaint sought damages due to the buyer's detrimental reliance upon the contract, in that the buyer had obligated himself to resell the calves, which obligation the buyer then was unable to fulfill and for which the buyer was liable. The seller argued that, based upon the buyer's own pleadings, the buyer could not recover because he, the buyer, could not detrimentally rely on the contract; the seller had warned him he could not fulfill the contract. The Supreme Court said that argument was beside the point. Damages were determined ultimately on the simple basis of difference between market prices on the date of delivery and the price on the date of execution, as provided by 30-2-713. Although the trial court's method of resolving damages did not conform precisely to that pleaded in the buyer's complaint, the District Court action was proper because, under Rule 8(f), M.R.Civ.P., pleadings are to be construed to do substantial justice. The real purpose of the claim as a whole was to be considered and honored. Here the purpose and spirit behind the complaint were recovery for breach of contract, and damages based upon the changes in the market were within the scope of the complaint. Miller v. Titeca, 192 M 357, 628 P2d 670, 38 St. Rep. 853 (1981), followed in Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999).

Specificity of Pleadings: Concerning the degree of specificity in plaintiff's pleadings desired by defendants, the Supreme Court does not favor the cutting short of litigation at the initial pleading stage unless a complaint does not state a cause of action under any set of facts. Tobacco River Lumber Co., Inc. v. Yoppe, 176 M 267, 577 P2d 855 (1978).

Administrative Proceedings: Pleadings and applications in an administrative matter should be construed as to do substantial justice. W. Bank of Billings v. Mont. St. Banking Bd., 174 M 331, 570 P2d 1115 (1977).

Laches and Statute of Limitations Adequately Pleaded: Plaintiffs' suit for rescission was barred by laches and their action for damages for breach of contract was barred by the 4-year Statute of Limitations. Since defendant's affirmative defenses revealed that plaintiffs had adequate notice of the defenses of laches and Statute of Limitations, although not specifically denominated as such, summary judgment was properly granted to defendants. Brabender v. Kit Mfg. Co., 174 M 63, 568 P2d 547 (1977).

Demand for Relief: In divorce action where complaint alleged that $2,040 which had been in bank was plaintiff's separate property, that it was placed in her name although she had no interest in it, and that she took the money without plaintiff's consent and prayer was for "such other and further relief as to the court may seem meet and equitable in the premises", it was not error for the court to adjudge that plaintiff recover from defendant the amount of $2,040. Rogers v. Rogers, 123 M 52, 209 P2d 998 (1949), distinguished in Chapman v. Chapman, 137 M 544, 354 P2d 184 (1960), explained in Key v. Clements, 133 M 344, 323 P2d 603 (1958).

Defective Complaint — Divorce Action: A complaint in a divorce action which does not set forth the elements of the ground for divorce with sufficient certainty to establish them was not aided by section 93-3801, R.C.M. 1947 (superseded by Rule 8(f), M.R.Civ.P.). Hosking v. Hosking, 120 M 437, 186 P2d 503 (1947).

Omitted Allegations Not Implied: Although sections 93-3801 and 93-3909, R.C.M. 1947 (superseded by Rule 8(f), M.R.Civ.P.), abolished the rigorous rules of the common law requiring the pleading to be construed most unfavorably to the pleader, they did not require such a liberal construction as would read into the pleading a substantial allegation which has been omitted therefrom. Kosonen v. Waara, 87 M 24, 285 P 668 (1930); Mont. Amusement Sec. Co. v. Goldwyn Distrib. Corp., 56 M 215, 182 P 119 (1919); Conrad Nat'l Bank v. Great N. Ry., 24 M 178, 61 P 1 (1900).

Misjoinder of Actions: Notwithstanding there may be some question as to whether causes of action in tort and in contract have not been improperly joined, the Supreme Court will not too closely scrutinize the complaint to determine this fact, where the case has been tried on its merits and substantial justice appears to have been done. Ivey v. LaFrance Copper Co., 45 M 71, 121 P 1061 (1912).

Common-Law Rule Abolished: The effect of sections 93-3801 and 93-3909, R.C.M. 1947 (superseded by Rule 8(f), M.R.Civ.P.), was to abolish the rigorous rule of the common law requiring the pleading to be construed most unfavorably to the pleader. Conrad Nat'l Bank v. Great N. Ry., 24 M 178, 61 P 1 (1900); Becker v. Bd. of Comm'rs, 11 M 490, 28 P 1116 (1891); Daniels v. Andes Ins. Co., 2 M 78 (1874).

DEFECTS IN FORM

Participial Phrase — Common-Law Rule Abolished: While the use of the participial phrase in pleading under the common law was not permissible, it does not vitiate a pleading under code pleading. Cook v. Galen, 83 M 334, 272 P 250 (1928).

Technical Defects — No Error Where Defendant Not Misled: Where defendant was not misled by any allegations or lack of allegations in the complaint but was fully prepared to defend the action upon the merits, the judgment in favor of the plaintiff will not be reversed for mere technical defect in the pleading raised by general demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed). Davis v. Freisheimer, 68 M 322, 219 P 236 (1923).

Mistakes of Form and Surplusage to Be Disregarded: Under the liberal rule of construction of pleadings provided by sections 93-3801 and 93-3909, R.C.M. 1947 (superseded by Rule 8(f), M.R.Civ.P.), in determining the issues of law presented by a general demurrer (demurrer abolished, Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to the complaint or by objection to the introduction of evidence, matters of form as well as allegations which are irrelevant or redundant must be disregarded, and if the pleading warrants recovery in any amount and upon any admissible theory, it will be sustained. Grant v. Nihill, 64 M 420, 210 P 914 (1922).

Omission of Particular Words: Where the subject of denial, on information and belief, is certain specified allegations of the complaint, the omission of the word "thereof", in denying that the defendant has any knowledge or information sufficient to form a belief, is immaterial. The pleading is to be liberally construed. Pengelly v. Peeler, 39 M 26, 101 P 147 (1909).

No Effect on Substance if Intent and Purpose Shown: Mere matters of form or defective statement not affecting the substance will not be held fatal if the pleading as a whole shows its general intent and purpose. Conrad Nat'l Bank v. Great N. Ry., 24 M 178, 61 P 1 (1900).

INFERENCES FROM ALLEGATIONS

Error in Allowing Amendment of Pleadings in Parental Rights Termination Case to Include New Theory — Lack of Notice Violative of Due Process Rights: During a parental rights termination hearing, the District Court allowed the state to amend the pleadings to include a new theory that the mother had abandoned her children. The mother's counsel objected for lack of notice. The state asserted that although abandonment may not have been included in the original pleadings as a separate ground for termination, there were facts in the original petition that supported a claim for abandonment and that the mother was thus on notice that the state intended to present evidence that would support a theory of abandonment. The Supreme Court disagreed. The fundamental liberty interest associated with parental rights must be protected with fundamentally fair procedures, including the due process requirement that a parent receive notice and be allowed the opportunity to be heard. Generally, a District Court cannot grant leave to amend the pleadings arbitrarily or perfunctorily, and although there are cases when the Supreme Court will allow a party to amend pleadings in order for a case to proceed efficiently on the merits, this was not one of those cases. The termination petition as a whole did not provide the mother with sufficient notice on the charge of abandonment. Although some of the facts may have been applicable to abandonment, the mother should not have been required to glean from those facts which claims the state could bring. Rather, the state was required to articulate the claims that it expected to raise, and allowing amendment of the pleadings during the hearing to include a theory of abandonment was reversible error. In re T.C. & W.C., 2001 MT 264, 307 M 244, 37 P3d 70 (2001).

Claim and Delivery — Right to Possession Implied: In a claim and delivery action brought to recover partnership property belonging to a partnership which was dissolved by express will of the partners, a complaint alleging the existence of the partnership, the subsequent dissolution, and that the defendants wrongfully acquired possession of the partnership property involved was sufficient to show the plaintiff's right to possession and to state a cause of action. Rykken v. Black, 136 M 464, 348 P2d 998 (1960).

Right and Infringement to Be Shown: The allegations of a complaint must be liberally construed, and a complaint attacked by general demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed), although defective in many particulars, will be held sufficient if it alleges, directly or by necessary inference, facts showing plaintiff's primary right and its infringement by defendant and is sufficiently certain to enable the latter to prepare his evidence to meet the alleged facts. Miller v. Schrock, 135 M 409, 340 P2d 154 (1959); Johnson v. Johnson, 92 M 512, 15 P2d 842 (1932).

Inferences From Allegations as Directly Averred: Whatever is necessarily implied in or reasonably to be inferred from an allegation is to be taken as directly averred. Hage v. Orton, 119 M 419, 175 P2d 174 (1946); Kelly v. Lowney & Williams, Inc., 113 M 385, 126 P2d 486 (1942); Matteson v. Ackerson, 104 M 239, 66 P2d 797 (1937); Gotzian & Co. v. Norris, 89 M 307, 297 P 489 (1931); Cramer v. Deschler Broom Factory, 79 M 220, 255 P 346 (1927); Ray v. Divers, 72 M 513, 234 P 246 (1925); Connelly Co. v. Schlueter Bros., 69 M 65, 220 P 103 (1923); Grant v. Nihill, 64 M 420, 210 P 914 (1922); Doane v. Marquisee, 63 M 166, 206 P 426 (1922); Buhler v. Loftus, 53 M 546, 165 P 601 (1917); Stokes v. Long, 52 M 470, 159 P 28 (1916); Gauss v. Trump, 48 M 92, 135 P 910 (1913); Daily v. Marshall, 47 M 377, 133 P 681 (1913); Allen v. Bear Creek Coal Co., 43 M 269, 115 P 673 (1911); Silver Bow County v. Davies, 40 M 418, 107 P 81 (1910), distinguished in Smallhorn v. Freeman, 61 M 137, 201 P 567 (1921); Harmon v. Fox, 31 M 324, 78 P 517 (1904).

Pleadings on Default — Every Reasonable Inference Allowed: Leniency is to be exercised in construction of pleadings on default and courts must indulge every reasonable inference to support a cause of action. Lindsey v. Keenan, 118 M 312, 165 P2d 804 (1946).

Failure of Civil Officer to Comply With Request: Under section 93-3801, R.C.M. 1947 (superseded by Rule 8(f), M.R.Civ.P.), providing liberal construction of pleading, whatever is necessarily implied in, or can be reasonably inferred from its allegations was to be treated as directly averred, and when relator in mandamus proceeding alleged in his petition that he asked the County Assessor to enter on an application for registration, the full, true, and assessed valuation of automobile, and such officer "willfully and unlawfully refused" to do so, the averment was tantamount to alleging that the Assessor failed to comply with his request. State ex rel. Sadler v. Evans, 106 M 286, 77 P2d 394 (1938).

Basis for Implication Required: Before the rule that whatever is implied in or reasonably to be inferred from allegations of a pleading is to be taken as directly averred may be invoked, it must appear that sufficient facts are stated to furnish a basis for the implication or inference. Grover v. Hines, 66 M 230, 213 P 250 (1923); Smallhorn v. Freeman, 61 M 137, 201 P 567 (1921).

Necessary but Omitted Facts Not Inferred — Reasonable Inferences Required: This section does not permit the reading into the pleading of a statement of a necessary, substantial fact which has been omitted, so as to make it state a cause of action where none is stated. It does require that whatever is necessarily implied by a statement directly made, or is reasonably to be inferred therefrom, is to be taken as directly averred. Allen v. Bear Creek Coal Co., 43 M 269, 115 P 673 (1911).

Inference of Compliance With Law: An allegation that the chief deputy of a Clerk of the District Court issued jurors' and witnesses' certificates as chief deputy implies that he issued them in the form and under the requirements prescribed by the statute. Silver Bow County v. Davies, 40 M 418, 107 P 81 (1910).

Collateral References

Pleading *key* 34(1) through (7).
71 C.J.S. Pleading §§81 through 89.
61A Am. Jur. 2d Pleading §§80 through 97.

Rule 9. Pleading special matters

Case Notes

Adequacy of Pleadings in Libel Suit — Damages: The Supreme Court reversed the District Court dismissal of a libel action and rejected defendant's argument that in Montana specific damages must be pleaded and proven to support a claim for libel per quod and that actual malice must be specifically pleaded to satisfy the requirements of the first amendment of the United States Constitution. The plaintiff's pleadings were found to satisfy the standards set forth in New York Times Co. v. Sullivan, 376 US 254 (1964), adopted by Montana in Madison v. Yunker, 180 M 54, 589 P2d 126 (1978), as well as the requirements of Rule 9(b), M.R.Civ.P. Gallagher v. Johnson, 188 M 117, 611 P2d 613 (1980).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).
Defamation: The Montana Law, Kimball, 20 Mont. L. Rev. 1 (1958).

Rule 9(a). Capacity.

Commission and Advisory Committee Notes

COMMISSION NOTE

The rule is identical with the Federal Rule, except for changes made in subdivisions (a) and (d). Subdivision (a) omits a clause, "except to the extent required to show the jurisdiction of the court," at the end of the first sentence, since this clause seems to refer only to diversity jurisdiction under federal practice.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

The amendment adds language to conform the rule to the Federal Rule. The added language appears to have been inadvertently omitted when the rule was originally adopted by Montana.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable and made accurate by the Supreme Court's correction of an oversight. See advisory committee's note.

Amendments: The amendment of October 9, 1984, in last sentence inserted "or the authority of a party to sue or be sued".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Section 1983 Action for Damages and Declaratory and Injunctive Relief — State Agency Held Not a "Person" — Individual or Official Capacity of Individual Defendants Determined — Test for Qualified Immunity in Damages Action — Remington Overruled: Orozco, an inmate in the Montana State Prison, brought a civil action for damages pursuant to 42 U.S.C. 1983 against the Department of Corrections and Human Services (now Department of Corrections) and several Department employees for the denial of his due process rights in connection with the denial of his

ability to earn good time credits. The Department moved for dismissal for failure to state a claim, based upon 11th amendment immunity. As to the Department, the Supreme Court held, citing Will v. Mich. Dept. of St. Police, 491 US 58 (1989), that because the Department has been created as part of the Executive Branch of state government, suing the Department is the same as suing the State of Montana, which is not a "person" for the purposes of a section 1983 action. In response to Orozco's argument that 2-9-305 required him to join the Department as a party, the Supreme Court noted that there is nothing in the text of that section that requires that the state be joined as a party; the section provides only for the tender of a defense and payment of damages by the state if a state employee is sued. Therefore, the Supreme Court held that the District Court correctly dismissed the action for damages against the Department. As to the individual defendants, the Supreme Court held that state employees acting in their official capacities are likewise not "persons" for the purposes of a section 1983 action but that state employees acting in their individual capacities are "persons" within the meaning of section 1983. The Supreme Court noted that Orozco had not clearly indicated the capacities in which the individual defendants were being sued, and so it looked to other provisions of the complaint and to U.S. Supreme Court decisions in order to determine Orozco's intent and held that Orozco intended to sue the individual defendants in their individual capacities. For this reason, the Supreme Court held that the District Court erred in holding that the individually named defendants were not "persons" under 42 U.S.C. 1983 for the purposes of the action for damages. The Supreme Court also held that in enacting 53-30-105 (now repealed) mandating rules for the accrual of good time, the state had created a right to good time. The Supreme Court also held that the immunity analysis used in Remington v. Dept. of Corrections and Human Services, 255 M 480, 844 P2d 50 (1992), was incorrect in light of the later decision of the U.S. Supreme Court in Sandin v. Connor, 515 US 472 (1995), and overruled Remington, but, on the basis of the Sandin immunity analysis, determined that Orozco's liberty interest in the award of good time credits was not clearly established on the date of Orozco's hearing to reclassify him as a maximum security prisoner who was no longer entitled to earn good time credits. For this reason, the Supreme Court held that the Department employees who were sued in their individual capacities were to be given qualified immunity for the purposes of the action for damages but that the District Court improperly dismissed the action for declaratory and injunctive relief and remanded the case to the District Court for a determination of what process was due Orozco before his opportunity to earn good time was revoked and whether he received that process. Orozco v. Day, 281 M 341, 934 P2d 1009, 54 St. Rep. 200 (1997).

Breach of Contract Action for Failure to Properly Embalm Deceased — Agency — Standing to Sue: Maria handled all funeral arrangements for her deceased mother. The family of the deceased, when viewing the body, observed a stain on the clothing that was determined to be caused by leaking embalming fluid. The lower court dismissed the family's claim for breach of contract and also ruled that Maria was not acting as agent for the other family members and that only she would have been able to sue for breach of contract. The Supreme Court held that a cause of action for breach of contract would exist if Maria could show that the breach had so "damaged" the funeral as to constitute a breach of contract entitling Maria to damages. The Supreme Court did affirm the lower court's ruling that Maria was not acting as an agent for the rest of the family in contracting with the mortuary. Therefore, only she could sue on the contract. Contreraz v. Michelotti-Sawyers & Nordquist Mortuary, Inc., 271 M 300, 896 P2d 1118, 52 St. Rep. 454 (1995).

Intentional Infliction of Emotional Distress Extended to Negligent Handling of Dead Bodies — Standing to Sue: The family of the deceased, when viewing the body, observed a stain on the clothing that was determined to be caused by leaking embalming fluid. The Supreme Court, in reversing the District Court, held that one who negligently handles a dead body is liable to the family for emotional distress and that the test for emotional distress is that established in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995). The Supreme Court also held that the children and the grandchildren of the deceased had standing to sue based on a factual showing of their closeness to the deceased and that having seen the stain was not a prerequisite to their right to sue. Contreraz v. Michelotti-Sawyers & Nordquist Mortuary, Inc., 271 M 300, 896 P2d 1118, 52 St. Rep. 454 (1995).

Failure of Limited Partners to Request General Partner to Initiate Suit: The limited partners sued the bank, alleging that the bank had forced the general partner to breach his fiduciary duty to the limited partners. The lower court dismissed the complaint for failure to state a claim, holding that the plaintiffs had not alleged that they were suing in a derivative capacity and that they had failed to set forth with particularity their efforts to obtain action by the general partner. The Supreme Court ruled that under this rule, the plaintiffs did not need to allege that they were

suing in a derivative capacity. The court also held that although Rule 23.1, M.R.Civ.P., and 35-12-1403 require the plaintiffs to set out with particularity their efforts to get the general partner to take action, the lower court should have given the plaintiffs a chance to amend their complaint. Larson v. First Interstate Bank, 241 M 350, 786 P2d 1176, 47 St. Rep. 344 (1990).

Injunctive Relief Granted to Persons Not Specifically Named as Plaintiffs — Representative Capacity Not Challenged: The District Court did not exceed its personal jurisdiction by granting injunctive relief to persons other than those specifically named as plaintiffs in the complaint when the voluntary trade organization, as plaintiff, alleged that it was representing persons holding liquor licenses in Montana and the state, as defendant, did not challenge the adequacy of the association's representative capacity under Rule 9(a), M.R.Civ.P. (see Title 25, ch. 20). Mont Tavern Ass'n v. St., 224 M 258, 729 P2d 1310, 43 St. Rep. 2180 (1986).

Failure to Raise Issue of Capacity by Negative Averment — Defense Waived: Failure of a party to raise the issue of capacity by specific negative averment in the responsive pleading or in a motion before the pleadings results in a waiver of that defense. Interstate Prod. Credit Ass'n v. Abbott, 223 M 405, 726 P2d 824, 43 St. Rep. 1829 (1986), citing Summers v. Interstate Tractor & Equip. Co., 466 F2d 42 (9th Cir. 1972).

Standing to Sue Government in General — Annexation Proceedings in Particular: Before one has standing to sue a governmental entity, there must be a case or controversy. The plaintiff must clearly allege past, present, or threatened injury to a property or civil right, and the injury must be distinguishable from injury to the public in general, though it need not be exclusive to the plaintiff. In an annexation protest, annexation is a political matter exclusively for legislative control, absent a constitutional prohibition. The annexation must be void ab initio, and the challenger must be a property owner who would suffer a tax increase. The available remedy is an injunction, not monetary damages. A count of petition signatures for only one of many annexed areas, by a plaintiff who used his own criteria for the count, is insufficient to support a claim that the government entity inaccurately counted the signatures. Since plaintiff here had no standing to directly attack the annexation, he could not collaterally attack it by attempting to show negligence. O'Donnell Fire Serv. & Equip. Co. v. Billings, 219 M 317, 711 P2d 822, 42 St. Rep. 2051 (1985), followed in Knudsen v. Ereaux, 275 M 146, 911 P2d 835, 53 St. Rep. 83 (1996).

Foreign Administrator: The question of the right of a foreign administrator to maintain an action in the courts of this state in his representative capacity goes to the sufficiency of the complaint to state a cause of action and not to plaintiff's legal capacity to sue. Lefebure v. Baker, 69 M 193, 220 P 1111 (1923).

Corporate Capacity Need Not Be Pleaded: When a corporation brings an action at law in its corporate name it need not affirmatively allege in its complaint that it is a corporation in order to state a cause of action. NW. Hardware & Steel Co. v. Winnett, 67 M 545, 216 P 568 (1923).

Taxpayer's Action — Standing to Sue: Want of authority in a taxpayer to maintain a contest of a county seat election forms no ground of special demurrer, and has nothing to do with lack of "legal capacity to sue", meaning that plaintiff shall be free from such general disability as infancy or insanity. Poe v. Sheridan County, 52 M 279, 157 P 185 (1916).

Collateral References

Pleading *key* 38 ½ through 186.
71 C.J.S. Pleading §§116 through 146.
61A Am. Jur. 2d Pleading §§361, 362.

Rule 9(b). Fraud, mistake, condition of the mind.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

Fraudulently Obtained Independent Contractor Exemption First Raised in Opposition to Affirmative Defense and Motion for Summary Judgment: A worker fell from a carport roof that she was painting and sued the contractor who hired her and the people who hired the contractor to paint the house, claiming failure to provide a safe workplace and workers' compensation insurance. The defendants who hired the contractor pleaded the affirmative defense that the worker was an independent contractor, and the worker responded that the approved application for an independent contractor exemption was fraudulently obtained. Although this rule requires a claim of fraud to be pleaded with particularity, in this case, evidence of fraud raised by the worker in her brief in opposition to summary judgment was properly before the court and should

have been considered in the summary judgment proceeding. Gonzales v. Walchuk, 2002 MT 262, 312 M 240, 59 P3d 377 (2002).

Constructive Fraud Pleading — "Inartful" Pleading Held Sufficient — Relationship Between Rule 8(a) and This Rule: Berg was sued by the State Fund in a complaint that pleaded constructive fraud in three paragraphs that incorporated previous counts of the complaint by reference. Berg alleged that the constructive fraud count did not comply with the requirements of this rule that all of the elements of the constructive fraud claim be pleaded with "particularity" because all of the elements of constructive fraud were not pleaded. The Supreme Court held that the "particularity" requirements of this rule do not negate, and must be read in conjunction with, the provisions of Rule 8(a), M.R.Civ.P., requiring a short and plain statement. The Supreme Court noted that Berg was able to sufficiently understand the state's pleading, that he made a responsive pleading denying the allegation of constructive fraud, that the State Fund pleading must be understood in its context of the facts of the case, and that there were no contradictory statements or statements made "on information and belief" in any of the State Fund's statements in its complaint. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

General Assertions Inadequate to Prove Fraud: Defendants, who were subject to repossession of their truck, alleged by affidavit that changes discovered in the truck indicated that it had been tampered with, despite the seller's contention that the truck was new when defendants purchased it, indicating fraud. However, the affidavits: (1) were dated almost 3 years after the truck was purchased and after defendants had driven the truck over 300,000 miles; (2) did not state when the observations were made; (3) stated no opinion as to who created the alleged defects or when they were created; and (4) did not demonstrate that plaintiff knew or should have known of the claimed defects. Defendants' general assertion that because they did not tamper with the truck, it must have been tampered with by the sellers did not satisfy defendants' obligation to prove their claim of fraud with particularity. Defendant's admission that he had the truck inspected within a few days after purchase precluded a claim that defendants were ignorant of the falsity of the representation. These factors, absent a specific proof of damages to support the allegation that the truck had been wrecked and rebuilt, precluded a finding of fraud, and the District Court did not err in so finding. NW. Truck & Trailer Sales, Inc. v. Dvorak, 269 M 150, 887 P2d 260, 51 St. Rep. 1530 (1994).

Presentation of Counterclaims Allowed — Evidence of Fraud Properly Disallowed: Defendants contended District Court error in disallowing evidence in a fraud action that the truck that they had purchased was not new despite the seller's claim that it was new. However, defendants were allowed to try to the jury their counterclaims concerning warranties, modification to and breach of contract, and odometer tampering, but failed to provide any evidence of damages resulting from their claim. Refusal by the trial court to allow evidence that the truck was not new was not in error. NW. Truck & Trailer Sales, Inc. v. Dvorak, 269 M 150, 887 P2d 260, 51 St. Rep. 1530 (1994).

Contradictory, Unsupported Allegations — Summary Dismissal Proper: The District Court properly granted a motion for summary dismissal for failure to state a claim when allegations of fraud were found to be contradictory, not sufficiently particular, and unsupported by fact. Allegations of fraud cannot ordinarily be based on "information and belief" except as to matters that are particularly within the opposing party's knowledge, and the allegations must be accompanied by a statement of facts upon which the belief is founded. C. Haydon Ltd. v. Mont. Min. Properties, Inc., 262 M 321, 864 P2d 1253, 50 St. Rep. 1577 (1993), distinguished in State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Failure to Keep Promise to Pay Medical Bills if Injured Person Travels to Exam — No Fraud: The District Court properly granted the church summary judgment on issues of fraud and misrepresentation in an action arising after plaintiff fell and was injured on church property. Plaintiff claimed that the church agreed in writing to pay medical bills if plaintiff would travel to Salt Lake City for a medical exam. Plaintiff did so, and the church failed to pay. The promise to pay money in the future was not a representation, the first element of a prima facie case for fraud or misrepresentation. Davis v. Church of Jesus Christ of Latter Day Saints, 258 M 286, 852 P2d 640, 50 St. Rep. 535 (1993).

Nine Elements of Fraud to Be Stated With Particularity: The Supreme Court affirmed the lower court's dismissal of the Martins' claim for fraud because the Martins did not state with particularity the facts in support of all nine elements of fraud. Martin v. Dorn Equip. Co., Inc., 250 M 422, 821 P2d 1025, 48 St. Rep. 978 (1991).

Corporate Fraud Not Shown With Particularity: Claim of plaintiff who asserted fraud in sale of his interest in a corporation was summarily dismissed upon his failure to produce

documentation showing any misrepresentation or to allege fraud with particularity. Pipinich v. Battershell, 232 M 507, 759 P2d 148, 45 St. Rep. 1237 (1988).

Summary Judgment Proper on Unsupported Claims of Economic Advantage, Bad Faith, Civil Conspiracy, and Punitive Damages: Plaintiff mining company by amended complaint brought claims of economic advantage, bad faith, civil conspiracy, and punitive damages. Defendant mining company filed a motion for a more definitive statement. In response, plaintiff filed a 35-page brief with 43 attached exhibits but again neglected to address defendant's request for specificity or counter defendant's legal arguments. Summary judgment was proper after a finding that plaintiff: (1) repeatedly failed to provide, with particularity, factual support for its allegations of fraud; (2) repeatedly failed to provide the District Court with a simple, concise, and direct pleading; and (3) failed to demonstrate a genuine issue of material fact, relying instead on lengthy but unsupported allegations. Monte Vista Co. v. The Anaconda Co., 231 M 522, 755 P2d 1358, 45 St. Rep. 809 (1988).

Alleged Oral Covenant Not to Compete: The sellers and buyers of a grocery business discussed a noncompetition agreement but excluded such a provision from the written contract. The trial court found that this omission was not induced by the sellers' fraud. Even if the alleged noncompetition agreement had been entered in the contract, it could not be enforced because, although the two businesses are only 7 miles apart, they are in different counties and therefore not within the permissible exceptions for contracts in restraint of competition. Lar-Con Corp. v. Murman Properties, Ltd., 188 M 183, 612 P2d 676 (1980).

Elements of Fraud — Exception to Parol Evidence Rule: In order to establish an exception to the parol evidence rule, the elements of fraud must be stated with particularity: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the intent that it should be acted upon in the manner contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance upon its truth; (8) the right of the hearer to rely thereon; and (9) the hearer's consequent and proximate injury or damage. Kinjerski v. Lamey, 185 M 111, 604 P2d 782 (1979).

Detail Necessary in Pleading: The most basic consideration in making a judgment as to the sufficiency of a pleading is the determination of how much detail is necessary to give adequate notice to an adverse party and enable him to prepare a responsive pleading. Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979), followed in Irving v. School District No. 1-1A, 248 M 460, 813 P2d 417, 48 St. Rep. 512 (1991), State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996), and Poeppel v. Flathead County, 1999 MT 130, 294 M 487, 982 P2d 1007, 56 St. Rep. 525 (1999).

Amended Contract for Deed — Failure to Plead Fraud Specifically: When sellers of land argued that the buyers misled them as to the effect of an escrow agreement and warranty deed, estoppel had no application since the court found that sellers possessed a copy of the instruments for a considerable length of time and had ample opportunity to examine them. Furthermore, since sellers failed to plead fraud by amending their pleadings, they were not entitled to present parol evidence to show that these instruments constituted an acceptance of the land under the doctrine of estoppel. Tschache v. Barclay, 172 M 415, 564 P2d 1299 (1977).

Allegation of Fraud Ignored: Allegation that plaintiff's title to motor vehicle in claim and delivery action was ignored when that defense was not set forth as an affirmative defense or with particularity. Interstate Mfg. Co. v. Interstate Prod., 146 M 449, 408 P2d 478 (1965).

Constructive Fraud — Not Stated With Particularity: Because sufficient allegations of facts regarding "constructive fraud" were not pleaded with particularity, the complaint failed to state a claim for relief as a derivative action. Brooks v. Brooks Pontiac, Inc., 143 M 256, 389 P2d 185 (1964).

Fraud Alleged — Jury Issue: Where plaintiff in his reply alleged that the release pleaded by defendant's answer was procured through fraud, raising an issue of fact concerning a voidable release, an issue was raised that should have gone to the jury under proper instruction. Westfall v. Motors Ins. Corp., 140 M 564, 374 P2d 96 (1962).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Fraud *key* 42.

37 C.J.S. Fraud §78.

37 Am. Jur. 2d Fraud and Deceit §§451, 452.

Construction and application of provision of Rule 9(b), Federal Rules of Civil Procedure, that circumstances constituting fraud or mistake be stated with particularity. 27 ALR Fed. 407.

Rule 9(c). Conditions precedent.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

General 584
Performance of Contract 584

GENERAL

Lease Agreement — No Condition Precedent: Lease terminable by either party upon 10 days' notice does not impose a condition precedent, performance of which must be alleged in plaintiff's complaint, but a condition subsequent which terminates the obligations of the parties to the lease. McEwen v. Big Sky of Mont., 169 M 141, 545 P2d 665 (1976).

General Denial Insufficient — Matter Considered Admitted: In action by materialman against general contractor for material supplied subcontractor, contractor could not make affirmative defense that statutory notice was not given under materialmen's statute after materialman alleged that he had complied with all conditions precedent to bringing suit and contractor entered general denial. General denial of allegation that all conditions precedent were performed did not put matter in issue and would be treated as admission that they were performed. Treasure St. Indus., Inc. v. Leigland, 151 M 288, 443 P2d 22 (1968), followed in Mattson v. Julian, 209 M 48, 678 P2d 654, 41 St. Rep. 544 (1984).

Prevention of Performance: One who prevents or makes impossible the performance or happening of a condition precedent upon which his liability by the terms of a contract is made to depend cannot avail himself of its nonperformance. Smith v. Gunniss, 115 M 362, 144 P2d 186 (1943), distinguished in Mitchell v. Carlson, 132 M 1, 313 P2d 717 (1957).

Required Time Lapse Not Condition Precedent: The lapse of 60 days required by a contract before beginning action was not a condition precedent which plaintiff could perform before commencing suit, and the general allegation that plaintiff had performed all conditions precedent to be performed by her under the contract, did not supply the necessary allegation that the period had elapsed before filing complaint. Smith v. Franklin Fire Ins. Co. of Philadelphia, 61 M 441, 202 P 751 (1921).

Insurance Policy — Compliance as Sufficient Allegation of Performance: A complaint in an action on a fire policy sufficiently alleges performance of a condition precedent in the policy, requiring loss to be ascertained by arbitrators in case of disagreement, when it alleges generally that plaintiff has duly performed all the conditions of the policy on his part. Ackley v. Phenix Ins. Co. of Brooklyn, 25 M 272, 64 P 665 (1901).

PERFORMANCE OF CONTRACT

Foreclosure of Lien — Allegations as Sufficient: Allegations in a complaint seeking foreclosure of mechanics' and materialmen's lien (now construction lien) relative to performance by plaintiff of the requirements of a building contract, to the effect that plaintiff carried on the work in "accordance with" the directions of defendant and "pursuant to the terms" of the construction contract, were proper under section 93-3807, R.C.M. 1947 (superseded by Rule 9(c), M.R.Civ.P.), and not open to the objection that they were mere conclusions of law, and the complaint was sufficient to state a cause of action. Smith v. Gunniss, 115 M 362, 144 P2d 186 (1943).

Conditions Precedent — General Allegations as Sufficient: In declaring upon a contract containing conditions precedent, a party may, under section 93-3807, R.C.M. 1947 (superseded by Rule 9(c), M.R.Civ.P.), allege generally that he has performed all the conditions on his part, provided he couch the allegations in the terms of the statute or in terms equivalent thereto. Enterprise Sheet Metal Works v. Schendel, 55 M 42, 173 P 1059 (1918).

Performance of Contract — Allegation as Sufficient: An allegation that the plaintiff actually completed all of the work and labor to be by him performed under his contract, and did all of the things to be by him performed under said contract, and did all of the things in said contract of him required to be done, is a sufficient allegation of performance of the contract. Ivanhoff v. Teale, 47 M 115, 130 P 972 (1913).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Contracts *key* 332(3) and other particular topics.

17A C.J.S. Contracts §§640, 644.

Rule 9(d). Official document, act, ordinance or statute.

Commission Notes

The rule is identical with the Federal Rule, except for changes made in subdivisions (a) and (d).

As to subdivision (d): The first sentence is identical with the Federal Rule, but the rest of it has been added. The second sentence follows but expands for clarity R.C.M. 1947, section 93-3811 [repealed], with respect to pleading private statutes, and is consistent with and complimentary [sic] to R.C.M. 1947, sections 93-501-2 and 93-501-5 [repealed], with respect to judicial notice of laws of other states. No provision is made for pleading statutes of this state or of the United States, since under R.C.M. 1947, section 93-501-1 [repealed], the court takes judicial notice thereof without necessity of notice by a party.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Municipal Ordinance: One who bases his action against a city upon an ordinance must plead it, either by giving the date of passage and the title thereof, or by setting out in haec verba the whole or so much of it as relates to the action, or by giving the substance of its contents, so stated as to enable the court to judge from the provision of the ordinance itself. Dineen v. Butte, 83 M 370, 272 P 243 (1928).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Statutes *key* 279, 280.
82 C.J.S. Statutes §§441 through 446.
61A Am. Jur. 2d Pleading §§12 through 19.
Necessity and sufficiency of pleading custom or usage. 151 ALR 324.

Rule 9(e). Judgment.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Judgment *key* 948, 949.
50 C.J.S. Judgments §§822, 824 through 827, 848.
Pleading res judicata. 120 ALR 8.

Rule 9(f). Time and place.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

Specific Allegations in Pleading: Specificity in pleading time and place are not required but when specific allegations are made, they are material. Whether or not specificity is required is to be determined under the general rules as to pleadings. Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979).

Rule 9(g). Special damage.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

No Obligation to Extinguish Lien Until Debt Fully Satisfied — Summary Dismissal of Action for Slander of Title Proper: Following a business default, defendant sought to enforce a lease agreement and received a judgment in Justice's Court for $7,156.56, including interest. In an effort to satisfy the judgment, plaintiff's wife paid $7,121.14. Plaintiff later attempted to refinance the disputed property and found that defendant's lien had not been extinguished, so

plaintiff requested a partial satisfaction of judgment to his wife and release of the lien on the judgment. When defendant refused to release the lien, plaintiff sued for slander of title. Slander of title is an action in which one maliciously publishes false matter that brings into question or disparages the title to property, thereby causing special damages to the owner. Defendant was under no obligation to extinguish the lien until the judgment was fully satisfied. Because the wife's payment was $35.42 short of completely satisfying the judgment, defendant could not be said to have maliciously published false matter regarding the lien, so slander of title was not proved, and summary judgment for defendant was proper. Pryor v. Babcock Bldg. Corp., 2002 MT 68, 309 M 222, 45 P3d 35 (2002). See also First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976), and Felska v. Goulding, 238 M 224, 776 P2d 530 (1989).

Specificity of Pleadings: Concerning the degree of specificity in plaintiff's pleadings desired by defendants, the Supreme Court does not favor the short-circuiting of litigation at the initial pleading stage unless a complaint does not state a cause of action under any set of facts. Tobacco River Lumber Co., Inc. v. Yoppe, 176 M 267, 577 P2d 855 (1978).

Special Damages Not Pleaded: Because items of special damages were not specifically pleaded, defendant had no notice that special damages were claimed and the court had no power or authority to award special damages in its default judgment. Purington v. Soundwest, 173 M 106, 566 P2d 795 (1977).

Filing of U.C.C. Financing Statement as Not Supporting Slander of Title Against Real Property Action Absent Proof of Special Damages: Claim that bank's filing of a U.C.C. financing statement was a slander of title against real property described in statement, without proof of special damages, was without merit because the so-called "slander" is not actionable, but the resulting special damages are the basis for the action and therefore an averment of special damages was necessary. First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Damages *key* 142.

25 C.J.S. Damages §131.

Rule 10. Form of pleadings

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 10(a). Caption — names of parties.

Commission Notes

The rule is identical with the Federal Rule, except for additional provisions peculiar to Montana.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable. The first sentence of this rule requires "the name, district and county of the court" and "the number of the action" instead of "the name of the court" and "the file number" as in the Federal Rule.

Case Notes

Caption Not an Allegation: The caption of a complaint is not a part of the allegation of the pleading. NW. Hardware & Steel Co. v. Winnett, 67 M 545, 216 P 568 (1923).

Correction of Name of Party: Where defendant answered in abatement for misnomer, alleging its true name, it was error for the court to enter judgment on the merits against defendant, but plaintiff should have amended in accordance with the answer, its truth being conceded, or the action have been abated. When the defendant pleads it, if the plaintiff does not then choose to amend his complaint, and if upon a trial of the issue it be found against the plaintiff, the action must abate. Clark v. Oreg. Short Line R.R., 29 M 317, 74 P 734 (1903).

Objections to Title Not Basis for Dismissal: Objections to the title or style of the case at bar cannot be considered under a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) which alleges "that said action is not brought under the proper caption or style, nor in the proper name, to wit, in the name of the people of the state of Montana, instead of being brought in the name of the state of Montana", as no such ground of demurrer is known to the statute. People ex rel. Kern v. McIntyre, 10 M 166, 25 P 100 (1890).

Collateral References

Pleading *key* 4, 38 ½ through 75.

71 C.J.S. Pleading §§8, 66 through 80.
61A Am. Jur. 2d Pleading §§33 through 35.

Rule 10(b). Paragraphs — separate statements.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

Failure to State Separately — Remedy: The objection that causes of action are not separately stated and numbered cannot be raised by demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P. and 25-31-503, now repealed), the proper remedy for such a defect being a motion to make the complaint more definite and certain by separately stating the causes of action. Jorud v. Woodside, 63 M 23, 206 P 344 (1922).

Misjoinder of Causes — Dismissal as Remedy: Where two causes of action are improperly united, a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P. and 25-31-503, now repealed), and not a motion to separately state and number, is the proper remedy. McLean v. Dickson, 58 M 203, 190 P 924 (1920).

Failure to State Separately — Dismissal Not Remedy: A demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P. and 25-31-503, now repealed) cannot be invoked to cure a complaint containing several causes of action, defective because such causes are not separately stated and numbered as required by former statute. Roberts v. Sinnott, 55 M 369, 177 P 252 (1918).

Rule 10(c). Adoption by reference — exhibits.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

Documents Evidencing Amount of Debt Incorporated Into Complaint and Effectively Put in Issue by Answer — Summary Judgment Inappropriate — Cross-Motions Not Proof of Absence of Genuine Issues of Fact: Montana Metal Buildings, Inc. (MMB), constructed a metal building for Shapiro at the Three Forks Airport and later served a notice of claim and construction lien upon Shapiro for $26,889.43. MMB claimed that this amount was owed by Shapiro as the balance due for labor and materials necessary for construction of the building. MMB subsequently sued Shapiro for that amount in foreclosure of the lien, attaching copies of invoices to its complaint. MMB moved for summary judgment on all issues, and Shapiro moved for summary judgment on issues concerning the defectiveness of the lien. The District Court granted summary judgment on all issues for MMB. The Supreme Court held that the District Court erred in granting summary judgment and that genuine issues of fact still existed in that when MMB attached copies of the invoices to its complaint, they became part of the complaint for all purposes. The amounts established by those invoices were effectively put into issue by Shapiro when, in his answer, he asserted that he owed no further payments to MMB. The Supreme Court held that at this point in their proceedings, MMB had the obligation, as the party moving for summary judgment on the issue of the amount owed, to come forward with other evidence in the form of affidavits, discovery documents, or otherwise to overcome Shapiro's denials and establish the absence of genuine issues of material fact. The only affidavit that was submitted by MMB, the Supreme Court noted, addressed the issue of the sufficiency of the property description for the purposes of the lien and did not present evidence as to the amounts owed by Shapiro. Citing Bozeman v. AIU Ins. Co., 262 M 370, 865 P2d 268 (1993), the Supreme Court pointed out that MMB could not rely on arguments of counsel to overcome the existence of an issue of material fact. The Supreme Court further noted, citing Gallatin Trust & Sav. Bank v. Darrah, 152 M 256, 448 P2d 734 (1968), that because the invoices were not submitted or filed by MMB as part of its motion for summary judgment, the invoices are not evidence of what was contained in the invoices but merely allegations of the complaint and were insufficient to overcome Shapiro's denials in his answer. In response to MMB's argument that Shapiro waived any right to object to MMB's evidentiary basis for its motion, the Supreme Court pointed out that there was no evidentiary basis for MMB's motion for summary judgment on the issue of the amount of the debt because the invoices were not submitted for the purposes of the motion but only for the purposes of the complaint and had been effectively addressed by Shapiro's answer. Citing Duensing v. Traveler's Co., 257 M 376, 849 P2d 203 (1993), the Supreme Court also pointed out that just because both parties have moved for summary judgment does not alone establish the absence of a genuine issue of material fact, particularly when the motions are not on precisely the same

issues, and the District Court therefore apparently assumed, incorrectly, that there were no such genuine issues. Mont. Metal Bldg., Inc. v. Shapiro, 283 M 471, 942 P2d 694, 54 St. Rep. 731 (1997).

Incorporating by Reference Parts of Complaint That Have Been Struck by Summary Judgment: The plaintiff's original 10-count complaint was dismissed by the District Court pursuant to the defendant's summary judgment motion. The plaintiff, addressing only 4 of the 10 counts, moved the court to alter or amend its judgment. The lower court denied the motion, holding that the four counts did not contain any material facts sufficient to support a claim. The Supreme Court reversed the decision, stating that sufficient facts had been set out in the dismissed counts and those facts had been incorporated by reference and were not affected by the dismissal of the other counts. Cummings v. Plains, 242 M 236, 790 P2d 486, 47 St. Rep. 769 (1990).

Effect of Attached Instrument: A security agreement attached to the complaint merely became part of the pleadings, and a deficiency provision was not enforced because it was never specifically pleaded. Gallatin Trust & Sav. Bank v. Darrah, 152 M 256, 448 P2d 734 (1968), followed in Mont. Metal Bldg., Inc. v. Shapiro, 283 M 471, 942 P2d 694, 54 St. Rep. 731 (1997).

Collateral References

Pleading *key* 15, 307.

71 C.J.S. Pleading §§12, 523 through 530.

61A Am. Jur. 2d Pleading §§74 through 76.

Maps, records, deeds, and papers allowed to complete or correct insufficient or inaccurate description in pleading. 111 ALR 1200.

Rule 11. Signing of pleadings, motions and other papers — sanctions.

Commission and Advisory Committee Notes

COMMISSION NOTE

The rule is identical with the Federal Rule, except for the omission of the sentence abrogating the rule in equity with respect to evidence to overcome an answer under oath. The sentence omitted would seem unnecessary in view of our statutory provisions on evidence.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

The amendment conforms the rule to the 1983 Amendment of the Federal Rule. For discussion of the amendment see the advisory committee note to the Federal Rule. It has been the practice for many years in both Montana Federal and State Courts for the pleader to first file a responsive motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b) for the purposes of obtaining additional time within which to prepare an answer and to inform the court and parties that an appearance is being made. The courts have recognized this practice and routinely overrule the motions unless briefs are filed in support or the motions are set for oral argument. It is not the intent of the Advisory Commission in adopting the foregoing amendment to do away with this practice.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of July 31, 1983, the above commission note was still applicable. As of December 1, 1989, Montana has not adopted the fourth sentence of the Federal Rule relating to abolishing the rule in equity concerning overcoming averments of an answer under oath. On August 1, 1983, extensive amendments to the Federal Rule became effective requiring the signing of motions and other papers, as well as pleadings, adding the requirement that it is not interposed for improper purposes, and providing appropriate sanctions for violations of the rule. The October 9, 1984, amendment of Rule 11 by the Montana Supreme Court makes the above commission note still applicable. As of May 1, 1990, Montana has not adopted the fourth sentence of the Federal Rule relating to abolishing the rule in equity concerning overcoming averments of an answer under oath.

Amendments: The amendment of October 9, 1984, after "pleading" inserted "motion, or other paper" in four places; in fourth sentence after "attorney" inserted "or party" and after "belief" substituted "formed after reasonable inquiry . . . increase in the cost of litigation" for "there is

good ground to support it; and that it is not interposed for delay"; in fifth sentence inserted "it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant"; and substituted last sentence for "or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Discretion of District Court to Grant Enlargement of Time to Respond to Motion: The wife filed a motion to enforce the pension provisions of a dissolution decree, and the husband moved for an enlargement of time nearly a month later. The District Court declined to grant the enlargement because there was nothing to indicate that the husband's failure to respond within the required 10 days was the result of excusable neglect. On appeal, the husband contended that under Rule 6, M.R.Civ.P., and this rule, he was entitled to an enlargement of time in order to reply to the motion to enforce. The Supreme Court disagreed and affirmed. Parties are not entitled to an enlargement of time; rather, the granting of an enlargement of time is within the discretion of the District Court, which in this case found the husband's arguments unpersuasive. In re Marriage of Weber, 2004 MT 206, 322 M 324, 95 P3d 694 (2004).

Improper Filing of Pro Se Motion Considered Direct Contempt — Community Service Penalty Affirmed: Christian's attorney notified him of the intent to withdraw as counsel of record, and Christian subsequently filed a motion to set trial in District Court, with the attorney's name as counsel and signing the motion himself. The court held Christian in contempt for signing the motion pro se in violation of this rule and sentenced Christian to 1,000 hours of community service. Christian petitioned the Supreme Court by writ of certiorari, contesting the contempt order and the sentence. The Supreme Court noted that its review was limited to questions regarding jurisdiction and whether there was sufficient evidence to support the contempt finding. Christian argued that his conduct was at most an indirect contempt and that, as such, procedural due process was violated because there was no charging document filed against him. The Supreme Court disagreed. The offending document was within the immediate view and presence of the District Court and thus constituted direct contempt. The document was contemptuous on its face because Christian was acting as counsel without authority. The sentence was also affirmed. The District Court had considered requiring pro bono service and also noted that jail time was possible, but concluded that extensive community service was the appropriate penalty to dissuade Christian from similar future behavior. Christian's writ of certiorari was denied. Christian v. District Court, 2004 MT 1, 319 M 162, 83 P3d 811 (2004).

Party's Action on Remand Urging Reversal of Supreme Court Decision Insufficient to Warrant Sanctions: Following remand of Muri v. Frank, 2001 MT 29, 304 M 171, 18 P3d 1022 (2001), plaintiff urged the District Court to reverse the Supreme Court's decision that an encumbrance on a lot was a clerical mistake and to deny defendants' costs of the appeal. The District Court improperly issued new findings of fact, in contravention of the law of the case, and denied defendants' appellate costs even though they were the prevailing party. Defendants appealed, asserting that plaintiff should be sanctioned pursuant to this rule for the actions taken on remand. The Supreme Court held that the actions on remand were neither frivolous nor brought for an improper purpose and declined to impose sanctions. Muri v. Frank, 2003 MT 316, 318 M 269, 80 P3d 77 (2003).

Sanctions Appropriate in Easement Case When Aerial Photographs Established Long-Time Presence of Road: Aerial photographs clearly showed that a road existed in exactly the same location since 1979, yet defendant proceeded with an easement case, contending that the road did not exist in 1985. The District Court did not abuse its discretion when it assessed fees and costs against defendant because the contention was not well grounded in fact and defendant's arguments unreasonably and vexatiously multiplied the proceedings. Ponderosa Pines Ranch, Inc. v. Hevner, 2002 MT 184, 311 M 82, 53 P3d 381 (2002).

Inadvertent Use of Previous Cause Number on New Complaint Considered Technical, Nonprejudicial Defect: One day before expiration of the statute of limitations, the Lundquists filed a pro se complaint against Shook, Hamilton, and McBeth for fraudulent transfer of property, but in preparing the complaint, the Lundquists used a template from a prior fraudulent transfer case involving Shook, Hamilton, and Pederson and included the same cause number from the prior case. The Lundquists' former counsel notified the District Court that he was not representing the Lundquists in the case involving McBeth. One day prior to service of process on McBeth, the District Court ordered the Clerk of the District Court to withdraw the

Lundquists' complaint on grounds that the complaint was filed in the same cause of action previously pending, and the Lundquists did not obtain the court's consent to amend prior pleadings and have their attorney of record sign the complaint against McBeth. The Lundquists then moved to have the court assign a new cause number to the complaint and allow amendment of the complaint to retain the original filing date. The court denied the motion, holding that if a new complaint was to be filed and a new cause number assigned, it would be considered filed as of the date on which it was presented for filing and not the date on which it was originally attempted to be filed. Thus, a new complaint was filed with a new cause number and filing date, but the new complaint was filed after expiration of the statute of limitations for fraudulent conveyance actions, so the District Court granted McBeth's dismissal motion because the complaint was not timely filed. The Lundquists appealed, and the Supreme Court reversed. In filing the new complaint, the Lundquists had notified the court that they intended to proceed against McBeth in an action that was independent of the transfer litigated in the previous cause, and their use of the cause number from the previous action was inadvertent and a technical rather than fundamental defect. The Lundquists did not need the District Court's permission to file a new complaint, nor did the new pro se complaint require their attorney's signature. Because the Lundquists named McBeth in the complaint, filed the complaint prior to the expiration of the fraudulent transfer statute of limitations, and served McBeth with a copy of the complaint, McBeth was not prejudiced by the technical defect and the District Court should not have ordered the complaint withdrawn. Lundquist v. McBeth, 2001 MT 311, 308 M 1, 38 P3d 831 (2001).

Failure to Respond to Arbitration Request — Motion to Compel Arbitration Not Considered Frivolous or Abusive: An employer failed to timely respond to an employee's request for arbitration, and subsequently moved to compel arbitration. When the District Court denied the employer's motion to compel, the employee sought attorney fees and costs pursuant to this rule, contending that the employer's lack of response and motion to compel arbitration created an unnecessary delay and needlessly increased the costs of litigation. The District Court denied the request for fees and costs, and the employee appealed. The Supreme Court found nothing in the record suggesting that the employer's motion to compel was frivolous or amounted to abusive litigation tactics. Although the employer's indifference did suffice to waive the right to compel arbitration, it did not rise to the level of conduct interposed for an improper purpose as required for sanctions under this rule, so denial of attorney fees and costs was affirmed. Firestone v. Oasis Telecommunications, Data & Records, Inc., 2001 MT 297, 307 M 469, 38 P3d 796 (2001).

Adequate Grounds for Assessment of Mandatory Sanctions for Groundless Complaint — Time for Filing Motion for Sanctions: When a husband found out about his ex-wife's mortgage and security interest on the ranch property that was to be sold as part of a marriage dissolution, he became distraught because he believed that he would not be able to obtain loans on the property to enable him to conduct ranch operations and meet his obligations. The husband subsequently filed suit against the ex-wife, the bank, and the bank president, who was the ex-wife's son-in-law, alleging tortious interference with business relationships, prima facie tort, and intentional infliction of emotional distress. The District Court granted the defendants' motion for summary judgment and awarded sanctions to the ex-wife and the bank because the husband's complaint was groundless and was not pursued in good faith and because the husband's conduct was not reasonable under the circumstances. The husband appealed, and the Supreme Court affirmed, finding that the District Court's findings were not clearly erroneous and that the award of sanctions was not an abuse of discretion. The District Court's rationale for finding a violation of this rule applied equally to the ex-wife and the bank, and once the court found the violation, imposition of sanctions was mandatory. The type of sanction imposed for a violation of this rule is uniquely within the discretion of the District Court. Further, the time when sanctions are to be imposed rests in the discretion of the trial judge, and a motion under this rule is not barred if it is filed after a dismissal order or after entry of judgment. Pospisil v. First Nat'l Bank of Lewistown, 2001 MT 286, 307 M 392, 37 P3d 704 (2001).

Sanctions Correctly Denied When Answer Seemed "Reasonable" Under Circumstances — Selective Enforcement Ultimately Relied Upon as Defense: Youngwirth was sued by the architectural committee of his subdivision to enforce restrictive covenants against him prohibiting him from having four dwelling units on his property. Youngwirth answered the complaint with a denial that he had four dwelling units on the property. When the committee sought sanctions for Youngwirth's denial of a claim that seemed so obviously true, the District Court denied the requested sanctions. The Supreme Court affirmed, noting that by the time of trial, Youngwirth's defense had been distilled down to a claim of selective enforcement of the covenants against him and that the District Court held that even though the plaintiff prevailed,

the "defendant's defense was reasonable". Madison Addition Architectural Comm. v. Youngwirth, 2000 MT 293, 302 M 302, 15 P3d 1175, 57 St. Rep. 1244 (2000).

Imposition of Liability as Matter of Law as Sanction for Discovery Abuse: Following extensive discovery requests, plaintiffs moved to compel discovery and for sanctions. The District Court imposed liability as a matter of law upon defendants as a sanction for discovery abuse. The court based its decision on findings that defendants: (1) misrepresented their corporate ownership and control; (2) falsely represented in briefs and at hearing that all pertinent documents had been provided; (3) knowingly withheld and concealed significant information; (4) falsely represented their involvement with equipment design and construction standards; and (5) falsely represented that certain investigation documents had been prepared for purposes of litigation. Citing In re Adoption of R.D.T., 239 M 33, 778 P2d 416 (1989), defendants contended on appeal that the court's use of deposition testimony solicited subsequent to defendants' discovery responses invoked the wisdom of hindsight, resulting in a Kafkaesque nightmare. After examining the record and noting sufficient evidence supporting the District Court's findings of defendants' repeated and willful concealment and misrepresentation of facts during discovery, the Supreme Court held that defendants had misconstrued both R.D.T. and Franz Kafka, noting that if anyone in the case were guilty of creating a nightmare, it was defendants through their refusal to comply with rules of discovery and civil procedure and to disclose information necessary for the proper presentation of plaintiffs' case. Imposition of liability as a matter of law as a sanction for discovery abuses was affirmed. Bulen v. Navajo Refining Co., Inc., 2000 MT 222, 301 M 195, 9 P3d 607, 57 St. Rep. 912 (2000), following First Bank v. Heidema, 219 M 373, 711 P2d 1384 (1986).

Sanctions Not Applied Absent Finding of Bad Faith in State Timber Sale: Plaintiff sought sanctions against the Department of Natural Resources and Conservation (DNRC) under this rule for requesting an injunction bond pursuant to 77-1-110 in relation to plaintiff's attempt to halt a timber sale. The District Court found that an injunction bond was not required, but also denied sanctions. On appeal, plaintiff contended that sanctions should apply because the DNRC's actions were intended solely to harass and cause needless increase in the cost of litigation. The Supreme Court agreed that the DNRC could not be said to have acted in bad faith by seeking to have a bond posted, so the District Court did not err in declining to impose sanctions under this rule. Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

No Error in Failure to Hold Hearing on Sanctions Absent Objection: The District Court found that plaintiff's attorney filed a complaint without conducting an investigation into the facts and imposed sanctions under this rule, but neglected to hold a hearing before doing so. Plaintiff contended that sanctions were improper because no hearing was held. The Supreme Court noted that plaintiff was clearly entitled to a hearing, but had failed to timely object to the failure to conduct one. The Supreme Court will not hold a District Court in error for an omission that the District Court was not given an opportunity to correct or review unless a timely objection is made. The imposition of sanctions was affirmed. Kinsey-Cartwright v. Brower, 2000 MT 198, 300 M 450, 5 P3d 1026, 57 St. Rep. 769 (2000). See also Green v. Green, 176 M 532, 579 P2d 1235 (1978).

Wait of Thirteen Months to Question Whether Sanctions Should Be Imposed — Adequate Notice and Opportunity to Be Heard: Defendant sought sanctions against Palmer, plaintiff's attorney, under Rule 37, M.R.Civ.P., and this rule for Palmer's defiance of scheduling and pretrial orders, and the District Court awarded sanctions under Rule 37. Palmer alleged that his due process rights were violated because he did not receive notice and an opportunity to be heard, but the due process arguments were not supported in the record. The Supreme Court agreed that when a person is sanctioned with attorney fees and costs under Rule 37, that person is entitled to notice and an opportunity to be heard before sanctions are imposed. However, in this case, Palmer waited more than 13 months after defendants moved for sanctions to question whether they should be imposed. Notice was adequate, and Palmer also was allowed to argue the appropriateness of sanctions at a hearing. Palmer's argument on appeal, that Rule 37 did not apply to him because he was a nonparty deponent, was not addressed because the issue was raised for the first time on appeal. The Supreme Court noted that Rule 16(f), M.R.Civ.P., clearly allows sanctions in cases like this one, in which an attorney defies a District Court's scheduling and pretrial orders. Dambrowski v. Champion Int'l Corp., 2000 MT 149, 300 M 76, 3 P3d 617, 57 St. Rep. 581 (2000).

Adequate Due Process and Opportunity to Appear — Sanctions Appropriate for Frivolous Suit: Brandts invested in a condominium development corporation, loaning $20,000 to the corporation president. The promissory note exchanged for the loan provided that Brandts would

be repaid with interest upon sale of a condominium to a family trust. Sande acted as escrow agent for the closing of the real estate sale and purchase transaction. The corporation president had instructed the title company to repay Brandts upon closing, but later rescinded that instruction, so funds from the purchase of the condominium were disbursed to the corporation and to various creditors instead of to Brandts. When the corporation was later sold, Brandts signed an agreement releasing and discharging their claims against the corporation. Nearly 2 years later, Brandts sued Sande and the title company for negligently and wrongfully applying $20,000 from the escrow account. The District Court determined that there was neither a valid assignment nor legal notice of an assignment of Brandts' interest in the funds from the closing, so Sande owed no legal duty to Brandts. The court summarily dismissed the suit and ordered sanctions against Brandts for filing a frivolous complaint, pursuant to this rule. The record on appeal showed that the District Court went to great lengths to ensure that Brandts were afforded due process by giving them notice to show cause and affording them an opportunity to be heard and to defend against the imposition of sanctions. The court did not err in assessing Brandts with Sande's attorney fees and costs. Brandt v. Sande, 2000 MT 98, 299 M 256, 1 P3d 929, 57 St. Rep. 400 (2000). See also Smith v. Electronic Parts, Inc., 274 M 252, 907 P2d 958, 52 St. Rep. 1215 (1995).

Discovery Requests Designed to Harass and Embarrass Opposing Counsel Worthy of Sanction: Counsel for the heirs to an estate filed for sanctions against the estate's attorneys, contending that the estate's attorneys had knowingly misrepresented provisions of the Insurance Code and presented unwarranted positions of law to the District Court. The estate's attorneys subsequently filed for a protective order and sanctions against the heirs' attorney, arguing that various discovery requests were abusive, harassing, and constituted a personal attack on the estate's attorneys. The District Court denied the heirs' attorney's motion and granted the estate's attorneys' motion, and the Supreme Court affirmed, finding adequate evidence in the record that the discovery requests in question were not designed to elicit any relevant information, but rather were designed to harass and embarrass opposing counsel and needlessly increase the costs of litigation. In re Estate of Miles v. Miles, 2000 MT 41, 298 M 312, 994 P2d 1139, 57 St. Rep. 191 (2000).

Improper Award of Joint and Several Sanctions Under Rule 37(c) — Award of Fees and Costs Proper as Sanction Under Rule 11: Pursuant to Rule 37(c), M.R.Civ.P., the trial court held both plaintiff and plaintiff's counsel jointly and severally liable for attorney costs and fees associated with a dilatory discovery action. Plaintiff's attorney correctly argued that the language of Rule 37(c) only allows a court to order that sanctions be paid by a party, so it was error to order that sanctions be paid by the party and the party's attorney under that rule. However, although Rule 37(c) was unavailable as a source of authority for imposing sanctions under this scenario, this rule did provide a basis for discipline for dilatory discovery. The District Court reached the right result but for the wrong reason. The error was harmless, and the Supreme Court affirmed the award of sanctions pursuant to this rule. Morris v. Big Sky Thoroughbred Farms, Inc., 1998 MT 229, 291 M 32, 965 P2d 890, 55 St. Rep. 957 (1998). Note: The Supreme Court amended Rule 37(c), M.R.Civ.P., to reflect the Morris holding by order dated September 15, 1998, published at 55 St. Rep. 979 (1998).

Improper Foreclosure Action Claims Not Grounded in Fact — Sanctions Proper: Glickman defaulted on his property payments, and following two foreclosure actions, the property was sold at a Sheriff's foreclosure sale. Glickman did not appeal either action but later filed an "original petition" seeking to quiet title, damages, and a declaratory judgment regarding the validity of the judgments, foreclosure decrees, and Sheriff's sales. Any reasonable inquiry by Glickman and his attorney prior to filing the "original petition" would have shown that the claims were not grounded in fact and were not warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law and that unnecessary delay and needless increase in litigation and cost would result from the claims. The award of attorney fees and costs pursuant to this rule were appropriate. Glickman v. Whitefish Credit Union Ass'n, 1998 MT 8, 287 M 161, 951 P2d 1388, 55 St. Rep. 27 (1998).

Easement Dispute — Attorney Fees Improperly Awarded — Foy and Randono Distinguished — Costs Sustained: Smalls brought a quiet title action against Goods for determination of an easement. Goods counterclaimed to quiet title to an easement for themselves. The District Court found in favor of the Smalls on the easement issue and awarded Smalls $8,536 in attorney fees and $759 in costs. The Supreme Court reversed on the issue of attorney fees, holding that there was no applicable exception to the general rule that attorney fees cannot be awarded absent a contractual agreement or other special circumstances. The Supreme Court held that the District Court improperly relied upon Foy v. Anderson, 176 M 507, 580 P2d 114 (1978), and Martin v.

Randono, 191 M 266, 623 P2d 959 (1981). The Supreme Court stated that the Randono case stands for the proposition that fees may not be awarded as costs and that Foy is distinguishable in that in Foy, fees were awarded to a person who had sought to avoid legal action, unlike the Smalls who initiated litigation in this case. Although expressing no opinion on the applicability of Rule 54(d), M.R.Civ.P., and this rule to the case before it, the Supreme Court also pointed out that fees could be awarded as a sanction under this rule and that costs could be awarded pursuant to Rule 54(d). However, the Supreme Court did sustain the award of costs to Smalls, noting that the purposes for which costs were awarded by the District Court were of the type of costs allowable under 25-10-201. Small v. Good, 284 M 159, 943 P2d 1258, 54 St. Rep. 825 (1997).

New Trial on Damages for Employer's Failure to Disclose Files Helping Employee's Wrongful Discharge Case: In a wrongful discharge action, an employee was properly granted a new trial on the issue of damages (he had been awarded $70,000 by a jury) as a sanction against the hospital-employer, which failed to give him discovery documents relevant to and favoring the employee on issues of the hospital's liability and employee's damages. The employee was anonymously sent the documents after the trial. Sullivan v. Sisters of Charity of Providence of Mont., 268 M 71, 885 P2d 488, 51 St. Rep. 1193 (1994).

Sanction of $5,500 Against Employer for Failure to Disclose Files Showing Wrongful Discharge: The trial court, in which a wrongful discharge plaintiff was granted a $70,000 jury verdict for damages, properly sanctioned the employer by granting the plaintiff $5,500 for amounts expended for work on summary judgment and, after the verdict, on the basis that documents in the employer's files were requested by the plaintiff and not produced by the employer. The documents, which were anonymously mailed to the plaintiff after the trial, showed that the employer had planned for some time to terminate the plaintiff. The documents would have affected the damages award had they been available for the trial. Sullivan v. Sisters of Charity of Providence of Mont., 268 M 71, 885 P2d 488, 51 St. Rep. 1193 (1994).

Notice and Hearing Required Before Imposing Sanctions: Although this rule does not state that a trial court must give notice to show cause and hold a hearing before imposing sanctions, the court should do so in order to provide due process and afford the party sufficient time to prepare its case against imposition of sanctions. The court should also specify in its judgment or order the pleadings, motions, or other papers upon which it bases imposition of this rule's sanctions. Lindey's, Inc. v. Goodover, 264 M 489, 872 P2d 767, 51 St. Rep. 359 (1994).

Nonparents Filing Child Custody Proceeding Not Subject to Sanctions: The grandparents filed an action to obtain custody of their grandchildren. The lower court dismissed the petition and, relying on In re Marriage of Miller, 251 M 300, 825 P2d 189 (1992), awarded attorney fees to the mother as sanctions against the grandparents. The Supreme Court distinguished Miller and held that the grandparents had a reasonable basis to rely on 40-4-211 to seek custody and therefore were not subject to sanctions. In re Custody of R.R.K., R.D.K., & L.M.K., 260 M 191, 859 P2d 998, 50 St. Rep. 1002 (1993).

Form of Pleadings When Information in Exclusive Control of Culpable Party: Plaintiff was injured on the job but did not know whether there was a meritorious cause of action or whether there were any culpable parties. He argued that he could not file a complaint and conduct discovery under this rule's requirement of certification that the complaint be grounded in fact because the information needed to certify the facts was in the exclusive control of the potentially culpable parties. However, this rule only requires that a party make reasonable inquiry and then certify based on knowledge, information, and belief. This rule does not require a guarantee or certification that every detailed fact has been thoroughly investigated and found to be correct. The Supreme Court cited the practices of joinder of parties and the filing of a fictitious "Doe" pleading as alternative ways to commence an action under such circumstances. Temple v. Chevron U.S.A. Inc., 254 M 455, 840 P2d 561, 49 St. Rep. 661 (1992).

Award of Sanctions Reversed — Argument Supported by Authorities: The District Court granted sanctions against plaintiffs after determining that they had repeatedly misrepresented the holdings in a previous Supreme Court decision regarding notice requirements relating to oil leases. After ruling in favor of plaintiffs on one aspect of their argument and determining that the argument was amply supported in law, the Supreme Court reversed the award of sanctions. Sundheim v. Reef Oil Corp., 247 M 244, 806 P2d 503, 48 St. Rep. 181 (1991).

Sanctions Denied — Suit Not Totally Frivolous: The plaintiff initiated a suit alleging tortious interference with a business relationship. The action was dismissed by summary judgment, and the lower court imposed sanctions on the plaintiff for bringing a frivolous suit. The Supreme Court upheld the dismissal of the action but reversed the imposition of sanctions, ruling that the plaintiff's suit was not totally frivolous nor did it appear to have been brought for an improper purpose. Smith v. Barrett, 242 M 37, 788 P2d 324, 47 St. Rep. 514 (1990).

Tort of Malicious Defense Not Recognized in Montana: The plaintiff alleged that the defendant had never intended to engage in litigation yet allowed her attorney to indicate to the plaintiff's bank that litigation was pending. This action resulted in certain funds of the plaintiff being held by the bank, thereby damaging the plaintiff's business relations. The plaintiff argued that the defendant's opposition to the suit against her for tortious interference with a business relation constituted the tort of malicious defense. The Supreme Court held that the tort of malicious defense has never been recognized in Montana. The court stated that it was not deciding if the tort should be recognized but that under the facts, the defendant's actions were not malicious and the tort was not applicable. Smith v. Barrett, 242 M 37, 788 P2d 324, 47 St. Rep. 514 (1990).

Lousy Pleadings Grounds for Sanctions: The District Court imposed a $1,200 sanction on the plaintiffs and their attorney as a punishment for their incomprehensible pleadings. The lower court found that this inept legal work cost the defendant thousands of dollars of unnecessary legal expense. The Supreme Court affirmed the decision, ruling that the lower court's action was not an abuse of discretion. McCracken v. Chinook, 242 M 21, 788 P2d 892, 47 St. Rep. 501 (1990).

Sanctions Warranted Upon Bad Faith Joinder of Third-Party Defendant — Standard Applicable to Review of Award of Sanctions: The District Court assessed sanctions against a party whose joinder of a third-party defendant was found to be unjustifiable, ill-advised, frivolous, fraudulent, malicious, and oppressive. In affirming the award of sanctions, the Supreme Court cited numerous federal cases, holding that: (1) the trial court's findings of fact will be overturned if clearly erroneous; (2) the court's legal conclusion that facts constitute a violation of this rule will be reversed if the determination constitutes an abuse of discretion; (3) a case will be reviewed de novo only if the violation is based on the legal sufficiency of a plea or motion; (4) once the court determines that a case has no merit or has been commenced for an improper purpose, the mandatory language of the rule requires the imposition of sanctions on the offending party or his counsel, or both; (5) failure to impose sanctions when circumstances reveal that the rule has been violated constitutes reversible error; and (6) the form and amount of the sanction imposed will be overturned only in cases of an abuse of discretion by the trial court. D'Agostino v. Swanson, 240 M 435, 784 P2d 919, 47 St. Rep. 10 (1990), followed in Harrison v. Chance, 244 M 215, 797 P2d 200, 47 St. Rep. 1539 (1990), Wise v. Sebena, 248 M 32, 808 P2d 494, 48 St. Rep. 309 (1991), Shull v. First Interstate Bank of Great Falls, 269 M 32, 887 P2d 193, 51 St. Rep. 1345 (1994), and Madison Addition Architectural Comm. v. Youngwirth, 2000 MT 293, 302 M 302, 15 P3d 1175, 57 St. Rep. 1244 (2000).

Adoption Petition Not Brought in Bad Faith: The mother of a child petitioned to have her child adopted by her ex-husband. The child's father, also an ex-husband of the mother, had the petition dismissed because he had not voluntarily relinquished his parental rights as required by statute. The biological father asked for sanctions against the mother and her attorney, arguing that the petition had been brought in bad faith and for an improper purpose. He argued that even a cursory reading of the statute would have shown that the petition could not be properly filed and that the action had only been undertaken to interfere with his visitation rights. The Supreme Court refused to impose sanctions, holding that to avoid sanctions under this rule, it is not necessary that a party be correct in his view of the law, only that he make a good faith argument in support of his view. In re Adoption of R.D.T., 239 M 33, 778 P2d 416, 46 St. Rep. 1489 (1989).

Objective Reasonableness Standard Applicable to Sanctions: More stringent than the original good faith formula, this rule imposes an objective reasonableness standard designed to prevent litigation and avoid waste. Accordingly, an attorney must make a reasonable inquiry into the facts and law that serve as the basis for his complaint. A party need not be correct in his view of the law. Rather, the pleader, at a minimum, must have a good faith argument for his view of what the law is or should be. Bee Broadcasting Associates v. Reier, 236 M 275, 769 P2d 709, 46 St. Rep. 356 (1989), followed in Jacildo v. McFadden, 253 M 114, 831 P2d 597, 49 St. Rep. 467 (1992).

Allegations Ungrounded in Fact and Legally Insufficient — Sanctions Warranted: The District Court properly awarded sanctions after finding that plaintiff's complaint was replete with allegations of fraud, misrepresentation, deceit, bad faith, malice, concealment, perjury, conspiracy, and collusion; yet, none of the allegations were grounded in fact or put forward any legal theory upon which relief could be granted. Accordingly, the court found that reasonable minds could only conclude that the action was interposed in order to harass or cause unnecessary delay or needless increase in costs of litigation. Brown v. Jensen, 231 M 340, 753 P2d 870, 45 St. Rep. 665 (1988).

Contradictory and Inconsistent Actions Warranting Sanctions: The District Court found an easement was warranted, and appellant testified that he intended to grant one, but later appellant informed respondent that no easement would be forthcoming. Respondent used Rule 70, M.R.Civ.P., as a basis for a motion for an easement. The District Court found appellant had acted in a contradictory and inconsistent manner with regard to the easement and that Rule 11, M.R.Civ.P., sanctions were proper. Respondent's use of Rule 70 was inappropriate because no judgment had been entered, but that did not defeat his motion because it was not unreasonable under the circumstances. Searight v. Cimino, 230 M 96, 748 P2d 948, 45 St. Rep. 46 (1988).

Bad Faith Paternity Defense — Fees Justified: The assessment of fees was proper under this rule where blood tests showed a 99.14% probability of paternity, but the alleged father denied paternity although admitting at trial that he believed he was the father, continuing to resist legal acknowledgement of paternity to gain leverage on the issue of support. He also admitted he undervalued property in his financial declaration and underestimated the child's need in his needs statement. These actions constituted needless delay by bad faith pleading, triggering Rule 11 sanctions. State ex rel. Sorenson v. Roske, 229 M 151, 745 P2d 365, 44 St. Rep. 1854 (1987).

Sufficiency of Attorney's Signature After Expiration of Statute of Limitations on Reply: A petition for valuation of shares of stock was timely filed but without the signature of a Montana attorney. The signing of the petition after expiration of the 60-day statute of limitations on the reply, accomplished promptly after the attorney was made aware of objection by defense counsel, clearly was within the exception of Rule 11, M.R.Civ.P. (Title 25, ch. 20), allowing late signatures. Gold Reserve Corp. v. McCarty, 228 M 512, 744 P2d 160, 44 St. Rep. 1723 (1987).

Genuine Controversy Warranting Attorney Fees Not Frivolous: A party that defended itself at the District Court level, cross-claimed against another party, and on appeal contended that damages and attorney fees should have been awarded may not maintain at the same time that the case is a frivolous lawsuit. Branstetter v. Beaumont Supper Club, Inc., 224 M 20, 727 P2d 933, 43 St. Rep. 1981 (1986).

Imposition of Sanctions Within Discretion of Trial Court: Plaintiff moved for relitigation of contractual issues on which judgment was final and also moved for consideration of new contractual issues that had arisen after judgment. Sanctions may be imposed at the trial court's discretion if a motion has been filed for purposes of delay or is not offered in good faith. Assessment of reasonable attorney fees and costs against plaintiff and his attorney was not an abuse of discretion. Schmidt v. Colonial Terrace Associates, 223 M 8, 723 P2d 954, 43 St. Rep. 1489 (1986), followed in Bee Broadcasting Associates v. Reier, 236 M 275, 769 P2d 709, 46 St. Rep. 356 (1989).

Verification Not Required — When: Since the adoption of the rules, it is not ordinarily required that either a complaint or an answer be verified. Keller v. Hanson, 157 M 307, 485 P2d 705 (1971).

Failure to Verify — Effect: When failure to verify was not raised as an issue until after trial and no claim was made that the failure was prejudicial, there was no error. The proper remedy was a motion to strike. Adams v. Davis, 142 M 587, 386 P2d 574 (1963).

Law Review Articles

Recent Work of the Civil Rules Committee, Sanner & Tobias, 52 Mont. L. Rev. 307 (1991).

Advocacy and Responsibility: Conflicting Paradigms?, Bennett, 51 Mont. L. Rev. 1 (1990).

Rule 11 Sanctions, Drummond, 48 Mont. L. Rev. 119 (1987).

Sanctions Available for Attorney Misconduct: A Glimpse at the "Other" Remedies, Axelberg, 47 Mont. L. Rev. 87 (1986), see VI. Rule 11 on page 96.

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Pleading *key* 287 through 304.

71 C.J.S. Pleading §§478 through 485.

61B Am. Jur. 2d Pleading §§881 through 887.

Existence and nature of cause of action for equitable bill of discovery. 37 ALR 5th 645.

Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on pleadings

Case Notes

Service Upon Limited Liability Company Not Constituting Service Upon Individual Company Members — No Joinder of Member Solely for Executing on Judgment Against Company: Plaintiff obtained a judgment against a limited liability company, but when plaintiff discovered that the company had no assets to levy against, plaintiff moved to levy judgment against defendant

personally. The motion was dismissed without prejudice, and plaintiff appealed, but the Supreme Court affirmed. Although defendant knew of the lawsuit involving the company, defendant was not separately served, and service upon the company did not constitute service upon the individual members of the company. Further, the District Court did not err in refusing to join defendant after judgment was rendered solely for the purpose of executing judgment because doing so would have deprived defendant of the due process right to notice and the opportunity to be heard. Ioerger v. Reiner, 2005 MT 155, 327 M 424, 114 P3d 1028 (2005), following S-W Co. v. Schwenk, 173 M 481, 568 P2d 145 (1977), Hadford v. Credit Bureau of Havre, Inc., 1998 MT 179, 289 M 529, 962 P2d 1198 (1998), Mtn. W. Bank v. Mine & Mill Hydraulics, Inc., 2003 MT 35, 314 M 248, 64 P3d 1048 (2003), and Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Denial of Motion to Change Venue — Explanation Within Court Discretion: Under Rule 52(a), M.R.Civ.P., when a court grants a motion under Rule 56, M.R.Civ.P., or this rule, the court shall support its order with an explanation of its reason, but there is no comparable requirement for orders denying motions to change venue. A District Court is at liberty to deny a venue motion with or without comment. Therefore, it was not error for a court to provide an explanation for why defendant's motion for change of venue was denied, nor was it error for the court to direct plaintiff to prepare an appropriate memorandum and order for the court to sign. I.S.C. Distrib., Inc. v. Trevor, 259 M 460, 856 P2d 977, 50 St. Rep. 880 (1993).

Venue — Second Suit Abuse of Process: Venue was proper in Lewis and Clark County, the location clearly indicated in the contract as the place where the contract was to be performed. It was an abuse of process for the defendant in a suit filed in District Court in Lewis and Clark County to file an action against the plaintiff in Justice's Court in Granite County. This was an attempt to thwart the plain provisions of the written contract and a use of the court system to accomplish that goal. The Supreme Court affirmed the order of the Lewis and Clark County District Court requiring defendant to dismiss its action filed in Justice's Court in Granite County. Leasing, Inc. v. Discovery Ski Corp., 235 M 133, 765 P2d 176, 45 St. Rep. 2250 (1988).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 12(a). When presented.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 12(a). The amendment allows the state or any state board or agency 40 days instead of the usual 20 within which to answer a complaint following service. The Federal Rule also allows additional time for the United States or an officer or agency thereof to answer.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments: The amendment of October 9, 1984, inserted fourth sentence regarding answer by state entity.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Appropriate Standards for Setting Aside Entry of Default and Default Judgment: Defendant failed to respond to a complaint within 20 days, and default was entered in favor of plaintiff. Defendant sought to set aside the entry of default under the good cause standard provided under Cribb v. Matlock Communications, Inc., 236 M 27, 768 P2d 337 (1989). Plaintiff contended that in order to meet the good cause standard, a party would have to meet the higher excusable neglect standard set out in Blume v. Metropolitan Life Ins. Co., 242 M 465, 791 P2d 784 (1990). The District Court held that the Blume standard applied and that defendant's neglect was inexcusable, so default judgment was entered. On appeal, the Supreme Court took the opportunity to clarify the applicable standards. When the issue is the setting aside of a default judgment under Rule 60(b), M.R.Civ.P., either alone or in conjunction with an entry of default, the appropriate standard is the Blume excusable neglect standard. When the issue is the setting aside of an entry of default under Rule 55(c), M.R.Civ.P., as opposed to a default judgment, the appropriate standard is the Cribb good cause standard. This case involved setting aside an entry

of default, so the court applied the Cribb standard. Defendant failed to show that its default was not willful, instead professing ignorance in the face of repeated warnings that if no answer was filed, a default would be taken. The Cribb standard also compels consideration of the prejudice to plaintiff and whether defendant had a meritorious defense. Plaintiff had a right to be apprised of defendant's defense in a timely manner, and defendant should have raised those claims in a timely fashion rather than ignore plaintiff's repeated attempts to elicit a responsive pleading. Defendant was correct that the proper standard to be applied in this case was the Cribb standard, but defendant nevertheless failed to show good cause to set aside entry of default under that standard. Thus, even though the District Court applied the wrong standard, it reached the correct result for the wrong reason, and the Supreme Court affirmed the default judgment. Essex Ins. Co. v. Jaycie, Inc., 2004 MT 278, 323 M 231, 99 P3d 651 (2004), followed in Peak Dev., LLP v. Juntunen, 2005 MT 82, 326 M 409, 110 P3d 13 (2005).

Child Custody Disputes — Defaults Disfavored: The father sought a modification of custody of his children. His wife failed to file her response within the time provided by the rules. The father argued that he was entitled to custody of his children by default. The Supreme Court held that any doubt in the late filing of an answer should be resolved by trial on the merits of the case, and custody cases present a compelling reason for a hearing on the merits. Duffey v. Duffey, 193 M 241, 631 P2d 697, 38 St. Rep. 1105 (1981).

Time for Pleading After Denial of Motion: Defendants had 20 days from day on which motion to dismiss complaint was denied in which to serve and file responsive pleading. Sealey v. Majerus, 149 M 268, 425 P2d 70 (1967).

Default Taken Prematurely — Service by Publication: Husband who went to Canada and was personally served there in divorce action had 40 days in which to answer under the combined time allotted in Rules 4(D)(5)(g) and 12(a), M.R.Civ.P., and default taken before that time was voidable. Sowerwine v. Sowerwine, 145 M 81, 399 P2d 233 (1965).

Jurisdiction — Attaches When: Jurisdiction of court attaches at time of personal service of complaint and summons; personal service of summons and complaint in divorce action precluded and made a nullity a subsequent divorce entered founded upon service by publication. Sowerwine v. Sowerwine, 145 M 81, 399 P2d 233 (1965).

Reply to Counterclaim Following Default Properly Ignored: Where a reply to a counterclaim was not filed until 19 months after the expiration of the 20-day period and 14 months after default had been entered, the court did not err in disregarding the belated pleading on motion for judgment on the counterclaim. Munger v. Nelson, 61 M 104, 201 P 286 (1921).

Collateral References

Pleading *key* 76 through 161, 341 through 369.

71 C.J.S. Pleading §§159 through 208, 591 through 762.

Rule 12(b). How presented.

Commission and Advisory Committee Notes

COMMISSION NOTE TO 1965 AMENDMENT

The numbering of the defenses which may be made by motion is changed to conform to that of the Federal Rule, which results in there being no "(3)" because "improper venue" as a ground for motion to dismiss was deleted in 1963. Subdivisions (i), (ii), (iii), and (iv) are added to clarify and detail the time and manner for motions for change of place of trial in the cases specified in Section 93-2906, R.C.M. 1947 [25-2-201, MCA].

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed.R.Civ.P. 12(b), as amended 1966.

Explanation of change: The terminology is changed to accord with the amendment of Rule 19. The numbering of listed defenses of the Montana Rule is retained: "(3) improper venue" is omitted; and the provisions of subdivisions (i), (ii), (iii) and (iv), dealing with motions for change of place of trial, remain unchanged.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 12(b)(iv). The amendment deletes the subdivision because this was the intent of Supreme Court Order dated December 29, 1976, as superseded by Supreme Court Order dated June 29, 1981, both of which cover the disqualification and substitution of judges. The Supreme

Court confirmed this in an unpublished order dated January 26, 1984, in the mandamus proceeding entitled Tadday v. District Court, No. 83-526.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule is identical to the Federal Rule, except this rule deletes (3) relating to improper venue and adds (i) through (iii).

Amendments: The 1965 amendment renumbered some of the numbered clauses in the first sentence and added subdivisions (i) to (iv). See commission note above.

The amendment of September 29, 1967, in the introductory paragraph, substituted "a party under Rule 19" for "an indispensable party" in item (7); and, in the fourth sentence, substituted "the" for "that" before "claim for relief".

The amendment of October 9, 1984, deleted former (iv) which read: "(iv) With respect to [ground 4 of section 93-2906, R.C.M. 1947], the party who disqualifies a district judge, and who desires a change of venue, must include such request in a motion filed along with the affidavit of disqualification. If the party who does not disqualify the district judge desires a change of venue, he shall make such request by motion within 5 days after being served with a copy of the affidavit of disqualification. Unless the parties have agreed in writing upon another district judge, or upon a member of the bar as judge pro tempore, the disqualified district judge must either call in another district judge within 15 days after filing of the affidavit of disqualification, or 10 days after filing of the motion for change of venue, or, if no other judge is called in, grant the motion for change of venue. If any other qualified district judge shall be called in, as herein provided, and shall, within 30 days after the motion for change of venue has been filed, appear and assume jurisdiction of the cause and of all matters and proceedings therein, no change of the place of trial shall be made. If the other qualified district judge called in, as herein provided, fails to appear and assume jurisdiction within 30 days after the motion for change of venue has been filed, then the disqualified judge must immediately grant the motion and order a change in the place of trial to some other county."

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 598
Failure to State a Claim 606
Necessary Parties to Action 616
Capacity of Parties 617
Dismissal Versus Summary Judgment 617

GENERAL

Reference to Matters Outside Complaint — Error in Failure to Notify Parties of Intent to Grant Summary Judgment: Stokes filed a complaint against the state alleging inverse condemnation pursuant to a public highway expansion project. The state moved to dismiss the complaint on grounds that prior litigation had established the exact footprint of Stokes' easement and that for purposes of judicial economy, Stokes should be required to pursue the claim in a pending eminent domain action involving the same parcels of land. The District Court agreed with the state and dismissed the complaint. On appeal, the Supreme Court held that by referring to matters outside the complaint, the District Court effectively transformed the motion to dismiss into a motion for summary judgment and then failed to notify the parties of its intention to do so, thereby failing to extend to the parties an opportunity to present additional material as required in this rule. Failure to comply with this rule was reversible error, and the case was remanded for further proceedings. Stokes v. St., 2005 MT 42, 326 M 138, 107 P3d 494 (2005).

No Loss of District Court Jurisdiction Upon Filing of Notice of Entry of Judgment — Amended Complaint Allowed: About 2 weeks after defendant filed a notice of entry of judgment, plaintiff filed a motion to amend the original complaint, and the District Court granted the motion. About 3 weeks after the amended complaint was filed, the court entered an order nunc pro tunc stating that it no longer had discretionary authority to grant leave to amend because it lost jurisdiction when defendant filed the notice of entry of judgment. The court held that the order allowing plaintiff's motion to amend was void and should be stricken. Plaintiff appealed the nunc pro tunc order, and the Supreme Court reversed. The filing of a notice of entry of judgment starts the clock running for the time to appeal, but does not divest the District Court of jurisdiction. Rather, the

District Court loses jurisdiction when a notice of appeal is filed. Thus, the order issued nunc pro tunc was based on a mistaken interpretation of law because when the motion to amend was granted, the District Court still had jurisdiction. Kruckenberg v. Kalispell, 2004 MT 185, 322 M 177, 94 P3d 748 (2004). See also McCormick v. McCormick, 168 M 136, 541 P2d 765 (1975), Hankinson v. Picotte, 235 M 143, 766 P2d 242 (1988), and Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001).

State Remedy and State Court Enforcement of Contract Wages Required by Federal Davis-Bacon Act: The District Court had subject matter jurisdiction of state contract law claims against a contractor and subcontractors by workers hired to build housing on Malmstrom Air Force base under a contract between the contractor and the Air Force. The workers claimed that they were not paid the prevailing wages required by the federal Davis-Bacon Act. The defendants claimed that there was no private right of action and that the workers had not exhausted their federal administrative remedies. The evidence showed that the workers extensively used the administrative remedies, taking all proper steps to attempt to administratively resolve the dispute. The workers were not seeking to enforce the Davis-Bacon Act labor standards; they sought to enforce a contract that includes wages required by the Act, a subtle but important distinction. The Act does not preempt the workers' right to a state enforcement action, using state remedies, under the facts of this case. That right is in keeping with Montana's longstanding policy and constitutional guarantee in Art. II, sec. 16, Mont. Const., of citizens' access to Montana courts when they are aggrieved. As third-party beneficiaries of the contract, the workers have the right to sue in state court to enforce the contract under state law. Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Third-Party Defendant Related to District Court Judge — Denial of Motion for Change of Venue When Not Timely Filed: Over a 2 ½-year period, one of plaintiff's employees forged signatures on more than 100 company checks and money orders, made them payable to herself, and deposited the proceeds in her personal account in a Missoula credit union. Plaintiff ultimately filed an action against the credit union and sought a change of venue from Missoula County on grounds that a fair trial could not be had in that county. The employee was related to one of the District Court judges in the county, although not the same judge that heard the case, but plaintiff nevertheless asserted a conflict of interest because both judges worked in the same courthouse in the same judicial district. The motion for change of venue was denied, and the Supreme Court affirmed. The motion for change of venue was not filed within 20 days of the credit union's answer, as required in this rule, so the untimely motion was properly denied. Yarbro, Ltd. v. Missoula Fed. Credit Union, 2002 MT 152, 310 M 346, 50 P3d 158 (2002).

Venue Versus Jurisdiction — Failure to Move for Change of Venue at Initial Appearance Constituting Waiver of Right to Later Object to Venue: A mother filed in District Court in Judith Basin County for review of a child support modification consent order by the Department of Public Health and Human Services Child Support Enforcement Division (CSED) reducing the father's child support obligation. CSED moved for dismissal, claiming that the mother had failed to exhaust her administrative remedies. The District Court granted the motion based on lack of jurisdiction, concluding that the petition should have been filed in a different county. The mother appealed, contending that the court confused the concepts of venue and jurisdiction and contending that dismissal of the petition for lack of jurisdiction was erroneous as a matter of law. The Supreme Court agreed and reversed. The District Court's interpretation of 2-4-702 as a requirement that a petition for judicial review must be filed in the correct venue for the court to obtain jurisdiction was incorrect as a matter of law. Jurisdiction is a court's authority to hear and determine a case that goes to the power of the court and cannot be waived or conferred by consent of the parties when there is no basis for jurisdiction under the law, while venue refers to the place where a case is to be heard or where the power of the court is to be exercised and is a personal privilege of defendant that may be waived and that is considered waived pursuant to this rule unless a motion to change venue is made at defendant's initial appearance. Thus, the mother's petition for judicial review vested the Judith Basin County District Court with jurisdiction under 2-4-702. Whether venue was proper in the county where the petition was filed was an entirely different issue. Section 2-4-702 also sets forth the proper place where a contested administrative decision can be heard, providing that the petition must be filed in the District Court for the county where the petitioner resides or has a principal place of business or where the agency maintains its principal office. Upon proper motion, the matter should have been transferred to the proper county, but CSED failed to move for a change of venue at the initial appearance, thereby waiving its right to later object to venue, opting instead to move to dismiss for lack of jurisdiction. Therefore, Judith Basin County was a proper place for trial absent

agreement by the parties to transfer venue. In re Support Obligation of McGurran, 2002 MT 144, 310 M 268, 49 P3d 626 (2002).

Miscalculation of Amount Necessary to Redeem Tax Lien — No Violation of Assignee's Constitutionally Protected Property Rights — Section 1983 Claim Properly Dismissed: Shepherd held an assignment of the tax sale certificate on real property in Red Lodge. A few days before the redemption period was to expire, the owner of record redeemed the property by paying $4,407.28, but the County Treasurer unintentionally overlooked an additional $56.30 in interest that had accrued between the date that notice was given that a tax deed would be issued and the date of redemption. Shepherd then filed a complaint under 42 U.S.C. 1983, alleging that the county's failure to collect the statutorily required amount for redemption deprived Shepherd of a property interest without due process of law. Shepherd sought $250,000 in general damages, punitive damages, and attorney fees and costs. Shortly thereafter, the county tendered Shepherd $56.30 plus interest, but Shepherd rejected the money and added a negligence claim to the complaint. The District Court dismissed the section 1983 claim on grounds that Shepherd failed to state a claim upon which relief could be granted, and awarded summary judgment to the county on the negligence claim, subject to the payment of $60.73 of accumulated interest then owed to Shepherd. Shepherd appealed, but the Supreme Court affirmed. Without ruling on whether Shepherd had a property right, the Supreme Court concluded that the claim failed as a matter of law. To prevail on a section 1983 claim pursuant to Orozco v. Day, 281 M 341, 934 P2d 1009 (1997), plaintiff must establish a violation of federal constitutional or statutory rights proximately caused by the conduct of a person acting under color of state law. Shepherd alleged a violation of the federal constitutional right to due process, but the process due in this case pertained to the redemption of tax liens under Montana law, and except for the inadvertent miscalculation of interest due, that process was followed. The miscalculation was at most a ministerial error, and to equate the miscalculation with a denial of due process would trivialize the constitution and the important remedial purpose of section 1983. Because there was no denial of due process, there was no section 1983 claim, and the District Court properly dismissed Shepherd's claim pursuant to this rule. Shepherd v. Carbon County Bd. of Comm'rs, 2002 MT 98, 309 M 391, 46 P3d 634 (2002).

Validity and Enforceability of Memorandum of Understanding — Findings of Facts and Conclusions of Law Not Required: The District Court ruled that the parties had entered into a valid and enforceable memorandum of understanding (MOU) regarding the parties' obligations applicable to an agricultural lease. The defendants argued that the MOU was simply an agreement to agree, that only a formal settlement agreement would bind the parties, and that the District Court erred in finding the MOU to be binding without setting out its findings of fact and conclusions of law. The plaintiff maintained that the MOU was an unconditional settlement agreement, that a more formal settlement document was not necessary to finalize or carry out the MOU, and that the court had no duty to set out its findings and conclusions. The Supreme Court found no error in the District Court's ruling and affirmed. All interested parties were present at the settlement conference and participated in negotiations, which ended with all the parties signing the MOU, memorializing the agreement among the signatories. Clearly there was a meeting of the minds during negotiations, and all the parties anticipated being bound by the MOU. The MOU was not conditioned upon the execution of a formal settlement agreement, so one was not necessary. The Supreme Court has recognized the validity of similar MOUs in Hetherington v. Ford Motor Co., 257 M 395, 849 P2d 1039 (1993), and Marta Corp. v. Thoft, 271 M 109, 894 P2d 333 (1995), and concluded that the agreement memorialized in the MOU here was a valid unconditional resolution of the parties' claims that effectively released any claims of the signatories. Further, under Rule 52(a), M.R.Civ.P., findings and conclusions are unnecessary on decisions of motions except for judgments at trial, which did not apply in this case. The District Court did not abuse its discretion in denying a defendant's motion to file an amended answer and counterclaim addressed to the original complaint, because those claims were also resolved by the MOU. Bar OK Ranch, Co. v. Ehlert, 2002 MT 12, 308 M 140, 40 P3d 378 (2002).

Inadvertent Use of Previous Cause Number on New Complaint Considered Technical, Nonprejudicial Defect: One day before expiration of the statute of limitations, the Lundquists filed a pro se complaint against Shook, Hamilton, and McBeth for fraudulent transfer of property, but in preparing the complaint, the Lundquists used a template from a prior fraudulent transfer case involving Shook, Hamilton, and Pederson and included the same cause number from the prior case. The Lundquists' former counsel notified the District Court that he was not representing the Lundquists in the case involving McBeth. One day prior to service of process on McBeth, the District Court ordered the Clerk of the District Court to withdraw the

Lundquists' complaint on grounds that the complaint was filed in the same cause of action previously pending, and the Lundquists did not obtain the court's consent to amend prior pleadings and have their attorney of record sign the complaint against McBeth. The Lundquists then moved to have the court assign a new cause number to the complaint and allow amendment of the complaint to retain the original filing date. The court denied the motion, holding that if a new complaint was to be filed and a new cause number assigned, it would be considered filed as of the date on which it was presented for filing and not the date on which it was originally attempted to be filed. Thus, a new complaint was filed with a new cause number and filing date, but the new complaint was filed after expiration of the statute of limitations for fraudulent conveyance actions, so the District Court granted McBeth's dismissal motion because the complaint was not timely filed. The Lundquists appealed, and the Supreme Court reversed. In filing the new complaint, the Lundquists had notified the court that they intended to proceed against McBeth in an action that was independent of the transfer litigated in the previous cause, and their use of the cause number from the previous action was inadvertent and a technical rather than fundamental defect. The Lundquists did not need the District Court's permission to file a new complaint, nor did the new pro se complaint require their attorney's signature. Because the Lundquists named McBeth in the complaint, filed the complaint prior to the expiration of the fraudulent transfer statute of limitations, and served McBeth with a copy of the complaint, McBeth was not prejudiced by the technical defect and the District Court should not have ordered the complaint withdrawn. Lundquist v. McBeth, 2001 MT 311, 308 M 1, 38 P3d 831 (2001).

Dispute Over Whether Agreement to Arbitrate Exists — Motion to Compel Arbitration Improper: The District Court found that the arbitration provision in a contract to provide on-line stock trading was valid and enforceable and compelled arbitration. Although it is true that a court is required to follow a liberal policy in enforcing arbitration agreements, including resolving any doubts concerning the scope of arbitrable issues in favor of arbitration, under 27-5-115, arbitration may not be ordered if there is a substantial and bona fide dispute over whether an arbitration agreement exists. Further, the Federal Arbitration Act, 9 U.S.C. 1, et seq., provides that an agreement to arbitrate is valid except when grounds exist at law or in equity to revoke the contract, reversing the longtime judicial hostility to arbitration agreements and putting them on the same footing as other contract provisions. A District Court may properly adjudicate the validity of an arbitration agreement only when a party contests the validity of an arbitration clause within a contract but does not contest the validity of the contract as a whole. Here, plaintiffs were on notice that there was some form of arbitration governing the agreement, but they had no indication that they were agreeing to binding arbitration or that arbitration was their exclusive remedy because they allegedly never received the specific terms and conditions of the agreement, creating a substantial ambiguity. Because there was a substantial and bona fide dispute over the arbitration agreement that could not be overcome by the general policy encouraging upholding agreements to arbitrate, the District Court committed reversible error in not fully addressing whether a valid arbitration agreement existed, in dismissing the case for lack of jurisdiction, and in compelling arbitration. Kingston v. Ameritrade, Inc., 2000 MT 269, 302 M 90, 12 P3d 929, 57 St. Rep. 1137 (2000).

Claim for Punitive Damages Not Precluded by Estoppel — Issues of Previous Litigation Not Identical: Finstad was injured by asbestos in defendant's mine. A jury trial resulted in a verdict for Finstad and an award of $400,000 in compensatory damages, as well as a determination that punitive damages were warranted. The District Court conducted a minitrial on the issue of punitive damages, and the jury awarded $83,000. Defendant contested the award of punitive damages and moved for dismissal on grounds that Finstad's claim was barred by collateral estoppel by virtual representation because the issue had already been litigated in two previous Lincoln County cases against defendant. Defendant contended that the issues were identical, that final judgment had been rendered, and that Finstad was a party to or in privity with a party in the previous cases and thus was virtually represented by those parties in the previous cases. The District Court denied the motion to dismiss, finding that the issues were not identical, and also ruled for Finstad on the question of estoppel by virtual representation. On appeal, the Supreme Court reviewed the record, noting that although some of the evidence and witnesses regarding the punitive damages claim were the same as in the previous cases, several significant factual distinctions and legal claims existed. Because the first element of collateral estoppel regarding identical parties was not met, the Supreme Court affirmed without reaching the question of estoppel by virtual representation. Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778, 57 St. Rep. 934 (2000), following Holtman v. 4-G's Plumbing & Heating, Inc., 264 M 432, 872 P2d 318 (1994).

Contested Ownership of Independent Business — Standard of Review of Judgment on Pleadings: Hedges claimed ownership of an independent Melaleuca business, allegedly acquired through a written transfer of the business by Johnson, the former owner, before Johnson's death. As corepresentatives of Johnson's estate, the Woodhouses claimed ownership of the same business by virtue of a residuary devise in Johnson's will. The uncontroverted facts in the pleadings served as the factual basis for the parties' competing motions for judgment on the pleadings. A movant for judgment on the pleadings must establish that no material fact exists and that movant is entitled to judgment as a matter of law, and pleadings are to be construed in the light most favorable to the nonmoving party, whose allegations are taken as true. The conclusions of law standard of review is applied. The District Court properly looked to Johnson's Melaleuca contract, which required that Melaleuca accept signed and acknowledged forms in respect to transfer of a business during a business owner's lifetime and approve the transfer in writing. The contractual restrictions on assignment of a Melaleuca contract were not met by Johnson's written transfer of the business to Hedges, and the court correctly concluded that Johnson's assignment was not valid. Judgment on the pleadings for Woodhouses was affirmed. Hedges v. Woodhouse, 2000 MT 220, 301 M 180, 8 P3d 109, 57 St. Rep. 905 (2000).

Motion to Dismiss as Admission of All Well-Pled Allegations: A motion to dismiss pursuant to this rule has the effect of admitting all well-pled allegations in the complaint. In considering the motion, the complaint must be construed in the light most favorable to plaintiff, whose allegations of fact must be taken as true. The determination that a complaint does not state a claim upon which relief can be granted is a conclusion of law that the Supreme Court reviews to determine whether the trial court is correct. Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997).

No Personal Jurisdiction Over Nonresident Lawyer — Jurisdiction Not Acquired Through Interstate Communications: Plaintiffs sued an out-of-state attorney, alleging theft and conversion and fraud and deceit arising out of a dispute over settlement money. On defendant's motion, the District Court dismissed the complaint for lack of personal jurisdiction. When defendant came into possession of and allegedly asserted unauthorized control over settlement checks in Idaho, defendant did not do any act that resulted in the accrual of the tort of conversion within Montana. When all representations regarding the claims took place in Idaho and the settlement was negotiated in Idaho, defendant's act of mailing the contingency fee agreement and other letters to plaintiffs in Montana did not create jurisdiction in Montana. Jurisdiction is not acquired through interstate communications pursuant to a contract to be performed in another state. Bird v. Hiller, 270 M 467, 892 P2d 931, 52 St. Rep. 288 (1995), and Threlkeld v. Colo., 2000 MT 369, 303 M 432, 16 P3d 359, 57 St. Rep. 1578 (2000).

Nonresidents of Subdivision Without Standing to Enforce Covenants of Subdivision: The adjacent neighbors of a subdivision sued the county and the residents of the subdivision either to have the county enforce the subdivision's restrictive covenants, approved by the county, or to have the District Court require the subdivision residents to abide by the covenants. The Supreme Court held that, without an ownership interest in the property, the neighbors and the public do not have the right to insist that the local government enforce restrictive covenants previously approved by the local government as part of the subdivision. The Supreme Court also ruled that the neighbors do not share the mutuality of the benefits and burdens as between grantees of the subdivision and therefore lack standing to enforce the restrictive covenants. The issue of whether a resident of the subdivision could seek enforcement of the covenants by the local government was not before the Supreme Court. Patton v. Madison County, 265 M 362, 877 P2d 993, 51 St. Rep. 536 (1994).

Claims Not Defense — Not Barred by Rule: This rule requires that every defense to a claim, counterclaim, or third-party claim be raised in the responsive pleading. When plaintiff's claims against defendant were not a defense to the claims asserted by a different plaintiff in a prior litigation, plaintiff was not required to file his claims against defendant in that action. Holtman v. 4-G's Plumbing & Heating, Inc., 264 M 432, 872 P2d 318, 51 St. Rep. 340 (1994).

Untimely Appeal From Denial of Motion for Change of Venue — Waiver: In the course of a dissolution proceeding, Lori appealed from the District Court's denial of her motion for a change of venue. The Supreme Court held that while a denial of a motion for a change of venue is an appealable order within the scope of Rule 1, M.R.App.P. (Title 25, ch. 21), the request for a change of venue must be timely made. Under this rule, a motion for a change of venue must be made within 20 days after the response to the pleading is filed. In this case, the dissolution proceeding was begun in 1985 and the husband's motion for custody was filed on June 5, 1991. However, the motion for a change of venue was not filed until March 18, 1993. In addition to the untimely motion, Lori made numerous appearances in the District Court of the Eighth Judicial

District without challenging venue in that district. The Supreme Court therefore dismissed the appeal. In re Marriage of Smith, 260 M 406, 860 P2d 159, 50 St. Rep. 1151 (1993).

Determination of Constitutional Violation Necessary Element of 42 U.S.C. 1983 Claim — Summary Judgment Precluded: Talley filed a cross-complaint for summary judgment on the question of a violation of 42 U.S.C. 1983 and associated attorney fees in connection with a discharge from his employment as a part-time community college instructor. Recognizing that a free speech violation might possibly have occurred, the District Court nevertheless properly dismissed the summary judgment motion because the free speech complaint had not been resolved and a violation of constitutional rights, privileges, or immunities is attendant to a 42 U.S.C. 1983 claim. Consideration of attorney fees prior to settlement of the free speech claim was also premature. Talley v. Flathead Valley Community College, 259 M 479, 857 P2d 701, 50 St. Rep. 889 (1993), affirmed in 273 M 336, 903 P2d 789, 52 St. Rep. 1016 (1995).

Consideration by Court of Newspaper Articles Not Published Within Twenty Days of Motion to Change Venue: Mannix argued that the lower court erred in considering newspaper editorials published more than 20 days before the defendants' motion for change of venue. The Supreme Court held that the lower court had not abused its discretion because many of the articles published were editorials rather than news articles as had been the case in its decision in St. v. Pease, 227 M 424, 740 P2d 659 (1987). Mannix v. Butte Water Co., 259 M 79, 854 P2d 834, 50 St. Rep. 691 (1993).

Failure to File Notice of Entry of Judgment — Amended Complaint Allowed: Defendant, who was successful in having an action dismissed on a motion under this rule, failed to file a notice of entry of judgment. The plaintiffs' 30-day period for filing a notice of appeal did not run, the order of dismissal of the original complaint did not become final, and the District Court had jurisdiction to grant plaintiffs leave to file an amended complaint. The District Court had not lost subject matter jurisdiction. Hankinson v. Picotte, 235 M 143, 766 P2d 242, 45 St. Rep. 2259 (1988).

Filing Amended Motion — Prior District Court Approval Necessary: Prior approval of the District Court is a prerequisite to the proper filing of an amended Rule 12(b) motion. Ass'n of Unit Owners of the Deer Lodge Condominium v. Big Sky of Mont., Inc., 224 M 142, 729 P2d 469, 43 St. Rep. 2084 (1986).

Plaintiff's Failure to Comply With Court Procedural Rules — Order Granting defendant's Motion to Dismiss Upheld: It was proper to dismiss a complaint on defendant's motion to dismiss under this rule when plaintiff failed to comply with the procedure required by the Supreme Court Uniform Rule II and Missoula County District Court Local Rule 4 on a motion to dismiss. McLaughlin v. Hart, 213 M 216, 690 P2d 431, 41 St. Rep. 2059 (1984).

Motion to Change Venue After Default Judgment Entered — Denied as Untimely — Proper Course Suggested: A motion for a change of venue may not be made after judgment has been entered. Thus, in this case defendant's motion to change venue was correctly denied as untimely because a default divorce judgment had been granted. Defendant's proper course of action should have been to move for relief from judgment under Rule 60(b), M.R.Civ.P.; then, if granted, she should attempt to withdraw her initial appearance and request a change of venue. Hoyt v. Hoyt, 208 M 83, 675 P2d 392, 41 St. Rep. 183 (1984).

Uniform Rules for District Courts — Time Limit for Filing Brief in Support of Rule 12 Motion: In an action for strict liability in tort for personal injuries, defendant filed a motion for change of venue on November 17, 1982, and a brief in support of the motion on November 24, 1982. The motion was denied by the District Court for failure to file a supporting brief within 5 days, the time limit allowed by Rule II of the Uniform Rules for District Courts of Montana. The Supreme Court reversed and remanded the case to District Court, ruling that under Rule 6(a), M.R.Civ.P., three of the days intervening between the time of filing of the motion and the time of filing of the brief are excluded from the calculation of the maximum permissible time, so the filing of the brief was timely. Tanniehill v. Remington Arms Co., 207 M 501, 675 P2d 948, 41 St. Rep. 103 (1984).

Raising Statute of Limitations and Estoppel in Motion — When Allowed: The affirmative defenses of the Statute of Limitations and estoppel by judgment may be raised in a motion to dismiss rather than in the answer when the complaint on its face shows that the claim is barred by the Statute of Limitations and the judgment relied on for the estoppel by judgment defense was made in the same court that is asked to pass on the motion. Beckman v. Chamberlain, 673 P2d 480, 40 St. Rep. 2044 (1983) (apparently not reported in Montana Reports).

Change of Venue — Defendant's Personal Privilege in Main Action: Plaintiff (Novco) brought an action against the Graingers (defendants) on two counts, for payment for automobile parts delivered to Sunset Carburetor and Electric, Inc., and against Harold Grainger individually to collect on a bad check drawn on the account of Sunset Automotive, Inc., upon which Novco

alleged Grainger was personally liable. The Graingers defaulted, which default was subsequently set aside, and they filed an answer, a counterclaim, and a third-party complaint. The third-party complaint alleged that Sunset Carburetor and Electric, Inc., was the real party in interest and liable to Novco. Sunset moved for a change of venue, which the District Court denied. The Montana Rules of Civil Procedure do not permit a third-party plaintiff to implead as a third-party defendant a party who is not a party to the original action and who is or may be liable to the original plaintiff. Rule 14(a), M.R.Civ.P., only permits impleader of a party who "is or may be liable" to the third-party plaintiff. The Supreme Court followed the federal court rule and held that the privilege of objecting to venue in the main action is a personal privilege belonging to the defendant in the main action alone and not to a third-party defendant. Novco v. Grainger, 199 M 291, 649 P2d 445, 39 St. Rep. 1367 (1982).

Complaint Construed in Favor of Plaintiff: For purposes of the motion to dismiss, the complaint is to be construed in the light most favorable to plaintiff and its allegations taken as true. Willson v. Taylor, 194 M 123, 634 P2d 1180, 38 St. Rep. 1606 (1981); Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979); Fulton v. Farmers' Union Grain Terminal Ass'n, 140 M 523, 374 P2d 231 (1962).

Order Denying Motion for Relief From Default Judgment Properly Appealed — Special Appearance Abolished: When the defendant honey processing company twice moved to vacate and dismiss a default judgment obtained against it by the plaintiff honey producing company, the Supreme Court had jurisdiction over an appeal from the District Court's denial of the second motion to vacate and dismiss. The defendant's first motion was untimely filed, and the fact that it was brought to challenge the personal jurisdiction of the court and characterized as a "special appearance" is of no effect, as special appearances have been abolished and the same requirements for timely appeal applies to all appearances. The second motion was properly appealable as it is considered denied, which denial is a final order, if the court has not ruled on the motion within 15 days after submission. Foster Apiaries, Inc. v. Hubbard Apiaries, Inc., 193 M 156, 630 P2d 1213, 38 St. Rep. 1025 (1981), followed in In re Estate of Ducey, 241 M 419, 787 P2d 749, 47 St. Rep. 232 (1990).

"Special Appearance" Treated as Motion to Dismiss — Dismissal of Nonresident Defendants for Lack of Personal Jurisdiction Upheld: Plaintiffs appealed the dismissal of nonresident defendants from their wrongful death and survivorship lawsuits. The Supreme Court found that a "special appearance" made by a party defendant to quash service of a summons for lack of personal jurisdiction, despite its outdated label, served as a motion to dismiss for lack of jurisdiction. The trial court did not commit reversible error by granting a motion that used an antiquated label. Knoepke v. SW. Ry., 190 M 238, 620 P2d 1185, 37 St. Rep. 1910 (1980).

Time for Motion to Change Venue for Interests of Justice and Witnesses' Convenience: The District Court properly denied as premature a motion for a change of venue on the grounds that the interests of justice and the convenience of witnesses would be best served. Former case law held that the motion may be made only after an answer has been filed, and Rule 12(b)(iii), M.R.Civ.P., preserves that policy. St. v. Sec. St. Bank, 184 M 461, 603 P2d 681 (1979).

Change of Venue for Taxpayer Bias — Timely Motion: A motion for a change of venue, based on the allegation that county taxpayers could not be unbiased jurors in a case in which that county was a party because the county taxpayers risked higher taxes if the county lost the case, was denied. The movant did not file the motion within 20 days after the answer or within 20 days after an event affording good cause to believe an impartial trial could not be had. Keith v. Liberty County Hosp. & Nursing Home, 183 M 39, 598 P2d 203 (1979).

Statute of Frauds Not Pleaded: Defendant failed to raise the Statute of Frauds defense in his pleadings, therefore he could not maintain it on appeal. Mont. Seeds, Inc. v. Holliday, 178 M 119, 582 P2d 1223 (1978).

Notice of Subsequent Proceedings: If a party "appears" by filing a motion he is entitled to notice of all subsequent proceedings. Big Spring v. Blackfeet Tribe of the Blackfeet Indian Reservation, 175 M 258, 573 P2d 655 (1978).

Illegal Tax Alleged — Improper Dismissal: The court erred in granting defendants' motions to dismiss for lack of subject matter jurisdiction because the complaints alleged an illegal tax, and did not put into issue any question of valuation. Thus, the courts, and not the tax appeal boards, had original jurisdiction to hear the case under former law and the rule of Larson v. Dept. of Revenue, 166 M 449, 534 P2d 854 (1975). U.S. Nat'l Bank of Red Lodge v. Dept. of Revenue, 175 M 205, 573 P2d 188 (1977).

Unlawful Detainer — Failure to Claim Rent Due: When an agricultural tenant held over and received no notice to quit within 60 days, he was free from the action for unlawful detainer for the term of the previous lease, and since plaintiff prayed for relief solely under the unlawful detainer

statute, the court properly dismissed the action without discussing recovery of rent. Holliday Land & Livestock Co. v. Pierce, 174 M 393, 571 P2d 93 (1977).

Contract Between City and Firemen — Dismissal Improperly Granted: The District Court erred when it dismissed counts within a complaint which were claims for relief on the basis of a contract between the city and the firemen when it was abundantly clear that appellant's complaint was not so defective as to appear beyond a doubt that appellant could prove no set of facts in support of its claim which would entitle it to relief. Local 8 Int'l Ass'n of Firefighters v. Great Falls, 174 M 53, 568 P2d 541 (1977).

No Substantive Changes in Amended Complaint — Dismissal Properly Granted: The court properly dismissed an amended complaint which was essentially the same as the original complaint filed before another District Judge. Plaintiff merely added sweeping alternative conclusions of law to his original complaint and claimed that they were substantive changes. Sovey v. Chouteau County District Hosp., 173 M 392, 567 P2d 941 (1977).

Dismissal of Complaint Appealable: Dismissal of complaint pursuant to this rule is appealable since the practical effect of dismissal is to leave plaintiff without opportunity for further judgment relief, just as if judgment had been entered against him. Hasbrouck v. Krsul, 168 M 270, 541 P2d 1197 (1975); Prentice Lumber Co., Inc. v. Hukill, 161 M 8, 504 P2d 277 (1972).

Motion to Dismiss Equivalent to Demurrer: A motion to dismiss under this rule is equivalent to a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) under former procedure. Duffy v. Butte Teachers' Union, 168 M 246, 541 P2d 1199 (1975); Rambur v. Diehl Lumber Co., 143 M 432, 391 P2d 1 (1964); Holtz v. Babcock, 143 M 341, 389 P2d 869, 390 P2d 801 (1964); Payne v. Mtn. States Tel. & Tel. Co., 142 M 406, 385 P2d 100 (1963).

Hearing on Lack of Jurisdiction Required — Dismissal Improperly Granted: Dismissal of tort action for lack of jurisdiction was premature without full hearing and cross-examination on defendant's motion under Rule 12(b)(2), where complaint alleged that corporate defendant had agent in Montana but answer of nonresident corporation stated that corporation had no "representative resident" in Montana, but also stated that "orders received from dealers in Montana are accepted in Indiana". Harrington v. Holiday Rambler Corp., 165 M 32, 525 P2d 556 (1974).

Failure to File Supporting Brief: Defendants, by failing to file brief within prescribed time of District Court rules, admitted their motion to dismiss complaint for failure to state a claim upon which relief could be granted was without merit. Wiseman v. Holt, 163 M 387, 517 P2d 711 (1973).

Order Equivalent to Final Judgment: An order dismissing a complaint and denying leave to amend was equivalent to final judgment although judgment had not been entered. Prentice Lumber Co., Inc. v. Hukill, 161 M 8, 504 P2d 277 (1972).

Third-Party Defendant — Negligence — When Dismissal Proper: Court erred in dismissing seller and manufacturer of truck as party defendants when many issues of material fact remained to be determined. Duchesneau v. Mack Trucks, 158 M 369, 492 P2d 926 (1971).

Findings of Fact and Conclusions of Law — Unnecessary: Findings of fact and conclusions of law are unnecessary on decisions with respect to motions made under Rule 12, Rule 56, or any other motion except as provided in Rule 41(b), M.R.Civ.P. Eisemann v. Hagel, 157 M 295, 485 P2d 703 (1971).

Jurisdictional Defense Lost — Scope of Jurisdiction Over Nonresidents: Defendant could not inject plea of lack of jurisdiction over the person after filing motion asserting lack of jurisdiction over the subject matter. Jurisdiction is proper over nonresident buyer purchasing through nonresident agent when one payment was made directly to and one order was made directly with resident seller. Prentice Lumber Co. v. Spahn, 156 M 68, 474 P2d 141 (1970).

Jurisdiction Over Subject Matter — Divorce: Notwithstanding a party's expressed intention to remain in another state, the Supreme Court will look to the facts and they speak louder than words. This may hold true when the party expresses an actual intention. Veseth v. Veseth, 147 M 169, 410 P2d 930 (1966).

Challenging Venue — When: Notwithstanding the 1963 amendment to this rule which deleted venue as a defense which could be asserted as a motion under the rule, the convenience of witnesses cannot be invoked to authorize a change in venue until an answer has been filed. Yeager v. Foster, 146 M 330, 406 P2d 370 (1965).

Rule as Statute of Limitations: Rule 41(e) (replaced with Rule 4E), M.R.Civ.P., is procedural and not a Statute of Limitations which, under Rule 8(c), M.R.Civ.P., must be affirmatively pleaded as a defense. A dismissal can be raised by motion under Rule 12, M.R.Civ.P. The hiatus between the repeal of the former section dealing with failure to serve summons and enactment of

Rule 41(e) (replaced with Rule 4E), did not vitiate the validity of the dismissal or restart computation of time. Whitcraft v. Semenza, 145 M 94, 399 P2d 757 (1965).

Disposal on Grounds Other Than Merits: The rules encourage disposition of cases quickly and on the merits. Close scrutiny should be given when one party moves to have the case disposed of on grounds other than the merits. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

Involuntary Dismissal Inapplicable to Failure to State a Claim: Rule 41(b), M.R.Civ.P., providing for involuntary dismissal which operates as an adjudication upon the merits, has no application to a motion to dismiss for failure to state a claim under this rule. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

Relationship Between Rules 12(b) and 41(b): Rule 41(b), M.R.Civ.P., has no application to a motion to dismiss for failure to state a claim under Rule 12(b), M.R.Civ.P. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

Res Judicata — Not Raised Beyond Pleadings: Parties did not go beyond the pleadings and introduce other material regarding res judicata. Therefore, the motion to dismiss was not one for a judgment on the merits. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

Order Sustaining Motion Not Appealable: An order sustaining a motion to dismiss is not appealable. Rambur v. Diehl Lumber Co., 143 M 432, 391 P2d 1 (1964), but see Prentice Lumber Co. v. Hukill, 161 M 8, 504 P2d 277 (1972), and Hasbrouck v. Krsul, 168 M 270, 541 P2d 1197 (1975).

Constructive Fraud — Not Stated With Particularity: Because sufficient allegations of fact regarding "constructive fraud" were not pleaded with particularity, the complaint failed to state a claim for relief as a derivative action. Brooks v. Brooks Pontiac, Inc., 143 M 256, 389 P2d 185 (1964).

Motion as Admission of Facts — Exceptions: While a motion to dismiss for failure to state a claim on which relief can be granted is the same as a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) under former Montana procedure and therefore admits to all facts well pleaded, it does not admit to controversial conclusions of law or to the accuracy of alleged construction of written instruments set forth in the pleading. Holtz v. Babcock, 143 M 341, 389 P2d 869, 390 P2d 801 (1963).

Motion to Dismiss — What Facts Admitted: A motion to dismiss admits all well-pleaded allegations, but conclusions of law and unwarranted deductions or inferences of fact are not admitted. Holtz v. Babcock, 143 M 341, 389 P2d 869, 390 P2d 801 (1963).

Requisites for Cause of Action: To state a cause of action the complaint must show that the plaintiff has the right to sue, and where it appears from the face of the pleading that he has no such right, on grounds other than lack of legal capacity, no legal judgment could be entered in the action, and the complaint does not state a cause of action. In such a situation a general demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P. and 25-31-503, now repealed) on that ground is sufficient. Hand v. Heslet, 81 M 68, 261 P 609 (1927).

Misjoinder of Parties — Liability Not Affected: A party's liability is not in any way affected because another, who is not liable, is made a defendant with him. Hence, a joint demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P. and 25-31-503, now repealed) will be overruled if a good cause of action is stated against either party. Cummings v. Reins Copper Co., 40 M 599, 107 P 904 (1910).

Objection Stated in Statutory Language: Where a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) is interposed to a counterclaim on the ground that it does not state facts sufficient to constitute a cause of action, it is sufficient to state the objection in the statutory language. Power v. Sla, 24 M 243, 61 P 468 (1900).

FAILURE TO STATE A CLAIM

City Not Liable Under Scaffolding Law: Plaintiff's husband was killed in the collapse of a scaffold, and plaintiff sued the city of Missoula, asserting that the city violated its duty to inspect the scaffold. The District Court found that the city owed no duty and summarily dismissed the claim. On appeal, the Supreme Court affirmed. Under 50-77-101, the Legislature imposed liability only on certain entities for violations of scaffolding law, not including cities. Additionally, under State ex rel. Great Falls Nat'l Bank v. District Court, 154 M 336, 463 P2d 326 (1969), only those having direct and immediate control of the work involving the scaffold are required to make an injured worker whole. Because the city was not liable for scaffolding violations, plaintiff failed to raise a justiciable issue for which relief could be granted and the claim was dismissed as moot. Dukes v. Missoula, 2005 MT 196, 328 M 155, 119 P3d 61 (2005), following Dennis v. Brown, 2005 MT 85, 326 M 422, 110 P3d 17 (2005).

Reasonable Accommodation of Incarcerated Plaintiff's Opportunity to Prosecute Claim — Dismissal for Failure to Prosecute Affirmed: Following remand of Hauschulz v. Michael Law Firm, 2001 MT 160, 306 M 102, 30 P3d 357 (2001), the District Court gave Hauschulz, who was incarcerated out of state, about 1 1/2 years to obtain counsel and participate in the proceedings, but Hauschulz was unable to specify when he would be able to prosecute the claim. The District Court subsequently dismissed Hauschulz's claim for failure to prosecute, and Hauschulz appealed. The Supreme Court affirmed, holding that although incarceration undoubtedly restricts one's ability to exercise civil liberties, it does not give rise to a right to an indefinite postponement of civil proceedings, particularly over the objection of the other party. Applying the factors in Westland v. Weinmeister, 259 M 412, 856 P2d 1374 (1993), the Supreme Court found no abuse of the District Court's discretion in balancing the competing public policy interests when dismissing Hauschulz's claim with prejudice. Hauschulz v. Michael Law Firm, 2005 MT 189, 328 M 95, 117 P3d 908 (2005).

Issues in Third-Party Action Contained in Underlying Suit — Third-Party Complaint Properly Dismissed as Moot: In a real property dispute, a realtor filed a complaint against the attorney who represented plaintiffs, asserting that the attorney had a duty to disclose and explain zoning issues related to the property. The District Court dismissed the complaint for failure to state a claim upon which relief could be granted, and the realtor appealed, but the Supreme Court affirmed. The attorney's negligence as an agent, if any was contained in the underlying case before the District Court, and a ruling on whether the realtor could assert a duplicative claim for contribution by way of a third-party complaint would have no practical effect on the controversy. The realtor's issue was thus moot or academic, and the claim was properly dismissed. Dennis v. Brown, 2005 MT 85, 326 M 422, 110 P3d 17 (2005). See also Commercial Standard Title Co. v. Superior Court, 155 Cal. Rep. 393 (Cal. Ct. App. 1979).

Human Rights Act Exclusive Remedy for Sexual Discrimination Complaint — Summary Dismissal by District Court Affirmed: Arthur filed a sexual discrimination complaint with the Montana Commission on Human Rights but failed to rebut a defendant's response, so the Commission sent Arthur a notice of dismissal and right to file a civil action in District Court. Arthur filed neither a timely objection to dismissal nor a timely action in District Court. Instead, Arthur filed a tort action against defendants, alleging various torts and requesting compensatory and punitive damages. An amended complaint filed 2 years later asserted: (1) failure to provide a safe workplace; (2) negligent retention of the employee who allegedly sexually harassed Arthur; (3) negligent supervision of the employee; (4) intentional infliction of emotional distress; (5) negligent infliction of emotional distress; and (6) sexual harassment under Title 49, ch. 2, commonly known as the Montana Human Rights Act. The District Court summarily dismissed the first five complaints as barred by the exclusive remedy provision of 49-2-509 and dismissed the sixth complaint as barred by the statute of limitations in 49-2-509. On appeal, the Supreme Court affirmed. Arthur's tort claims were a recharacterization of the initial sexual harassment claim, and pursuant to 49-2-509, the Montana Human Rights Act is the exclusive remedy for claims of sexual discrimination and precludes other tort claims that arise from underlying allegations of sexual discrimination or harassment. Further, under Hash v. U.S. W. Communication Serv., 268 M 326, 886 P2d 442 (1994), equitable tolling of the statute of limitations is not applicable in a discrimination case when a claimant does not have more than one legal remedy available, any one of which could be pursued in good faith. Rather, the claimant's exclusive remedy is under the Montana Human Rights Act. Arthur had knowledge of the vital facts underlying the sexual discrimination claim and could not claim inability to obtain the information in order to toll the statute of limitations. Arthur v. Pierre Ltd., 2004 MT 303, 323 M 453, 100 P3d 987 (2004), following Harrison v. Chance, 244 M 215, 797 P2d 200 (1990), Bruner v. Yellowstone County, 272 M 261, 900 P2d 901 (1995), and Fandrich v. Capital Ford Lincoln Mercury, 272 M 425, 901 P2d 112 (1995).

Prison Diet Plan Not Violative of Freedom of Religion — Summary Dismissal Proper: While incarcerated at a correctional facility, Cape, a Catholic, sued the facility and the food service providers for violating Cape's freedom of religion by failing to provide religious meals of fish and unleavened bread during Lent. The District Court summarily dismissed the claim on grounds that Cape failed to state a claim upon which relief could be granted. On appeal, Cape asserted that because the court was not the arbitrator of religious orthodoxy, it could not pass judgment on the correctness of Cape's religious beliefs. However, the warden at the facility testified that meatless meals were provided to all Catholic inmates during Lent, and a Catholic priest testified that the Catholic religion does not require that fish be consumed on days of abstinence from red meat, that a vegetarian diet is acceptable, and that Catholics are not required to consume unleavened bread during Lent. To be protected as a constitutional right, a dietary request must

be essential to the practice of a particular religion. Cape failed to allege that the dietary requests were an essential part of a religious diet. Having failed to state a claim upon which relief could be granted, the Supreme Court affirmed. Cape v. Crossroads Correctional Center, 2004 MT 265, 323 M 140, 99 P3d 171 (2004).

Summary Dismissal Proper Absent Evidence Supporting Inmate's Freedom of Religion and Equal Protection Claims: While a prisoner at the Crossroads Correctional Facility, Cape sued the facility and the food service providers for violating Cape's freedom of religion for failing to provide religious meals, for failing to provide access to a priest and religious materials, and for violating his right to equal protection by denying Cape's request for group prayer and Bible study while providing those services to other inmates. Cape was subsequently transferred to a regional jail facility. The District Court granted summary judgment for defendants on grounds that the matter was moot because Cape was no longer in the custody of the facility. On appeal, the Supreme Court acknowledged that Cape could be transferred back to the facility and thus suffer the same alleged deprivation of rights. Nevertheless, the Supreme Court affirmed absent evidence to support Cape's freedom of religion and equal protection claims. Cape v. Crossroads Correctional Center, 2004 MT 265, 323 M 140, 99 P3d 171 (2004).

Repealed Statute Regarding Sale or Lease of School Trust Lands to School Districts — No Justiciable Controversy or Action Upon Which Relief Could Be Granted: Former 20-6-621(4) allowed the Board of Land Commissioners to sell, for appraised value, or to lease, for $1 a year, school trust lands to a school district. The Department of Natural Resources and Conservation stipulated that the provision was unconstitutional because it made state lands available for less than full market value. The District Court agreed, noting that leasing school trust lands to some school districts would favor only some of the beneficiaries and not the school trust as a whole. The Legislature concurred and repealed the subsection in 1999. Plaintiff subsequently sued the Department, the Board, and the state, contending that the Department unlawfully determined that the provision was unconstitutional and failed to defend the constitutionality of the provision. The state moved to dismiss the complaint on grounds that no justiciable controversy existed and that the complaint alleged no cause of action upon which relief could be granted. The District Court granted summary judgment for the state, and on appeal, the Supreme Court affirmed. Any determination that the Department exceeded its authority would have had no bearing on the existing rights or interests at issue, and a judgment granting the relief sought would not have effectively operated to resolve any issue in the case. Thus, there was no justiciable case or controversy, and the claim was properly dismissed. Advocates for Educ., Inc. v. Dept. of Natural Resources and Conservation, 2004 MT 230, 322 M 429, 97 P3d 553 (2004), following Mont.-Dak. Util. Co. v. Billings, 2003 MT 332, 318 M 862, 80 P3d 1247 (2003).

No Requirement That Court Take as True Conclusions or Allegations With No Factual Basis or Contrary to What Has Been Adjudicated — Estoppel — Dismissal Proper: In Cowan v. Cowan, 2004 MT 68, 320 M 332, 87 P3d 443 (2004), the District Court held that a husband's parents and sister had no enforceable ownership interests in their own right to disputed marital property because any interest that they arguably had was dependent on the husband's equitable interest, which was litigated in the dissolution action in which the husband denied any interest in the property. Nevertheless, the parents and sister brought a separate action, claiming that the parents were trustors of a trust created for the husband's benefit and that the sister was a successor trustee or trust beneficiary. The District Court dismissed the complaint pursuant to this rule for failure to state a claim. The parents and sister appealed, but the Supreme Court affirmed. The District Court did not consider matters outside the pleadings, which would have required that the dismissal motion be converted to a summary judgment motion, but properly considered only the complaint and incorporated documents. Moreover, the court was not under any duty to take as true legal conclusions or allegations that had no factual basis or that were contrary to what had already been adjudicated. Any purported interest in the property by the husband was barred by estoppel. The prior decision that adjudicated the husband's interest in the property extinguished any derivative claim that the parents and sister might have had, and the complaint and attached documents supported the District Court's granting of the motion to dismiss. Cowan v. Cowan, 2004 MT 97, 321 M 13, 89 P3d 6 (2004), following Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001).

State Law Tort Claims Not Protected or Prohibited by FELA — Dismissal for Failure to State Claim Improper: Reidelbach worked for the railroad for about 20 years but was forced to stop working because of job-related disabling cumulative spinal injuries. Reidelbach reached an agreement with the railroad's claim representatives under which he would forego pursuing a claim under the Federal Employers' Liability Act (FELA) and the railroad would propose a fair settlement for the injuries. After 2 years, no settlement was offered, and ultimately the parties

exchanged counteroffers, but no agreement on an amount was reached. Reidelbach then filed a timely FELA claim and also brought several state claims, alleging that the railroad had engaged in unfair, dilatory, and fraudulent claims practices. The District Court concluded that all the postinjury state claims were preempted by FELA and dismissed them pursuant to this rule, so Reidelbach appealed. Following an extensive analysis of federal law related to preemption in its various forms, the Supreme Court held that Reidelbach's state claims were neither expressly nor impliedly preempted by FELA and did not conflict with or stand as an obstacle to the accomplishment and execution of FELA. Therefore, the District Court erred in dismissing Reidelbach's state claims on grounds of FELA preemption, and the case was reversed and remanded for trial in state court. Reidelbach v. Burlington N. & Santa Fe Ry. Co., 2002 MT 289, 312 M 498, 60 P3d 418 (2002).

Incorrect Dismissal of Declaratory Judgment Seeking Payment of Prejudgment Medical Expenses — Ridley and Safeco Clarified: DuBray filed a complaint for a declaratory judgment, asking for a determination that Farmers Insurance Exchange (Farmers) was required to pay DuBray's medical expenses prior to settlement of or judgment on the underlying claim. DuBray also sought prejudgment interest, costs of suit, and compensatory and punitive damages. The District Court found that the complaint was effectively a bad faith action barred by 33-18-242 prior to resolution of the underlying claim against Farmers and dismissed the claim in its entirety for failure to state a claim upon which relief could be granted. DuBray appealed, citing Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834 (2000), wherein the Supreme Court approved declaratory judgment actions as a means for compelling advance payment of medical expenses. Farmers contended that Safeco authorized declaratory judgment actions only for damages that, according to Ridley v. Guarantee Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997), are owed prior to final judgment, that the only damages to which Ridley applied are undisputed medical expenses, and that the District Court should therefore be affirmed. The Supreme Court affirmed Safeco inasmuch as that case does not authorize a declaratory judgment to determine an insurer's liability prior to resolution of the underlying claim, with the exception of damages for which liability is reasonably clear, which are not barred by 33-18-242. Therefore, the District Court correctly dismissed DuBray's claims for pain and discomfort, mental distress, inconvenience, and punitive damages. However, Farmers' liability for medical damages was reasonably clear, so the District Court committed reversible error in dismissing the portion of DuBray's claim that sought payment of medical expenses. The Supreme Court went on to clarify Safeco and Ridley to ensure that those cases not be construed to apply only to medical expenses, because medical expenses are just one of the obligations incurred by victims that mandatory liability insurance laws were designed to eliminate, another being lost wages that are reasonably certain and directly related to an insured's negligence or wrongful act. DuBray v. Farmers Ins. Exch., 2001 MT 251, 307 M 134, 36 P3d 897 (2001).

Improper Grant of Motion to Dismiss Legal Malpractice Suit for Failure to State Claim Upon Which Relief Could Be Granted: Hauschulz faced criminal charges in Billings, and while awaiting trial, he was extradited to Idaho on unrelated charges and incarcerated. The Michael Law Firm was hired to represent Hauschulz in the Billings proceedings, which Hauschulz could not attend. Instead of moving for dismissal of the charges unless Montana extradited Hauschulz, the law firm professed not to know where Hauschulz was and negotiated an unauthorized plea agreement on behalf of Hauschulz. Upon learning of the law firm's actions, Hauschulz filed a legal malpractice complaint alleging constitutional violations and requesting damages. The District Court dismissed the action on grounds that Hauschulz had failed to state a claim upon which relief could be granted, reasoning that no damages could be awarded because Hauschulz's problems all stemmed from the failure to appear at trial. Hauschulz appealed, and the Supreme Court reversed. A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief, and a dismissal will be affirmed by the Supreme Court only if plaintiff is not entitled to relief under any set of facts that would support the claim. As set out in Merzlak v. Purcell, 252 M 527, 830 P2d 1278 (1992), to recover damages in a legal malpractice claim, plaintiff must establish that: (1) the professional owed plaintiff a duty of care; (2) the professional breached the duty of care through failure to use reasonable care and skill; (3) plaintiff suffered an injury; and (4) the professional's conduct was the proximate cause of the injury. In this case, the Supreme Court found that each element was satisfied. Hauschulz might be able to prove a set of facts that would entitle him to relief and has stated a sufficient claim to survive a challenge under this rule. Hauschulz v. Michael Law Firm, 2001 MT 160, 306 M 102, 30 P3d 357 (2001). See also Trankel v. St., 282 M 348, 938 P2d 614 (1997).

Equitable Estoppel Defense Defeated — Failure of Counterclaim to State Claim for Which Relief May Be Granted: The city of Whitefish sought and obtained a permanent injunction against Troy Town Pump, Inc. (Town Pump), requiring removal of a sign that violated the city's ordinance. Town Pump's defense was that the city's approval of the original building plan equitably estopped the city's claim. Alternatively, Town Pump counterclaimed for the costs of remodeling the building. In order for the city to obtain a permanent injunction, it first had to overcome Town Pump's counterclaim that it was equitably estopped from doing so. The city successfully defeated the counterclaim. Absent a legal theory upon which to base damages, the city could not be held liable, so the District Court did not err in dismissing Town Pump's counterclaim for damages on grounds that it failed to state a claim for which relief could be granted. Whitefish v. Troy Town Pump, Inc., 2001 MT 58, 304 M 346, 21 P3d 1026 (2001).

Claim for Common-Law Tort of Bad Faith by Third Party Not Preempted by Statute — General Statute of Limitations Applicable: The District Court dismissed Brewington's complaint against two insurance companies based on the conclusion that the complaint failed to state a claim for which relief could be granted because the claim was barred by the statute of limitations in 33-18-242 regarding third-party claimants. Brewington contended that the claim was based on the common-law tort of bad faith, not on 33-18-242. The Supreme Court construed the plain language of the statute in determining that by its terms, 33-18-242 does not prohibit a third-party claimant from bringing an action for bad faith. Both Vigue v. Evans Prod. Co., 187 M 1, 608 P2d 488 (1980), and Hayes v. Aetna Fire Underwriters, 187 M 148, 609 P2d 257 (1980), establish a common-law cause of action for bad faith that was not affected by the passage of 33-18-242. When the common law is not in conflict with a statute, the common law applies. Thus, the District Court's conclusion that 33-18-242 prohibited Brewington from pleading the common-law tort of bad faith was reversible error. Further, because the claim was brought for bad faith and not pursuant to 33-18-242, the 3-year statute of limitations in 27-2-204, not the 1-year statute of limitations in 33-18-242, applied. Brewington v. Employers Fire Ins. Co., 1999 MT 312, 297 M 243, 992 P2d 237, 56 St. Rep. 1257 (1999), distinguishing Grenz v. Orion Group, Inc., 243 M 486, 795 P2d 444, 47 St. Rep. 1346 (1990).

Rebuttable Presumption That Prison Escapee Abandoned Personal Property: Hawkins escaped from the state prison. Immediately following the escape, officials packed up Hawkins' personal property, sealed it in boxes with security tape and Hawkins' name on each box, and placed it in the prison storage room. After 2 days, Hawkins was apprehended and returned to prison. He was found guilty of escape, but his property was not ordered destroyed. Over the next 30 days, Hawkins requested the return of his personal property several times. Eventually, Hawkins was escorted to the storage room and allowed to remove his legal papers but was informed that, by policy, when a prisoner escapes, all personal property is considered abandoned, so the remainder of his property was destroyed or sold. Hawkins filed an action for the value of the property, alleging that prison officials destroyed his property without affording him due process, which constituted cruel and unusual punishment and violated a gratuitous bailment that Hawkins had formed. The District Court, concluding that Hawkins had abandoned his property by his escape and that the abandonment constituted a complete defense to any action brought by Hawkins that depended on his ownership of the property, dismissed the action based on failure to state a claim for which relief could be granted. On appeal, the Supreme Court cited Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939), for the proposition that in determining whether one has abandoned property or rights, intention is the first and paramount object of inquiry. If there is no expressed intent to abandon, then intent must be inferred from the acts of the property owner. The presumption or inference of intent to abandon one's property based solely on the acts of the owner is a rebuttable presumption. Here, upon returning to prison and requesting the return of his property, Hawkins effectively rebutted the presumption that he intended to abandon it, and when he reclaimed his property by requesting its return, he regained his status as owner of his personal property against all others. The District Court committed reversible error when it found that Hawkins abandoned the property by escape and dismissed the action based on failure to state a claim for which relief could be granted. Hawkins v. Mahoney, 1999 MT 296, 297 M 98, 990 P2d 776, 56 St. Rep. 1185 (1999), distinguishing Herron v. Whiteside, 782 SW 2d 414 (1989). See also 1 C.J.S. Abandonment §12 (1985).

Satisfaction of Elements of Estoppel as Question of Proof, Not Pleading: Poeppel asserted in District Court that he was misled by a county representative as to the proper time to file a grievance and that this act estopped the county from arguing that the request for a grievance was untimely. The county argued on appeal that the claim of estoppel was properly dismissed because Poeppel's complaint failed to allege the six elements of estoppel set forth in Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991). The question then became whether

those elements must be alleged in the complaint or are factual issues of proof. Rule 9(b), M.R.Civ.P., requires particularity in pleading certain specified matters, not including estoppel, which is governed by the requirement in Rule 8(e), M.R.Civ.P., which states that pleadings must be simple, concise, and direct. The allegations in Poeppel's complaint, sparse and artless as they were, nevertheless put the county on notice so that a responsive pleading could be prepared. Whether Poeppel could satisfy the elements of estoppel was a question of proof, not pleadings, and the District Court erred in dismissing the grievance for failure to state a claim. The Supreme Court did not reach the question of whether the complaint was timely because resolution of that issue hinged upon whether Poeppel could prove the claim of estoppel at trial. The case was remanded for further proceedings. Poeppel v. Flathead County, 1999 MT 130, 294 M 487, 982 P2d 1007, 56 St. Rep. 525 (1999), following Fraunhofer v. Price, 182 M 7, 594 P2d 324 (1979).

Res Judicata as Bar to Relitigation of Foreclosure Sale Dispute — Claim Properly Dismissed: Glickman defaulted on his property payments, and following two foreclosure actions, the property was sold at a Sheriff's foreclosure sale. Glickman did not appeal either action but later filed an "original petition" seeking to quiet title, damages, and a declaratory judgment regarding the validity of the judgments, foreclosure decrees, and Sheriff's sales. Applying the criteria in Loney v. Milodragovich, Dale & Dye, P.C., 273 M 506, 905 P2d 158 (1995), the Supreme Court held that the underlying District Court actions satisfied the elements of res judicata and that Glickman's subsequent "original petition" failed to state a claim upon which relief could be granted. Glickman v. Whitefish Credit Union Ass'n, 1998 MT 8, 287 M 161, 951 P2d 1388, 55 St. Rep. 27 (1998).

Ability to Demonstrate Later Accrual of Action as Precluding Motion to Dismiss Based on Failure to State Claim — Human Rights Violation Claim: Powell was dismissed from his job with the Salvation Army on February 18, 1994, for the stated reason that he had been drinking on the job that day. Powell asserted that he learned months later that the dismissal was actually based on his past history of alcoholism, and he subsequently filed a grievance charge with the Human Rights Commission, alleging unlawful discrimination. The District Court granted a motion by the Salvation Army to dismiss for failure to state a claim for which relief could be granted for lack of jurisdiction based on Powell's failure to file a timely claim with the Commission. Under 27-2-102, the period of limitation applicable to any given cause of action begins to run when the claim or cause of action accrues, unless otherwise provided by statute. Pursuant to 49-2-501, a cause of action accrues under Title 49, ch. 2, commonly known as the Montana Human Rights Act, when the alleged unlawful discriminatory practice occurred or was discovered. Applying the principles in Hash v. U.S. W. Communication Serv., 268 M 326, 886 P2d 442 (1994), the Supreme Court found that Powell may well be able to demonstrate that his cause of action did not accrue until sometime after his termination and that he had thus complied with the applicable 300-day limitation period. The allegations in Powell's complaint were sufficient to withstand the Salvation Army's motion to dismiss, and the District Court erred in concluding otherwise. The case was remanded for further proceedings. Powell v. Salvation Army, 287 M 99, 951 P2d 1352, 54 St. Rep. 1518 (1997), following Willson v. Taylor, 194 M 123, 634 P2d 1180 (1981).

Dismissal for Failure to State a Claim — When: A complaint should not be dismissed for insufficiency unless it appears certain that plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim. Court erred in dismissing complaint. Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997); Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 M 367, 922 P2d 1140, 53 St. Rep. 687 (1996); Farris v. Hutchinson, 254 M 334, 838 P2d 374, 49 St. Rep. 717 (1992); Proto v. Missoula County, 230 M 351, 749 P2d 1094, 45 St. Rep. 265 (1988); Mogan v. Harlem, 227 M 435, 739 P2d 491, 44 St. Rep. 1212 (1987), followed in Doe v. St., 256 M 348, 846 P2d 1018, 50 St. Rep. 105 (1993); Stillman v. Fergus Co., 220 M 315, 715 P2d 43, 43 St. Rep. 396 (1986); Busch v. Kammerer, 200 M 130, 649 P2d 1339, 39 St. Rep. 1624 (1982); Willson v. Taylor, 194 M 123, 634 P2d 1180, 38 St. Rep. 1606 (1981); Kielmann v. Mogan, 156 M 230, 478 P2d 275 (1970).

Section 1983 Action for Damages and Declaratory and Injunctive Relief — State Agency Held Not a "Person" — Individual or Official Capacity of Individual Defendants Determined — Test for Qualified Immunity in Damages Action — Remington Overruled: Orozco, an inmate in the Montana State Prison, brought a civil action for damages pursuant to 42 U.S.C. 1983 against the Department of Corrections and Human Services (now Department of Corrections) and several Department employees for the denial of his due process rights in connection with the denial of his ability to earn good time credits. The Department moved for dismissal for failure to state a claim, based upon 11th amendment immunity. As to the Department, the Supreme Court held, citing Will v. Mich. Dept. of St. Police, 491 US 58 (1989), that because the Department has been created

as part of the Executive Branch of state government, suing the Department is the same as suing the State of Montana, which is not a "person" for the purposes of a section 1983 action. In response to Orozco's argument that 2-9-305 required him to join the Department as a party, the Supreme Court noted that there is nothing in the text of that section that requires that the state be joined as a party; the section provides only for the tender of a defense and payment of damages by the state if a state employee is sued. Therefore, the Supreme Court held that the District Court correctly dismissed the action for damages against the Department. As to the individual defendants, the Supreme Court held that state employees acting in their official capacities are likewise not "persons" for the purposes of a section 1983 action but that state employees acting in their individual capacities are "persons" within the meaning of section 1983. The Supreme Court noted that Orozco had not clearly indicated the capacities in which the individual defendants were being sued, and so it looked to other provisions of the complaint and to U.S. Supreme Court decisions in order to determine Orozco's intent and held that Orozco intended to sue the individual defendants in their individual capacities. For this reason, the Supreme Court held that the District Court erred in holding that the individually named defendants were not "persons" under 42 U.S.C. 1983 for the purposes of the action for damages. The Supreme Court also held that in enacting 53-30-105 (now repealed) mandating rules for the accrual of good time, the state had created a right to good time. The Supreme Court also held that the immunity analysis used in Remington v. Dept. of Corrections and Human Services, 255 M 480, 844 P2d 50 (1992), was incorrect in light of the later decision of the U.S. Supreme Court in Sandin v. Connor, 515 US 472 (1995), and overruled Remington, but, on the basis of the Sandin immunity analysis, determined that Orozco's liberty interest in the award of good time credits was not clearly established on the date of Orozco's hearing to reclassify him as a maximum security prisoner who was no longer entitled to earn good time credits. For this reason, the Supreme Court held that the Department employees who were sued in their individual capacities were to be given qualified immunity for the purposes of the action for damages but that the District Court improperly dismissed the action for declaratory and injunctive relief and remanded the case to the District Court for a determination of what process was due Orozco before his opportunity to earn good time was revoked and whether he received that process. Orozco v. Day, 281 M 341, 934 P2d 1009, 54 St. Rep. 200 (1997).

Saving Statute Inapplicable to Complaint Filed Against Party Not Originally Named in Complaint: On January 8, 1992, Williams filed a charge with the Human Rights Commission (HRC) of racial discrimination in employment against Zortman Mining, Inc. (Zortman), a wholly owned subsidiary of Pegasus Gold Corporation (Pegasus). At Zortman's request, a right-to-sue letter was issued by the HRC. On June 18, 1993, Williams filed a complaint against Pegasus in federal court, but that complaint was dismissed on November 3, 1993, because Williams had not exhausted his administrative remedies. The federal court noted that Williams was attempting to manipulate the diversity jurisdiction of the federal court by naming the foreign parent corporation, Pegasus, but not the Montana subsidiary, Zortman. Naming Zortman as a party would have defeated diversity jurisdiction under 28 U.S.C. 1332. On November 9, 1993, after the 90-day period to file following issuance of a right-to-sue letter, Williams filed a complaint in state District Court naming Zortman as the only defendant. Williams asserted that the federal filing satisfied 49-2-509(2) and that the saving statute, 27-2-407, gave him 1 year to refile his complaint following dismissal in federal court. However, Zortman was not named in the federal action. Because the federal action was against a different party, 27-2-407 did not apply. The saving statute applies only when the new complaint and the original complaint are substantially for the same cause of action, including identity of the parties. The statute of limitations in 49-2-509 operated to bar Williams' claim against Zortman because Zortman was not a party to the first suit. As set out in Tietjen v. Heberlein, 54 M 486, 171 P 928 (1918), 27-2-407 applies in cases in which an action has been commenced and, without plaintiff's fault, there is a failure to reach a determination of the merits and the statute of limitations runs during the pendency of the action. Williams v. Zortman Min., Inc., 275 M 510, 914 P2d 971, 53 St. Rep. 289 (1996), following Turner v. Aldor Co. of Nashville, Inc., 827 SW 2d 318 (Tenn. Ct. App. 1991).

Failure to Assert Discharge of Debt by Bankruptcy in Earlier Action as Waiver and Res Judicata in Subsequent Action: Loney was sued by his law firm for fees owed for representing him in bankruptcy proceedings. Loney failed to answer the complaint, and a default judgment was entered. Loney subsequently filed a complaint to have the judgment declared void on the basis that the debt had been discharged in bankruptcy. The Supreme Court held that Loney had been required to assert the discharge of the debt in bankruptcy as an affirmative defense when the law firm sued him. Therefore, he had waived that defense and could not now assert it in his claim against the firm. The Supreme Court also held that Loney could have litigated the issue of

the discharge of the debt when the law firm sued him. Therefore, he was barred by the doctrine of res judicata from litigating that issue again in his suit to have the firm's judgment voided. Loney v. Milodragovich, Dale & Dye, P.C., 273 M 506, 905 P2d 158, 52 St. Rep. 1093 (1995), followed in Balyeat Law, P.C. v. Hatch, 284 M 1, 942 P2d 716, 54 St. Rep. 780 (1997).

Failure to Install or Maintain Safety Device — No Allegation of Intentional or Malicious Acts — Exclusivity Provision of Workers' Compensation Act Prevails: Plaintiff sued, alleging that her son's death, which was covered by workers' compensation insurance, was caused by the negligence of defendant in not installing or maintaining a safety device. The District Court granted defendant's motion to dismiss on the grounds that the Workers' Compensation Act provided the exclusive remedy. Plaintiff urged the court to carve out judicial exception to the Act to provide tort liability when a worker is killed because of failure to install or maintain a required safety device. The Supreme Court declined to make a judicial exception and relied on the legislative determination that absent intentional and malicious conduct, employees cannot sue their employers for injuries sustained during the course of their employment that are covered by the Workers' Compensation Act. Kortes v. Pool Co., 270 M 474, 893 P2d 322, 52 St. Rep. 291 (1995). See also Maney v. La. Pac. Corp., 2000 MT 366, 303 M 398, 15 P3d 962, 57 St. Rep. 1561 (2000).

Contradictory, Unsupported Allegations — Summary Dismissal Proper: The District Court properly granted a motion for summary dismissal for failure to state a claim when allegations of fraud were found to be contradictory, not sufficiently particular, and unsupported by fact. Allegations of fraud cannot ordinarily be based on "information and belief" except as to matters that are particularly within the opposing party's knowledge, and the allegations must be accompanied by a statement of facts upon which the belief is founded. C. Haydon Ltd. v. Mont. Min. Properties, Inc., 262 M 321, 864 P2d 1253, 50 St. Rep. 1577 (1993).

Equitable Bill of Discovery Allowable Under Limited Circumstances: While modern rules of pleading and practice virtually eliminated the need for an equitable bill of discovery, it is cognizable under the following limited circumstances: (1) it is available only against a person or entity that cannot be a defendant in subsequent litigation; (2) it is available for the names and addresses of potential defendants and for onsite visits to inspect specific items that may have caused a documented injury; and (3) plaintiff in an equitable action must show that the discovery requested cannot be obtained otherwise and has been requested of and denied by the person or entity that, for whatever reason, cannot be a defendant in subsequent litigation. An equitable bill of discovery that did not meet these narrow criteria was properly dismissed under this rule for failure to state a claim for which relief could be granted. Temple v. Chevron U.S.A. Inc., 254 M 455, 840 P2d 561, 49 St. Rep. 661 (1992), distinguishing State ex rel. Pitcher v. District Court, 114 M 128, 133 P2d 350 (1943), and Japp v. District Court, 191 M 319, 623 P2d 1389 (1981).

Use of Declaratory Judgment to Settle Question of Business Association Between Dentist and Denturist Improper — Dismissal for Failure to State Claim and Exhaust Administrative Remedies: Brisendine, a licensed denturist, presented to the Board of Dentistry a proposal stating his desire to enter into a business association with a dentist regarding fees and compensation. The Board issued a letter stating that it was considering the proposal but that such association would probably constitute the illegal practice of dentistry. The Board further threatened sanctions against Brisendine if he went forward with his proposal, but no final decision was ever issued by the Board. Brisendine sought a declaratory judgment and injunctive relief in District Court, requesting a decision on whether the business association was legal. The District Court dismissed the complaint for failure to present a justiciable controversy. On appeal, the Supreme Court affirmed, holding that use of a declaratory judgment at this stage of the proceedings constituted an attempt to seek an advisory opinion and an unwarranted intrusion into the Board's regulatory authority. The Supreme Court noted that Brisendine could seek a declaratory judgment from the Board without subjecting his license to suspension or revocation and that dismissal of the motion for declaratory judgment was proper because Brisendine had not exhausted his administrative remedies. Brisendine v. St., 253 M 361, 833 P2d 1019, 49 St. Rep. 444 (1992), distinguished in Ridley v. Guarantee Nat'l Ins. Co., 286 M 325, 951 P2d 987, 54 St. Rep. 1430 (1997).

Claim Under 42 U.S.C. 1983 Not Barred by Res Judicata — Prior Summary Judgment No Bar to Consideration of Motion to Dismiss — Differing Parties: Plaintiff brought an action against the city of Great Falls to recover damages for violation of 42 U.S.C. 1983 in connection with a discharge from employment. The District Court granted the city's motion for summary judgment. Plaintiff then filed an action against her immediate supervisor, in the supervisor's official and individual capacity, making the same allegations. The supervisor moved the District Court to dismiss on the basis that the section 1983 claim was res judicata by reason of the

summary judgment in the former action, and the District Court granted the motion. The Supreme Court reversed, holding that under this rule, the District Court's consideration of the first action was limited to consideration of the pleadings. The Supreme Court also stated that because the immediate supervisor was not a party to the first action, neither the plaintiff nor the defendant was able to present all the facts and theories in the first case that are present in the second. For these reasons, the Supreme Court held that the second action was not barred. Dagel v. Manzer, 251 M 176, 823 P2d 874, 48 St. Rep. 1166 (1991).

Facts Challenging Zoning Ordinance — Sufficient Statement of Claim: The Supreme Court overruled the lower court's dismissal of a suit challenging a change in the zoning ordinance, holding that the plaintiffs' amended complaint was specific enough in its claim of damage to their property by the ordinance change to sufficiently state a claim. However, the Supreme Court did uphold the lower court's dismissal of the suit on the basis that the plaintiffs had failed to exhaust their administrative remedies. Kunz v. Butte-Silver Bow, 244 M 271, 797 P2d 224, 47 St. Rep. 1615 (1990).

Failure of Limited Partners to Request General Partner to Initiate Suit: The limited partners sued the bank, alleging that the bank had forced the general partner to breach his fiduciary duty to the limited partners. The lower court dismissed the complaint for failure to state a claim, holding that the plaintiffs had not alleged that they were suing in a derivative capacity and that they had failed to set forth with particularity their efforts to obtain action by the general partner. The Supreme Court ruled that under Rule 9(a), M.R.Civ.P., the plaintiffs did not need to allege that they were suing in a derivative capacity. The court also held that although Rule 23.1, M.R.Civ.P., and 35-12-1403 require the plaintiffs to set out with particularity their efforts to get the general partner to take action, the lower court should have given the plaintiffs a chance to amend their complaint. Larson v. First Interstate Bank, 241 M 350, 786 P2d 1176, 47 St. Rep. 344 (1990).

Failure to State Claim — False Arrest and Imprisonment: The District Court properly dismissed plaintiff's suit when plaintiff was arrested for the offense of custodial interference for returning children to the Department of Family Services (now Department of Public Health and Human Services) rather than to their lawful custodian as required by 45-5-304. Contway v. Camp, 236 M 169, 768 P2d 1377, 46 St. Rep. 270 (1989).

Summary Judgment Proper — No Reasonable Difference of Opinion That Defendant Did Not Cause Injury: Plaintiff parents appealed a summary judgment order in an action alleging a university's negligence caused injury to their minor daughter who had consumed alcohol and was involved in a motorcycle accident while under the supervision of a university program. Although the university assumed a custodial role similar to that of a high school when it undertook to have plaintiffs' daughter live on its campus, supervised by university personnel, and thus was charged with exercising reasonable care, there was no room for a reasonable difference of opinion as to whether someone other than the defendant university was the intervening cause of the daughter's injury. Therefore, summary judgment for the university based on proximate cause was proper. Graham v. Mont. St. Univ., 235 M 284, 767 P2d 301, 45 St. Rep. 2389 (1988).

Motion to Dismiss Treated as Motion for Summary Judgment: A motion to dismiss that raised the failure to state a claim as a defense and presented facts outside the pleading was properly treated as a motion for summary judgment. Am. Medical Oxygen Co. v. Mont. Deaconess Medical Center, 232 M 165, 755 P2d 37, 45 St. Rep. 962 (1988).

Three-Year Delay Between Filing of Grievance and Board Hearing — Motion to Dismiss Not Error: When appellant was not rehired by the city of Billings for a vacant position, he filed a grievance with the State Board of Personnel Appeals (Board), charging that the city was discriminating against him for earlier filing an unfair labor practice charge against the city. The District Court did not err in granting the Board's motion to dismiss for failure to state a claim, although there was a 3-year delay between the filing of the grievance and a hearing by the Board, allegedly caused by labor union interference and Board delay. The Board fulfilled the fundamental requirements of due process by allowing appellant notice and an opportunity to be heard. Under 2-4-701, appellant could have petitioned the Supreme Court to require the Board to hold a hearing. As to the defendant labor union, the District Court's order granting a motion to dismiss for failure to state a claim is reversed because appellant may be able to prove a set of facts stating a claim against the union. Klundt v. St., 219 M 347, 712 P2d 776, 43 St. Rep. 1 (1986). See also In re Connell v. St., 280 M 491, 930 P2d 88, 54 St. Rep. 28 (1997), in which the delay was by a state agency.

Frivolous Claims — The "Justinhoard" Thesis: Plaintiff sued a state government executive branch attorney because the attorney had represented four state Supreme Court Justices in

another action in which plaintiff sued the Justices. Plaintiff claimed the attorney was guilty of conspiracy, improper official action, and abuse of the principle of "justinhoard" (a principle of justice apparently developed by and unique to plaintiff). The court found the complaint and appeal from its dismissal fruitless, weightless, needless, and senseless, stating that the cause is another of a series of proceedings by plaintiff in the state and federal courts in which he has imputed incompetence, bias, and conspiracy to judges and parties involved in his court actions, and has subjected the judicial process to denigration. The appeal was dismissed. Lussy v. Young, 215 M 50, 695 P2d 455, 42 St. Rep. 173 (1985).

Legal Malpractice Complaint — Upheld Under Liberal Rules of Pleading: In a legal malpractice suit, the defendant-attorney moved to dismiss the action on the grounds that the complaint did not state a cause of action because the complaint did not specifically allege that had it not been for the negligence of the attorney, the client would have won the lawsuit. The District Court dismissed the case. The Supreme Court reversed, ruling that under Montana's liberal rules of pleading, the complaint was sufficient. R.H. Schwartz Constr. Specialties, Inc. v. Hanrahan, 207 M 105, 672 P2d 1116, 40 St. Rep. 1926 (1983).

Conversion of Investment by Investment Advisor — Claim: Amended complaint was sufficient to constitute a claim for relief based on conversion where it alleged plaintiff invested approximately $32,000 through defendant investment firm in the Franklin Money Fund, that the firm wrongfully and without authority removed the money from the fund and placed it in the Kemper Cash Equivalent Fund, and that plaintiff was damaged by the firm's actions in the amount of $1,500, as he had to secure the services of an attorney and expend time, effort, and funds in pursuit of his property. Gebhardt v. D. A. Davidson & Co., 203 M 384, 661 P2d 855, 40 St. Rep. 521 (1983).

Dismissal of Claims Without Certification Held Not Appealable — Multiple Parties: Where the claims of two of the three plaintiffs for breach of contract, misrepresentation, and trespass were dismissed for failure to state a claim, the dismissal was not appealable without certification under Rule 54(b), M.R.Civ.P. In Tobacco River Lumber, Inc. v. Yoppe, 176 M 267, 577 P2d 855 (1978), the Supreme Court held the dismissal of the claims of one of several parties to be appealable because the practical effect of the dismissal was to leave the party without judicial relief. However, in the instant case the remaining plaintiff sought the same relief as those whose claims were dismissed. The order dismissing those claims must therefore be considered interlocutory and not final. Benders v. Stratton, 202 M 150, 655 P2d 989, 39 St. Rep. 2389 (1982).

Discovery as Remedy for Lack of Specificity of Complaint: The Supreme Court does not favor cutting short litigation at initial pleading stage when a complaint does not state a cause of action under any set of facts; further specificity regarding a claim may be obtained by appropriate discovery devices. Willson v. Taylor, 194 M 123, 634 P2d 1180, 38 St. Rep. 1606 (1981).

Refusal to Dismiss Count Not Directed Toward Movant: Refusal to dismiss certain defendants as to a count of the complaint was not error where the count was not directed toward them and the court's judgment on that count did not affect them. Willson v. Taylor, 194 M 123, 634 P2d 1180, 38 St. Rep. 1606 (1981).

No Factfinding Appropriate on Motion to Dismiss: In action based not only on an action at law for breach of contract but also on a claim in equity for fraud, the court did not err in denying defendants' motion to dismiss on grounds that they were not "contractual parties" to the promissory note involved. A complaint will not be dismissed for failure to state a claim unless it appears beyond any doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. The court is not engaged in factfinding when ruling on a motion to dismiss. What evidence is later actually adduced in support of plaintiff's position is of no consequence when reviewing the appropriateness of the lower court's denial of a motion to dismiss made prior to trial. Flemmer v. Ming, 190 M 403, 621 P2d 1038, 37 St. Rep. 1916 (1980).

Error in Procedure of County Commissioners — Dismissal Properly Ordered: Plaintiff and a majority of the residents of his territory petitioned to become a part of a school district in Teton County. The Cascade County Commissioners failed to meet jointly with Teton County Commissioners as required by 20-6-213 (now repealed). Each board of commissioners was unanimous in its decision, though their decisions were contrary, and no facts are alleged that any other mode of decision would have produced a different result. Plaintiff has not alleged an injury from the procedure followed, and one who is not injured will not be heard to complain. The District Court properly dismissed the complaint for failure to state a claim upon which relief could be granted. Gunderson v. County Comm'rs, 183 M 317, 599 P2d 359 (1979).

Tortious Interference With Business Relationship: The District Court erred in granting defendant's motion to dismiss because the complaint does, in fact, state a cause of action for

tortious interference with a business relationship sufficient to require a Rule 12(b)(6), M.R.Civ.P, motion to be overruled. Pelton v. Markegard, 179 M 102, 586 P2d 306 (1978).

Motion Viewed With Disfavor: Courts view motions to dismiss for failure to state a claim upon which relief can be granted with disfavor, and will grant them only where the complaint and accompanying allegations show upon their face some insuperable barrier to relief. Buttrell v. McBride Land & Livestock, 170 M 296, 553 P2d 407 (1976); Wheeler v. Moe, 163 M 154, 515 P2d 679 (1973), followed in Glaude v. St. Comp. Ins. Fund, 271 M 136, 894 P2d 940, 52 St. Rep. 367 (1995).

Motion to Dismiss a Complaint for Failure to State a Claim in the Face of a Specific Statute: Applying the rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, a motion to dismiss a complaint for failure to state a claim was proper where third-party plaintiff knew that third-party defendant was an agent and that credit was not extended to him personally as 28-10-702(1) specifies credit must be given to the agent personally to hold him responsible to third persons as a principal. Hasbrouck v. Krsul, 168 M 270, 541 P2d 1197 (1975).

Civil Conspiracy: Granting of motion to dismiss for failure to state a claim upon which relief can be granted was proper where the complaint alleged a mere conspiracy, as the actionable element of conspiracy is the wrong done plaintiff, not the combination of persons constituting the conspiracy. Thus, assuming the facts of the conspiracy are true, there is still no claim for relief stated. Duffy v. Butte Teachers' Union, 168 M 246, 541 P2d 1199 (1975), followed in Boylan v. Van Dyke, 247 M 259, 806 P2d 1024, 48 St. Rep. 188 (1991), Simmons Oil Corp. v. Holly Corp., 258 M 79, 852 P2d 523, 50 St. Rep. 433 (1993), Schumacker v. Meridian Oil Co., 1998 MT 79, 288 M 217, 956 P2d 1370, 55 St. Rep. 338 (1998), and Hughes v. Pullman, 2001 MT 216, 306 M 420, 36 P3d 339 (2001).

Official Immunity Sustained: Complaint against county Sheriff and four deputies and County Attorneys and two deputies for damages arising out of plaintiff's arrest, search of plaintiff's store, and plaintiff's public trial did not state claim upon which relief could be granted since public officers are immune from civil liability for their official acts and complaint did not allege defendants were acting outside their capacity as public officers or in excess of their authority. Wheeler v. Moe, 163 M 154, 515 P2d 679 (1973).

Failure to State a Claim — Sublessee — Privity: A sublessee, not a party to the original lease, does not have requisite privity to base a claim against the lessor upon. Such a complaint was properly dismissed for failure to state a claim. State ex rel. Buttrey Foods, Inc. v. District Court, 148 M 350, 420 P2d 845 (1966).

Failure to State a Claim — Terms of Pleading: Mere absence of certain terms of act does not cause a complaint to be bad by failing to state a claim upon which relief can be granted. A short and plain statement of the claim, in whatever words, suffices. Williams v. Superior Homes, Inc., 148 M 38, 417 P2d 92 (1966).

NECESSARY PARTIES TO ACTION

Conversion — Response to Improper Pleading: Good pleading requires that all the owners of a chattel, whether partners or not, join in an action to recover damages to, or for the wrongful taking or conversion of it, or to recover its possession; where this is not done, the pleading is vulnerable to a special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed), the defect, however, being waived by failure to demur. Schoenborn v. Williams, 83 M 477, 272 P 992 (1928).

Defect in Parties to Be Shown: Where an objection to a defect of parties is taken by demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed), the defect relied upon must be specifically pointed out. Church v. Zywert, 58 M 102, 190 P 291 (1920).

Absence of Necessary Party to Be Shown: A demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) for defect of parties must point out the particulars relied on, showing the absence of necessary, as distinguished from merely proper, parties. Poe v. Sheridan County, 52 M 279, 157 P 185 (1916); Beach v. Spokane Ranch & Water Co., 25 M 379, 65 P 111 (1901).

Raising Issue by Answer or Motion: An alleged defect of parties, to be available as a ground of demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed), must appear from the face of the complaint, else the objection can be raised only by answer. Marcellus v. Wright, 51 M 559, 154 P 714 (1916).

CAPACITY OF PARTIES

Lack of Capacity Raised by Motion or Answer: Lack of legal capacity in plaintiff to sue, when apparent on the face of the complaint, can be questioned only by demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed), and when not so apparent the objection may be taken by answer; if not so taken advantage of, it is considered waived. NW. Hardware & Steel Co. v. Winnett, 67 M 545, 216 P 568 (1923).

Complaint to Show Defect Relied On: A special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) on the ground that the plaintiff has no legal capacity to sue, such as infancy or insanity, must point out the particular defect relied on, and the fact of such disability must appear on the face of the complaint. Poe v. Sheridan County, 52 M 279, 157 P 185 (1916).

Dismissal for Lack of Capacity — How Issue Raised: Where lack of capacity in plaintiff to sue does not appear from the face of the complaint, a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) on this ground must point out wherein he lacks capacity. Marcellus v. Wright, 51 M 559, 154 P 714 (1916).

Pleading to Be Specific: An objection of want of capacity to sue, defect or misjoinder of parties, or misjoinder of causes of action, must be made by a pleading which specifically points out the defect relied upon, whether the pleading be a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) or an answer. O'Donnell v. Butte, 44 M 97, 119 P 281 (1911).

Want of Capacity Distinct From Failure to State a Claim: A demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) on the ground of want of capacity is something entirely distinct from one which raises the objection that a complaint does not state facts sufficient to constitute a cause of action. When one of these two separate grounds is the basis of a demurrer, the other cannot be considered. Knight v. Le Beau, 19 M 223, 47 P 952 (1897).

DISMISSAL VERSUS SUMMARY JUDGMENT

Examination on Motion to Dismiss Limited to Contents of Complaint — Notice Required for Consideration of Materials Outside Pleading: Plouffe sued the state for tortious conduct, malicious prosecution, and defamation. The state moved for dismissal based on res judicata, and the District Court granted the state's motion, so Plouffe appealed. In considering the dismissal motion, the District Court relied on exhibits and materials related to other issues than those cited in the complaint. Plouffe noted that the exhibits could have been examined by converting the motion to one for summary judgment but that Plouffe would have been entitled to proper notice of the court's intention to do so. The state contended that the District Court was allowed to take judicial notice of the extraneous materials under Rule 201, M.R.Ev. (Title 26, ch. 10), without converting the motion to one for summary judgment. The Supreme Court decided for Plouffe. On a motion to dismiss, the District Court may examine only whether a claim has been adequately stated in the complaint, and the court's examination is limited to the content of the complaint. Whether Plouffe's complaint was barred by res judicata could not be determined from the allegations of the complaint. The District Court could have ignored the exhibits and decided the motion based on the rules pertaining to a motion to dismiss, or the court could have converted the motion to one for summary judgment, which would have allowed Plouffe to present all material pertinent to the motion and to avoid surprise. However, judicial notice cannot circumvent the notice requirement in this rule. Plouffe's complaint did not challenge or present a collateral attack on a prior judgment, so the complaint could not be dismissed without converting the motion to dismiss to one for summary judgment. The District Court's failure to do so, and to notify Plouffe of its intent to do so, was reversible error. Plouffe v. St., 2003 MT 62, 314 M 413, 66 P3d 316 (2003). See also Glickman v. Whitefish Credit Union Ass'n, 1998 MT 8, 287 M 161, 951 P2d 1388 (1998).

Adequate Notice and Opportunity to Respond to Revised Motion for Summary Judgment: Plaintiffs contended that the District Court improperly converted a motion under this rule to dismiss to a Rule 56, M.R.Civ.P., motion for summary judgment, arguing that they were denied the opportunity to respond to affidavits submitted by defendant with its reply brief and that the District Court erred when it did not assume the facts stated in plaintiffs' complaint to be true, thus improperly resolving contested issues of fact. The Supreme Court noted that under Gebhardt v. D.A. Davidson & Co., 203 M 384, 661 P2d 855 (1983), when a District Court intends to convert a motion in this manner, notice should be given to the parties that the court intends to consider matters outside the pleadings, in order to give the party opposing summary judgment or dismissal the opportunity to produce additional facts by affidavit or otherwise that would

establish a genuine issue of material fact and thereby avoid summary judgment if possible. However, in this case, the District Court did not convert the motion at a point when plaintiffs had no opportunity to respond. Rather, for reasons not apparent from the record, plaintiffs did not respond to the revised motion, nor at the time that the motion was heard did plaintiffs complain or ask for an opportunity to respond, even though it was clear that the motion for summary judgment would be heard. Instead, plaintiffs went beyond the pleadings in filing an affidavit with their response brief, but offered no further proof, and argued that the factual allegations in the complaint must be taken as true for purposes of a motion to dismiss under this rule. Therefore, plaintiffs had adequate notice of and opportunity to respond to the motion for summary judgment, and the District Court did not improperly convert the motion. Enger v. Missoula, 2001 MT 142, 306 M 28, 29 P3d 514 (2001).

Lack of Property Ownership Within Proposed Annexation — No Standing to Challenge Annexation Resolution — Summary Judgment Proper Despite Lack of Notice to Parties of Intent to Convert Motion to Dismiss Into Motion for Summary Judgment: It is error for a court to fail to give formal notice of the intent to convert a motion to dismiss into a motion for summary judgment, giving the party opposing the motion an opportunity to produce additional facts by affidavit or otherwise that would create a genuine issue of material fact to preclude summary judgment. However, in this case, plaintiffs lacked standing to challenge an annexation resolution because they did not own property within the proposed annexation. Without standing to state a claim, plaintiffs could prove no set of facts in support of their action that would entitle them to relief. Therefore, failure by the court to give the parties notice of conversion of the motion to dismiss was harmless error. Knudsen v. Ereaux, 275 M 146, 911 P2d 835, 53 St. Rep. 83 (1996), following O'Donnell Fire Serv. & Equip. v. Billings, 219 M 317, 711 P2d 822 (1985).

No Notice of Intent to Treat Dismissal Motion as Summary Judgment — Eventual Result Same: Although the District Court erred in not giving the required notice that it intended to treat the motion to dismiss as a motion for summary judgment, the matter was not reversed or remanded because the eventual result in the court would have been the same. First Fed. S&L Ass'n of Missoula v. Anderson, 238 M 296, 777 P2d 1281, 46 St. Rep. 1280 (1989).

Motions to Dismiss Properly Converted to Motions for Summary Judgment: Defendants brought motions to dismiss under this rule, and in response plaintiff attached 11 documents to his brief opposing the motions, arguing the contents of the documents throughout the brief. The District Court considered the documents, excluded nothing presented to it, converted the motions to dismiss to motions for summary judgment, and dismissed the action as barred by the statute of limitations. Plaintiff did not appear at the oral hearing, but later claimed he had no opportunity to present material pertinent to a motion for summary judgment. The Supreme Court found that by introducing the documents and inviting consideration of them, plaintiff was fairly apprised that the trial court would look beyond the pleadings and could treat the motions to dismiss as motions for summary judgment. Bretz v. Ayers, 232 M 132, 756 P2d 1115, 45 St. Rep. 936 (1988), citing Grove v. Mead School District, 753 F2d 1528 (9th Cir. 1985), and followed in Rafanelli v. Dale, 1998 MT 331, 292 M 277, 971 P2d 371, 55 St. Rep. 1346 (1998), and Koke v. Little Shell Tribe of Chippewa Indians of Mont., Inc., 2003 MT 121, 315 M 510, 68 P3d 814 (2003).

Consideration of Matters Outside Pleadings on Motion to Dismiss — Conversion to Summary Judgment: Reversible error was committed when matters outside the pleadings were considered in conjunction with defendant's motion to dismiss complaint and the court did not notify plaintiff that the effect of such consideration was conversion of the motion to dismiss into a motion for summary judgment. Plaintiff was entitled to reasonable opportunity to present all materials pertinent to a motion for summary judgment. Though plaintiff must be presumed to have knowledge of the automatic conversion requirements of the rule governing a motion to dismiss, since the court had discretion as to whether or not it would exclude extra-pleading materials, it was incumbent on the court to affirmatively notify the parties that the materials were not excluded and that the conversion of the motion to dismiss into a summary judgment motion was effected. Gebhardt v. D. A. Davidson & Co., 203 M 384, 661 P2d 855, 40 St. Rep. 521 (1983), followed in Gordon v. Hedman, 277 M 96, 918 P2d 680, 53 St. Rep. 558 (1996).

Motion to Dismiss Improperly Granted — Court's Reliance on Alleged Facts in Brief Improper: The defendant moved to dismiss plaintiff's complaint for failure to state a claim upon which relief could be granted. The motion to dismiss was improperly granted, because the District Court appeared to rely on allegations of fact contained in the parties' briefs. If a District Court intends to utilize this rule as a summary judgment proceeding, it is under a duty to give notice to the parties of the changed status of the motion. Busch v. Kammerer, 200 M 130, 649 P2d 1339, 39

St. Rep. 1624 (1982). See also Wood v. Den Herder, 277 M 147, 920 P2d 105, 53 St. Rep. 646 (1996).

Appealability and Appropriateness of Partial Summary Judgment: Although a partial summary judgment granting specific performance of an option contract was designated as interlocutory it was a final and appealable transfer of property. Furthermore, the summary judgment was improperly granted when based upon a determination in a hearing on motion to dismiss that there were no issues of material fact, depriving defendant the opportunity to effectively resist the summary judgment motion. Graveley v. MacLeod, 175 M 338, 573 P2d 1166 (1978).

Distinction Between Motion to Dismiss and for Summary Judgment: The District Judge did not reverse the previously disqualified District Judge's denial of defendants' motion to dismiss by granting defendants' motions for summary judgment and thereby improperly exercising appellate jurisdiction because the latter motion was a decision on the merits while the former was merely a determination of the sufficiency of the allegations in the complaint. Granger v. Time, Inc., 174 M 42, 568 P2d 535 (1977).

Notice — Summary Judgment Granted on a Motion to Dismiss Complaint for Failure to State a Claim: District Court erred in treating defendant's motion to dismiss for failure to state a claim as a motion for summary judgment without affording plaintiff notice and opportunity to oppose it because the court must give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such motion so no one will be taken by surprise by the conversion. State ex rel. Dept. of Health and Environmental Sciences v. Livingston, 169 M 431, 548 P2d 155 (1976), followed in Hoveland v. Petaja, 252 M 268, 828 P2d 392, 49 St. Rep. 245 (1992).

Law Review Articles

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).

Collateral References

Abatement and Revival *key* 40; Parties *key* 75, et seq.; Pleading *key* 33, 87, 400, et seq.

1 C.J.S. Abatement and Revival §§109 through 112; 67A C.J.S. Parties §§121, 122, 125, 126; 71 C.J.S. Pleading §§591, 685, 809, 810.

20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff §12.

Litigant's participation on merits, after objection to jurisdiction of person made under special appearance or the like has been overruled, as waiver of objection. 62 ALR 2d 937.

Raising defense of Statute of Limitations by motion to dismiss. 61 ALR 2d 300.

Demurrer as setting up defense of bona fide purchase of real property. 33 ALR 2d 1330.

Objection before judgment to jurisdiction of court over subject matter as constituting general appearance. 25 ALR 2d 833.

Right of one defendant to demur to complaint because of failure to state a cause of action against codefendant, or to complain of overruling of demurrer interposed by latter. 145 ALR 676.

Asking relief in addition to vacation of service of process as waiver of special appearance or of right to rely upon lack of jurisdiction. 111 ALR 925.

What matters not contained in pleadings may be considered in ruling on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure or motion for judgment on the pleadings under Rule 12(c) without conversion to motion for summary judgment. 138 ALR Fed. 393.

Rule 12(c). Motion for judgment on the pleadings.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

Failure to State Cognizable Claim Under 42 U.S.C. 1983 — Judgment on Pleadings Properly Granted: Brown filed a complaint in District Court seeking to address alleged deprivations of his rights by prison officials under 42 U.S.C. 1983, but the complaint was dismissed on the pleadings for failure to state a cognizable claim under the federal law. The District Court found that Brown's claims were barred by Heck v. Humphrey, 512 US 477 (1994), which held that a state prisoner's claim for damages is not cognizable under 42 U.S.C. 1983 if a judgment in favor of plaintiff would necessarily imply the invalidity of the conviction or sentence, unless the prisoner can demonstrate that the conviction or sentence has been previously invalidated. Brown appealed, seeking to distinguish Heck by casting his claim as one for an earlier parole appearance, rather than as affecting his ultimate release date. The Supreme Court was not

persuaded. Brown's claims, if proved, would necessarily imply the invalidity of his conviction or sentence and thus were not cognizable under 42 U.S.C. 1983, unless Brown could demonstrate that the conviction or sentence had been invalidated. The District Court's dismissal of Brown's 42 U.S.C. 1983 claim was affirmed. Brown v. St., 2002 MT 58, 309 M 106, 46 P3d 42 (2002), distinguishing Neal v. Shimoda, 131 F3d 818 (9th Cir. 1997).

Contested Ownership of Independent Business — Standard of Review of Judgment on Pleadings: Hedges claimed ownership of an independent Melaleuca business, allegedly acquired through a written transfer of the business by Johnson, the former owner, before Johnson's death. As corepresentatives of Johnson's estate, the Woodhouses claimed ownership of the same business by virtue of a residuary devise in Johnson's will. The uncontroverted facts in the pleadings served as the factual basis for the parties' competing motions for judgment on the pleadings. A movant for judgment on the pleadings must establish that no material fact exists and that movant is entitled to judgment as a matter of law, and pleadings are to be construed in the light most favorable to the nonmoving party, whose allegations are taken as true. The conclusions of law standard of review is applied. The District Court properly looked to Johnson's Melaleuca contract, which required that Melaleuca accept signed and acknowledged forms in respect to transfer of a business during a business owner's lifetime and approve the transfer in writing. The contractual restrictions on assignment of a Melaleuca contract were not met by Johnson's written transfer of the business to Hedges, and the court correctly concluded that Johnson's assignment was not valid. Judgment on the pleadings for Woodhouses was affirmed. Hedges v. Woodhouse, 2000 MT 220, 301 M 180, 8 P3d 109, 57 St. Rep. 905 (2000).

Order for Summary Judgment Proper When Additional Information Considered: Whitlock characterized the District Court's decision as a judgment on the pleadings because no extrinsic evidence was introduced to treat the decision as a summary judgment and contended that the court's decision was therefore improper. Noting that at one point during the proceedings Whitlock had moved for summary judgment in his favor and urged consideration of some supplementary documents, the Supreme Court held that the trial court had before it additional information that was not part of the pleadings. Because there was no disputed issue of material fact, the court's order was considered one for summary judgment pursuant to this rule. Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74, 49 St. Rep. 1113 (1992).

Denial of Motion for Judgment on Pleadings Part Way Through Trial: It was proper for the District Court to deny as tardy a motion for judgment on the pleadings after 16 stipulations had been read into the record and two witnesses had testified for approximately 140 pages of transcript. In re Estate of Flasted, 228 M 85, 741 P2d 750, 44 St. Rep. 1362 (1987).

Quiet Title Action — Motion Properly Denied: A Rule 12(c) motion is improper if the court must look to matters beyond the pleadings. The District Court was asked to examine matters beyond the pleadings, such as tax records and records of the County Clerk and Recorder; thus, the District Court correctly denied the motion. Murphy v. Atl. Richfield Co., 221 M 166, 717 P2d 558, 43 St. Rep. 717 (1986).

Motion Properly Granted as to Improper Defendant: Where complaint alleged defendant was a party to the contract underlying the lawsuit but the contract itself revealed defendant was not a party and no other evidence was offered showing defendant was a proper party to the lawsuit, motion for judgment on the pleadings was properly granted. Kinion v. Design Sys., Inc., 197 M 177, 641 P2d 472, 39 St. Rep. 408 (1982).

Motion for Judgment on Pleadings Treated as Motion for Summary Judgment: The court improperly granted judgment on the pleadings because in doing so it considered matters beyond the complaint and answer, the only pleadings in the case. The motion should have been treated as one for summary judgment. Mathews v. Glacier Gen. Assurance Co., 184 M 368, 603 P2d 232 (1979).

Failure to State Cause of Action: The court properly granted judgment on the pleadings to defendant when the pleadings failed to state a cause of action for libel—either libel per se or libel per quod by special damages. Wainman v. Bowler, 176 M 91, 576 P2d 268 (1978).

Constitutionality — Judgment on the Pleadings Affirmed:

Judgment on pleadings for defendant against plaintiff contesting the constitutionality of 90-5-101 through 90-5-113 was upheld. Fickes v. Missoula County, 155 M 258, 470 P2d 287 (1970).

Judgment on pleadings for defendant against plaintiff contesting the constitutionality of Ch. 177, L. 1963, was upheld. Great Falls Nat'l Bank v. McCormick, 152 M 319, 448 P2d 991 (1968).

No Appeal From Denial of Motion: An appeal does not lie from an order denying a motion for judgment on the pleadings. Corey v. Sunburst Oil & Gas Co., 72 M 383, 233 P 909 (1925).

Denial of Motion — Failure to Proceed to Trial: It was proper for the court to enter judgment for defendant after overruling plaintiff's motion for judgment on the pleadings, where plaintiff, instead of proceeding to trial upon the merits, announced that he would stand on the motion made. Moore v. Murray, 30 M 13, 75 P 515 (1904).

Collateral References

Pleading *key* 344.

71 C.J.S. Pleading §§594 through 621.

61A Am. Jur. 2d Pleading §§602 through 622.

Raising defense of Statute of Limitations by motion for judgment on pleadings. 61 ALR 2d 300.

Proper procedure and course of action by trial court where both parties move for judgment on the pleadings. 59 ALR 2d 494.

Court's power, on motion for judgment on the pleadings, to enter judgment against movant. 48 ALR 2d 1175.

Appealability of order overruling motion for judgment on pleadings. 14 ALR 2d 460.

Application and effect of parol evidence rule as determinable upon the pleadings. 10 ALR 2d 720.

What matters not contained in pleadings may be considered in ruling on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure or motion for judgment on the pleadings under Rule 12(c) without conversion to motion for summary judgment. 138 ALR Fed. 393.

Rule 12(d). Preliminary hearings.

Advisory Committee Notes

Advisory Committee's Note to September 29, 1967, Amendment: "(7)" has been substituted for "(6)" to correct misnumbering and conform to the defenses enumerated in subdivision (b) [Rule 12(b)].

Advisory Committee's Note to October 9, 1984, Amendment: Subdivision 12(d). A hyphen has been inserted between the figures (1) and (7) in order to conform to the Federal Rule. The hyphen appears to have been inadvertently omitted when the rule was originally adopted by Montana.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was identical with the Federal Rule.

Amendment: The amendment of October 9, 1984, deleted "[to]" between "(1)" and "(7)" and inserted hyphen.

Case Notes

Preliminary Hearing Procedure Appropriate to Determine Jurisdictional Dispute: A preliminary hearing by the District Court pursuant to this rule is the appropriate procedure if there are material jurisdictional facts in dispute. If there are jurisdictional facts intertwined with facts involving the merits of the case, the court may determine its jurisdiction in a plenary pretrial proceeding. Minuteman Aviation, Inc. v. Swearingen, 237 M 207, 772 P2d 305, 46 St. Rep. 741 (1989).

Factual Issue Relating to Both Jurisdiction and Ultimate Liability Properly Determined by Motion: Plaintiffs appealed the use of affidavits and discovery material in the court file in the court's determination of whether an employee of a certain defendant was acting within the scope of his employment. The plaintiffs complained that the court's determination amounted to a decision of the defendant's ultimate tort liability rather than a factual determination of the court's jurisdiction over some defendants. While agreeing that jurisdiction and ultimate liability in tort are not subject to determination by motion where disputes of fact exist, the Supreme Court held that common collateral issues related to the defendant's connection with the tortious act are jurisdictional issues which may be resolved before trial and the trial court's use of affidavits for that purpose was correct under Rules 12(d) and 43(e), M.R.Civ.P. In so holding, the court noted that the discovery materials and affidavits were extensive and that the plaintiffs were given a sufficient opportunity to examine the nonresident defendants through depositions and interrogatories and thereby to develop their argument regarding jurisdiction. Knoepke v. SW. Ry., 190 M 238, 620 P2d 1185, 37 St. Rep. 1910 (1980).

"Special Appearance" Treated as Motion to Dismiss — Dismissal of Nonresident Defendants for Lack of Personal Jurisdiction Upheld: Plaintiffs appealed the dismissal of nonresident defendants from their wrongful death and survivorship lawsuits. The Supreme Court found that a "special appearance" made by a party defendant to quash service of a summons for lack of personal jurisdiction, despite its outdated label, served as a motion to dismiss for lack of

jurisdiction. The trial court did not commit reversible error by granting a motion that used an antiquated label. Knoepke v. SW. Ry., 190 M 238, 620 P2d 1185, 37 St. Rep. 1910 (1980).

Rule 12(e). Motion for more definite statement.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Failure to Replead in Accordance With Rules — Dismissal With Prejudice Warranted — Exhaustion of All Sanctions Not Required: After a contract action against Nystroms was dismissed, Nystroms brought an action against the plaintiffs and their counsel, consisting of 76 paragraphs in 26 pages, alleging malicious fraudulent prosecution, intentional abuse of process, and unlawful intentional infliction of emotional distress. The District Court determined that the complaint was vindictive, argumentative, and repetitive and directed Nystroms to replead in accordance to Rules 8 and 12, M.R.Civ.P. Nystroms then filed an amended complaint of 130 paragraphs in 43 pages including previous allegations and adding allegations of interference with business relations and conspiracy. The District Court dismissed with prejudice under Rule 41(b), M.R.Civ.P., for failure to comply with the court's order. The Supreme Court affirmed, holding that even though there may have been other less severe remedies available to the District Court, that court did not abuse its discretion in dismissing the complaint with prejudice. The Nystroms' counsel had warning that failure to replead in accordance with the Rules of Civil Procedure could result in dismissal. The District Court could have reasonably concluded that there was no other adequate remedy available to the District Court and the defendant under the circumstances. Nystrom v. Melcher, 262 M 151, 864 P2d 754, 50 St. Rep. 1488 (1993).

When Claims Uncertain: If plaintiff's claims were as uncertain as defendants asserted, plaintiff was entitled to file a motion to make the pleadings more definite and certain under Rule 12(e), M.R.Civ.P., rather than expect the court to dismiss the claims. Tobacco River Lumber Co., Inc. v. Yoppe, 176 M 267, 577 P2d 855 (1978).

Findings of Fact and Conclusions of Law — Unnecessary: Findings of fact and conclusions of law are unnecessary on decisions with respect to motions made under Rule 12, M.R.Civ.P., Rule 56, M.R.Civ.P., or any other motion except as provided in Rule 41(b), M.R.Civ.P. Eisemann v. Hagel, 157 M 295, 485 P2d 703 (1971).

Lack of Separate Statement of Causes: The objection to a complaint that the causes of action therein contained are not separately stated and numbered cannot be raised by demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed). The proper remedy for such a defect is a motion to make the pleading more definite and certain. Roberts v. Sinnott, 55 M 369, 177 P 252 (1918); Marcellus v. Wright, 51 M 559, 154 P 714 (1916); Galvin v. O'Gorman, 40 M 391, 106 P 887 (1910).

Collateral References

Pleading *key* 367(1).

71 C.J.S. Pleading §§685 through 695.

61A Am. Jur. 2d Pleading §§464 through 487.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties. 3 ALR 5th 237.

Dismissal of state court action for failure or refusal of plaintiff to appear or answer questions at deposition or oral examination. 32 ALR 4th 212.

Dismissal of state court action for failure or refusal of plaintiff to obey request or order for production of documents or other objects. 27 ALR 4th 61.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories. 56 ALR 3d 1109.

Sufficiency on motion to make definite allegations of desertion, abandonment, or living apart as ground for divorce, separation, or alimony. 57 ALR 2d 485.

Rule 12(f). Motion to strike.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 623
Sham Pleading 623

GENERAL

Findings of Fact and Conclusions of Law — Unnecessary: Findings of fact and conclusions of law are unnecessary on decisions with respect to motions made under Rule 12, M.R.Civ.P., Rule 56, M.R.Civ.P., or any other motion except as provided in Rule 41(b). Eisemann v. Hagel, 157 M 295, 485 P2d 703 (1971).

Failure to Verify — Effect: When failure to verify was not raised as an issue until after trial and no claim was made that the failure was prejudicial, there was no error. The proper remedy was a motion to strike. Adams v. Davis, 142 M 587, 386 P2d 574 (1963).

Appellate Review: Where the District Court sustains a motion of defendant to strike out certain portions of the complaint on the ground that they are "sham, conclusion, irrelevant, incompetent, immaterial, redundant, surplusage and frivolent", and neither brief nor argument indicate in what manner same was subject to such objections, the Supreme Court will examine the stricken matter with the rest of the complaint and if found unobjectionable the court will direct overruling of the motion to strike. Christie v. Morris, 116 M 210, 149 P2d 250 (1944).

Insufficient Defense — Remedies: Where the plea of another action pending is open to the objection of being sham, irrelevant, and redundant, it may be stricken on motion. Where, however, the sufficiency of the plea is sought to be tested, the proper practice is to demur (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed). Flatt v. Norman, 91 M 543, 11 P2d 798 (1932); McCormick v. Shields, 63 M 9, 205 P 831 (1922).

Redundant Material in Complaint — Remedy: A motion to strike, and not a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed), is the proper method of attacking a complaint alleged to be defective for maintaining conclusions of law or surplusage. Raiche v. Morrison, 37 M 244, 95 P 1061 (1908).

Immaterial Matter to Be Disregarded: Sham and irrelevant matter, when not stricken out on motion, will be wholly disregarded. Power v. Gum, 6 M 5, 9 P 575 (1886).

SHAM PLEADING

Failure to Replead in Accordance With Rules — Dismissal With Prejudice Warranted — Exhaustion of All Sanctions Not Required: After a contract action against Nystroms was dismissed, Nystroms brought an action against the plaintiffs and their counsel, consisting of 76 paragraphs in 26 pages, alleging malicious fraudulent prosecution, intentional abuse of process, and unlawful intentional infliction of emotional distress. The District Court determined that the complaint was vindictive, argumentative, and repetitive and directed Nystroms to replead in accordance to Rules 8 and 12, M.R.Civ.P. Nystroms then filed an amended complaint of 130 paragraphs in 43 pages including previous allegations and adding allegations of interference with business relations and conspiracy. The District Court dismissed with prejudice under Rule 41(b), M.R.Civ.P., for failure to comply with the court's order. The Supreme Court affirmed, holding that even though there may have been other less severe remedies available to the District Court, that court did not abuse its discretion in dismissing the complaint with prejudice. The Nystroms' counsel had warning that failure to replead in accordance with the Rules of Civil Procedure could result in dismissal. The District Court could have reasonably concluded that there was no other adequate remedy available to the District Court and the defendant under the circumstances. Nystrom v. Melcher, 262 M 151, 864 P2d 754, 50 St. Rep. 1488 (1993).

Sham Defenses in Amended Answer: Where, after a general demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to certain affirmative defenses in an action on a surety company's bond had been sustained as not presenting a defense, defendant in

an amended answer repleaded them, the court properly ordered them stricken as sham. St. v. Am. Sur. Co. of New York, 78 M 504, 255 P 1063 (1927), explained in Aetna Life Ins. Co. v. Phillips, 69 F2d 901 (9th Cir. 1934).

"Sham", "Irrelevant", and "Redundant" Matter Defined: A "sham" pleading is one which appears to be false by comparison with other declarations of the pleading, or appears manifestly and inherently so by reason of its incompatibility with the law or the nature and condition of things within the judicial knowledge. "Irrelevant" matter is such as has no connection with the cause of action. "Redundant" matter is that which is unnecessary or superfluous. Flatt v. Norman, 91 M 543, 11 P2d 798 (1922).

How Sham Determined: The sham pleading, or portion thereof to be eliminated on motion, is such as appears manifestly and inherently sham by reason of its incompatibility with the law, or the nature and condition of things within the judicial knowledge, or appears to be false by comparison with other declarations of the pleading; and these conditions should appear upon a consideration of the pleading alone. McDonald v. Pincus, 13 M 83, 32 P 283 (1892).

Collateral References

Pleading *key* 358, 359, 362(3).

71 C.J.S. Pleading §§622 through 684.

61A Am. Jur. 2d Pleading §§488 through 532.

Appealability of order entered on motion to strike pleading. 1 ALR 2d 422.

Power and duty of court to keep its files and records free from scandalous matter. 111 ALR 879.

Rule 12(g). Consolidation of defenses in motion.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed.R.Civ.P. 12(g) and (h), as amended 1966.

Explanation of change: Where a dilatory defense is omitted from a preanswer motion, under the language of these subdivisions [Rule 12(g) and 12(h)] the cases are divided on the question of whether the defense can be included in the answer although it is not permitted in another motion. This amendment prevents the inclusion of such omitted defenses in the answer as well as in another preanswer motion. This change follows the provisions of the federal amendment, except that "improper venue" is not included in the enumeration in (h)(1)(A), because the times for making motions for a change of venue are specified in subdivisions (b)(ii), (iii) and (iv) of the Montana Rule [12(b)].

The substance of subdivision (g) has not been changed.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990 this rule was identical with the Federal Rule.

Amendments: The amendment of September 29, 1967, in the first sentence, substituted "any" for "the" before "other motions"; in the second sentence, substituted "but omits therefrom any defense or objection" for "and does not include therein all defenses and objections" and "on the defense or objection" for "on any of the defenses or objections"; inserted "a motion" after "except"; and substituted "subdivision (h)(2) . . . there stated" for "subdivision (h) of this rule".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Jurisdictional Defense Lost — Scope of Jurisdiction Over Nonresidents: Defendant could not inject plea of lack of jurisdiction over the person after filing motion asserting lack of jurisdiction over the subject matter. Jurisdiction is proper over nonresident buyer purchasing through nonresident agent when one payment was made directly to and one order was made directly with resident seller. Prentice Lumber Co. v. Spahn, 156 M 68, 474 P2d 141 (1970).

Objection to Uncertainty of Pleadings Waived: Where the defendant charged in a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to a complaint that it did not state facts sufficient to constitute a cause of action, but failed to interpose an objection on the ground that the complaint was ambiguous and uncertain, he must be considered to have waived the latter objection. Johnson v. Herring, 89 M 156, 295 P 1100 (1931); Doane v.

Marquisee, 63 M 166, 206 P 426 (1922); Cohen v. Clark, 44 M 151, 119 P 775 (1911); Pryor v. Walkerville, 31 M 618, 79 P 240 (1905).

Rule 12(h). Waiver or preservation of certain defenses.

Advisory Committee's Note to September 29, 1967, Amendment

Source: Fed.R.Civ.P. 12(g) and (h), as amended 1966.

Explanation of change: See advisory committee's note under Rule 12(g).

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was identical with the Federal Rule, except the latter includes reference to "improper venue" in the defenses enumerated in (1).

Case Notes

General 625
Jurisdiction Over Parties 625
Capacity of Parties 626
Ambiguity of Pleading 626
Failure to State a Claim 627
Nonjoinder of Parties 628
Jurisdiction of Subject Matter 628

GENERAL

Challenge to Jurisdiction — Formality Not Required: A written request for dismissal because of lack of jurisdiction and an oral challenge to jurisdiction at a hearing were entirely adequate under Rule 12(h)(3), M.R.Civ.P., to bring the issue before the court. In re Marriage of Lance, 213 M 182, 690 P2d 979, 41 St. Rep. 2032 (1984).

Motion to Change Venue After Default Judgment Entered — Denied as Untimely — Proper Course Suggested: A motion for a change of venue may not be made after judgment has been entered. Thus, in this case defendant's motion to change venue was correctly denied as untimely because a default divorce judgment had been granted. Defendant's proper course of action should have been to move for relief from judgment under Rule 60(b), M.R.Civ.P.; then, if granted, she should attempt to withdraw her initial appearance and request a change of venue. Hoyt v. Hoyt, 208 M 83, 675 P2d 392, 41 St. Rep. 183 (1984).

Real Party in Interest — Waiver: Where it does not appear from the face of the complaint that plaintiff is not the real party in interest, the defect can only be reached by answer and is waived by failure to so plead. La Bonte v. Mut. Fire & Lightning Ins. Co., 75 M 1, 241 P 631 (1925).

Answer After Objection Overruled — Waiver of Right to Appeal: Where a defendant has interposed a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to a complaint which is overruled, and fails to stand upon his demurrer, but answers over and goes to trial upon the merits, he waives his right to be heard upon his objection to the action of the court in overruling the demurrer, unless the complaint should be so defective as not to support the judgment. Wyman v. Jensen, 26 M 227, 67 P 114 (1902); Murphy v. Phelps, 12 M 531, 31 P 64 (1892); Barber v. Briscoe, 8 M 214, 19 P 589 (1888); Garver v. Lynde, 7 M 108, 14 P 697 (1887); Francisco v. Benepe, 6 M 243, 11 P 637 (1886), distinguished in Van Horn v. Holt, 30 M 69, 75 P 680 (1904); Hershfield & Bros. v. Aiken, 3 M 442 (1880); Collier v. Ervin, 3 M 142 (1878); Perkins v. Davis, 2 M 474 (1876).

JURISDICTION OVER PARTIES

No Jurisdiction in Montana Courts Over Reservation Indian — URESA (Now UIFSA) — Jurisdiction Not Based on Waiver Alone: The wife appealed the dismissal of her action seeking to enforce child support payments under the Uniform Reciprocal Enforcement of Support Act (URESA) (now Uniform Interstate Family Support Act (UIFSA)). The District Court ruled it had no jurisdiction, and the Supreme Court agreed there was neither subject matter jurisdiction nor personal jurisdiction. The husband was a Blackfeet Indian living on the reservation in Montana. Jurisdiction could not be found in federal enabling statutes because neither the tribe nor the state complied with them, there were no off-reservation acts in Montana sufficient to vest state courts with jurisdiction over the husband, and a reservation Indian's domicile on the reservation is not an in-state contact that grants jurisdiction to state courts. The father has not acquiesced in state jurisdiction and has challenged state court jurisdiction from the outset. The fact that there was no appeal from the tribal court, the only avenue open to the wife, to the federal court system was not a waiver in favor of state court jurisdiction. There must be a legal basis supporting state jurisdiction. State ex rel. Flammond v. Flammond, 190 M 350, 621 P2d 471, 37 St. Rep. 1991 (1980).

Jurisdictional Defense Lost — Scope of Jurisdiction Over Nonresidents: Defendant could not inject plea of lack of jurisdiction over the person after filing motion asserting lack of jurisdiction over the subject matter. Jurisdiction is proper over nonresident buyer purchasing through nonresident agent when one payment was made directly to and one order was made directly with resident seller. Prentice Lumber Co. v. Spahn, 156 M 68, 474 P2d 141 (1970).

Lack of Jurisdiction Waived: Defendant who did not plead lack of jurisdiction over the person in his initial response to complaint was precluded from making subsequent motion on the omitted defense under subsection (g) and he thereby waived the defense under provisions of this subsection. Prentice Lumber Co. v. Spahn, 156 M 68, 474 P2d 141 (1970).

Misjoinder of Plaintiff on Face of Complaint — How Objection Taken — Waiver: Where it appears on the face of the complaint that causes of action have been improperly united or that there is a misjoinder of parties plaintiff, the objection must be by demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed); otherwise it is considered waived. State ex rel. Clark v. Bailey, 99 M 484, 44 P2d 740 (1935); Frost v. Long & Co., 66 M 385, 213 P 1107 (1923).

Misjoinder of Defendant on Face of Complaint — How Objection Taken — Waiver: Where a misjoinder of parties defendant is patent upon the face of the complaint, the defect can be availed of only by special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed), failure to interpose which waives it. Schauer v. Morgan, 67 M 455, 216 P 347 (1923).

Misjoinder Objection Waived — How Taken: The objection of a misjoinder of causes of action is waived, unless it is taken by answer or demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed). Frost v. Long & Co., 66 M 385, 213 P 1107 (1923); Forsell v. Pittsburgh & Mont. Copper Co., 38 M 403, 100 P 218 (1909).

Objection to Introduction of Evidence — Misjoinder Objection Improper: The point that the complaint discloses a misjoinder of parties, or that causes of action are improperly united, may not be raised by objection to the introduction of evidence, but must be taken advantage of by special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed), else the right to object is waived. Meredith v. Roman, 49 M 204, 141 P 643 (1914).

Unneeded Defendants Joined — Waiver of Objection: Where the proof showed that too many persons had been joined as defendants, but this fact did not appear upon the face of the complaint, and the answer of the defendant did not plead it, the defendant thereby waived his objection to the misjoinder of the parties defendant. Knatz v. Wise, 16 M 555, 41 P 710 (1895); Conklin v. Fox, 3 M 208 (1878). See also Logan v. Billings & N. R.R., 40 M 467, 107 P 415 (1910); Puckett v. Hopkins, 63 M 137, 206 P 422 (1922); and Frost v. Long & Co., 66 M 385, 213 P 1107 (1923).

CAPACITY OF PARTIES

Form of Objection — Waiver: Lack of legal capacity in plaintiff to sue, when apparent on the face of the complaint, can be questioned only by demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed); when not so apparent the objection may be taken by answer. If the apparent lack of capacity is not so taken advantage of, it is considered waived. Piatt & Heath Co. v. Wilmer, 87 M 382, 288 P 1021 (1930); NW. Hardware & Steel Co. v. Winnett, 67 M 545, 216 P 568 (1923).

Failure to Object — Waiver of Remedy: If no objection to the capacity of minor plaintiffs to sue is taken by demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) or answer, it is considered to be waived. O'Donnell v. Butte, 44 M 97, 119 P 281 (1911).

Caption Defective: Where the complaint did not state the Christian name of the plaintiff, and defendant answered and admitted that plaintiff was in the possession of certain premises when an alleged trespass was committed thereon, defendant waived his right to raise the question in the Supreme Court that the complaint was uncertain in stating plaintiff's name. Nichols v. Dobbins, 2 M 540 (1877), distinguished in Boyd v. Platner, 5 M 226, 2 P 346 (1884).

AMBIGUITY OF PLEADING

Waiver After Joinder of Issue: After joinder of issue there is considered to be a waiver of any right to object by special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to the complaint, on the ground of ambiguity or uncertainty in the allegations of the facts upon which the relief is demanded. Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916).

No First Objection Allowed on Appeal: An objection that the complaint is ambiguous and uncertain cannot be urged on appeal where no special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed), because of such defects, was interposed in the court below. Chenoweth v. Great N. Ry., 50 M 481, 148 P 330 (1915).

Waiver of Objection: An objection to a complaint on the ground of indefiniteness is waived unless a special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) on that account is interposed. Keffler v. Wilds, 50 M 387, 146 P 1105 (1915); Billings Realty Co. v. Big Ditch Co., 43 M 251, 115 P 828 (1911).

Incorrect Designation of Parties — Waiver: An inadvertent substitution of the word "defendant" for "plaintiff" in the complaint does not render the pleading insufficient, but subject to special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) on the ground of uncertainty, which defect is waived by answering to the merits. Ivanhoff v. Teale, 47 M 115, 130 P 972 (1913).

Complaint to Be Construed in Favor of Plaintiff: After issue joined, the complaint, though ambiguous in its allegations, should be construed most favorably to the plaintiff, as the defendant waives defects of this character by answering. Robinson v. Helena Light & Ry., 38 M 222, 99 P 837 (1909).

FAILURE TO STATE A CLAIM

Frivolous Claims — The "Justinhoard" Thesis: Plaintiff sued a state government executive branch attorney because the attorney had represented four state Supreme Court Justices in another action in which plaintiff sued the Justices. Plaintiff claimed the attorney was guilty of conspiracy, improper official action, and abuse of the principle of "justinhoard" (a principle of justice apparently developed by and unique to plaintiff). The court found the complaint and appeal from its dismissal fruitless, weightless, needless, and senseless, stating that the cause is another of a series of proceedings by plaintiff in the state and federal courts in which he has imputed incompetence, bias, and conspiracy to judges and parties involved in his court actions, and has subjected the judicial process to denigration. The appeal was dismissed. Lussy v. Young, 215 M 50, 695 P2d 455, 42 St. Rep. 173 (1985).

Default Judgment — Deficiency Alleged — Allegations Admitted: The sufficiency of a complaint may be raised for the first time on appeal. However, where it is so raised, every reasonable inference will be drawn from the facts stated necessary to uphold the pleading. For the purpose of testing the sufficiency of the complaint where defendant suffered entry of default judgment, all of the allegations therein must be considered as admitted. Calkins v. Smith, 106 M 453, 78 P2d 74 (1938).

Objection Never Waived: The objection that the complaint does not state facts sufficient to constitute a cause of action is never waived. Hand v. Heslet, 81 M 68, 261 P 609 (1927); Clark v. Oreg. Short Line R.R., 38 M 177, 99 P 298 (1908); Parker v. Bond, 5 M 1, 1 P 209 (1883).

Action on Appeal Bond — Action Destroyed by Defective Complaint: Where official bond was conditioned on defendant's taking an appeal to Supreme Court, the right to recover thereon was entirely destroyed where plaintiff in an action on the bond affirmatively averred such appeal was in fact taken, and such defects, going to sufficiency of complaint to state cause of action, were not cured by findings of court. USF&G Co. v. Whittaker, 8 F2d 455 (9th Cir. 1925).

Omission From Complaint — Supplied in Answer: Where defendant, upon the assumption that a recital in the caption of the complaint that defendant was doing business under a certain firm name and style supplied a necessary allegation, treated it as such in answering, he supplied the omission of an affirmative allegation in the complaint, and was in no position on appeal to urge error. NW. Hardware & Steel Co. v. Winnett, 67 M 545, 216 P 568 (1923).

First Objection Allowed on Appeal — Reversal for Defendant: The sufficiency of a complaint may be questioned for the first time on appeal and if found fatally defective a judgment rendered thereon for the plaintiff will be reversed. Ellinghouse v. Ajax Livestock Co., 51 M 275, 152 P 481 (1915), distinguished in Dickason v. Dickason, 84 M 52, 274 P 145 (1929); Cole v. Helena Light & Ry., 49 M 443, 143 P 974 (1914); Shober v. Blackford, 46 M 194, 127 P 329 (1912); Tracy v. Harmon, 17 M 465, 43 P 500 (1896); Foster v. Wilson, 5 M 53, 2 P 310 (1883).

Inference of Sufficiency of Complaint for Plaintiff: Though the sufficiency of a complaint may be questioned for the first time on appeal and if found fatally defective a judgment rendered thereon for the plaintiff will be reversed, every reasonable deduction will be drawn from the facts stated in order to uphold the judgment. Ellinghouse v. Ajax Livestock Co., 51 M 275, 152 P 481 (1915), distinguished in Dickason v. Dickason, 84 M 52, 274 P 145 (1929).

When Complaint Sufficient on Appeal: A complaint will be held sufficient, if attacked for the first time on appeal, if the defect made the basis of the objection is not a matter going to the root of the cause of action, but is such as might have been remedied by an amendment. Ellinghouse v. Ajax Livestock Co., 51 M 275, 152 P 481 (1915), distinguished in Dickason v. Dickason, 84 M 52, 274 P 145 (1929).

Failure to State a Claim Not Cured by Judgment: The omission to state in a complaint facts essential to make out a cause of action is not cured by the decision and judgment, and the question of its sufficiency may be presented at any time during the progress of the trial, even in the Supreme Court for the first time. Badovinac v. N. Pac. Ry., 39 M 454, 104 P 543 (1909); Thornton v. Kaufman, 35 M 181, 88 P 796 (1907); Wyman v. Jensen, 26 M 227, 67 P 114 (1902); Whiteside v. Lebcher, 7 M 473, 17 P 548 (1888).

Deficient Complaint Not Aided by Reply — Time for Objection: A complaint, in an action to determine an adverse claim in patent proceedings in the matter of mining property, defective in omitting to allege that an adverse claim has been filed in the land office within 60 days after application for patent, is not aided by allegations in the reply. The sufficiency of the complaint to support the judgment may be raised at any time during the progress of the case. Thornton v. Kaufman, 35 M 181, 88 P 796 (1907).

First Objection Allowed on Appeal: The objection that the complaint does not support the judgment can be raised in the appellate court for the first time on appeal from the judgment. Quirk v. Clark, 7 M 31, 14 P 669 (1887); Foster v. Wilson, 5 M 53, 2 P 310 (1883); Parker v. Bond, 5 M 1, 1 P 209 (1883); Territory v. Virginia Road Co., 2 M 96 (1874).

NONJOINDER OF PARTIES

Failure of Defect to Appear in Complaint — How Objection Taken: Generally, any defect in parties must be taken advantage of by special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) or else it is considered waived, or if the defect of parties does not appear on the face of the complaint then by motion for nonsuit at the trial. Ballenger v. Tillman, 133 M 369, 324 P2d 1045 (1958).

Misjoinder Discovered by Defendant — Amendment of Answer Improperly Denied: In view of the authority lodged in the District Court to order additional parties brought into court whenever necessary, where attorney discovered after cause set for trial that defendant company's operations and affairs had been placed in the hands of trustees in bankruptcy necessitating bringing action against the trustees, there was no waiver of the defect in parties by failure to demur (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed), and court abused its discretion in denying petition to amend its answer. State ex rel. Chicago, Milwaukee & St. Paul Ry. v. District Court, 105 M 396, 73 P2d 204 (1937).

Defect Upon Face of Complaint — How Objection Made: Where a defect of parties appears on the face of the complaint, it must be taken advantage of by demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed). Church v. Zywert, 58 M 102, 190 P 291 (1920).

Nonjoinder of Business Partners — Waiver of Objection: Where A brought an action against B as the surviving partner of the firm of B and C, which firm was composed of B, C, and D, but the answer of B did not set forth that D was a partner, or that there was a nonjoinder of parties, and judgment was entered against B alone, B waived the defect of parties by failing to take advantage of it by demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) or answer. Parchen v. Peck, 2 M 567 (1877).

JURISDICTION OF SUBJECT MATTER

State Remedy and State Court Enforcement of Contract Wages Required by Federal Davis-Bacon Act: The District Court had subject matter jurisdiction of state contract law claims against a contractor and subcontractors by workers hired to build housing on Malmstrom Air Force base under a contract between the contractor and the Air Force. The workers claimed that they were not paid the prevailing wages required by the federal Davis-Bacon Act. The defendants claimed that there was no private right of action and that the workers had not exhausted their federal administrative remedies. The evidence showed that the workers extensively used the administrative remedies, taking all proper steps to attempt to administratively resolve the dispute. The workers were not seeking to enforce the Davis-Bacon Act labor standards; they sought to enforce a contract that includes wages required by the Act, a subtle but important distinction. The Act does not preempt the workers' right to a state enforcement action, using state remedies, under the facts of this case. That right is in keeping with Montana's longstanding policy and constitutional guarantee in Art. II, sec. 16, Mont. Const., of citizens' access to Montana courts when they are aggrieved. As third-party beneficiaries of the contract, the workers have the right to sue in state court to enforce the contract under state law. Favel v. Am. Renovation & Constr. Co., 2002 MT 266, 312 M 285, 59 P3d 412 (2002).

Alleged New Evidence Not Extending Statutory Time Bar for Postconviction Relief: Abe was found guilty of accountability for deliberate homicide and was sentenced to 60 years in prison. One year and 14 days after the deadline, Abe filed a petition for postconviction relief on grounds of newly discovered evidence. Allegedly, two jurors from Abe's trial sat in on the trial of Abe's coconspirator and heard two of the state's witnesses testify differently than they did in Abe's trial. The Supreme Court applied the factors to be considered when a District Court evaluates a motion for a new trial based on newly discovered evidence as set out in St. v. Sullivan, 285 M 235, 948 P2d 215 (1997) (see also St. v. Greeno, 135 M 580, 342 P2d 1052 (1959)), including the requirement that the evidence must have come to the knowledge of the defendant since trial and the requirement that the evidence must not be such as will tend only to impeach the character or credit of a witness. Here, Abe's counsel knew about the alleged discrepancies after Abe's trial but prior to Abe's appeal, so the discrepancies in testimony could have been raised on direct appeal. Further, the petition for postconviction relief alleged that the discrepancies undermined the credibility of the witnesses but did not establish that Abe did not engage in the criminal conduct for which he was convicted. Thus, the District Court concluded, and the Supreme Court agreed, that the alleged new evidence did not serve to extend the statutory bar for filing a petition for postconviction relief beyond the 1-year period in 46-21-102. Although Abe correctly pointed out that the state did not raise the issue of the statutory bar in District Court and that the District Court did not rule on the issue, the general rule that the Supreme Court will not address issues raised for the first time on appeal did not apply in this case because that rule does not apply when the issue is jurisdictional. The 1-year statute of limitations for postconviction relief is a jurisdictional limit, and lack of subject matter jurisdiction may be raised at any time under this rule. Dismissal of Abe's petition for postconviction relief was affirmed as procedurally barred. St. v. Abe, 2001 MT 260, 307 M 233, 37 P3d 77 (2001).

Lack of Subject Matter Jurisdiction Over Tribe — Motion for Relief From Judgment Not Subject to Time Constraints: After protracted litigation involving a tribal security interest in cows of tribal members, the Blackfeet Tribe filed a motion for relief from judgment pursuant to Rule 60(b)(4), M.R.Civ.P., based upon a contention that the District Court lacked jurisdiction. No response to the motion was ever made by the District Court. Eighteen months later, the Blackfeet Tribe then filed a motion to dismiss for lack of subject matter jurisdiction, and the District Court granted the motion approximately 6 years later. The Supreme Court held that even though under normal circumstances the motion was considered denied after 45 days and the District Court would then have lost jurisdiction, the ability of a party to invoke the rules concerning subject matter jurisdiction transcend normal procedural consideration. Thus, the Blackfeet Tribe's motion to dismiss was not subject to time constraints. The fact that it was filed 18 months after judgment was entered and the fact that the District Court took 6 years to rule on the motion did not deprive the District Court of jurisdiction. Wippert v. The Blackfeet Tribe, 260 M 93, 859 P2d 420, 50 St. Rep. 973 (1993). See also In re Marriage of Skillen, 1998 MT 43, 287 M 399, 956 P2d 1, 55 St. Rep. 147 (1998).

Question of Abandonment Not Within Subject Matter Jurisdiction Regarding Modification: Husband was served a petition for adoption of his children by wife's new husband. The petition alleged abandonment. The District Court improperly considered the question of abandonment during the postdissolution hearing, which centered around the issues of visitation and unpaid child support. The question was outside the scope of issues included within the original dissolution decree, was to be decided by the court hearing the adoption proceedings, and should have been dismissed under subsection (3) of this rule. In re Marriage of Callahan, 233 M 465, 762 P2d 205, 45 St. Rep. 1639 (1988).

Tort Suits Against Production Credit Associations — Applicability of Federal Tort Claims Act: The District Court properly dismissed a tort claim against a production credit association (PCA) for lack of subject matter jurisdiction. A PCA is properly considered an instrumentality under 12 U.S.C. 2091, and tort claims against instrumentalities acting primarily as agents of the United States must be pursued under the Federal Tort Claims Act according to 28 U.S.C. 2679. Tooke v. Miles City Prod. Credit Ass'n, 234 M 387, 763 P2d 1111, 45 St. Rep. 641 (1988), citing In re Sparkman, 703 F2d 1097 (9th Cir. 1983).

Jurisdiction — Cannot Be Obtained by Consent: Objection to lack of jurisdiction over subject matter may be raised at any time. A court lacking jurisdiction cannot acquire it by consent of parties. Corban v. Corban, 161 M 93, 504 P2d 985 (1972), followed in In re Marriage of Cox, 226 M 176, 736 P2d 97, 44 St. Rep. 567 (1987).

Appeal of Justice Court Judgment — Improper Service of Notice of Appeal Raised for First Time in Supreme Court: The fact that the notice of appeal from a Justice's Court to the District Court was served before filing may be urged as a ground for dismissal of the appeal in the

Supreme Court, although the point was not raised in the District Court; as the question involves the jurisdiction of the District Court to entertain the appeal, it may be raised at any time. McCauley v. Jones, 35 M 32, 88 P 572 (1907).

Issue First Raised on Appeal: The question of jurisdiction may be raised for the first time in the Supreme Court. McCauley v. Jones, 35 M 32, 88 P 572 (1907); Oppenheimer v. Regan, 32 M 110, 79 P 695 (1905).

Collateral References

Courts *key* 37(1); Pleading *key* 404 through 407.

71 C.J.S. Pleading §§826 through 828.

61A Am. Jur. 2d Pleading §§459 through 463.

Effect of settlement with and acceptance of release from one wrongful death beneficiary upon liability of tortfeasor to other beneficiaries or decedent's personal representative. 21 ALR 4th 275.

Rule 13. Counterclaim and cross-claim

Law Review Articles

Counterclaim in Montana, Mason, 3 Mont. L. Rev. 33 (1941).

Rule 13(a). Compulsory counterclaims.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

The amendment conforms the rule to the 1963 Amendment of the Federal Rule which has not been previously adopted by Montana. For a discussion of the amendment see advisory committee note to the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was identical with the Federal Rule.

Amendments: The amendment of October 9, 1984, substituted last sentence for "except that such claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 630
Same Contract or Transaction 632

GENERAL

Failure to Litigate Claims Justifying Dismissal of Counterclaims With Prejudice — Lack of Specific Findings on Counterclaims Not Erroneous: Defendants failed to litigate the claims against them, resulting in default judgment in plaintiffs' favor and dismissal of defendants' counterclaims with prejudice. On appeal, defendants asserted that the District Court committed reversible error in failing to mention the counterclaims and enter general findings from which the Supreme Court could determine whether the counterclaims had merit. The Supreme Court affirmed dismissal of the counterclaims. Failure to litigate the claims justified dismissal of the counterclaims with prejudice, and entry of the default judgment on the issues in the complaint also served to settle any compulsory counterclaims arising out of the transaction or occurrence that was the subject of the suit. Further, the District Court did not err in failing to make specific findings regarding the counterclaims because the counterclaims were considered dismissed and res judicata upon entry of the default judgment in favor of plaintiffs. Caplis v. Caplis, 2004 MT 145, 321 M 450, 91 P3d 1282 (2004).

Forgery Counterclaim Not Permitted: In a dispute over the charges for the care and training of horses, the parties agreed that Watkins would accept $5,000 for his services. The Williamses gave Watkins two checks for $2,500, but they stopped payment on the second check and refused to tender the rest of the money on the basis that one of the horses had been mistreated. The jury returned a verdict in favor of Watkins for $20,191 for services. The Williamses argued that the lower court erred in excluding evidence that Watkins had sold their horse trailer and forged the

bill of sale. The Supreme Court held that the Williamses' pleadings did not assert a counterclaim for forgery and that they did not attempt at any time to amend the pleadings to reflect the forgery claim. Watkins v. Williams, 265 M 306, 877 P2d 19, 51 St. Rep. 489 (1994).

Failure to Counterclaim as Bar of Later Action:

Affirmative defenses constituting compulsory counterclaims in an initial action that stated claims of creditor misconduct arose from the same transaction alleged in the original complaint, and therefore a later action on the same issues was barred by res judicata. First Bank v. District Court, 226 M 515, 737 P2d 1132, 44 St. Rep. 861 (1987), followed in Zimmerman v. Connor, 1998 MT 131, 289 M 148, 958 P2d 1195, 55 St. Rep. 521 (1998).

Home owner's failure to plead design or construction defect as a defense or counterclaim in a prior suit by his builder to recover contract amount for the construction of a residence bars the home owner from later bringing action against the builder based on such defect. Such a claim is a compulsory counterclaim under this rule. The purposes of the compulsory counterclaim rule are to insure that only one judicial proceeding is required to settle all those matters determinable by the facts or law and to bring all logically related claims into a single litigation. Julian v. Mattson, 219 M 145, 710 P2d 707, 42 St. Rep. 1908 (1985), followed in Springs v. First Nat'l Bank of Cut Bank, 647 F. Supp. 1394, 43 St. Rep. 2397 (1986), Troglia v. Bartoletti, 266 M 240, 879 P2d 1169, 51 St. Rep. 783 (1994), and Zimmerman v. Connor, 1998 MT 131, 289 M 148, 958 P2d 1195, 55 St. Rep. 521 (1998), and affirmed in 835 F2d 1293 (9th Cir. 1988).

The purpose of the statute permitting the filing of a counterclaim is to enable and require the parties to adjust, in one action, their differences growing out of any given transaction. Hence where defendant fails to set up a counterclaim he may have, he is thereafter barred from maintaining an action thereon against the plaintiff. Friedrichsen v. Cobb, 84 M 238, 275 P 267 (1929).

Compulsory Counterclaims Res Judicata: When an original complaint was dismissed with prejudice, all preexisting claims between the parties were concluded; therefore, compulsory counterclaims arising out of the original transaction were res judicata on appeal. Robinson v. First Sec. Bank of Big Timber, 224 M 138, 728 P2d 428, 43 St. Rep. 2080 (1986).

Failure to Plead Compulsory Counterclaim in Foreign Jurisdiction — Barred in Montana in Proceeding to Enforce Foreign Judgment: Where appellant was represented by counsel in a proceeding in Florida, he could not, in an action in Montana to collect money from that judgment, prevail on a counterclaim that as a matter of law was a compulsory counterclaim in the original Florida action since Florida has rules of civil procedure similar to Montana's. O'Neal, Booth & Wilkes, P.A. v. Andrews, 219 M 496, 712 P2d 1327, 43 St. Rep. 120 (1986).

Responsive Pleading Including Cross-Complaint, Counterclaim, and Third-Party Complaints — Motion to Strike Properly Granted: The plaintiff filed an action on four promissory notes on June 9, 1978, and defendant filed an amended answer on November 10, 1980, more than 20 days after it was served. The District Court did not err in granting the plaintiff's motion to strike the amended answer. After a responsive pleading is served or 20 days after an original pleading is served, a party may amend his pleading only by leave of court or written consent of the adverse party. Here, neither was obtained, and because the cross-complaint, counterclaim, and third-party claim were not severed from the amended answer, they were properly treated as part of that answer and properly dismissed along with the amended answer. First Nat'l Bank & Trust of Wibaux v. Sec. Bank, 199 M 168, 648 P2d 1166, 39 St. Rep. 1270 (1982).

Same Transaction or Occurrence — Counterclaim's Effect on Right to Jury Trial: Counterclaim was not compulsory and accordingly court did not err in denying defendant's request for a jury trial. Also, interposition of a legal issue in an equitable action gives the defendant no right to a jury trial of the case generally or of the issue raised by the counterclaim. Citizens St. Bank v. Duus, 154 M 18, 459 P2d 696 (1969).

Claim for Damages in Action for Claim and Delivery Not as Counterclaim: A defendant's claim for damages from the wrongful seizure and detention of property, in an action of claim and delivery, is not a counterclaim. Hammond v. Thompson, 54 M 609, 173 P 229 (1918).

Eminent Domain Proceedings — Damages Not Counterclaim: In condemnation proceedings the defendant is not required to set up his claims for damages, either special or general, and they cannot be pleaded by way of counterclaim. Therefore, plaintiff cannot be heard to complain that, by defendant's failure to plead them, it had no notice of their character and amount, and was deprived of an opportunity to controvert them. Yellowstone Park R.R. v. Bridger Coal Co., 34 M 545, 87 P 963 (1906).

Action as Between Same Parties — Successor to Defendant: The action is between the same parties, within the meaning of the rules pertaining to counterclaims, when it appears from the

complaint that the defendant in the action is the successor in interest of the defendant in a former action. Wetzstein v. Boston & Mont. Consol. Copper & Silver Min. Co., 28 M 451, 72 P 865 (1903).

SAME CONTRACT OR TRANSACTION

Judgment Against "State" Binding Against Two Agencies — Retirement Benefits Setoff Barred as Compulsory Counterclaim: During a longstanding dispute by firefighters employed by the Montana Air National Guard and involving several separate lawsuits, the plaintiff was fired and began receiving retirement benefits. The plaintiff sued "the State" for reinstatement of employment, lost wages, employment benefits during the period of termination, liquidated damages, and attorney fees and costs. After other firefighters' suits were decided in the firefighters' favor, the plaintiff settled with the Department of Military Affairs (DMA) for reinstatement, lost wages, lost annual leave and sick leave benefits, retirement contributions that the DMA would have made during the termination period, and attorney fees and costs of suit. After settlement, the Public Employees' Retirement System (PERS) claimed that it was entitled to repayment of the retirement benefits that the plaintiff had been paid before reinstatement. The DMA and PERS agreed to offset the settlement damages by the retirement amount. The Supreme Court held that the state's setoff claim was barred as a compulsory counterclaim, that both agencies were bound by the DMA's settlement agreement because they were the same party collectively known as the "State of Montana", and that the plaintiff was entitled to the full settlement amount without setoff. Peters v. St., 285 M 345, 948 P2d 250, 54 St. Rep. 1185 (1997).

Use of Damage Judgments to Offset Damages Against Assignor Arising From Breach of Wellhead Purchase Contracts: First Security Bank filed a complaint in which it sought to recover amounts allegedly owed by Northern Montana Gas Company (Northern) to Montana Pacific Oil & Gas Company (MOPOG) based on wellhead purchase contracts that Northern allegedly breached. Northern's answer included defenses under 27-1-502, claiming a right to offset against any recovery obtained by the bank the amount of judgments entered in its favor against First Security Bank's assignor, MOPOG, and defenses under 27-1-503, claiming that its right to offset could not be defeated when MOPOG assigned its claim to the bank and when that claim was ultimately asserted by the Federal Deposit Insurance Corporation (FDIC). The trial court concluded that the FDIC, as the bank's receiver, was entitled to damages and that none of the judgments could be set off against FDIC. On appeal, the Supreme Court held that when read in the context of 27-1-502, "cross-demands" necessarily refers to claims between the parties and that 27-1-502 does not limit setoff to claims arising out of the same transaction, but refers only to counterclaims that could have been set up in the same action. Because at the time that MOPOG assigned its rights to First Security its obligation already existed and because Northern was entitled to assert that obligation as a basis for setoff, pursuant to 27-1-503, Northern's right survived the assignment. The District Court relied on the general rule that in the absence of an express assumption of liability, an assignee is not liable for an assignor's obligation. However, that holding fails to recognize the difference between a counterclaim for affirmative relief and a defense that simply seeks to reduce the plaintiff's recovery dollar-for-dollar based on a defense that could have been asserted against the assignor. Pursuant to Rules 13(b) and 13(c), M.R.Civ.P., any claim that Northern had against MOPOG could have been permissibly set up as a counterclaim if MOPOG had sued Northern for breach of the wellhead purchase contracts. Therefore, Northern's right to offset survived the assignment by MOPOG to the bank. Although a setoff requires mutuality, all mutuality requires is that the defendant have a right to assert the claim against the plaintiff or its assignor that forms the basis for setoff. Thus, the Supreme Court affirmed the award of damages to FDIC and reversed the District Court, holding that judgments could not be used to setoff the bank's damage award because pursuant to 27-1-502, Northern had a right to offset those amounts against any claim by MOPOG and pursuant to 27-1-503, the right to offset that amount survived the assignment by MOPOG of its rights to First Security Bank. Fed. Deposit Ins. Corp. v. N. Mont. Gas Co., 274 M 371, 908 P2d 1357, 52 St. Rep. 1276 (1995).

Compulsory Counterclaim to Be Pleaded Regardless of Legal or Equitable Nature of Plaintiff's Suit: The defendant, in a suit brought by the plaintiff to enforce the covenants on land sold to the defendant, did not counterclaim that fraud induced him to buy the property. The defendant then initiated a second suit, claiming fraud and misrepresentation on the plaintiff's part. The Supreme Court held that a fraud claim constituted a compulsory counterclaim required to be raised in the first case. The court also held that it made no difference as to the compulsory nature of a counterclaim when the claim was legal in nature and the counterclaim was equitable in

nature. Turtainen v. Poulsen, 243 M 355, 792 P2d 1089, 47 St. Rep. 1028 (1990), followed in Zimmerman v. Connor, 1998 MT 131, 289 M 148, 958 P2d 1195, 55 St. Rep. 521 (1998).

Mandatory Pleading of Counterclaim: Plaintiff brought suit alleging that the parties had executed a construction contract on a cost-plus basis, that plaintiffs had performed the work under the contract, and that defendant had failed to pay the final $6,832.33 owed. Defendant filed an answer generally denying all allegations. At trial, defendant attempted to introduce evidence of failure to correct and alleged defective performance. The District Court rejected the evidence because it appeared to be an attempt to raise a counterclaim that had not been pleaded. On appeal, the Supreme Court said that because defendant did not plead or otherwise give notice of his defects theory prior to trial, it was unclear whether he was attempting to prove failure of a condition precedent or was seeking recoupment. In either case, the District Court had properly excluded the evidence, because Rule 13(a), M.R.Civ.P., requires that a party plead a counterclaim which arises out of the same transaction. Failure to follow the pleading procedures designed to give notice to the opposing party and narrow the issues for trial precluded the introduction of the evidence. Mattson v. Julian, 209 M 48, 678 P2d 654, 41 St. Rep. 544 (1984).

Action to Foreclose Mortgage — Fraud as Proper Counterclaim: In an action to foreclose a mortgage on roominghouse furniture and furnishings, a counterclaim for damages resulting from alleged fraudulent representations relating to the character of the house, the rentals paid by the tenants, etc., was properly pleadable as such, as arising out of the contract sued upon by plaintiff. Griffiths v. Thrasher, 95 M 210, 26 P2d 995 (1933).

Defining "Transaction" — Court Not Bound to Alleged Facts: In determining whether a counterclaim arises out of the transaction set forth in the complaint as the foundation of plaintiff's claim, the court is not limited to the facts alleged in the complaint but may look to all the facts and circumstances out of which the injury complained of by plaintiff arose. Griffiths v. Thrasher, 95 M 210, 26 P2d 995 (1933); Mulcahy v. Duggan, 67 M 9, 214 P 1106 (1923).

Tort Counterclaim Pleaded in Contract Action: A counterclaim sounding in tort may be pleaded as against a demand upon contract, provided it arises out of the transaction which gave rise to plaintiff's cause of action. Mulcahy v. Duggan, 67 M 9, 214 P 1106 (1923); Scott v. Waggoner, 48 M 536, 139 P 454 (1914).

"Transaction" Defined: "Transaction" is not synonymous with "contract". It is broader than "contract", and broader than "tort", although it may include either or both. It is "that combination of acts and events, circumstances, and defaults, which, viewed in one aspect, results in the plaintiff's right of action, and viewed in another aspect, results in the defendant's right of action". It "applies to any dealings of the parties resulting in wrong, without regard to whether the wrong be done by violence, neglect, or breach of contract". Scott v. Waggoner, 48 M 536, 139 P 454 (1914), followed in Julian v. Mattson, 219 M 145, 710 P2d 707, 42 St. Rep. 1908 (1985).

Same Transaction to Appear From Face of Complaint: To constitute a counterclaim, a failure to plead which will thereafter bar an action thereon, it must appear affirmatively from the pleadings that the cause of action asserted is one "arising out of the contract or transaction, set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action". Kaufman v. Cooper, 39 M 146, 101 P 969 (1909).

Law Review Articles

A Primer on the Developing Doctrine of Constructive Fraud in Montana, Monhart, 52 Mont. L. Rev. 153 (1991). See footnote 173 on p. 172.

Collateral References

Judgment *key* 622(1), (2); Pleading *key* 138 through 150; Setoff and Counterclaim *key* 1 through 61.

50 C.J.S. Judgments §684; 71 C.J.S. Pleading §§200 through 206; 80 C.J.S. Setoff and Counterclaim §10.

20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff §§3, 4, 104, 105.

Failure to assert matter as counterclaim as precluding assertion thereof in subsequent action, under Federal Rules. 22 ALR 2d 621.

Rule 13(b). Permissive counterclaims.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

General 634
Sufficiency of Counterclaim 635

GENERAL

Use of Damage Judgments to Offset Damages Against Assignor Arising From Breach of Wellhead Purchase Contracts: First Security Bank filed a complaint in which it sought to recover amounts allegedly owed by Northern Montana Gas Company (Northern) to Montana Pacific Oil & Gas Company (MOPOG) based on wellhead purchase contracts that Northern allegedly breached. Northern's answer included defenses under 27-1-502, claiming a right to offset against any recovery obtained by the bank the amount of judgments entered in its favor against First Security Bank's assignor, MOPOG, and defenses under 27-1-503, claiming that its right to offset could not be defeated when MOPOG assigned its claim to the bank and when that claim was ultimately asserted by the Federal Deposit Insurance Corporation (FDIC). The trial court concluded that the FDIC, as the bank's receiver, was entitled to damages and that none of the judgments could be set off against FDIC. On appeal, the Supreme Court held that when read in the context of 27-1-502, "cross-demands" necessarily refers to claims between the parties and that 27-1-502 does not limit setoff to claims arising out of the same transaction, but refers only to counterclaims that could have been set up in the same action. Because at the time that MOPOG assigned its rights to First Security its obligation already existed and because Northern was entitled to assert that obligation as a basis for setoff, pursuant to 27-1-503, Northern's right survived the assignment. The District Court relied on the general rule that in the absence of an express assumption of liability, an assignee is not liable for an assignor's obligation. However, that holding fails to recognize the difference between a counterclaim for affirmative relief and a defense that simply seeks to reduce the plaintiff's recovery dollar-for-dollar based on a defense that could have been asserted against the assignor. Pursuant to Rule 13(c), M.R.Civ.P., and this rule, any claim that Northern had against MOPOG could have been permissibly set up as a counterclaim if MOPOG had sued Northern for breach of the wellhead purchase contracts. Therefore, Northern's right to offset survived the assignment by MOPOG to the bank. Although a setoff requires mutuality, all mutuality requires is that the defendant have a right to assert the claim against the plaintiff or its assignor that forms the basis for setoff. Thus, the Supreme Court affirmed the award of damages to FDIC and reversed the District Court, holding that judgments could not be used to setoff the bank's damage award because pursuant to 27-1-502, Northern had a right to offset those amounts against any claim by MOPOG and pursuant to 27-1-503, the right to offset that amount survived the assignment by MOPOG of its rights to First Security Bank. Fed. Deposit Ins. Corp. v. N. Mont. Gas Co., 274 M 371, 908 P2d 1357, 52 St. Rep. 1276 (1995).

Forgery Counterclaim Not Permitted: In a dispute over the charges for the care and training of horses, the parties agreed that Watkins would accept $5,000 for his services. The Williamses gave Watkins two checks for $2,500, but they stopped payment on the second check and refused to tender the rest of the money on the basis that one of the horses had been mistreated. The jury returned a verdict in favor of Watkins for $20,191 for services. The Williamses argued that the lower court erred in excluding evidence that Watkins had sold their horse trailer and forged the bill of sale. The Supreme Court held that the Williamses' pleadings did not assert a counterclaim for forgery and that they did not attempt at any time to amend the pleadings to reflect the forgery claim. Watkins v. Williams, 265 M 306, 877 P2d 19, 51 St. Rep. 489 (1994).

Malicious Prosecution Counterclaim — Allowed: The defendant in a personal injury case filed a counterclaim against the plaintiffs, alleging that their negligence was the cause of the automobile accident involving the parties. Subsequently, in his deposition, the defendant admitted that he had been intoxicated at the time of the accident, that he had been driving negligently, and that the plaintiffs had not been negligent. The plaintiffs sought summary judgment to dismiss the defendant's counterclaims, but prior to the hearing, the defendant voluntarily dismissed his counterclaims. The lower court ruled that the plaintiffs could not seek damages for malicious prosecution because the court believed that the defendant's dismissal of his counterclaims was part of the overall settlement and that therefore there had not been a termination of a proceeding in favor of the plaintiffs, one of the required elements of malicious prosecution claims. The Supreme Court, in a case of first impression, held that a claim resolved by settlement rather than by judgment did constitute a termination in favor of the plaintiffs. O'Fallon v. Farmers Ins. Exch., 260 M 233, 859 P2d 1008, 50 St. Rep. 1022 (1993).

Determination of Real Party in Interest Prior to Ratification, Joinder, or Substitution: Defendants appealed from a judgment denying a motion to allow amendment to pleadings to add their incorporated business entity as a party plaintiff. The Supreme Court remanded the case, holding that before it could be determined if ratification, joinder, or substitution should be allowed, it was necessary to determine whether the corporate entity was a real party in interest on the counterclaim. First Sec. Bank of Glendive v. Gary, 221 M 329, 718 P2d 1345, 43 St. Rep. 852 (1986).

Malicious Prosecution as Counterclaim: In this case, which was remanded because summary judgment was improperly granted, defendant's counterclaim for malicious prosecution was dismissed. An action for malicious prosecution may not be asserted by way of cross-complaint or counterclaim in the original proceeding prior to its termination, since it is essential that the original proceeding has been previously terminated in favor of the party bringing the malicious prosecution action. Thus, a counterclaim purporting to set forth the cause of action in malicious prosecution was properly dismissed as premature. First Trust Co. of Mont. v. McKenna, 188 M 534, 614 P2d 1027 (1980).

Malicious Prosecution Counterclaim: Bollinger v. Jarrett, 146 M 355, 406 P2d 834 (1965), states that malicious prosecution may not be the subject of a counterclaim. That opinion does not explain that such rule applies only when the counterclaim is made during the original proceeding. A counterclaim for malicious prosecution is not premature if the claim is based on a previously terminated proceeding (e.g., administrative proceeding). McGuire v. Armitage, 184 M 407, 603 P2d 253 (1979).

Superseded Contract: A counterclaim must be in existence and matured at the time of the commencement of the action in which it is pleaded. Therefore, where a counterclaim was based upon a contract which had been superseded by a subsequent one, the court properly excluded testimony offered in support of it. Dick v. King, 73 M 456, 236 P 1093 (1925).

Copartnership — No Counterclaim by One Partner: In an action against an individual defendant to recover the price of livestock sold to him, a counterclaim for services rendered to plaintiff by a copartnership of which defendant was a member could not be set up even though the other partner consented thereto. Heinrich v. Kirby, 64 M 1, 208 P 897 (1922).

Sale of Goods — Chattel Mortgage: Where a chattel mortgage has been given to secure the unpaid purchase money for an automobile, but on the same day a new arrangement is made between the seller and purchaser, whereby the purchaser is to run the machine for hire, and the buyer afterward sues the seller for seizing the machine and converting it to his own use, the defendant may counterclaim for the balance of the purchase price. Kinsman v. Stanhope, 50 M 41, 144 P 1083 (1914).

Landlord and Tenant — Conversion: In an action by a landlord for rent due under a written lease and for damages for waste committed on the premises, it is proper for the defendant to interpose a counterclaim for the conversion of personal property placed by him on the premises. Scott v. Waggoner, 48 M 536, 139 P 454 (1914).

Assignee of Contract: A demand against the assignor of a nonnegotiable contract cannot be set off against the assignee, unless due and payable when the assignment was made. Cornish v. Woolverton, 32 M 456, 81 P 4 (1905); Stadler v. First Nat'l Bank, 22 M 190, 56 P 111 (1899).

Foreclosure of Contractors' Lien: Orders on the property owner to laborers, given by the contractor for work done in the removal of buildings, are properly pleaded as counterclaims in an action by the contractor or his assignees to foreclose a lien for the contract price of such removal. Boucher v. Powers, 29 M 342, 74 P 942 (1904).

SUFFICIENCY OF COUNTERCLAIM

Counterclaim for Breach of Warranty Properly Denied — Failure to Prove Prima Facie Case: In an action to collect the purchase price of tires purchased on credit, the defendant (buyer) filed a counterclaim for breach of warranty against the plaintiff (seller). The defendant's counterclaim was properly denied because the defendant had failed to prove a prima facie case. Defendant appealed, alleging that there was no proof of some of the purchases. The Supreme Court said that an open account between the seller and buyer can be proved by evidence that the seller's records showed that the goods were sold, that invoices had been sent to the buyer who failed to object to them, and that the seller's records are accurate. Here the buyer's rebuttal testimony was indefinite, and the credibility of the buyer's witnesses was a question for the District Court. No breach of warranty was proven; only the testimony of the buyer was given and no solid evidence, such as any tires, records of the amount of use of the tires, or maintenance records, was produced. This, with findings of possible alternative causes of the problems with the tires, was a sufficient record to support the finding that breach of warranty was not proved by sufficient evidence. Defendant therefore was liable for the price of the tires. D & K Distrib. v. Ford, 189 M 505, 616 P2d 1097, 37 St. Rep. 1693 (1980).

Requirements for Valid Counterclaim: A counterclaim must contain a statement of such facts as would be sufficient in a complaint, must be in existence and matured at the time of the commencement of the action, and must be pleaded as such. If it is not so pleaded, evidence tending to establish it is inadmissible. Lappin v. Martin, 71 M 233, 228 P 763 (1924).

Counterclaim Must State Cause of Action: Matter in an answer is not a counterclaim, unless it states a cause of action, complete within itself, and tends in some way to diminish or defeat plaintiff's recovery. Hillman v. Luzon Cafe Co., 49 M 180, 142 P 641 (1914).

Defense Distinguished: An answer, in an action of replevin, to the effect that the defendant took possession of the chattels as the assignee of one who had been in possession thereof for a long time, that plaintiff knowingly allowed the defendant to sell the same, and that by reason thereof plaintiff was estopped from maintaining the action, does not state a counterclaim as the same is defined in this section. Babcock v. Maxwell, 21 M 507, 54 P 943 (1898).

Collateral References

Pleading *key* 138, et seq.; Setoff and Counterclaim *key* 9, 29, 34(1) through (3), 41.

71 C.J.S. Pleading §200.

20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff §§3, 4, 104, 105.

Rule 13(c). Counterclaim exceeding opposing claim.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

Use of Damage Judgments to Offset Damages Against Assignor Arising From Breach of Wellhead Purchase Contracts: First Security Bank filed a complaint in which it sought to recover amounts allegedly owed by Northern Montana Gas Company (Northern) to Montana Pacific Oil & Gas Company (MOPOG) based on wellhead purchase contracts that Northern allegedly breached. Northern's answer included defenses under 27-1-502, claiming a right to offset against any recovery obtained by the bank the amount of judgments entered in its favor against First Security Bank's assignor, MOPOG, and defenses under 27-1-503, claiming that its right to offset could not be defeated when MOPOG assigned its claim to the bank and when that claim was ultimately asserted by the Federal Deposit Insurance Corporation (FDIC). The trial court concluded that the FDIC, as the bank's receiver, was entitled to damages and that none of the judgments could be set off against FDIC. On appeal, the Supreme Court held that when read in the context of 27-1-502, "cross-demands" necessarily refers to claims between the parties and that 27-1-502 does not limit setoff to claims arising out of the same transaction, but refers only to counterclaims that could have been set up in the same action. Because at the time that MOPOG assigned its rights to First Security its obligation already existed and because Northern was entitled to assert that obligation as a basis for setoff, pursuant to 27-1-503, Northern's right survived the assignment. The District Court relied on the general rule that in the absence of an express assumption of liability, an assignee is not liable for an assignor's obligation. However, that holding fails to recognize the difference between a counterclaim for affirmative relief and a defense that simply seeks to reduce the plaintiff's recovery dollar-for-dollar based on a defense that could have been asserted against the assignor. Pursuant to Rule 13(b), M.R.Civ.P., and this rule, any claim that Northern had against MOPOG could have been permissibly set up as a counterclaim if MOPOG had sued Northern for breach of the wellhead purchase contracts. Therefore, Northern's right to offset survived the assignment by MOPOG to the bank. Although a setoff requires mutuality, all mutuality requires is that the defendant have a right to assert the claim against the plaintiff or its assignor that forms the basis for setoff. Thus, the Supreme Court affirmed the award of damages to FDIC and reversed the District Court, holding that judgments could not be used to setoff the bank's damage award because pursuant to 27-1-502, Northern had a right to offset those amounts against any claim by MOPOG and pursuant to 27-1-503, the right to offset that amount survived the assignment by MOPOG of its rights to First Security Bank. Fed. Deposit Ins. Corp. v. N. Mont. Gas Co., 274 M 371, 908 P2d 1357, 52 St. Rep. 1276 (1995).

Money Judgment — Claim for Possession: A claim for a money judgment, whether arising out of the transaction set forth in the complaint or not, tended in no way to defeat or diminish the plaintiff's right of recovery of the possession of property wrongfully taken. Osmers v. Furey, 32 M 581, 81 P 345 (1905).

Collateral References

Judgment *key* 207, 253(4); Setoff and Counterclaim *key* 55 through 61.

49 C.J.S. Judgments §§54, 70; 80 C.J.S. Setoff and Counterclaim §§109 through 113.

Rule 13(d). Counterclaim against the state.

Commission Notes

The rule is identical with the Federal Rule, except for subdivisions (d), (h), and (i). Subdivision (d) of the Federal Rule applies to counterclaims against the United States; the proposed subdivision (d) is modeled upon the federal provisions, but with application to the state.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Malicious Prosecution as Counterclaim: In this case, which was remanded because summary judgment was improperly granted, defendant's counterclaim for malicious prosecution was dismissed. An action for malicious prosecution may not be asserted by way of cross-complaint or counterclaim in the original proceeding prior to its termination, since it is essential that the original proceeding has been previously terminated in favor of the party bringing the malicious prosecution action. Thus, a counterclaim purporting to set forth the cause of action in malicious prosecution was properly dismissed as premature. First Trust Co. of Mont. v. McKenna, 188 M 534, 614 P2d 1027 (1980).

Malicious Prosecution Counterclaim: Bollinger v. Jarrett, 146 M 355, 406 P2d 834 (1965) states that malicious prosecution may not be the subject of a counterclaim. That opinion does not explain that such rule applies only when the counterclaim is made during the original proceeding. A counterclaim for malicious prosecution is not premature if the claim is based on a previously terminated proceeding (e.g., administrative proceeding). McGuire v. Armitage, 184 M 407, 603 P2d 253 (1979).

Collateral References

Claim of government against taxpayer (or one in privity with him) which is barred by lapse of time as available to defeat or diminish claim of taxpayer against government, or vice versa. 12 ALR 2d 815.

Right to setoff, counterclaim, or recoupment against the United States. 106 ALR 1241.

Rule 13(e). Counterclaim maturing or acquired after pleading.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Collateral References

Setoff and Counterclaim *key* 24, 40.

80 C.J.S. Setoff and Counterclaim §32.

Rule 13(f). Omitted counterclaim.

Advisory Committee Notes

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TO MAY 1, 1990, AMENDMENT

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Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

No Leave to Amend Granted After Final Judgment: Kincheloes sued the defendants over a royalty interest and were granted summary judgment in District Court, which was reversed on

appeal. Kincheloes then moved to amend their pleading to allege a new theory of recovery, and the motion was denied. The Supreme Court noted that the litigation had gone on for nearly 14 years, that if the motion had been granted, it would mean that there was no finality to the case, and that the plaintiffs cannot now include a theory that they neglected with no good reason to include in their original pleading. Because there was no showing to the District Court as to why the new theory was omitted, the District Court did not abuse its discretion in denying the motion to amend. Stanford v. Rosebud County, 254 M 474, 839 P2d 93, 49 St. Rep. 828 (1992), followed, with regard to failure to obtain leave of court, in Edgewater Townhouse Homeowner's Ass'n v. Holtman, 256 M 182, 845 P2d 1224, 50 St. Rep. 10 (1993).

Rule 13(g). Cross-claim against coparty.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Case Notes

Statute of Limitations on Action for Contribution or Indemnity: A cause of action for contribution or indemnity is distinct from the underlying cause of action, and the time from which the statute of limitations for such a cause of action begins to run is when the underlying claim, judgment, or settlement is paid or discharged. Linder v. Missoula County, 251 M 292, 824 P2d 1004, 49 St. Rep. 26 (1992), citing Schiess v. Bates, 693 P2d 440 (Idaho 1984). See also St. Paul Fire & Marine Co. v. Thompson, 152 M 396, 451 P2d 98 (1969).

Cross-Claim — No Relation Back to Time Complaint Filed: The defendant, Freed, and a party named Egeland were limited partners in a real estate development project. The limited partners had received SID bonds from the city of Cut Bank. Egeland used the bonds to secure his personal trading account with D.A. Davidson. In December 1983, Freed informed D.A. Davidson that Egeland had no authority to make personal use of the bonds. D.A. Davidson responded that it held an interest in the bonds superior to Freed's interest. On January 16, 1985, Freed filed suit against Egeland, and judgment was entered on July 9, 1987, giving all of the limited partnership's interest in the bonds to Freed. On January 22, 1985, Egeland filed a mandamus petition to force the city of Cut Bank to pay interest on the SID bonds. The city answered and petitioned to interplead Freed and D.A. Davidson as parties claiming an interest in the bonds. On March 3, 1987, the District Court issued an order interpleading Freed and D.A. Davidson. On March 16, 1987, Freed filed his responsive pleading, alleged an interest in the bonds superior to any other person, and accused D.A. Davidson of bad faith. The District Court, using December 21, 1983, as the triggering date, applied a 3-year statute of limitations to Freed's bad faith claim and granted D.A. Davidson's motion for summary judgment. Freed argued that his cross-claim related back to the time the complaint was filed, which was within the applicable statute of limitations. The Supreme Court stated that it was adopting the federal rule that a counterclaim, cross-claim, or third-party claim for affirmative relief does not relate back to the date of the original complaint and therefore must comply with the applicable statute of limitations. State ex rel. Egeland v. City Council of Cut Bank, 245 M 484, 803 P2d 609, 47 St. Rep. 2212 (1990).

Motion to Consolidate — Denied: When plaintiff made a valid assignment of his interest in a promissory note and filed a supplemental complaint dropping him as a party plaintiff, the action on the note could not properly be joined with another action to which he was a party. Keller v. Llewellyn, 175 M 164, 573 P2d 166 (1977).

Res Judicata Inapplicable: The Supreme Court dismissed allegations by appellants that respondents should have asserted their cross-claim to property in a federal foreclosure action or be barred by the doctrine of res judicata. It is discretionary with the party whether to assert his claim as a cross-claim or to reserve it for later independent litigation. Whittaker v. Schreiner, 174 M 232, 570 P2d 299 (1977).

Action by Insurer Not Barred by Insured's Failure to File Cross-Claim: Employer's insurer who paid judgment entered against employer and employee in automobile accident case did not lose its right of indemnity against employee by employer's failure to file cross-claim in accident action. St. Paul Fire & Marine Ins. Co. v. Thompson, 152 M 396, 451 P2d 98 (1969).

Cross-Claims Are Not Compulsory: Cross-claims are not compulsory but are discretionary and may be reserved for an independent action. St. Paul Fire & Marine Ins. Co. v. Thompson, 152 M 396, 451 P2d 98 (1969).

Failure to Serve Primary Party — No Jurisdiction of Cross-Claim: District Court did not have jurisdiction and power to adjudicate mechanics' liens (now construction liens) of cross complainants, materialmen, where they failed to serve the principal contractor with process. Greene Plumbing & Heating Co. v. Morris, 144 M 234, 395 P2d 252 (1964).

Mandamus Action — Limitation on Cross-Claim: Interveners in a mandamus action are not entitled to maintain their cross-complaint unless that cross-complaint relates to, or depends upon, the duties asserted by the plaintiff against the defendant public officer. Thus, where the plaintiff seeks by mandamus to require the recorder of marks and brands to record a brand in his name as administrator, whether the interveners are the owners of the brand, the animals bearing the brand, and of the proceeds of the sale of animals so branded presents a question which bears no relation to the duty of the general recorder of marks and brands to issue a certificate to the plaintiff. Benolken v. Miracle, 129 M 495, 289 P2d 953 (1955).

Forcible Entry and Detainer: Section 93-3415, R.C.M. 1947 (superseded by Rule 13(g), M.R.Civ.P.), relating to cross-complaints, was made applicable to proceedings for forcible entry and unlawful detainer by 70-27-109 and 70-27-111. Hutchinson v. Burton, 126 M 279, 247 P2d 987 (1952).

Cross-Complaint — Requisites — Need Not Defeat Complaint: A cross-complaint need not defeat or diminish the relief sought in the action in which it is pleaded, but is sufficient if it relates to the transaction or subject matter thereof, and the relief sought may be distinct from the relief demanded by plaintiff. Jardine Min. Co. v. Bacorn, 113 M 416, 131 P2d 258 (1942).

Foreclosure Action — Subsequent Cross-Claim for Sale of Grain: Cross-complaint can be filed by defendant for price of grain sold after the filing of the complaint in a foreclosure suit. State ex rel. Union Cent. Life Ins. Co. v. District Court, 102 M 371, 58 P2d 491 (1936).

Insufficient Cross-Complaint: A cross-complaint is defective where the pleader runs his affirmative defenses together rather than stating them separately, and where it includes an assigned claim without showing that it arose out of the same transaction on which the complaint is based. Flatt v. Norman, 91 M 543, 11 P2d 798 (1932).

Quiet Title Action — Foreclosure by Cross-Complaint: Defendant in an action by a mortgagor to quiet title may by cross-complaint seek foreclosure of the mortgage held by him on the property. Skillen v. Harris, 85 M 73, 277 P 803 (1929).

After-Acquired Claim Based on Contract: A cross-complaint in an action based on contract is not restricted to a cause or causes of action existing at the time of the commencement of the action. Callender v. Crossfield Oil Synd., 84 M 263, 275 P 273 (1929), overruled on other grounds in Pioneer Eng'r Works v. McConnell, 113 M 392, 130 P2d 685, 132 P2d 160 (1942).

Substance Determines Cross-Complaint: Whether a pleading is a cross-complaint must be determined from its allegations, not from the designation given it by the pleader, i.e., "a further and separate defense". Callender v. Crossfield Oil Synd., 84 M 263, 275 P 273 (1929).

Insufficient Complaint and Counterclaim: In an action for an accounting, it may be that a defendant can, upon pleadings adequate to support a judgment, obtain affirmative relief against a codefendant by filing a pleading in the nature of a counterclaim. This cannot be done where the complaint does not set forth a cause of action, and the defendant's pleading in his own behalf is insufficient to support a judgment. Alywin v. Morley, 41 M 191, 108 P 778 (1910).

Collateral References

Setoff and Counterclaim *key* 42 ½.

80 C.J.S. Setoff and Counterclaim §§66 through 70.

Rule 13(h). Joinder of additional parties.

Advisory Committee's Note to September 29, 1967, Amendment

Source: Fed.R.Civ.P. 13(h), as amended 1966.

Explanation of change: The amendment to Rule 13(h) incorporates by direct reference the revised criteria and procedures of Rule 19, as amended. The amendment also expressly refers to Rule 20 thus correcting an existing inadequacy by calling attention to the fact that a party pleading a counterclaim or a cross-claim may join additional persons when the conditions for permissive joinder of parties under Rule 20 are satisfied. Hereafter, for the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be, and amended Rules 19 and 20 are to be applied in the usual fashion.

Compiler's Comments

Identity With Federal Rule: The amendment referred to in the above advisory committee comment rewrote this rule to conform it to the Federal Rule, which was itself rewritten in 1966. As of May 1, 1990, the rule was still identical to the Federal Rule.

Case Notes

Determination of Real Party in Interest Prior to Ratification, Joinder, or Substitution: Defendants appealed from a judgment denying a motion to allow amendment to pleadings to add

their incorporated business entity as a party plaintiff. The Supreme Court remanded the case, holding that before it could be determined if ratification, joinder, or substitution should be allowed, it was necessary to determine whether the corporate entity was a real party in interest on the counterclaim. First Sec. Bank of Glendive v. Gary, 221 M 329, 718 P2d 1345, 43 St. Rep. 852 (1986).

Collateral References

Defendant's right under Rule 13(h) to bring in new parties as cross-defendants to his counterclaim or cross-claim in action for personal injury, property damage, or death. 46 ALR 2d 1253.

Rule 13(i). Separate trials — separate judgment.

Commission Notes

The rule is identical with the Federal Rule, except for subdivisions (d), (h) and (i). Also, subdivision (i) omits a clause, "when the court has jurisdiction to do so," which would seem to apply only to proceedings in federal district courts.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Rule 14. Third-party practice

Case Notes

No Right to Third-Party Indemnity or Contribution in RICO Action: In a Racketeer Influenced and Corrupt Organizations Act (RICO) action there is no right to indemnification or contribution from a third party. Jacobson v. W. Mont. Prod. Credit Ass'n, 643 F. Supp. 391, 43 St. Rep. 1598 (D.C. Mont. 1986), citing Seminole Elec. Co-op, Inc. v. Anthony Tanner, No. 85-1286-Civ-T-13 (M.D. Fla. 1986).

Law Review Articles

Impleader in Montana After Duchesneau v. Silver Bow County, Strong, 34 Mont. L. Rev. 320 (1973).

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 14(a). When defendant may bring in third party.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

The amendment conforms the rule closely to amendments of the Federal Rule which have not previously been adopted by Montana. The 30 day period provided in the second sentence has been increased from 10 days as contained in the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, after several amendments to both the State and Federal Rule, the rules are substantially the same except as indicated in the advisory committee's note and the following exceptions: (1) the Federal Rule does not contain the clause contained in the next to the last sentence of the Montana Rule providing for direction of final judgment on the original claim alone or the third-party claim alone, and (2) the Federal Rule contains a final sentence pertaining to admiralty that does not appear in the State Rule.

Amendments: The amendment of October 9, 1984, in first sentence substituted "defending party" for "defendant", after "may cause" deleted "to be served", after "summons and complaint" inserted "to be served", and substituted "liable to him" for "liable to such third-party plaintiff"; inserted second and third sentences; in fourth sentence substituted "person served with the summons and third-party complaint" for "person so served"; and in eighth sentence after "move" substituted "to strike the third-party claim, or for its severance or separate trial" for "for severance, separate trial, or dismissal of the third-party claim".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Liability of Properly Impleaded Insurance Companies Not to Be Relitigated on Subrogation Theory: While making a delivery for his employer, Roach and Smith Distributors, Guiberson parked a delivery truck outside the Warm Springs store, leaving the keys in the ignition. Tintinger, a patient at Warm Springs state hospital, and another patient got in the truck and began to drive it away. Guiberson jumped in the truck and unsuccessfully attempted to persuade Tintinger to stop the truck. Eventually the truck overturned and Guiberson was injured. Guiberson sued Hartford Casualty Insurance, his personal insurer, under an uninsured motorist provision. Hartford joined, as third-party defendants, State Farm, Roach and Smith Distributors' insurer, and the state of Montana. State Farm's policy also contained uninsured motorist coverage. The jury returned a verdict in favor of Guiberson for $600,000, finding Tintinger and the state equally responsible for Guiberson's injuries. The court apportioned the $600,000 equally between Tintinger and the state. Based on the insurance policies, the court further apportioned the recovery of payments for the liabilities of Tintinger between Hartford and State Farm. On appeal, Hartford and State Farm claimed that they should be subrogated to Guiberson's rights against the real party responsible for the injuries, that is, the state, whose failure to supervise Tintinger was the actual cause of Guiberson's injuries. The Supreme Court rejected this argument, ruling that Rule 14, M.R.Civ.P., permits impleading of third parties before trial; it does not substitute for a jury determination of liability. The insurers are subrogated only to the rights of Guiberson against Tintinger, for his personal liability as determined by the jury. Guiberson v. Hartford Cas. Ins. Co., 217 M 279, 704 P2d 68, 42 St. Rep. 1196 (1985).

Injunction Against Interference With Use of River — Severance of Property Owner's Third-Party Complaint: In an action seeking an injunction against interference with recreational use of the Beaverhead River, the District Court properly severed defendant property owner's third-party complaint. It was filed only a few days before trial on the primary action and was sufficiently different from the issues in the primary action to warrant severance. Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984).

Intervention — Third-Party Practice: Plaintiff agreed to lend Prospect Associates, Inc. (Prospect) money to finance construction of a subdivision. As part of the security for the loan, Prospect was required to obtain a letter of credit with plaintiff as beneficiary. Prospect defaulted on the promissory note evidencing the loan. Defendant refused payment on the letter of credit, contending it was a guaranty on which it was not primarily liable. The District Court granted summary judgment to plaintiff, and defendant appealed. Prospect contended the District Court erred in denying its motion to intervene in the letter of credit action. The Supreme Court found that defendant's liability on the letter of credit arose without regard to the underlying instruments and therefore Prospect had no claim or defense that would have a common question of law or fact to the letter of credit suit. The letter of credit action could not be consolidated with the underlying action between Prospect and plaintiff for the same reason. Defendant, however, filed a third-party complaint against Prospect for indemnity on plaintiff's claim against it. The court held that Prospect could assert its claims against plaintiff as a third-party defendant in the underlying indemnity action following remand. Sherwood & Roberts, Inc. v. First Sec. Bank, 209 M 402, 682 P2d 149, 41 St. Rep. 787 (1984).

Change of Venue — Defendant's Personal Privilege in Main Action: Plaintiff (Novco) brought an action against the Graingers (defendants) on two counts, for payment for automobile parts delivered to Sunset Carburetor and Electric, Inc., and against Harold Grainger individually to collect on a bad check drawn on the account of Sunset Automotive, Inc., upon which Novco alleged Grainger was personally liable. The Graingers defaulted, which default was subsequently set aside, and they filed an answer, a counterclaim, and a third-party complaint. The third-party complaint alleged that Sunset Carburetor and Electric, Inc., was the real party in interest and liable to Novco. Sunset moved for a change of venue, which the District Court denied. The Montana Rules of Civil Procedure do not permit a third-party plaintiff to implead as a third-party defendant a party who is not a party to the original action and who is or may be liable to the original plaintiff. Rule 14(a), M.R.Civ.P., only permits impleader of a party who "is or may be liable" to the third-party plaintiff. The Supreme Court followed the federal court rule and held that the privilege of objecting to venue in the main action is a personal privilege belonging to the defendant in the main action alone and not to a third-party defendant. Novco v. Grainger, 199 M 291, 649 P2d 445, 39 St. Rep. 1367 (1982).

Responsive Pleading Including Cross-Complaint, Counterclaim, and Third-Party Complaints — Motion to Strike Properly Granted: The plaintiff filed an action on four

promissory notes on June 9, 1978, and defendant filed an amended answer on November 10, 1980, more than 20 days after it was served. The District Court did not err in granting the plaintiff's motion to strike the amended answer. After a responsive pleading is served or 20 days after an original pleading is served, a party may amend his pleading only by leave of court or written consent of the adverse party. Here, neither was obtained, and because the cross-complaint, counterclaim, and third-party claim were not severed from the amended answer, they were properly treated as part of that answer and properly dismissed along with the amended answer. First Nat'l Bank & Trust of Wibaux v. Sec. Bank, 199 M 168, 648 P2d 1166, 39 St. Rep. 1270 (1982).

Time of Impleader of Uninsured Motorist — Contingent Liability: In an action by an insured against her insurance company to recover damages under uninsured motorist coverage, the trial court erred in granting the uninsured motorist's motion to dismiss the insurance company's third-party complaint. Rule 14(a) expressly grants a defendant the procedural right to bring into a lawsuit as a third-party defendant anyone who "may be" liable to him. This can be done under the principle of subrogation even if the liability of the third-party defendant is contingent upon establishing the liability of the original defendant. St. Farm Mut. Auto. Ins. Co. v. Solem, 191 M 156, 622 P2d 682, 38 St. Rep. 124 (1981).

Multiple Claims and Parties — Certification Required for Appeal Because of Impleader of Third Party: Where the plaintiff corporation brought an action against the defendant insurance company to collect an account and the defendant impleaded a third-party defendant, a final judgment against the defendant insurance company was interlocutory in nature and could not be appealed absent an express determination by the court that there was no just reason for delay. Rule 14(a), M.R.Civ.P., expressly provides that an entry of judgment upon either the original claim or the third-party claim must comply with Rule 54(b), M.R.Civ.P. Because the court did not make the express determination required, the appeal is premature. Pioneer Concrete & Fuel, Inc. v. Apex Constr., Inc., 190 M 229, 620 P2d 854, 37 St. Rep. 2023 (1980).

Parties to Contract — Effect of Property Disposition: Because the obligations of a contract are limited to the contracting parties, plaintiff properly sued defendant for recovery on two retail installment contracts executed by defendant, even though the object of the contracts became part of a property disposition to defendant's wife in a divorce decree which transferred the indebtedness along with the subject property. Gambles v. Perdue, 175 M 112, 572 P2d 1241 (1977).

"Cross-Claim" Against Nonparties Not Permitted: Rules of Civil Procedure do not permit or even contemplate a cross-claim against a person or entity which is not a party. Such a "cross-claim" cannot be converted into a third-party claim under this rule where neither allegations nor relief sought could be stretched to state that nonparties might be liable to defendant for all or part of plaintiff's claim against him. Campanella v. Bouma, 164 M 214, 520 P2d 1073 (1974).

Third-Party Defendant — Negligence — When Dismissal Proper: Court erred in dismissing seller and manufacturer of truck as party defendants when many issues of material fact remained to be determined. Duchesneau v. Mack Trucks, 158 M 369, 492 P2d 926 (1971).

Separate Trial of Third-Party Action: Third-party claim initiated by hospital, which was being sued by minor patient burned by defective television switch while in hospital, against lessor of television equipment should have been separated from main action between hospital and patient and tried separately. Crosby v. Billings Deaconess Hosp., 149 M 314, 426 P2d 217 (1967).

Pending State Action — Effect on Federal Action: Federal court dismissed declaratory judgment action because third-party complaint was pending in state action. W. Cas. & Sur. Co. v. Pinson, 255 F. Supp. 624 (D.C. Mont. 1966).

Liberal Joinder — Effect Upon: The provisions of this rule adequately protect defendants and thus allow a liberal use of joinder guided by the discretion of trial courts. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965).

Use of Cross-Complaint — Not as Third-Party Complaint: A cross-complaint may not be used for the sole purpose of bringing into the case additional parties, or securing substitution of parties, which is the province of interpleader. It is to be used when a defendant is entitled to some relief against the plaintiff in respect to the subject matter of the action not obtainable by answer or counterclaim, or if plaintiff's judgment may determine, as between the defendants their respective rights to the subject matter of the action, controversial between them. The basis of a cross-complaint must be a demand upon which there may be a recovery. State ex rel. Bedord v. District Court, 112 M 192, 114 P2d 265 (1941).

Collateral References

Parties *key* 49 through 56.

67A C.J.S. Parties §§88 through 111.

59 Am. Jur. 2d Parties §§110 through 123.

What law governs right to contribution or indemnity between tortfeasors. 95 ALR 2d 1096.

Right of defendant in action for personal injury or death to bring in a joint tortfeasor. 11 ALR 2d 228, §4 superseded by 95 ALR 2d 1096; 132 ALR 1424; 78 ALR 580.

Right of defendant to bring in third person asserted to be solely liable to plaintiff. 168 ALR 600.

Rule 14(b). When plaintiff may bring in third party.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Rule 15. Amended and supplemental pleadings

Rule 15(a). Amendments.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 643
Right to Amendment of Course or Upon Leave of Court 647
Timeliness of Amendment 649
Mistake Corrected by Amendment 652
Waiver of Objection to Amendment 653
Service of Amended Pleading 653
Response to Amended Pleading 653
Leave to Amend Denied 654

GENERAL

Inadvertent Use of Previous Cause Number on New Complaint Considered Technical, Nonprejudicial Defect: One day before expiration of the statute of limitations, the Lundquists filed a pro se complaint against Shook, Hamilton, and McBeth for fraudulent transfer of property, but in preparing the complaint, the Lundquists used a template from a prior fraudulent transfer case involving Shook, Hamilton, and Pederson and included the same cause number from the prior case. The Lundquists' former counsel notified the District Court that he was not representing the Lundquists in the case involving McBeth. One day prior to service of process on McBeth, the District Court ordered the Clerk of the District Court to withdraw the Lundquists' complaint on grounds that the complaint was filed in the same cause of action previously pending, and the Lundquists did not obtain the court's consent to amend prior pleadings and have their attorney of record sign the complaint against McBeth. The Lundquists then moved to have the court assign a new cause number to the complaint and allow amendment of the complaint to retain the original filing date. The court denied the motion, holding that if a new complaint was to be filed and a new cause number assigned, it would be considered filed as of the date on which it was presented for filing and not the date on which it was originally attempted to be filed. Thus, a new complaint was filed with a new cause number and filing date,

but the new complaint was filed after expiration of the statute of limitations for fraudulent conveyance actions, so the District Court granted McBeth's dismissal motion because the complaint was not timely filed. The Lundquists appealed, and the Supreme Court reversed. In filing the new complaint, the Lundquists had notified the court that they intended to proceed against McBeth in an action that was independent of the transfer litigated in the previous cause, and their use of the cause number from the previous action was inadvertent and a technical rather than fundamental defect. The Lundquists did not need the District Court's permission to file a new complaint, nor did the new pro se complaint require their attorney's signature. Because the Lundquists named McBeth in the complaint, filed the complaint prior to the expiration of the fraudulent transfer statute of limitations, and served McBeth with a copy of the complaint, McBeth was not prejudiced by the technical defect and the District Court should not have ordered the complaint withdrawn. Lundquist v. McBeth, 2001 MT 311, 308 M 1, 38 P3d 831 (2001).

Error in Allowing Amendment of Pleadings in Parental Rights Termination Case to Include New Theory — Lack of Notice Violative of Due Process Rights: During a parental rights termination hearing, the District Court allowed the state to amend the pleadings to include a new theory that the mother had abandoned her children. The mother's counsel objected for lack of notice. The state asserted that although abandonment may not have been included in the original pleadings as a separate ground for termination, there were facts in the original petition that supported a claim for abandonment and that the mother was thus on notice that the state intended to present evidence that would support a theory of abandonment. The Supreme Court disagreed. The fundamental liberty interest associated with parental rights must be protected with fundamentally fair procedures, including the due process requirement that a parent receive notice and be allowed the opportunity to be heard. Generally, a District Court cannot grant leave to amend the pleadings arbitrarily or perfunctorily, and although there are cases when the Supreme Court will allow a party to amend pleadings in order for a case to proceed efficiently on the merits, this was not one of those cases. The termination petition as a whole did not provide the mother with sufficient notice on the charge of abandonment. Although some of the facts may have been applicable to abandonment, the mother should not have been required to glean from those facts which claims the state could bring. Rather, the state was required to articulate the claims that it expected to raise, and allowing amendment of the pleadings during the hearing to include a theory of abandonment was reversible error. In re T.C. & W.C., 2001 MT 264, 307 M 244, 37 P3d 70 (2001).

Dismissal of Amended Petition for Postconviction Relief — Failure to Address New Claims in Order Harmless Error — Postconviction Relief Claims Civil in Nature: On remand, petitioner amended the petition for postconviction relief, adding claims 16-18. By remanding to the District Court to allow petitioner to add proposed claims 16-18, the Supreme Court necessarily required the District Court to address the merits of those claims. However, the District Court's failure to address the new claims in its Findings of Fact, Conclusions of Law and Order was harmless error. Petitioner's newly discovered evidence claims, Brady claim, and cumulative error claims were without merit. Postconviction relief proceedings are collateral attacks that are civil in nature and independent of the underlying criminal cause. If there is no showing of substantial injustice the error is harmless. Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000).

Pleadings Amended Without Prior Notice to Respondents — Remand Warranted: Petitioners sought a writ of mandate to compel compliance with restrictive covenants regarding respondents' residence and landscaping. Respondents presented no evidence at a hearing on the petition, but argued that a writ of mandate was not the appropriate remedy, based on the facts alleged and the private nature of the dispute. The District Court invited the parties to file briefs in connection with the question of the appropriateness of the writ, then subsequently signed its final judgment ordering that the pleadings be amended to state a claim for injunctive relief instead and requiring respondents to comply with the restrictive covenants. On appeal, the Supreme Court held that the District Court erred by forming an entirely new and dissimilar theory as a basis for its judgment without prior notice to respondents. The case was remanded for a hearing after proper notice to respondents regarding the nature of the relief being sought. Country Estates Homeowners Ass'n v. McMillan, 269 M 131, 887 P2d 249, 51 St. Rep. 1494 (1994), citing Shaw v. Kalispell, 135 M 284, 340 P2d 523 (1959), McJunkin v. Kaufman, 229 M 432, 748 P2d 910 (1987), and In re Custody of C.J.K., 258 M 525, 855 P2d 90 (1993).

Failure to Amend Complaint — Dismissal Proper: Kudloff brought an action against the city of Billings, alleging that the city had wrongfully annexed his property. Two years later, the city moved to have the wrongful annexation claim dismissed because Kudloff no longer owned the

property and was without standing to pursue the claim. Kudloff argued that he had sold the property in order to mitigate damages and was still entitled to recover for losses he alleged were due to the forced sale of his property. The Supreme Court ruled that the lower court had properly dismissed the claim because Kudloff had not amended his complaint and the purpose of a complaint and subsequent amendments is to provide adequate notice to the defendant of the nature of the action that must be defended against. Kudloff v. Billings, 260 M 371, 860 P2d 140, 50 St. Rep. 1108 (1993).

Reversal of Mislabeled Award — Validity Not Raised in Pleadings: The Supreme Court reversed the District Court award of $3,768.66 in damages related to freight adjustment, which the District Court had mistakenly labeled as invalid trailer charges. The award was improper because under the contract, plaintiff was responsible for the adjustments and because the validity of the charges was not properly raised in the initial or amended pleadings. Koontz v. Sky Country, Inc., 244 M 192, 795 P2d 980, 47 St. Rep. 1490 (1990).

Theories of Recovery Limited Through Instructions Following Filing of Amended Complaint — No Prejudice: An original complaint alleged theories of bad faith, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, and fraud. Three weeks prior to trial, plaintiff filed an amended complaint that defendant asserted changed the theories to equitable estoppel, fraud, and bad faith. Prior to settling of instructions, the District Court, on its own motion, dismissed plaintiff's claims of equitable estoppel, fraud, bad faith, and punitive damages and allowed the case to go forward on theories of constructive fraud and negligent misrepresentation. The action by the court in limiting the theories of recovery through instructions had the effect of removing much of defendant's claimed prejudice through the allowance of the amended complaint. Phil-Co Feeds, Inc. v. First Nat'l Bank in Havre, 238 M 414, 777 P2d 1306, 46 St. Rep. 1380 (1989).

Plaintiff Allowed to Amend Prayer in Complaint: Under Rule 15(a), M.R.Civ.P. (Title 25, ch. 20), the plaintiff is allowed to amend the prayer in her complaint regarding punitive and compensatory damages. Under the provisions of 25-4-311 through 25-4-313, the defendant is entitled to have the amendments to the prayer include the dollar amount of special and general damages sought, including punitive damages, or in lieu of the amounts, a statement of damages under 25-4-312. In any amendment the dollar amount sought may not be open-ended by reference to a proportion of the financial condition or net worth of the defendant. The amendment, in addition to stating the dollar amounts, may include such language as "other and further relief to which the plaintiff may be entitled". State ex rel. Fitzgerald v. District Court, 217 M 106, 703 P2d 148, 42 St. Rep. 1061 (1985).

Amendment Adding Theories and Increasing Damages Allowed: A complaint was filed in 1971 alleging negligence and lease violations by the defendant, resulting in damages to the plaintiff's land. In 1980, the plaintiff moved to amend the complaint to include further damages. The motion was denied because the amended complaint changed the theory of the case from two theories to seven and asked for damages of $750,000, an increase from $15,000 in the original complaint. On appeal, the court said that a party should be allowed to amend the complaint unless the moving party is guilty of undue delay, bad faith, or dilatory motive, none of which are present here. The court allowed the complaint to be amended. Lien v. Murphy Corp., 201 M 488, 656 P2d 804, 39 St. Rep. 2252 (1982).

Responsive Pleading Including Cross-Complaint, Counterclaim, and Third-Party Complaints — Motion to Strike Properly Granted: The plaintiff filed an action on four promissory notes on June 9, 1978, and defendant filed an amended answer on November 10, 1980, more than 20 days after it was served. The District Court did not err in granting the plaintiff's motion to strike the amended answer. After a responsive pleading is served or 20 days after an original pleading is served, a party may amend his pleading only by leave of court or written consent of the adverse party. Here, neither was obtained, and because the cross-complaint, counterclaim, and third-party claim were not severed from the amended answer, they were properly treated as part of that answer and properly dismissed along with the amended answer. First Nat'l Bank & Trust of Wibaux v. Sec. Bank, 199 M 168, 648 P2d 1166, 39 St. Rep. 1270 (1982).

No Substantive Changes in Amended Complaint — Dismissal Properly Granted: The court properly dismissed an amended complaint which was essentially the same as the original complaint filed before another District Judge. Plaintiff merely added sweeping alternative conclusions of law to his original complaint and claimed that they were substantive changes. Sovey v. Chouteau County District Hosp., 173 M 392, 567 P2d 941 (1977).

Service Upon Counsel of Record: Whether or not counsel agreed to accept service for his clients was immaterial. Service of an amended complaint is required to be made on the attorney.

A reasonable time must be given for responsive pleadings before default, however. State ex rel. Leavitt v. District Court, 172 M 12, 560 P2d 517 (1977).

Amendment of Answer Properly Permitted: No prejudice was shown in permitting defendant to amend answer after notice had been given plaintiff of change in legal theories. Lahman v. Rocky Mtn. Phosphate Co., 161 M 28, 504 P2d 271 (1972).

Power to Grant Leave to Amend — Limited: Although judges have broad discretionary power to grant leave to amend the pleadings and granting leave is the rule rather than the exception, that power may be limited by a decision of the Supreme Court upon a former appeal of the same cause. St. Highway Comm'n v. Schmidt, 148 M 316, 420 P2d 153 (1966).

Amendment After Appeal Dismissing Pleadings: A party may not amend pleadings when appellate court affirmed their dismissal unless the appellate court permits amendment. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

"Responsive Pleading" Defined: A motion to dismiss for failure to state a claim upon which relief can be granted is not a responsive pleading within this rule. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

Striking of Amended Pleading — Reinstatement of Original Pleading: Even though an amended pleading ordinarily renders the original pleading functus officio, the original pleading is reinstated if the amended pleading is stricken. Monarch Lumber Co. v. Haggard, 139 M 105, 360 P2d 794 (1961).

Continuance Denied After Amendment — Plaintiff Not Prejudiced: Where defendant, during trial, was permitted to amend his answer on motion supported by affidavits, over plaintiff's oral objections, but not opposed by counteraffidavits or controverted as to facts, the court cannot be put in error for allowing the amendment, which was not prejudicial to plaintiff, or for failing to grant a continuance, which plaintiff did not seek but waived by proceeding without objection. Walsh v. Kennedy, 115 M 551, 147 P2d 425 (1944).

Amendment of Estate Claim — Relation Back: A claim against an estate, upon being rejected, may be amended if claimant acts before the time has elapsed in which claims may be presented, or even where the time for amendment of pleadings or proceedings has elapsed, where the amendment does not change the essential grounds of recovery or increase the amount, but supplies elements necessary to express its full merits. In this event it relates back to the original presentation, and when done after the time has passed for presentation, a further rejection of the claim is neither necessary nor proper. State ex rel. Steinfort v. District Court, 111 M 216, 107 P2d 890 (1940).

Levy of Attachment — Substitution of Parties: Where an attachment had been levied in an action brought by plaintiff as trustee, the fact that he thereafter petitioned for leave to amend his complaint by substituting himself as owner of the cause of action would not affect the continuing force of the levy; the rule is that such an amendment may be allowed without affecting the attachment so long as it will not change the cause of action. N. Mont. Ass'n of Credit Men v. Hauge, 111 M 56, 105 P2d 1102 (1940).

Timely Motions to Be Granted: The rule as to amendments of pleadings proposed at an opportune time is to allow and the exception to deny them. N. Mont. Ass'n of Credit Men v. Hauge, 111 M 56, 105 P2d 1102 (1940).

Interpleader Petition — Amendment by Affidavit: The District Court, in an action between banks to recover on a cashier's check issued by defendant, in which the latter petitioned for an order requiring conflicting claimants to interplead, properly allowed amendment of the petition by the filing of an affidavit of one of the claimants. State ex rel. St. Bank of Townsend v. District Court, 94 M 551, 25 P2d 396 (1933).

Motion to Strike — Challenge of Amendment Without Leave: The only method of determining whether an amended pleading has been improperly filed, i.e., filed without leave of court when such leave is necessary, is by motion to strike. Paramount Publix Corp. v. Boucher, 93 M 340, 19 P2d 223 (1933).

Probate Proceedings: Section 93-3905, R.C.M. 1947 (superseded by Rule 15(a), M.R.Civ.P.), providing for allowance of amendments to pleadings, had application to probate proceedings. State ex rel. Paramount Publix Corp. v. District Court, 90 M 281, 1 P2d 335 (1931); State ex rel. Hahn v. District Court, 83 M 400, 272 P 525 (1928).

Liberal Allowance of Amendment: The matter of permitting amendments of pleadings lies within the sound discretion of the District Court, and the rule is to allow and the exception to deny them. Fowlis v. Heinecke, 87 M 117, 287 P 169 (1930).

Amendment to Relief Sought: The filing of an amended and supplemental complaint in one pleading is permissible and the relief asked therein could be different from that prayed in the original complaint. Nat'l Bank of Mont. v. Bingham, 83 M 21, 269 P 162 (1928).

Lack of Terms on Leave to Amend Not Abuse of Discretion: Section 93-3905, R.C.M. 1947 (superseded by Rule 15(a), M.R.Civ.P.), providing that the trial court may allow an amendment of any pleading upon such terms as may be just, did not under all circumstances require the imposition of terms as a condition to granting leave, the matter being left to the discretion of the court. Where it did not appear that the application to amend was untimely, or that the adversary was placed at any disadvantage or incurred any expense by reason of the amendment, the action of the court in granting leave without imposing terms was not an abuse of discretion. Wandel v. Wandel, 76 M 160, 248 P 864 (1926).

Attachment — Amendment of Affidavit Properly Allowed: Where the affidavit for a Writ of Attachment originally recited that the debt sued on had not been secured, the court properly permitted the affiant to amend to the effect that while the debt had originally been secured, the security had become valueless without any fault of his, and refusal to dissolve the attachment was proper. Hetrick v. Renwald, 73 M 426, 236 P 1089 (1925).

Motion Pending at Time of Amendment: Permission to amend the complaint pending determination of a motion to discharge an attachment procured in the action was proper. Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 181 P 332 (1919); Muth v. Erwin, 14 M 227, 36 P 43 (1894).

Amendment of Cross-Complaint: A defendant who demands relief against a codefendant must do so before the issues between him and the plaintiff have been made up. He cannot do it afterward by amended answer without first obtaining leave of court. Meredith v. Roman, 49 M 204, 141 P 643 (1914).

Delay in Amended Answer — Unauthorized Amendment: Delay in filing an amended answer, though entirely excusable, does not justify a change of the issues without permission of the court. Meredith v. Roman, 49 M 204, 141 P 643 (1914).

Direction of Amendment Sua Sponte: In proper cases the court may, even on its own motion, direct an amendment if in its opinion a nonsuit or mistrial may be avoided. De Celles v. Casey, 48 M 568, 139 P 586 (1914).

Original Pleading Superseded — Default Judgment Improper: Where each of two defendants has been served, but before the time for appearance has expired and before any appearance has been made by either an amended complaint is filed and served upon one of them only, a default judgment cannot be properly entered against the one not served. Ben Kress Nursery Co. v. Oreg. Nursery Co., 45 M 494, 124 P 475 (1912), distinguished in Price v. Skylstead, 69 M 453, 222 P 1059 (1924), and Monarch Lumber Co. v. Haggard, 139 M 105, 360 P2d 794 (1961).

Insufficient Pleading — Amendment Allowed: A complaint may be amended, even though it fails to state facts sufficient to constitute a cause of action. Such a pleading is not a mere nullity, but is something which may be amended. Clark v. Oreg. Short Line R.R., 38 M 177, 99 P 298 (1908).

Amendment Granted — Continuance Properly Denied: It was within the court's discretion to permit an amendment to a complaint after the cause had been called for trial, and to deny a motion for postponement, where it did not appear that movant was surprised by the presentation of an issue which he was not prepared to meet, or that he did not meet it with all the evidence available in any event. Dorais v. Doll, 33 M 314, 83 P 884 (1905), followed in Ward v. Vibrasonic Laboratories, Inc., 236 M 314, 769 P2d 1229, 46 St. Rep. 387 (1989).

Substitution of Parties Allowed — Lack of Prejudice: Where it appeared from an application for certiorari that the application was not made by the one beneficially interested, but by another on his behalf, and the defendant had not been misled or jeopardized by reason of the error, an amendment substituting the real party in interest as plaintiff should be allowed. State ex rel. Allen v. Napton, 24 M 450, 62 P 686 (1900).

Amended Pleading to Be Served: A pleading is amended by filing and serving the same as amended. Holter Hardware Co. v. Ontario Min. Co., 24 M 184, 61 P 3 (1900).

Attachment — Amendment Not Affecting Substantial Rights of the Parties: It is not error for the trial court to permit an attachment plaintiff to amend his complaint and affidavit on attachment, without an affidavit showing ground therefor, and pending a motion to dissolve, where the amendment does not affect the substantial rights of the parties. Muth v. Erwin, 14 M 227, 36 P 43 (1894). See also Union Bank & Trust Co. v. Himmelbauer, 56 M 82, 181 P 332 (1919).

RIGHT TO AMENDMENT OF COURSE
OR UPON LEAVE OF COURT

Right to Amend Pleadings Improperly Denied — Failure of District Court to Follow Scheduling Order: Defendants purchased lumber from plaintiff's retail lumber business. When payment was not received within 30 days, plaintiff sent a bill requesting payment in full and

adding interest on the account at 18% a year. The District Court issued a scheduling order requiring that all amendments to the pleadings be filed by October 25, 1999, and that all motions for summary judgment be filed by February 4, 2000. Plaintiff moved for summary judgment on January 3, 2001, and the court set a hearing for February 7, 2001. At the hearing, defendants sought to amend the pleadings to add a claim of usury. The court denied defendants' motion to amend and granted plaintiff's motion for summary judgment. Defendants appealed, asserting that the court erred in refusing to amend the pleadings. The Supreme Court agreed. Unless the moving party is guilty of undue delay, bad faith, or dilatory motive, leave to amend should be freely given. Here, the District Court abused its discretion when it neglected to follow its own scheduling order by permitting plaintiff to move for summary judgment 11 months after the scheduling date, while at the same time refusing to grant a similarly untimely motion by defendants to amend the pleadings prior to completion of discovery and the setting of a trial date. Because the case was reversed on other grounds, the Supreme Court directed that defendants be allowed to amend the pleadings to add the usury claim on remand. Aldrich & Co. v. Ellis, 2002 MT 177, 311 M 1, 52 P3d 388 (2002).

Leave of Court Required but Not Obtained — Failure to Consider Second Amended Complaint Held Not Error: After the Shieldses had already amended their section 1983 complaint once, they again filed an Amendment to Complaint. Earlier on the same day, the District Court filed its order dismissing the complaint. The Supreme Court held that since the Shieldses had already filed one amended complaint, they were required by this rule to obtain leave of the court for filing the Amendment to Complaint, which they failed to do. Because leave of the court was not obtained, the Supreme Court held that the District Court did not err in ignoring the Shieldses' second amended complaint. Shields v. Helena School District No. 1, 284 M 138, 943 P2d 999, 54 St. Rep. 815 (1997).

Failure to Amend Despite Opportunity to Do So: Third-party plaintiffs contended that the District Court abused its discretion by depriving the party of its opportunity to amend its complaint. However, the record showed that the party had ample, reasonable opportunities to amend the complaint both before and after hearing, but failed to do so. The assertion of abuse of discretion was therefore without merit. C. Haydon Ltd. v. Mont. Min. Properties, Inc., 262 M 321, 864 P2d 1253, 50 St. Rep. 1577 (1993).

Failure to Answer Motion to Strike Amended Complaint Following Extension — Leave to Amend Properly Denied: The District Court, despite defendant's objections, accommodated plaintiff by extending the time in which he could amend his complaint. Having granted the extension, the court did not abuse its discretion in denying further extensions or in denying leave to amend after plaintiff failed to file an answer to defendant's motion to strike the complaint. Gursky v. Parkside Professional Village, 258 M 148, 852 P2d 569, 50 St. Rep. 470 (1993).

Amendment to Assert New Information — Effect of Impeachment of Plaintiff's Witness by New Information: Cattle company requested leave to amend its complaint because it had new information on damages. The extent to which the new information would impeach the deposition of its principal was relevant to principal's credibility as a witness but should not have been used as one of two reasons for denying the amendment, especially because granting the amendment would not have harmed defendant. Denial of amendment on that ground and because the lower court thought it untimely was an abuse of discretion. The error was not harmless because cattle company was precluded from asserting a cause of action based on the alleged damage the amendment sought to claim. Hobble-Diamond Cattle Co. v. Triangle Irrigation Co., 249 M 322, 815 P2d 1153, 48 St. Rep. 764 (1991). See also Stundal v. Stundal, 2000 MT 21, 298 M 141, 995 P2d 420, 57 St. Rep. 108 (2000).

Test for Leave to Amend: Leave to amend is properly denied when the amendment is futile or legally insufficient to support the requested relief, but it is an abuse of discretion to deny leave to amend when the amendment should be allowed in furtherance of justice or when it cannot be said that the pleader can develop no set of facts under its proposed amendment that would entitle the pleader to the relief sought. The merits of a proposed amendment should usually not be considered unless the claim is frivolous, meritless, or futile. Leave to amend to correct a mistake should be freely given if the amendment will not harmfully mislead defendant. Hobble-Diamond Cattle Co. v. Triangle Irrigation Co., 249 M 322, 815 P2d 1153, 48 St. Rep. 764 (1991), followed in Hickey v. Baker School District No. 12, 2002 MT 322, 313 M 162, 60 P3d 966 (2002). See also Stundal v. Stundal, 2000 MT 21, 298 M 141, 995 P2d 420, 57 St. Rep. 108 (2000).

No Absolute Right to Jury Trial: Nothing in the Uniform Declaratory Judgments Act gives an absolute right to a trial by jury. It is a recognized general rule of law that the nature of the issues determines the right to a jury trial. If the issues are strictly equitable, there is no right to a jury trial. Thus, it was not error for the District Court to deny jury trial in an action originally filed as

a declaratory judgment but amended to enjoin interference with recreational use of the Beaverhead River. Furthermore, the court did not err in granting leave to file an amended complaint since the matter was clearly injunctive in nature and the issues equitable since inception. Mont. Coalition for Stream Access, Inc. v. Hildreth, 211 M 29, 684 P2d 1088, 41 St. Rep. 1192 (1984).

One Amendment of Course Per Pleading: This rule does not allow one amendment as a matter of course per defendant. Rather it allows one amendment as a matter of course per pleading. Any other interpretation would violate the purposes of the rule, to prevent poor pleading and to discourage harassment of the defendant. Haugen v. Warner, 204 M 508, 665 P2d 1132, 40 St. Rep. 1036 (1983).

Cash Sanction Improperly Imposed as Condition to Amending Complaint: The District Court has authority under Rule 15(a), M.R.Civ.P., to impose terms or conditions upon granting a motion for leave to amend a complaint upon plaintiffs. This is an appropriate means of balancing the interests of the party seeking an amendment and those of the party objecting to it. The imposition of such conditions or sanctions as here ($150 in attorney's fees to each defendant) requires a showing of extraordinary prejudice, and since neither extraordinary prejudice to the defendants was shown here nor a uniform degree of prejudice, the order imposing cash sanctions is vacated without prejudice. St. v. District Court, 193 M 413, 632 P2d 318, 38 St. Rep. 1204 (1981).

Addition of Verification: The right of plaintiff to amend his complaint before demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) or answer extends to correcting or supplying a verification. Claussen v. Chapin, 69 M 205, 221 P 1073 (1923).

No Right to Amend After Answer: After a cause is at issue and has been set for trial, defendant may not file an amended answer as a matter of right, but must obtain permission of the trial court to do so. Meredith v. Roman, 49 M 204, 141 P 643 (1914).

Right Not Subject to Court's Discretion: The right of a party to an action to amend his pleading once as a matter of course is one which the court cannot deny him, and respecting which it cannot exercise any discretion whatever. State ex rel. Anaconda Copper Min. Co. v. Clancy, 30 M 529, 77 P 312 (1904).

TIMELINESS OF AMENDMENT

No Loss of District Court Jurisdiction Upon Filing of Notice of Entry of Judgment — Amended Complaint Allowed: About 2 weeks after defendant filed a notice of entry of judgment, plaintiff filed a motion to amend the original complaint, and the District Court granted the motion. About 3 weeks after the amended complaint was filed, the court entered an order nunc pro tunc stating that it no longer had discretionary authority to grant leave to amend because it lost jurisdiction when defendant filed the notice of entry of judgment. The court held that the order allowing plaintiff's motion to amend was void and should be stricken. Plaintiff appealed the nunc pro tunc order, and the Supreme Court reversed. The filing of a notice of entry of judgment starts the clock running for the time to appeal, but does not divest the District Court of jurisdiction. Rather, the District Court loses jurisdiction when a notice of appeal is filed. Thus, the order issued nunc pro tunc was based on a mistaken interpretation of law because when the motion to amend was granted, the District Court still had jurisdiction. Kruckenberg v. Kalispell, 2004 MT 185, 322 M 177, 94 P3d 748 (2004). See also McCormick v. McCormick, 168 M 136, 541 P2d 765 (1975), Hankinson v. Picotte, 235 M 143, 766 P2d 242 (1988), and Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001).

Attempt to Raise New Theory Five Days Before Trial Prejudicial: Allison brought a claim against the town of Clyde Park, alleging disability, sex, and age discrimination in employment. Five days before trial, Allison attempted to raise a new theory based on alleged violation of the governmental code of fair practices. The town moved to prohibit introduction of the new theory at trial, arguing that prejudice would result because of the lack of notice and the inability to prepare a defense. The District Court agreed and granted the town's motion to preclude introduction of the new theory. On appeal, Allison contended that the court erred in prohibiting raising of the new theory because the legal obligations in the governmental code of fair practices were not presented as a separate claim, but rather were intended as evidence of the discrimination claims. However, characterizing the newly alleged violations as evidence did not alter the fact that Allison attempted to introduce a new theory 5 days before trial. The court correctly found that the alleged violations were two distinct causes of action and that allowing introduction of the new cause of action so soon before trial would prejudice the town. Allison v. Clyde Park, 2000 MT 267, 302 M 55, 11 P3d 544, 57 St. Rep. 1119 (2000).

Facts Regarding Spousal Maintenance Known Nearly Twenty-One Months Before Trial — Leave to Amend Properly Denied: Within one month before trial, a wife sought to amend her petition for dissolution of marriage to include a claim for spousal support. The trial court denied the motion as untimely, and the case went to trial as scheduled. The wife appealed on grounds that the court abused its discretion by not freely giving leave to amend the petition. However, the issue of maintenance was not previously part of the case, which had been pending for more than 2 years. The wife's claim was based on facts known to her nearly 21 months earlier, yet she did not raise the issue until the eve of trial. She offered no reason for the delay in filing the motion, nor did she do anything pretrial to bring her maintenance claim to the attention of the court or opposing counsel. To expect the husband to proceed to trial on the maintenance issue without adequate discovery or preparation would have been patently unfair and prejudicial, and the court properly denied the motion to amend. Stundal v. Stundal, 2000 MT 21, 298 M 141, 995 P2d 420, 57 St. Rep. 108 (2000), following Peuse v. Malkuch, 275 M 221, 911 P2d 1153, 53 St. Rep. 135 (1996).

Failure of Stucco Product — No Agency Relationship Between Contractor-Applicator and Manufacturer — No Negligence or Strict Liability Found — Leave to Amend Complaint Denied: Sunset Point Partnership (Sunset), a condominium developer, sued Wolstein, d/b/a Stuc-O-Flex Systems; Stuc-O-Flex International, Inc.; and Melton and Fischer, d/b/a Melton Fischer Construction (Melton/Fischer). Sunset's complaint alleged breach of contract, breach of warranty, indemnity, negligence, and strict liability in tort because a stucco-like product that Wolstein, as a subcontractor with Melton/Fischer, applied to the exterior of condominium buildings developed problems. The District Court granted summary judgment in favor of Stuc-O-Flex International, Inc., on each of the five counts in Sunset's complaint, holding that there was no evidence of negligence or breach of contract or warranty by Stuc-O-Flex International, Inc., and no evidence of agency between Stuc-O-Flex International, Inc., and Melton/Fischer. Sunset appealed. Citing previous decisions by it to the effect that in order for there to be ostensible agency the principal and not the agent must have taken steps to lead a third party to the belief that an agency relationship existed, the Supreme Court held that there was no evidence of actual or ostensible agency between Melton/Fischer and Stuc-O-Flex International, Inc. As to Sunset's claim of negligence, the Supreme Court answered Sunset's argument that Stuc-O-Flex International, Inc., was negligent in failing to provide adequate training, supervision, and instruction to Wolstein by pointing out that Sunset's complaint only alleged negligence against the defendants in the "manner in which they applied" Stuc-O-Flex and that there was no record evidence indicating a duty on the part of Stuc-O-Flex International, Inc., to train and supervise Wolstein. Concerning Sunset's claim for strict liability, the Supreme Court noted that Sunset had only alleged defective application of Stuc-O-Flex and had not alleged a defective product. Moreover, the Supreme Court pointed out that Sunset's own expert testified that: (1) there was nothing inherently defective about Stuc-O-Flex; (2) Stuc-O-Flex International, Inc., did not sell a "system" consisting of the material on which the product was applied and the product, but only sold the product itself; and (3) therefore only that product was guaranteed. In its review of the District Court's denial of Sunset's motion to amend its complaint to add the seller of the product as a defendant, the Supreme Court affirmed the District Court's decision, pointing out that the litigation was 2 years old by the time that Sunset made its untimely motion to amend. Sunset Point Partnership v. Stuc-O-Flex Int'l, Inc., 1998 MT 42, 287 M 388, 954 P2d 1156, 55 St. Rep. 141 (1998).

Irrigation District's Amendment Alleging Governmental Immunity Timely Filed: The plaintiffs filed suit in August 1983, alleging that the irrigation district's actions had resulted in crop losses for the plaintiffs. In November 1989, the lower court allowed the defendant to amend its answer to include the defense that the irrigation district was a governmental entity immune from suit. The Supreme Court upheld the lower court's decision on the basis that it was within the lower court's discretion and that the plaintiffs had failed to show that they were prejudiced by the amendment. Love v. Harlem Irrigation District, 245 M 443, 802 P2d 611, 47 St. Rep. 2190 (1990). After the 1990 Love decision, supra, Loves filed another amended complaint alleging contractual violations, negligence, fraud, and additional damages. Following Whirry v. Swanson, 254 M 248, 836 P2d 1227 (1992), and Mills v. Lincoln County, 262 M 283, 864 P2d 1265 (1993), and distinguishing Boucher v. Dramstad, 522 F. Supp. 604 (D.C. Mont. 1981), the Supreme Court held that despite Loves' claims of issues of fundamental fairness and new theories of recovery, all four elements composing the doctrine of res judicata were met. The issues having been previously decided in the 1990 Love decision, judgment for the irrigation district on the issues raised by the amended complaint was granted. State ex rel. Harlem

Irrigation District v. District Court, 271 M 129, 894 P2d 943, 52 St. Rep. 364 (1995), followed in Bozeman v. AIU Ins. Co., 272 M 349, 900 P2d 296, 52 St. Rep. 823 (1995).

Failure to File Notice of Entry of Judgment — Amended Complaint Allowed: Defendant, who was successful in having an action dismissed on a Rule 12(b) motion, failed to file a notice of entry of judgment. The plaintiffs' 30-day period for filing a notice of appeal did not run, the order of dismissal of the original complaint did not become final, and the District Court had jurisdiction to grant plaintiffs leave to file an amended complaint. The District Court had not lost subject matter jurisdiction. Hankinson v. Picotte, 235 M 143, 766 P2d 242, 45 St. Rep. 2259 (1988).

Amendment to State Alternative Basis of Liability and to Name Previously Unnamed Defendants: District Court improperly denied plaintiff's motion to amend his complaint 14 months after original filing in order to state an alternative basis of recovery and to name certain defendants previously unknown to him and referred to in the original complaint as John Does. This was because the previously unnamed defendants had not yet filed responsive pleadings, and there was no bad faith, dilatory motive, or undue delay in the plaintiff's motion to amend. Sooy v. Petrolane Steel Gas, Inc., 218 M 418, 708 P2d 1014, 42 St. Rep. 1702 (1985).

Responsive Pleading Including Cross-Complaint, Counterclaim, and Third-Party Complaints — Motion to Strike Properly Granted: The plaintiff filed an action on four promissory notes on June 9, 1978, and defendant filed an amended answer on November 10, 1980, more than 20 days after it was served. The District Court did not err in granting the plaintiff's motion to strike the amended answer. After a responsive pleading is served or 20 days after an original pleading is served, a party may amend his pleading only by leave of court or written consent of the adverse party. Here, neither was obtained, and because the cross-complaint, counterclaim, and third-party claim were not severed from the amended answer, they were properly treated as part of that answer and properly dismissed along with the amended answer. First Nat'l Bank & Trust of Wibaux v. Sec. Bank, 199 M 168, 648 P2d 1166, 39 St. Rep. 1270 (1982).

No Substantial Prejudice: Granting of plaintiff's motion to amend the amended complaint on morning of trial was proper because substantial prejudice was not incurred by defendant, even though the effect of the amendments was to change the basis of recovery on particular claims from tort to contract. Kearns v. McIntyre Constr. Co., 173 M 239, 567 P2d 433 (1977).

Answer Amended on Day of Trial — Prerequisites: District Court's granting leave to file an amended answer on day of trial, admitting existence of partnership where original answer denied existence, was error without inquiring why contrary new facts were not pleaded in original answer, why there was a delay of nearly 2 years, or whether amendment would impose a prejudicial burden on plaintiff, without opportunity to afford plaintiff to adjust accordingly. Mitchell v. Mitchell, 169 M 134, 545 P2d 657 (1976).

Products Liability — Belated Change in Theory: Granting plaintiff's motion to amend complaint to include theory of implied warranty of fitness for a particular purpose was error where motion was presented shortly before trial and plaintiff had relied upon theory of negligence through the entire course of the pretrial proceedings. Warranty theory was foreign to the proper pleading of the case and required defendant to be prepared for an entirely different defense theory. McGuire v. Nelson, 162 M 37, 508 P2d 558 (1973).

Amendment Allowed on Day of Trial: Trial court may permit defendants to make amendments to their answer on the date set for trial. Union Interchange, Inc. v. Parker, 138 M 348, 357 P2d 339 (1960), followed in Ward v. Vibrasonic Laboratories, Inc., 236 M 314, 769 P2d 1229, 46 St. Rep. 387 (1989).

Motion Six Months After Answer — Motion Properly Denied: Trial court did not abuse its discretion in denying motion to amend answer made at the opening of the trial without prior notice, nearly 6 months after the original answer had been filed. Kraus v. Newman, 137 M 388, 352 P2d 261 (1960).

Abuse of Discretion and Prejudice Required: The power to allow amendments at any stage of the trial is within the discretion of the trial court, and its action in this behalf is not subject to review by the Supreme Court, unless it is affirmatively shown that it abused its discretion to the prejudice of the adverse party. Betor v. Chevalier, 121 M 337, 193 P2d 374 (1948); Nesbitt v. Butte, 118 M 84, 163 P2d 251 (1945); Sellers v. Montana-Dakota Power Co., 99 M 39, 41 P2d 44 (1935); Clack v. Clack, 98 M 552, 41 P2d 32 (1935); Besse v. McHenry, 89 M 520, 300 P 199 (1931); Callen v. Hample, 73 M 321, 236 P 550 (1925); Buhler v. Loftus, 53 M 546, 165 P 601 (1917).

Amendment Six Months After Complaint Filed Properly Denied: In a negligence action, where a motion to amend the complaint, made 2 days after commencement of trial and more than

6 months after the filing of the complaint, by addition of an allegation of negligence would have changed the whole theory on which the action was brought, the court did not abuse its discretion in denying the motion. Sellers v. Montana-Dakota Power Co., 99 M 39, 41 P2d 44 (1935).

New Defense Based on Record — Motion Properly Denied: Application to amend a pleading at commencement of trial is addressed to the sound discretion of the trial court, its discretion in that respect not being limited to the imposition of terms, and it will not be held to have abused it in denying defendant's motion for permission to amend the answer by inserting an entirely new defense based upon matters of record for many months in the court in which the action was pending. Parsons v. Rice, 81 M 509, 264 P 396 (1928).

Appeal From Justice Court — Delay of Two Months: Where defendant in a cause appealed to the District Court from a Justice's Court did not ask for leave to amend his answer until a jury had been sworn to try the cause, although the transcript from the Justice's Court had been on file with the Clerk of Court for over 2 months thus giving him ample time to seek permission to amend, and the amendment sought to be made changed the issues entirely, the court did not abuse its discretion in granting leave on condition that he pay plaintiff's costs. Apple v. Seaver, 70 M 65, 223 P 830 (1924).

Amendment in Discretion of Trial Court — Refusal for Indifference or Neglect: Application to amend the complaint after issue joined is addressed to the sound legal discretion of the trial court, and the showing made in support of it must be sufficient to move that discretion, amendments being allowable in furtherance of justice but not where the applicant has been guilty of indifference or neglect. Barrett v. Shipley, 63 M 152, 206 P 430 (1922).

Appeal From Justice Court — Delay of Fifteen Months: Where the sufficiency of the complaint in a claim and delivery action had been challenged in the Justice Court and no effort to amend was made by plaintiff for 15 months thereafter or until the trial in the District Court on appeal had commenced and no showing was made or any excuse offered for the delay, refusal to permit the amendment then was not an abuse of discretion. Barrett v. Shipley, 63 M 152, 206 P 430 (1922).

Standard of Appellate Review: The power to allow or disallow amendments at any stage of the trial is within the discretion of the court, and if no abuse is shown the court's action will be approved on appeal. De Celles v. Casey, 48 M 568, 139 P 586 (1914).

MISTAKE CORRECTED BY AMENDMENT

Incorrect Statutory Reference — Charge Not Invalid: A complaint which used the statutory language of 61-8-401 to describe the offense but which listed a citation to 61-8-406 was not made defective by the incorrect reference since the complaint adequately described and gave notice of the offense. The District Court did not err in granting a motion to amend the complaint to correct the statutory reference. St. v. Handy, 221 M 365, 719 P2d 766, 43 St. Rep. 897 (1986).

Abuse of Discretion — Denied Motion to Amend to Correct Inadvertent Error: It was an abuse of discretion for the trial court judge to deny defendant and third-party plaintiff the opportunity to amend the third-party complaint for a second time to include an allegation of damages that had been inadvertently left out. Haugen v. Warner, 204 M 508, 665 P2d 1132, 40 St. Rep. 1036 (1983).

Mistake in Legal Description — Amendment Properly Allowed: In an action for rent by the lessor of farm lands the complaint mistakenly described the land as located south of the Montana meridian instead of north. At the conclusion of all the evidence, and after the instructions had been settled, plaintiff asked for leave to amend the complaint in the particular mentioned and reopen the case for the purpose of introducing evidence in support of the amended description. Leave was granted, the case reopened, defendant being given permission to introduce any evidence he desired; he declined to introduce any. The mistake in the description was a mere clerical one; defendant under the circumstances could not have been misled to his prejudice by the amendment, and the court properly allowed it to be made. Besse v. McHenry, 89 M 520, 300 P 199 (1931).

Mistakes Made in Original Pleadings: The court may permit an amendment of a complaint, which amounts to nothing more than the correction of a mistake made in the pleading as originally drawn. Downs v. Cassidy, 47 M 471, 133 P 106 (1913).

Name of Parties: Where there is a misnomer of the name of the defendant in the complaint, the court should allow the plaintiff to correct the name of the defendant upon his request to do so. Clark v. Oreg. Short Line R.R., 29 M 317, 74 P 734 (1903).

WAIVER OF OBJECTION TO AMENDMENT

Codefendants — No Standing to Object: Where the principal defendant, a corporation, defaulted in a foreclosure suit and its secretary by stipulation consented to the amendment, a codefendant objecting but not asking for a continuance on the ground of surprise was not in a position to complain on appeal of the failure to serve the amendment on the consenting defendant. Clack v. Clack, 98 M 552, 41 P2d 32 (1935).

Insertion of Legal Description — No Abuse of Discretion: In a mortgage foreclosure suit, the court's action in permitting plaintiff to amend his complaint at the opening of the trial, by inserting therein a description of a tract of land inadvertently omitted by the scrivener from both mortgage and pleading, was not an abuse of discretion, where appellant neither asked for a continuance on the ground of surprise nor suggested that she was not prepared to proceed to trial on the facts presented by the amendment. Clack v. Clack, 98 M 552, 41 P2d 32 (1935).

Answer as Waiver of Objection: Where no objection is made to the filing of an amended complaint and no motion interposed to strike it from the files, any objection is waived by answering. Fowlis v. Heinecke, 87 M 117, 287 P 169 (1930).

Continuance Not Requested — No Abuse of Discretion: Where an amendment to an answer in a divorce proceeding was permitted 15 days prior to trial and plaintiff did not apply for a continuance under a claim of surprise, he was in no position to urge abuse of discretion in allowing the amendment. Wandel v. Wandel, 76 M 160, 248 P 864 (1926).

SERVICE OF AMENDED PLEADING

Order to Plead Without Service as Error: Where the District Court sustains a motion of defendant to strike a portion of the complaint, permits plaintiff to amend and directs defendant to plead to it as amended, without requiring service of the amended pleading, it commits error, even though the substance of the cause of action is not changed by the amendment or the change does not seem important. State ex rel. NW. Eng'r Co. v. District Court, 114 M 179, 133 P2d 594 (1943).

Amendment of Right to Be Served — Default Improper: An amendment to a pleading made as a matter of right does not become effective for any purpose until it is filed and served. Hence, where an amended complaint was never served, judgment by default could not be rendered against defendant. Griffith v. Mont. Wheat Growers' Ass'n, 75 M 466, 244 P 277 (1926).

All Amendments to Be Served: An amended complaint must be served on all the adverse parties who are to be bound by the judgment, whether it materially affects them or not. If the amended complaint is not served upon a defendant, there is no pleading upon which a judgment against him can be sustained. Ben Kress Nursery Co. v. Oreg. Nursery Co., 45 M 494, 124 P 475 (1912), distinguished in Price v. Skylstead, 69 M 453, 222 P 1059 (1924), and Monarch Lumber Co. v. Haggard, 139 M 105, 360 P2d 794 (1961).

Formal Amendments — Service Not Required: When the amendment is merely formal, such as to correct a clerical error, the name of the court, a party, or a date, it need not be served or any delay allowed for answering. Barber v. Briscoe, 8 M 214, 19 P 589 (1888).

Service of Material Amendments — Time for Answer: When an amended complaint differs from the original in a substantial matter, or adds a material averment requiring proof, it should always be served upon a defendant who should be allowed the statutory time to plead. Barber v. Briscoe, 8 M 214, 19 P 589 (1888).

RESPONSE TO AMENDED PLEADING

Amendment Not Requiring Answer — No Supersession of Complaint: Amendment of a complaint, after answer filed, by striking therefrom an allegation of a conclusion of law which defendant might properly have disregarded as surplusage and which did not require an answer, worked no change in the complaint as originally filed, and therefore the amended pleading did not supersede the original one. Johnson v. Herring, 89 M 156, 295 P 1100 (1931).

Answer as Waiver of Right to Demur: The right to answer an amended complaint includes the right to demur (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) thereto. Where the amendment, after answer filed, did not change the original pleading but removed an immaterial allegation therefrom, the right to demur to it for ambiguity and uncertainty was waived by answering. Johnson v. Herring, 89 M 156, 295 P 1100 (1931).

Divorce Complaint — Default to Amended Complaint: Where the amended complaint in an action for divorce added a new count, the allegations of which were not denied by the answer to the original complaint, it was incumbent upon defendant to answer or demur (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) anew, failing in which his default was properly entered. Danielson v. Danielson, 62 M 83, 203 P 506 (1921).

First Answer Applicable to Second Complaint: Where the answer to the original complaint puts in issue the material allegations of the complaint as amended, the defendant may rely upon his answer and his failure to plead to the amended complaint does not subject him to default. Danielson v. Danielson, 62 M 83, 203 P 506 (1921).

LEAVE TO AMEND DENIED

No Error in Denial of Motion to Amend Pleadings to Address Previously Decided Statutory Constitutionality: In Geil v. Missoula Irrigation District, 2002 MT 269, 312 M 320, 59 P3d 398 (2002), the Supreme Court held that a process allowing a landowner to petition for exclusion from an irrigation district was constitutional. The dissent in Geil suggested an additional constitutional argument that was not previously considered, so the irrigation district attempted to amend the pleadings, but the motion was denied. On appeal, the Supreme Court noted that although leave to file amendments to pleadings should be freely granted, a District Court also has discretion to deny amendments to pleadings when justice requires and that denial of a motion to amend will be upheld absent an abuse of that discretion. Noting the length of the proceeding and the fact that the irrigation district brought the new constitutional argument only after the dissent brought it to its attention, the Supreme Court determined that Geil had addressed the constitutionality issues, so further constitutional arguments were barred by res judicata and collateral estoppel. Thus, the District Court did not abuse its discretion in denying the irrigation district's effort to amend the pleadings, and the District Court was affirmed. RSG Holdings v. Missoula Irrigation District, 2004 MT 214, 322 M 369, 96 P3d 1131 (2004). See also Geil v. Missoula Irrigation District, 2004 MT 217, 322 M 388, 96 P3d 1127 (2004), and Petitioners I-549 v. Missoula Irrigation District, 2005 MT 100, 326 M 527, 111 P3d 664 (2005).

No Error in Denial of Amended Complaint When Underlying Claim Moot: Plaintiff sought to file an amended complaint based on allegations of defendants' fraud in treating plaintiff's pet dog at defendants' animal clinic. The District Court denied the amended complaint, and plaintiff appealed, but the Supreme Court affirmed. The 2-year statute of limitations on the fraud claim had run, rendering the fraud claim futile, so denial of the amended complaint was not an abuse of discretion. Hawkins v. Harney, 2003 MT 58, 314 M 384, 66 P3d 305 (2003).

No Error in Refusal to Allow Amendment of Claim at Final Pretrial Conference to Set Forth New Theory of Recovery: A party may amend its pleading pursuant to this rule by leave of court, and leave must be freely given when justice requires. It is error for a District Court to refuse to permit amendments to pleadings that are offered at a reasonable time and that should be made in the furtherance of justice. Here, the District Court rejected plaintiffs' attempt to amend their claim at the final pretrial conference in order to argue a new theory of recovery, apparently to avoid unnecessary delay and possible prejudice to defendants, and plaintiffs appealed. Plaintiffs' initial claim addressed easement by necessity, and the amendment would have added a new theory of easement by implication that, although a subspecies of easement by necessity, would have addressed different elements and necessitated different defenses. The Supreme Court concluded that the District Court did not abuse its discretion in disallowing amendments to the claim. Discovery had been closed, and there was no reason shown why plaintiffs could not have raised the issue earlier than in the pretrial memorandum. Loomis v. Luraski, 2001 MT 223, 306 M 478, 36 P3d 862 (2001).

Facts Regarding Spousal Maintenance Known Nearly Twenty-One Months Before Trial — Leave to Amend Properly Denied: Within one month before trial, a wife sought to amend her petition for dissolution of marriage to include a claim for spousal support. The trial court denied the motion as untimely, and the case went to trial as scheduled. The wife appealed on grounds that the court abused its discretion by not freely giving leave to amend the petition. However, the issue of maintenance was not previously part of the case, which had been pending for more than 2 years. The wife's claim was based on facts known to her nearly 21 months earlier, yet she did not raise the issue until the eve of trial. She offered no reason for the delay in filing the motion, nor did she do anything pretrial to bring her maintenance claim to the attention of the court or opposing counsel. To expect the husband to proceed to trial on the maintenance issue without adequate discovery or preparation would have been patently unfair and prejudicial, and the court properly denied the motion to amend. Stundal v. Stundal, 2000 MT 21, 298 M 141, 995 P2d 420, 57 St. Rep. 108 (2000), following Peuse v. Malkuch, 275 M 221, 911 P2d 1153, 53 St. Rep. 135 (1996).

Loss of District Court Jurisdiction When Wrongful Discharge Claim Submitted to Arbitration — Leave to Amend Complaint Denied: Dahl brought a wrongful discharge action against Fred Meyer, Inc. The parties agreed to arbitration and chose an arbitrator. Prior to the hearing, the arbitrator dismissed the arbitration on grounds that federal law applied. Dahl did not object to

the District Court's confirmation of the arbitrator's decision but did move for leave to amend the complaint to remove the federal implications. However, the District Court lost jurisdiction when the parties agreed to arbitration, at which point the court had authority only to confirm, modify and confirm, or vacate and remand for hearing pursuant to 27-5-311 through 27-5-314, but not the authority to allow Dahl to amend the complaint. Dahl v. Fred Meyer, Inc., 1999 MT 285, 297 M 28, 993 P2d 6, 56 St. Rep. 1149 (1999).

No Justifiable Basis for Denial of Opportunity to Amend Petition for Postconviction Relief in Death Penalty Case: After being sentenced to death, Kills On Top proposed a number of amendments to his petition for postconviction relief within the time set by the District Court for proposing further amendments. Nevertheless, the court denied the motion to amend based on its determination that the proposed amendments would be futile. The Supreme Court disagreed, noting that the proposed amendments were timely made and that neither the District Court nor the state provided any justifiable basis for denying the opportunity to amend. Whether one person lives and another dies for conduct alleged to have occurred during the same transaction should not hinge on a District Court's discretionary denial of a motion to amend a petition for postconviction relief, particularly in light of this rule's admonition that leave to amend be freely given when justice requires and the fact that no prejudice to the state was established that would justify denial of the motion to amend. Kills On Top v. St., 279 M 384, 928 P2d 182, 53 St. Rep. 1197 (1996). See Kills On Top v. St., 2000 MT 340, 303 M 164, 15 P3d 422, 57 St. Rep. 1444 (2000), holding that it was harmless error for the District Court to fail to address new claims in its Findings of Fact, Conclusions of Law and Order dismissing petitioner's amended petition for postconviction relief.

Motion to Amend After Partial Summary Judgment Granted Properly Denied: The buyer sued the sellers for specific performance. The sellers moved for leave to amend their answer 2 years after the original pleadings were filed and after the buyer had been granted partial summary judgment. The Supreme Court held that the buyer would be unduly prejudiced by allowing the sellers to amend because the buyer's motion was based on the original pleadings that remained unchanged for 2 years. Litigants should be allowed to change legal theories after a motion for summary judgment has been filed only in extraordinary cases. The District Court was within its discretion in denying the motion to amend the answer. Peuse v. Malkuch, 275 M 221, 911 P2d 1153, 53 St. Rep. 135 (1996), distinguished in First Sec. Bank of Missoula v. Ranch Recovery Ltd. Liab. Co., 1999 MT 43, 293 M 363, 976 P2d 956, 56 St. Rep. 188 (1999), in which, after summary judgment was granted and following the discovery of new evidence, leave to amend was allowed in the interests of justice and judicial efficiency, and followed in Stundal v. Stundal, 2000 MT 21, 298 M 141, 995 P2d 420, 57 St. Rep. 108 (2000). Peuse was also distinguished in Winslow v. Mont. Rail Link, Inc., 2000 MT 292, 302 M 289, 16 P3d 992, 57 St. Rep. 1238 (2000), in which the plaintiff sought to amend his complaint only to add factual allegations to a complaint and not to change or add any legal theory.

No Leave to Amend Granted After Final Judgment: Kincheloes sued the defendants over a royalty interest and were granted summary judgment in District Court, which was reversed on appeal. Kincheloes then moved to amend their pleading to allege a new theory of recovery, and the motion was denied. The Supreme Court noted that the litigation had gone on for nearly 14 years, that if the motion had been granted, it would mean that there was no finality to the case, and that the plaintiffs cannot now include a theory that they neglected with no good reason to include in their original pleading. Because there was no showing to the District Court as to why the new theory was omitted, the District Court did not abuse its discretion in denying the motion to amend. Stanford v. Rosebud County, 254 M 474, 839 P2d 93, 49 St. Rep. 828 (1992), followed, with regard to failure to obtain leave of court, in Edgewater Townhouse Homeowner's Ass'n v. Holtman, 256 M 182, 845 P2d 1224, 50 St. Rep. 10 (1993).

Failure to Provide Basis for Amendment — Leave Denied: Plaintiff filed a motion to amend his complaint after summary judgment was entered against him, but he failed to provide any basis for amendment. His motion consisted of a one-sentence request to amend without any explanation of why he wished to do so. It was within the District Court's discretion to deny the motion to amend. Trout v. Bennett, 252 M 416, 830 P2d 81, 49 St. Rep. 303 (1992).

Amended Complaint Containing New Cause of Action Offered Six Years After Original Complaint — Leave to Amend Properly Denied: t was not an abuse of District Court discretion in a workers' compensation case to deny leave to file a second amended complaint that included a new cause of action and that was filed 6 years after the original complaint and 4 years after the decision in Boehm v. Alanon Club, 222 M 373, 722 P2d 1160 (1986), which disallowed retroactive application of certain workers' compensation claims. Donahue v. Convenience Disposal, Inc., 250 M 261, 818 P2d 839, 48 St. Rep. 916 (1991).

Failure, After Discovery, to Raise Facts Sufficient to Withstand Summary Judgment Motion: Bank refused an additional loan requested by borrowers who already had a line of credit, stating that borrowers' only business customer and sole source of income for repayment of the line of credit was 84 days late in payments and appeared incapable of paying its bills. The line of credit provided that it did not constitute a commitment to make future advances and that any future advances would be at bank's discretion. In bank's suit to recover under the line of credit, it was not error to refuse borrowers' motion to amend counterclaims to state a cause of action for breach of the implied covenant of good faith and fair dealing. The line of credit gave bank discretion to deny future loans. There was no evidence that the discretion was misused to deprive borrowers of the benefit of the line of credit. Borrowers, after discovery, failed to raise sufficient facts to withstand a motion for summary judgment on the issue. Richland Nat'l Bank & Trust v. Swenson, 249 M 410, 816 P2d 1045, 48 St. Rep. 730 (1991).

New Claim Lacking Relation Back to Earlier Complaints: Leave to file a proposed third amended complaint, which sought to add new defendants who had no way of predicting from the second amended complaint that the action would be amended to include them as defendants, was considered a new claim that did not relate back to the time of filing the other complaints and was properly denied. Higham v. Red Lodge, 247 M 400, 807 P2d 195, 48 St. Rep. 273 (1991).

Failure to Allow Second and Third Amended Complaints — No Abuse of Discretion: Almost 2 months after the deadline for amending pleadings, the trial court granted plaintiff's first motion to file an amended complaint. When plaintiff failed to file the amended complaint within the extended time granted, the court was well within its discretion in not granting plaintiff's motions to file second and third amended complaints. Had the motions been granted, defendants would have been substantially prejudiced and the trial unduly delayed. Lindey's, Inc. v. Professional Consultants, Inc., 244 M 238, 797 P2d 920, 47 St. Rep. 1570 (1990). See also Smith v. Butte-Silver Bow County, 266 M 1, 878 P2d 870, 51 St. Rep. 610 (1994) , and Wolf v. Williamson, 269 M 397, 889 P2d 1177, 52 St. Rep. 51 (1995).

Amendment to Add Corporation as Plaintiff Against Lender Denied After Corporate Transfer of Interest to Lender: Shareholders' complaint, filed January 6, 1986, included counts of breach of loan agreements, fraud and negligent misrepresentation, negligence, tortious interference with business, and alleged vicarious liability against their lender, Norwest, Inc. (Norwest). On August 11, 1987, shareholders moved to amend their complaint to add their corporation, Nordak Industries, USA, Inc. (Nordak), of which they were sole shareholders and directors, as party plaintiff. The District Court denied amendment after finding that Nordak's claims against Norwest were barred because Nordak expressly and voluntarily transferred and assigned to Norwest all its assets, including legal claims, on August 25, 1983. The District Court also correctly found that any claim Nordak had against Norwest was barred by the statute of limitations because the cause of action against Norwest accrued at the time of the transfer, more than 3 years before the proposed amendment. The denial of leave to amend was clearly an appropriate exception to Rule 15(c), M.R.Civ.P. Walstad v. Norwest Bank of Great Falls, 240 M 322, 783 P2d 1325, 46 St. Rep. 2160 (1989), distinguishing Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115 (1986).

Approach Applicable in Considering Requests to Amend: In refusing to allow leave for filing of a second amended complaint, the District Court relied on the approach outlined in Prentice Lumber Co. v. Hukill, 161 M 8, 504 P2d 277 (1972). In the absence of any apparent or declared reason, the leave sought should be freely given. Reasons include: (1) undue delay; (2) bad faith; (3) dilatory motive on the part of the movant; (4) repeated failure to cure deficiencies by amendments previously allowed; (5) undue prejudice to the opposing party by virtue of allowance of the amendment; and (6) futility of amendment. Mogan v. Harlem, 238 M 1, 775 P2d 686, 46 St. Rep. 1043 (1989).

Attempt to Introduce Different Cause of Action on Eve of Trial — Amendment Denied: When plaintiff, 2 weeks before trial and more than 4 years after filing the original complaint, attempted to amend the pleadings to introduce a different cause of action, the motion to amend was properly denied. Yellowstone Conference of the United Methodist Church v. D.A. Davidson, Inc., 228 M 288, 741 P2d 794, 44 St. Rep. 1528 (1987).

Determination of Real Party in Interest Prior to Ratification, Joinder, or Substitution: Defendants appealed from a judgment denying a motion to allow amendment to pleadings to add their incorporated business entity as a party plaintiff. The Supreme Court remanded the case, holding that before it could be determined if ratification, joinder, or substitution should be allowed, it was necessary to determine whether the corporate entity was a real party in interest on the counterclaim. First Sec. Bank of Glendive v. Gary, 221 M 329, 718 P2d 1345, 43 St. Rep. 852 (1986).

Unlawful Detainer by Tenant in Common — Amendment of Pleading Properly Denied: Where the plaintiff and her sister leased farmland they owned as tenants in common to the defendant for a 6-year period and the sister conveyed her interest in the property to the defendant shortly before the expiration of the lease, the court did not err, in an action by the plaintiff brought in 1974 for an accounting of rents and profits from the defendant, in refusing to allow the plaintiff to plead and prove an unlawful detainer against the defendant. Leave of court should not be granted to allow amendments that present theories totally inapplicable to the case. As a tenant in common is an owner of an undivided interest in the property, a claim of unlawful detainer may not be asserted against a cotenant but only against a tenant for a term less than life. A cotenant is allowed to possess and use commonly held property, and an action will lie for waste but not unpermitted use. Fry v. Heble, 191 M 272, 623 P2d 963, 38 St. Rep. 228 (1981).

Amended Complaint Same as Dismissed Complaint — Leave Properly Denied: Where the court dismissed appellant's civil action collaterally attacking a previous decree of distribution allegedly based on fraud, there was no error in the order of the court denying leave to file an amended complaint that would raise the same issues again. Estate of Wallace v. McAlear, 186 M 18, 606 P2d 136 (1980).

Claim Against Estate — Statutory Period: In action to recover from an estate for services performed for decedent, the court did not err in denying plaintiffs' motion to amend and supplement a complaint based on contract to include gift theory because the services were performed without expectation of payment and the claim sued upon (gift theory) was not filed within the statutory period. Summary judgment was proper. Ziegler v. Kramer, 175 M 236, 573 P2d 644 (1978).

Judgment Set Aside — Lack of Knowledge by Defendant: Court's discretion was properly exercised when it refused to allow amendment to complaint in order to hold corporate board of directors personally liable for remainder of a default judgment, based on business dealings of which the directors were unaware. Prentice Lumber Co., Inc. v. Hukill, 161 M 8, 504 P2d 277 (1972).

Order Equivalent to Final Judgment: An order dismissing a complaint and denying leave to amend was equivalent to final judgment although judgment had not been entered. Prentice Lumber Co., Inc. v. Hukill, 161 M 8, 504 P2d 277 (1972).

Third Request to Amend Refused: District Court's refusal of leave to amend complaint, after such permission had been granted twice without avail, was not an abuse of discretion. Tillinger v. Frisbie, 138 M 60, 353 P2d 645 (1960).

Material Change of Issues No Abuse of Discretion: After plaintiff had put in his proof and rested his case and defendant introduced some evidence in support of his defense, the court cannot be said to have abused its discretion in refusing an amendment to the answer which would have materially changed the issues. Betor v. Chevalier, 121 M 337, 193 P2d 374 (1948).

Denial of Opportune Amendment as Abuse of Discretion: The matter of permitting amendments of pleadings after issue joined lies within the sound legal discretion of the trial court, but refusal to permit an amendment offered at an opportune time and which should be made in furtherance of justice is an abuse of discretion. State ex rel. Gold Creek Min. Co. v. District Court, 99 M 33, 43 P2d 249 (1935), followed in The Village Bank v. Cloutier, 249 M 25, 813 P2d 971, 48 St. Rep. 561 (1991).

Amendment for Lack of Information: An order refusing a defendant permission to file a second amended complaint on the ground that his attorneys did not have opportunity to secure certain desired information from records in the county seat, 80 miles away, but without a showing why the information could not be obtained or why an application for additional time within which to make filing had not been made to the court, was not an abuse of discretion. Granger v. Erie, 101 M 170, 53 P2d 443 (1935).

Amendment of Deficient Complaint Denied: Whether the court, after a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to the complaint has been sustained, will permit plaintiff to amend his pleading is a matter of grace, not of right, unless the circumstances are such that it would be an abuse of discretion to refuse permission to amend. Therefore, refusal to grant permission will not be disturbed on appeal in the absence of a showing of abuse of discretion. Shampagne v. Keplinger, 78 M 114, 252 P 803 (1927).

No Request Made — No Abuse of Discretion: Where the record did not disclose that plaintiff asked leave to amend her complaint after a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) thereto had been sustained or that permission to do so was denied her by the trial court, the court's failure to give her time to amend cannot be said to have been an abuse of its discretion. Shampagne v. Keplinger, 78 M 114, 252 P 803 (1927).

Standard of Appellate Review: After issue is joined, the matter of permitting amendments to pleadings is one addressed to the sound judicial discretion of the trial court, and before the Supreme Court will hold a refusal of leave to amend to have been in error, appellant must show an abuse of such discretion. Cullen v. W. Mtg. & Warranty Title Co., 47 M 513, 134 P 302 (1913).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Pleading *key* 229 through 286.

71 C.J.S. Pleading §§323 through 477.

61A Am. Jur. 2d Pleading §§745 through 880.

Amendment to show giving of requisite notice or presenting of claim to municipality or other public body. 83 ALR 2d 1208.

Amendment of pleading so as to deny partnership in action by third person against alleged partners. 68 ALR 2d 573.

Amendment of pleadings to assert Statute of Limitations under Rule 15. 59 ALR 2d 169.

Substitution of plaintiff as proper subject for amendment of complaint. 135 ALR 325.

Amendment of pleading by changing or correcting mistake in name of party. 124 ALR 86.

Amendment of pleading by changing description or characterization of party from corporation to individual, partnership, or other association, or vice versa. 121 ALR 1325.

Amendment of pleading to correct designation of court or judge. 65 ALR 709.

6 Wright & Miller, Federal Practice and Procedure: Civil §§1487 and 1488.

Rule 15(b). Amendments to conform to the evidence.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 658
Consent to Trial of Issues 660
Discretion of Court 661
Immaterial Variance 662
Material Variance 664

GENERAL

No Error in District Court Refusal to Supplement Record With Stipulated Information Not Addressed at Trial: The District Court decided that Boadle Road was a public road. About 2 months after trial, the parties stipulated that the District Court should supplement the record to apply the evidence pertaining to Boadle Road to also determine the status of another road to which Boadle Road connected, ostensibly to avoid future litigation. The District Court declined to supplement the record, and on appeal, the Supreme Court affirmed. Under this rule, parties may be entitled to an amendment of the pleadings only when the issue was tried by express or implied consent and there was sufficient evidence introduced at trial to support the amendment. In this case, the parties attempted to force the District Court through stipulation to decide an issue not presented at trial. The District Court therefore properly relied on a strict application of Rule 16(e), M.R.Civ.P., in adhering to the issues in the pretrial order and denying the motion to supplement the record on an issue not addressed at trial. Pub. Lands Access Ass'n, Inc. v. Jones, 2004 MT 394, 325 M 236, 104 P3d 496 (2004), following Wollaston v. Burlington N., Inc., 188 M 192, 612 P2d 1277 (1980), and distinguishing Bell v. Richards, 228 M 215, 741 P2d 788 (1987), and Webb v. Wolfe, 230 M 322, 749 P2d 531 (1988).

Failure to Plead Estoppel — Estoppel Raised in Trial Brief — No Evidence of Consent — No Motion to Amend Pleadings: Marsha sought to enforce a written conveyance of partnership property against the estate of a deceased partner by arguing that promissory and equitable estoppel prohibit the estate from claiming that the conveyance was invalid for lack of

consideration. The Supreme Court held that estoppel must be pleaded and that, while estoppel was raised in Marsha's trial brief, there was no evidence in the record that the issue of estoppel was tried with the express or implicit consent of the estate and no evidence that Marsha moved to conform her answer to any estoppel evidence adduced before the District Court. For these reasons, the Supreme Court held that the District Court was correct in holding that the issue of estoppel was not correctly before it. Nitzel v. Wickman, 283 M 304, 940 P2d 451, 54 St. Rep. 684 (1997).

Contract Providing Attorney Fees as Part of Record — Fees Mentioned in Pretrial Order: A motion to amend pursuant to Rules 52(b) and 59(a), M.R.Civ.P., to include attorney fees was denied on the basis that defendants abandoned their claim for attorney fees by neglecting to state a claim in their pretrial order and because no evidence relative to fees was introduced at trial and therefore could not be added as a posttrial issue. The Supreme Court noted that attorney fees were contractually agreed to by the parties, so the issue of whether fees should be awarded was not one that would have been argued at trial. Further, since the contract was before the court as evidence and since the issue of attorney fees was raised twice in the pretrial order, the issue was not outside the court's record. The case was remanded for determination of reasonable attorney fees. Bell v. Richards, 228 M 215, 741 P2d 788, 44 St. Rep. 1467 (1987).

Waiver of Provision in Collective Bargaining Agreement Not Properly Before Court: A declaratory judgment action was brought to construe a collective bargaining agreement. The plaintiff filed a motion for summary judgment. The defendant opposed the motion and filed an affidavit in support of its opposition. The plaintiff argued that the affidavit submitted by defendant was inadmissible as a violation of the parol evidence rule. The trial court concluded that no material factual issue existed but denied the motion because of waiver by the plaintiff. The waiver issue was addressed in the affidavit but not in any of the other pleadings. The Supreme Court held that the waiver issue was not properly before the trial court and ordered the trial court to reconsider its denial of the motion for summary judgment. The Supreme Court also said that the defendant could amend its answer to affirmatively plead waiver. Butte Teachers' Union v. Bd. of Trustees, 201 M 482, 655 P2d 146, 39 St. Rep. 2248 (1982), followed in Columbia Grain Int'l v. Cereck, 258 M 414, 852 P2d 676, 50 St. Rep. 591 (1993).

Attorney Fees — Procedure for Determining Amount: Defendant leased a truck from plaintiff. Defendant defaulted on the lease. Plaintiff sued for amounts owing and prevailed. The lease agreement provided for attorney fees. A motion for fees was filed along with a supporting affidavit. A hearing was held, and the District Court reduced the amount of attorney fees awarded from what was requested. The Supreme Court found nothing improper in the award of attorney fees on appeal. R & W Leasing v. Mosher, 195 M 285, 636 P2d 832, 38 St. Rep. 1857 (1981), followed in Audit Serv., Inc. v. Frontier-West, Inc., 252 M 142, 827 P2d 1242, 49 St. Rep. 186 (1992).

Amendment to Conform to Evidence — Affirmative Defense: This case was decided under contributory negligence. Plaintiff at the close of his case moved that the pleadings be amended to conform to the evidence and offered an instruction that contributory negligence was not a bar to recovery for injuries caused by the reckless or wanton misconduct of Sanders County. The offered instruction incorrectly defined reckless and wanton misconduct and was properly denied. Implicit in appellant's contention regarding this instruction is the argument that the District Court should have granted the motion to amend the pleadings to conform to the evidence. This in effect raised the new issue of affirmative defense. Plaintiff would be entitled to the amendment and to instructions thereunder unless there was no evidence to support the motion to conform. In this case, while evidence of negligence was presented, the evidence was lacking to show the elements necessary to constitute willful, wanton, or reckless negligence. In that situation, there was no abuse of discretion in refusing to change or add a legal theory or defense after the introduction of all the evidence. Wollaston v. Burlington N., Inc., 188 M 192, 612 P2d 1277 (1980).

Failure to Amend Pleadings — Evidence of Fraud Precluded: When sellers of land argued that the buyers misled them as to the effect of an escrow agreement and warranty deed, estoppel had no application since the court found that sellers possessed a copy of the instruments for a considerable length of time and had ample opportunity to examine them. Furthermore, since sellers failed to plead fraud by amending their pleadings, they were not entitled to present parol evidence to show that these instruments constituted an acceptance of the land under the doctrine of estoppel. Tschache v. Barclay, 172 M 415, 564 P2d 1299 (1977).

Due Process Implications: Leave to amend pleadings to conform to the evidence cannot be arbitrarily granted when issues not raised by the pleadings are tried by consent of the parties. Questions as to due process arise when a party may not have had adequate opportunity to

prepare his case for new issues. Brothers v. Surplus Tractor Parts Corp., 161 M 412, 506 P2d 1362 (1973), followed in McJunkin v. Kaufman, 229 M 432, 748 P2d 910, 44 St. Rep. 2111 (1987).

Change in Theories as Causing Change in Jury Instructions: Although this rule has been liberally applied in favor of allowing amendment of pleadings to conform to the evidence, where a change in the theory of liability from negligence to breach of contract caused the trial court to submit to the jury instructions based on both theories, which instructions when read as a whole were conflicting, inconsistent, and confusing, trial court erred in denying motion for new trial. Brothers v. Surplus Tractor Parts Corp., 161 M 412, 506 P2d 1362 (1973).

Notice of Claim of Deficiency: Where plaintiff failed to plead claim for deficiency judgment on balance remaining after sale of repossessed vehicles, the pleadings could not later be amended to conform to evidence that would have supported a deficiency judgment. Gallatin Trust & Sav. Bank v. Darrah, 152 M 256, 448 P2d 734 (1968).

Recovery Limited by Pleadings — No Implied Consent Without Notice: Generally, a complainant cannot recover beyond the amount prayed for in his complaint. Notwithstanding the provision for issues being tried by express or implied consent after pleadings closed, implied consent will not operate when one party was not put on notice. Gallatin Trust & Sav. Bank v. Darrah, 152 M 256, 448 P2d 734 (1968).

Evidence Made Admissible by Subsequent Amendment: Assuming that the court ruled erroneously in the admission of evidence which was not within the issues of the pleadings at the time, the error was not reversible where the evidence became applicable to the issue as later amended during trial. Walsh v. Kennedy, 115 M 551, 147 P2d 425 (1944).

Delay in Amending — Refusal of Leave Upheld: Where defendant, without any showing in excuse of delay in asking for leave to amend, took no action until 4 weeks had expired after conclusion of the taking of the testimony, the court may not be held to have abused its discretion in refusing leave to amend. Sawyer v. Somers Lumber Co., 86 M 169, 282 P 852 (1929).

Bill of Particulars: Where evidence was admissible under the allegations of the complaint, and the bill of particulars furnished by plaintiff was to meet a definite request not affecting such evidence, the court properly overruled defendant's objection that plaintiff was barred from introducing any evidence upon matters not specifically mentioned in the bill. Rogness v. N. Pac. Ry., 59 M 373, 196 P 989 (1921).

Capacity of Parties Shown on Face of Complaint: Where it is disclosed by proof upon the trial of a cause that the plaintiff is a minor, and the complaint is then amended to show the minority and emancipation of plaintiff, it is error for the court to sustain a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to the complaint on the ground of want of legal capacity to sue, but the court, upon the suggestion of plaintiff's minority, should clothe him with capacity to sue by the appointment of a guardian, and allow amendment of his complaint by inserting the name of such guardian. Hoskins v. White, 13 M 70, 32 P 163 (1893).

CONSENT TO TRIAL OF ISSUES

Subdivision Covenant Containing One Hundred Foot Setback Restriction and One-Garage Restriction — Implied Consent to Trial of Garage Restriction — Amendment of Pleadings: Defendants constructed a building on their subdivision property. Plaintiffs sued because the building violated a 100-foot setback restriction. During trial, defendant testified that the building was intended to be used as a second garage. Plaintiffs sought to amend the pleadings to include a violation of a one-garage restriction that was also part of the covenants. The District Court did not rule on the motion to amend the pleadings, but nevertheless held in favor of plaintiffs, finding that defendants violated both the 100-foot restriction and the one-garage restriction, and ordered removal of the garage. On appeal, defendants contended that the trial court erred in addressing the garage issue because it was not included in the pleadings. The Supreme Court affirmed. Under this rule, issues not raised by the pleadings may be tried by the express or implied consent of the parties, in which case the pleadings may be amended to conform to the issues actually litigated. Having raised the issue during direct examination, defendants impliedly consented to its subsequent litigation. Defendants' argument that the motion to amend the pleadings was not timely, because it was not made at trial, also failed. The rule allows amendment of the pleadings at any time, even after judgment. Armbrust v. York, 2003 MT 36, 314 M 260, 65 P3d 239 (2003). See also Glacier Nat'l Bank v. Challinor, 253 M 412, 833 P2d 1046 (1992).

Rule Inapplicable to Change From Joint to Sole Custody When Parties Do Not Consent: The District Court cited this rule in concluding that the issue of modifying only the physical custody provisions of a joint custody decree, rather than a modification from joint to sole custody, was raised by express or implied consent of the parties at the hearing. The court's reliance on this

rule was misplaced because the father clearly sought sole custody and thus did not consent to the issue, nor did the mother consent, objecting throughout the proceedings that the court was applying an improper standard in modifying custody. In re Marriage of Frydenlund, 255 M 474, 844 P2d 58, 49 St. Rep. 1074 (1992).

Failure to Consent to Trial of Suretyship Issue — No Abuse in Failing to Amend Pleadings: The record was replete with objections raised by plaintiff in response to defendant's attempt to interject evidence into trial concerning the issue of whether a surety relationship existed, making it clear that plaintiff did not consent either explicitly or implicitly to litigation of the suretyship issue. It was not an abuse of discretion for the District Court to not order the pleadings amended to reflect that issue. Glacier Nat'l Bank v. Challinor, 253 M 412, 833 P2d 1046, 49 St. Rep. 503 (1992).

Implied Consent to Determination of Rent Amount: Plaintiff requested only a declaratory judgment, not a court determination of the rent amount owed pursuant to the lease. Plaintiff, however, failed to object to the defendants' many exhibits concerning the cost-of-living index and property tax and utility expenditures, all relating to the rent amount. By failing to object, the plaintiff impliedly consented to the rent amount being determined by the court. Lemley v. Bozeman Community Hotel Co., 200 M 470, 651 P2d 979, 39 St. Rep. 1877 (1982).

Implied Consent: There was implied consent of the parties for the trial of issues not raised in the pleadings when evidence is introduced without objection. Reilly v. Maw, 146 M 145, 405 P2d 440 (1965).

Failure to Allege General Damages: Plaintiff's failure to allege general damages in a separate paragraph was not error because defendant never raised the issue during trial and this rule clearly allows nonpleaded issues to be tried by implied consent. Greenup v. Community Transit Co., 145 M 39, 399 P2d 418 (1965).

Life Insurance — Failure to Object to Admission of Incontestability Clause: Contention that plaintiff in an action to recover on a life insurance certificate issued by a fraternal society could not rely on an incontestable clause therein because of failure to plead it was without merit, where the certificate containing the clause was offered in evidence without objection and was before the court; plaintiff's pleadings were considered amended to conform to the proof, if necessary to sustain the judgment in plaintiff's favor. Stevens v. Woodmen of the World, 105 M 121, 71 P2d 898 (1937).

Failure to Object to Complaint — Evidence Admitted: Where complaint was not attacked for insufficiency as to the allegations of gross negligence until after plaintiff's testimony had been received, but evidence relating to such negligence was admitted without objection, the pleading will be considered amended at the trial to conform to the proof if necessary to affirm the judgment. Baatz v. Noble, 105 M 59, 69 P2d 579 (1937).

Constructive Amendment by Failure to Object: Where plaintiff is permitted, without objection by defendant, to introduce testimony not warranted by the allegations of his complaint, the pleading will on appeal be regarded as having been amended to admit the proof, if necessary to sustain the judgment. Baker v. Union Assurance Soc'y of London, 81 M 281, 264 P 132 (1928).

Failure to Object Not to Preclude Dismissal: Defendant is not precluded from moving for a nonsuit (nonsuit abolished by repeal, sec. 84, Ch. 13, L. 1961) upon the ground of a fatal variance between the allegations of the complaint and the proof, by his failure to object to the introduction of testimony by plaintiff. Kalispell Liquor & Tobacco Co. v. McGovern, 33 M 394, 84 P 709 (1905).

DISCRETION OF COURT

Amendment of Pretrial Order to Include Attorney Fees Not Listed in Pretrial Order — No Requirement to Plead Attorney Fees in Marriage Dissolution Case: During the second day of trial in a marriage dissolution case, the wife offered copies of her attorney fee bills, and the District Court, over the husband's objection, allowed the pretrial order to be amended on the issue of attorney fees. The husband cited Naftco Leasing Ltd. Partnership 301 v. Finalco, Inc., 254 M 89, 835 P2d 729 (1992), and contended that because the wife made no showing of manifest injustice, as required by Rule 16(e), M.R.Civ.P., to modify the pleadings, the District Court erred by awarding the wife her attorney fees and costs when they were not listed in the pretrial order. The Supreme Court distinguished Naftco, noting that that case was not a dissolution action and that the trial court in Naftco never had the opportunity to consider amending the pleadings at trial. Further, Rule 16(e), M.R.Civ.P., must be read together with this rule, which requires a showing by the objecting party that amendment of the pleadings would be prejudicial. The husband never claimed prejudice or sought a continuance to enable him to meet the wife's attorney fee evidence. Although it is good practice to plead attorney fees, it is not required in marriage dissolution actions under 40-4-110. Rather, that section gives the trial court the discretion to order payment

from time to time, after considering the financial resources of the parties. The husband failed to demonstrate an abuse of the court's discretion, and the Supreme Court affirmed the fee award. In re Marriage of Schmieding, 2000 MT 237, 301 M 336, 9 P3d 52, 57 St. Rep. 983 (2000).

Amendment of Answer at End of Trial — Discretion of Court to Allow Amended Pleadings to Conform to Evidence: At the end of trial, the District Court allowed defendants to amend their answer to raise a statute of limitations defense to plaintiff's fraud claim. Plaintiff contended that defendants' waived their statute of limitations defense by failing to set it forth in the pleadings. However, nothing in Rule 8(c), M.R.Civ.P., precludes the trial court from allowing a party to amend the pleadings to conform to the evidence under this rule. Keller v. Dooling, 248 M 535, 813 P2d 437, 48 St. Rep. 554 (1991).

Prayer for Relief Amended — Evidence of Additional Damages Properly Allowed: Where the plaintiffs brought an action for specific performance to compel the defendant to convey certain real property to them in accordance with an option contract, the trial court did not err in allowing the plaintiffs to amend their complaint to include a prayer for damages occasioned by the defendant's refusal to convey the property and in allowing the plaintiffs to introduce evidence of damages suffered subsequent to the filing of the complaint. It is within the discretion of the trial court to allow amendment of the pleadings if the objecting party fails to demonstrate that he would be prejudiced thereby. Here, the defendant made no motion for a continuance to meet the evidence offered by the plaintiffs. No abuse of the discretion of the trial court was shown. Keaster v. Bozik, 191 M 293, 623 P2d 1376, 38 St. Rep. 194 (1981), followed in In re Marriage of Welch/Phillips, 257 M 222, 848 P2d 500, 50 St. Rep. 240 (1993).

Prejudice to Be Shown for Reversal: Application to amend pleading to conform to proof is addressed to sound legal discretion of trial judge, and Supreme Court will not reverse a judgment on the ground of abuse of such discretion in absence of affirmative showing of prejudice to the adverse party. Hatch v. Nat'l Sur. Corp., 105 M 245, 72 P2d 107 (1937).

Allowance of Amendment as the Rule: The matter of allowing amendments to pleadings during trial rests in the discretion of the court, permission to make them being the rule, refusal of permission the exception. Hence, in the absence of a showing of abuse of discretion, permission to amend the complaint to conform to the proof given at the close of the testimony may not be held error. Berthelote v. Loy Oil Co., 95 M 434, 28 P2d 187 (1933).

Standard of Appellate Review: A pleading may be amended so as to correspond with the proof. The application to amend is addressed to the sound discretion of the trial court and, in the absence of any abuse of such discretion, the action of the trial court will be approved on appeal. Sandeen v. Russell Lumber Co., 45 M 273, 122 P 913 (1912).

IMMATERIAL VARIANCE

Theory of Contract Action — Quantum Meruit and Express Contract: In action by contractors against defendants to recover for work and labor alleged to have been performed and for materials alleged to have been furnished and delivered to defendants, there was no fatal variance which misled or prejudiced defendants when the complaint, although based on theory of quantum meruit, alleged that the labor and materials were furnished at the special instance and request of defendants, and an express contract, full performance of which was prevented by defendants, was proven at trial. Puetz v. Carlson, 139 M 373, 364 P2d 742 (1961).

Lack of Prejudice — Nonsuit Unjustified: A variance which does not mislead the defendant to his prejudice is insufficient to warrant the granting of a nonsuit. Arrow Agency v. Anderson, 137 M 494, 355 P2d 929 (1960), overruled in Puetz v. Carlson, 139 M 373, 364 P2d at 747 (1961); Wilcox v. Newman, 58 M 54, 190 P 138 (1920).

Variance in Rental Values: Where, in action to recover value of use and occupancy, plaintiff claimed damages measured on a certain basis, and defendant denied that it had any rental value, the fact that a different rental value than that alleged in the complaint was proved was not a material variance. Pritchard Petroleum Co. v. Farmers Co-op Oil & Supply Co., 121 M 1, 190 P2d 55 (1948).

Variance in Value of Labor: In action to recover balance allegedly due for work performed in clearing land, variance between complaint alleging that value of clearing 9 ½ acres was $150 an acre and proof that value of such work was $225 an acre was not a material variation. Metcalf v. Barnard-Curtiss Co., 120 M 50, 180 P2d 263 (1947).

Waiver of Objection to Variance: Unless appellant relying upon an alleged variance between pleading and proof was misled thereby, it will be considered immaterial. In any event, if the question of variance was not called to the attention of the trial court, appellant will not be heard to complain thereof for the first time on appeal. Nadeau v. Texas Co., 104 M 558, 69 P2d 586 (1937).

Recovery of Rent and Damages for Breach of Contract: When the purpose of an action by a tenant was merely to recover an advance payment of rent because of refusal of defendant to deliver possession of the premises, and not one for damages for breach of contract, and the complaint alleged the renting of two rooms while plaintiff's evidence referred to the renting of but one, the variance was immaterial. Rhule v. Thrasher, 88 M 468, 295 P 266 (1930).

F.E.L.A. Action — Error to Grant Nonsuit: An action was brought under the Federal Employers' Liability Act against a railway company by a section hand for personal injuries alleged in the complaint to have been sustained while unloading ties from a gondola car through the negligence of a fellow servant in dislodging a tie from the top of a pile which struck plaintiff, causing the injury. The plaintiff's proof was to the contrary, showing that the tie was pried loose by the fellow servant from another tie to which it was frozen, the two standing against the side of the car. This variance was immaterial and the court in holding it fatal and granting a nonsuit (nonsuit abolished by repeal, sec. 84, Ch. 13, L. 1961) committed error, particularly so in the absence of any suggestion that defendant was surprised or misled in maintaining its defense by having to meet issues not pleaded. Kakos v. Byram, 88 M 309, 292 P 909 (1930).

Motion for Directed Verdict Contrary to Defense: Where appellant does not claim that he was misled to his prejudice in making his defense or surprised by having to meet issues at the trial which were not pleaded, and especially where his motion for a directed verdict on the ground of variance appears contrary to the theory of the defense pleaded in his answer, the motion was properly denied. Webber v. Mass. Bonding & Ins. Co., 81 M 351, 263 P 101 (1928).

Injury at Railroad Crossing — Instruction on Variance Properly Refused: Where the complaint in a personal injury action charged that plaintiff was injured by the act of defendants in suddenly and without warning lowering and dropping upon plaintiff a gate arm while the latter was passing over a crossing in an automobile, while plaintiff's testimony showed that instead of the gate being dropped upon plaintiff, the driver saw it descending but was unable to stop the automobile, with the result that the end of the gate arm scraped by the windshield and struck plaintiff, an instruction that the jury should find for defendants because of a fatal variance was properly refused. Peabody v. N. Pac. Ry., 80 M 492, 261 P 261 (1927).

Lack of Surprise — Failure to Present Witness: Where an alleged variance between the allegations of the complaint and proof is so slight that it could not have misled defendant or prejudiced his defense, and it does not appear that his counsel was surprised or did not have present witnesses whom they could otherwise have had, it will be considered immaterial. Peabody v. N. Pac. Ry., 80 M 492, 261 P 261 (1927).

Damage to Irrigation Canal: If there was a variance between plaintiff's allegation that one of the banks of defendant's irrigating canal was not sufficient to withstand the pressure of the water in the canal and his proof indicating cutting away of the bank by overflow, it was immaterial, the record showing that defendant was neither surprised nor prejudiced thereby. Watts v. Billings Bench Water Ass'n, 78 M 199, 253 P 260 (1927).

Guaranty on Account Due: Where plaintiff sued on a guaranty of a note and the guaranty in terms showed that it was a guaranty of an account due plaintiff for which the note was given, the variance between the pleading and the proof was immaterial. Schauer v. Morgan, 67 M 455, 216 P 347 (1923).

Employment Contracts — No Prejudice to Defendant: Plaintiff alleged one contract in his complaint under which defendant employed him as a farm hand at a specified wage. His evidence disclosed that he worked under a number of different agreements as to the kind of work to be performed and wages to be paid. In view of the matters alleged in the answer which required defendant to go into the entire matter of his employment of plaintiff and the wages to be paid at different times and for different periods, defendant could not have been misled to his prejudice in maintaining his defense on the merits, and therefore the variance was immaterial. Wasley v. Dryden, 66 M 17, 212 P 491 (1923).

Negligent Injury by Hand Tools: In an action for personal injuries the complaint which alleged that while plaintiff, a section foreman, was assisting in moving a rail his coemployees negligently permitted it to drop and strike an iron bar plaintiff was using causing the bar to strike plaintiff, etc., whereas plaintiff's evidence showed that the bar was inserted in a hole in the rail which in turning carried with it the bar, striking plaintiff, the variance between pleading and proof was immaterial. Stevens v. Hines, 63 M 94, 206 P 441 (1922).

Assignment of Action or Assignment of Benefits: The variance between plaintiff's allegation asserting ownership of a claim for damages to livestock, by reason of an assignment of it to him by the owner thereof, and evidence to the effect that such owner had merely assigned the claim to plaintiff for the purpose of suit and collection, reserving in himself the beneficiary interest in the result of the action, was immaterial and not one of substance, the defendant not having been

prejudiced in its defense by the fact that plaintiff held only a limited and not the actual ownership of the thing in action. Rice v. Chicago, Milwaukee & St. Paul Ry., 59 M 570, 197 P 999 (1921).

Characterization of Facts — Action for Services Rendered: Where the plaintiff brought an action for services rendered, consisting of cooking, washing, and caring for the defendant, and for groceries, fuel, and other supplies furnished to the defendant, there was no variance where the evidence showed that the plaintiff "boarded" the defendant, and that the cooking and the furnishing of the food and fuel for that purpose were part of the "boarding". Even if there were a variance it would be immaterial as the defendant was not misled to his prejudice in making his defense upon the merits. Matoole v. Sullivan, 55 M 363, 177 P 254 (1918).

Libel and Slander: Section 93-3901, R.C.M. 1947 (superseded by Rule 15(b), M.R.Civ.P.), declaring immaterial nonprejudicial variances between pleadings and proof, applied as well to cases of libel and slander as to all others. Fowlie v. Cruse, 52 M 222, 157 P 958 (1916).

Action for Ejectment — Time and Manner of Payment: Where, in an action for ejectment, defendants relied upon a contract for the sale of the premises and the evidence, though not technically corresponding to the allegations of the answer, did support them in their general scope and meaning, the divergence relating to the mode and time of payment of the final installment of the purchase money only, a finding in favor of plaintiff on the ground of variance was error. Milwaukee Land Co. v. Ruesink, 50 M 489, 148 P 396 (1915).

Reversal Not Required: An immaterial variance will not work a reversal. Milwaukee Land Co. v. Ruesink, 50 M 489, 148 P 396 (1915); Am. Livestock & Loan Co. v. Great N. Ry., 48 M 495, 138 P 1102 (1914), distinguished in Baron v. Botsford, 108 M 356, 90 P2d 510 (1939); Stewart v. Stone & Webster Eng'r Corp., 44 M 160, 119 P 568 (1911).

Substantial Rights Not Affected: Immaterial variances not affecting the substantial rights of the parties will be disregarded on appeal. Willoburn Ranch Co. v. Yegen, 49 M 101, 140 P 231 (1914).

Lack of Substantial Variation Required: If plaintiff's proof follows substantially the allegations of the complaint, a slight, technical variance is immaterial. Wertz v. Lamb, 43 M 477, 117 P 89 (1911).

Prejudice by Surprise at Trial: A party will not be heard to complain that he was misled to his prejudice by a variance unless he was surprised at the trial by having to meet issues not pleaded. Frederick v. Hale, 42 M 153, 112 P 70 (1910).

Technical Description of Accident: Where, in a personal injury action against a street railway company, the complaint alleged that plaintiff, in attempting to board a streetcar, was injured by the car suddenly moving forward, and the evidence revealed that he was thrown from the car by a backward movement, but it did not appear that defendant was misled or its counsel surprised by this technical departure in the proof, the court properly overruled a motion for a new trial on the ground of variance. Robinson v. Helena Light & Ry., 38 M 222, 99 P 837 (1909).

New Trial Not to Be Granted: A defendant is not entitled to a new trial on the ground of variance where he was not misled. Robinson v. Helena Light & Ry., 38 M 222, 99 P 837 (1909).

Water Rights Action Appellants Not Misled: The judgment in favor of plaintiff in a water right suit will not be reversed because of an alleged variance between the proof introduced to establish his right and an allegation in his replication, as indicated by a finding of the court, where the record does not disclose that appellants were misled to their prejudice. The variance will be considered immaterial. Vreeland v. Edens, 35 M 413, 89 P 735 (1907).

Allegation of Negligence — Substantial Justice Done: Where the complaint alleged that a railroad company so negligently managed its locomotive and cars as to kill an animal, and the proof showed that the animal had been fatally injured and was killed by a section boss of defendant to end its sufferings, defendant was not misled by the variance and, substantial justice having been done, a judgment in favor of plaintiff should not be reversed. Poindexter & Orr Live Stock Co. v. Oreg. Short Line R.R., 33 M 338, 83 P 886 (1905).

Lack of Prejudice — Basis for Action Not Changed: It is not error for the court to allow an amendment to a pleading after the evidence is in, in order that the allegations may correspond with the proofs adduced, where such amendment does not change the nature of the action or mislead the adverse party to his prejudice. Williston v. Camp, 9 M 88, 22 P 501 (1889).

MATERIAL VARIANCE

Contract Action — Failure of Proof Not Variance: Where contract alleged was not proven but rather an attempt was made to prove an entirely different contract, there was not a variance but a failure of proof on behalf of the plaintiff. Fraser v. Williams, 140 M 66, 367 P2d 769 (1962).

Substance of Cause of Action to Be Proved: Where there is such a divergence between the issues tendered by plaintiff and the evidence that it cannot be said that plaintiff has proved in substance the cause of action alleged, there is a variance which amounts to a failure of proof. Kakos v. Byram, 88 M 309, 292 P 909 (1930).

Conversion of Grain Crop — Right to Possession: In an action against a Sheriff for the conversion of a mortgaged crop of grain, there was a fatal variance between pleading and proof where the complaint of plaintiff mortgagee alleged that his right of possession to the crop was by virtue of the lien growing out of the mortgage, whereas the proof showed that he went into possession under an agreement entered into between him and the mortgagor after the execution of the mortgage. Torgerson v. Stocke, 72 M 7, 230 P 1096 (1924), distinguished in Bennett v. Dodgson, 129 M 228, 284 P2d 990 (1955).

Joint Contract — Number of Defendants: The fact that a complaint in an action on a contract alleges a joint contract with several defendants, and the evidence discloses a separate contract with some of them, is not a variance amounting to a failure of proof. Chealey v. Purdy, 54 M 489, 171 P 926 (1918). See Lee v. Hayden, 63 M 589, 208 P 596 (1922).

Contract Pleaded in Complaint: Where the plaintiff has given notice in his complaint that he relies on a written contract pleaded therein, and that the defendant must be prepared to meet the claim of a breach of it, he may not at the trial prove the pleaded contract as materially modified unless the court has, on request, allowed him to amend and given time to the defendant to plead to the amended complaint. Ryan Co. v. Russell, 52 M 596, 161 P 307 (1916).

Contract Action — Variance as Failure of Proof: Where one contract is pleaded and another is proved, or where the complaint alleges one breach of duty and the evidence establishes a different one, the variance amounts to a failure of proof upon the occurrence of which a nonsuit is proper. Am. Livestock & Loan Co. v. Great N. Ry., 48 M 495, 138 P 1102 (1914), distinguished in Baron v. Botsford, 108 M 356, 90 P2d 510 (1939).

Variance First Raised on Appeal: The losing party will not be heard to assert on appeal, for the first time, that there was a fatal variance. Mosher v. Sutton's New Theater Co., 48 M 137, 137 P 534 (1913).

Cause of Action to Be Proved After Amendment: If, in the opinion of the court, the evidence presents a material variance, it may direct an amendment upon proper terms, but it cannot submit the case to the jury upon evidence tending to establish a cause of action wholly outside the issues, without according to the defendant full opportunity to controvert it with his proof. McCrimmon v. Murray, 43 M 457, 117 P 73 (1911).

Failure of Proof Not a Variance: When the cause of action pleaded is unproved, it is not a mere variance but a failure of proof. Knuckey v. Butte Elec. Ry., 41 M 314, 109 P 979 (1910).

Different Contracts: Where the contract upon which recovery is had is wholly different from the one set forth in the complaint, the variance is not to be considered immaterial, but must be considered a failure of proof. Kalispell Liquor & Tobacco Co. v. McGovern, 33 M 394, 84 P 709 (1905), distinguished in Baron v. Botsford, 108 M 356, 90 P2d 510 (1939), and Bennett v. Dodgson, 129 M 228, 284 P2d 990 (1955).

Forcible Entry: Where, in an action for a forcible entry under subsection (1) of 70-27-102, the evidence showed a peaceable entry, and a subsequent forcible turning out of plaintiff, which conduct is made a forcible entry by subsection (2) of said section, the variance was such as to constitute a failure of proof. Spellman v. Rhode, 33 M 21, 81 P 395 (1905), distinguished in Frederick v. Hale, 42 M 153, 112 P 70 (1910). See Forsell v. Pittsburgh & Mont. Copper Co., 38 M 403, 100 P 218 (1909).

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Collateral References

Pleading *key* 232, 237.

71 C.J.S. Pleading §§346 through 354.

61B Am. Jur. 2d Pleading §§809 through 834.

Propriety of amending petition to conform to proof as to last clear chance issue. 25 ALR 2d 279.

Variance between pleading and proof in suit for specific performance of oral agreement of deceased to leave property at death. 130 ALR 231.

Effect of proving case not pleaded where amendment cannot be made. 29 ALR 638.

Variance between allegation and proof as to the capacity in which one charged with embezzlement received the property. 12 ALR 603.

What constitutes variance between pleading and proof of defamatory words. 2 ALR 367.

What constitutes "prejudice" to party who objects to evidence outside issues made by pleadings so as to preclude amendment of pleadings under Rule 15(b) of Federal Rules of Civil Procedure. 20 ALR Fed. 448.

Rule 15(c). Relation back of amendments.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed.R.Civ.P. 15(c), as amended 1966.

Explanation of change: This amendment is designed to avoid problems which have arisen in instances in which the complaint named the wrong defendant and the statute of limitations expired prior to an amendment correcting the error. Where the newly named defendant received notice of the action and knew or should have known that he was the intended defendant, it seems unjust to prohibit relation back.

The most serious difficulties under the Federal Rules have been in suits against the United States or an agency or officer thereof. The second paragraph of the federal amendment contains specific provisions for such cases and the second paragraph of this amendment adapts the federal provision to suits where the true defendant is the state or a political subdivision thereof.

The change will also further the objective of the provision of Rule 25(d) for automatic substitution of the successor public officer.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the first paragraph of this rule was still identical with the Federal Rule.

Amendments: The amendment of September 29, 1967, referred to in the advisory committee's note above, added the last sentence of the first paragraph and all of the second paragraph.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Applicability of Fictitious Name Statute and Misnomer Rule to Similarly Named Defendants — Relation Back of Amended Complaint: Molina was injured on a construction site, and filed a complaint against Panco, Inc., a Washington corporation that he believed to be the general contractor, for failing to supervise the job site and to provide a safe place to work. Molina also named fictitious defendants John Does I-III in the complaint. After the complaint was served but before Panco, Inc., filed a responsive pleading, Molina learned that there were two different corporations in Washington with similar names, so he filed an amended complaint naming the true contractor, Panco Construction, Inc., and retaining the additional fictitious defendants. Panco Construction, Inc., then filed its answer and moved for summary judgment, listing as an affirmative defense that the action was barred by the statute of limitations because the amended complaint was filed 3 months and 3 days after the limitation for negligence claims in 27-2-204. Molina asserted that the statute of limitations did not apply because under 25-5-103, a fictitiously named defendant is party to the action from its commencement so the statute of limitations stops running as to the fictitious party on the date that the original complaint is filed. Molina also contended that under this rule, an amended complaint relates back to the date of the original complaint when the amended complaint revolves around the same operative facts as the original complaint. Molina then moved to amend the complaint, asking that the District Court rule that the amended complaint sufficed to substitute Panco Construction, Inc., for John Doe I or, alternatively, that Molina be allowed to file a second amended complaint substituting Panco Construction, Inc., for John Doe I. Molina then moved to dismiss Panco, Inc., as a defendant. The District Court subsequently granted the motion of Panco Construction, Inc., for summary judgment without ruling on Molina's motion to amend the complaint. Molina appealed, contending that Panco Construction, Inc., was not a new party to the action, but rather a presently identified, formerly fictitiously named defendant that should be considered a party from the filing of the original complaint. Panco Construction, Inc., argued that: (1) Molina had attempted to entirely replace a mistakenly named defendant with a correctly named defendant without meeting the notice requirements of this rule; (2) it was not a fictitiously named defendant under 25-5-103 because due diligence on Molina's part would have revealed the true

identity of the defendant; and (3) Molina was precluded from arguing the applicability of Rule 4E(2), M.R.Civ.P., on appeal because the issue was never raised in District Court. The Supreme Court reversed based on the District Court's incorrect assumption that it orally granted Molina's motion to file an amended complaint and on its failure to rule on the motion to amend the complaint. The case was remanded for consideration of the motion to amend the complaint in conjunction with Rule 4E(2), M.R.Civ.P., and of the effect that that rule may or may not have on 25-5-103, the fictitious name statute, and this rule, the misnomer rule. Molina v. Panco Constr. Inc., 2002 MT 136, 310 M 185, 49 P3d 570 (2002). On remand, the District Court concluded that Molina was not ignorant of defendant's name because, even though Molina was misinformed by the Washington Secretary of State, he nevertheless knew defendant's true corporate name, so summary judgment was granted to defendant. On appeal, the Supreme Court disagreed and remanded again. Under a liberal interpretation of 25-5-103, Molina was allowed to substitute defendant's real name for one of the John Doe defendants in the original complaint because he had no reason to believe that the wrong name had been supplied by the Washington Secretary of State, and even though he knew that the identity of the defendant whom he sought to name from the outset was the general contractor of the job on which he was injured, he relied on the incorrect information and thus was ignorant of the contractor's true legal name at the time that the complaint was filed. Molina v. Panco Constr., Inc., 2004 MT 198, 322 M 268, 95 P3d 687 (2004).

Failure to Effectuate Insurance Settlement in Good Faith as Independent Cause of Action: Under 33-18-201, an insurer is required to attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear. A violation of this provision gives rise to an independent cause of action under 33-18-242. Because the continuing duty of good faith is not ended by commencement of a lawsuit by an insured, that duty can be breached by an insurer's postfiling conduct, including the actions of attorneys conducting the insurer's defense. Amendment of the claim to include an action under 33-18-242 related back to the original claim and was properly allowed. Further, third-party defendant's alleged failure to conduct a reasonable investigation and its subsequent refusal to pay the claim, although occurring more than 2 years before commencement of plaintiff's cause of action, were, if proved, ostensibly part of the bad faith postjudgment conduct. Thus, the evidence of those acts was not time-barred. Federated Mut. Ins. Co. v. Anderson, 1999 MT 288, 297 M 33, 991 P2d 915, 56 St. Rep. 1152 (1999), following Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217, 43 St. Rep. 1689 (1986), and Palmer v. Farmers Ins. Exch., 261 M 91, 861 P2d 895, 50 St. Rep. 1210 (1993).

Amended Complaint After Running of Statute of Limitations for Amended Complaint's Claim: L&R Spraying sprayed Semenza's land and Fitzgerald's land, which Semenza custom farmed. Semenza sued L&R for negligent spraying that allegedly damaged crops on both owners' farms. After the 2-year statute of limitations for injury to property ran out, Fitzgerald sought to be added as a party. Since Fitzgerald's claim arose out of conduct set forth in Semenza's original pleading, the amended complaint adding Fitzgerald as a party with the same cause of action related back to the date of Semenza's original pleading and thus was not barred by the statute of limitations. In addition, the 3-year negligent tort statute of limitations also applied, and when two statutes of limitations apply, the court should use the longer one. Semenza v. Bowman, 268 M 118, 885 P2d 451, 51 St. Rep. 1209 (1994).

Misnomer Rule Allowing Amendment of Complaint, Not Judgment — Inapplicable When New Party Would Be Added by Allowing Amendment: The "misnomer rule" derived from this rule allows a party to amend a complaint to name a defendant after the running of the applicable statute of limitations so that the amended complaint relates back to the date of the original complaint for statute of limitations purposes. The rule applies when the correct party is sued, but the name in the complaint is merely misspelled or a subsidiary corporation is named rather than the parent corporation. The rule does not apply to situations in which an entirely new party would be added to the litigation by allowing the amendment. Most importantly, the rule applies to the amendment of pleadings, not to the amendment of a judgment, including a default judgment. Jerry Martin & Associates, Inc. v. Don's Westland Bulk, 267 M 464, 884 P2d 795, 51 St. Rep. 1119 (1994).

Original Complaint and Proposed Amendment Not Sharing Same Operative Facts — Amendment Denied: When the original complaint and the proposed amendment did not share the same operative facts involving acts and omissions by different individuals, the District Court did not abuse its discretion in determining that because the proposed amendment did not arise from the same conduct, transaction, or occurrence as the original complaint and the amendment did not relate back to the filing of the original complaint, amending the complaint to add

additional claims was improper because the statute of limitations for those causes of action had expired. Smith v. Butte-Silver Bow County, 266 M 1, 878 P2d 870, 51 St. Rep. 610 (1994).

Relation Back — Joinder of Additional Parties Not Barred by Statute of Limitations: Berlin sued Boedecker, and 7 ½ years after the transaction that was the basis of the suit joined Boedecker Resources, Inc., of which Boedecker was the owner. Boedecker argued that the joinder of the corporation was precluded by the statute of limitations. The Supreme Court held that under this rule, parties may be dropped or added at any time and that when so added, the addition relates back to the date of filing of the original action. In this case, the requirements of this rule were fulfilled because the party to be joined was involved in the transaction at issue, the original action was filed within the period of time for bringing suit against the party to be joined, the party sued in the original action was acting as an agent for the party to be joined, and Boedecker had extensively intermingled his funds with those of the corporation. The joined party was therefore not prejudiced by a lack of notice. Berlin v. Boedecker, 268 M 444, 887 P2d 1180, 51 St. Rep. 569 (1994).

Amended Complaint for Retaliatory Termination as Relating Back to Employment Discrimination Complaint: After Simmons returned from a leave of absence from employment with Mountain Bell because of a back injury, she was demoted for absenteeism. She then filed a complaint with the Human Rights Commission, alleging employment discrimination. Later, Simmons was terminated for insubordination, whereupon she filed an amended complaint with the Commission, approximately 1 year after the filing of her original complaint, alleging retaliatory termination. A hearing examiner for the Commission held that the second complaint by Simmons was barred as being beyond the 180-day limit contained in 49-2-501. The District Court reversed, holding that the second complaint related back to the filing of the first. The Supreme Court affirmed, holding that under this rule, the amended complaint for termination arose from the filing of the employment discrimination charge and thus arose from the same conduct for the purposes of computing time under this rule. Simmons v. Mtn. Bell, 246 M 205, 806 P2d 6, 47 St. Rep. 1857 (1990).

Amendment to Add Corporation as Plaintiff Against Lender Denied After Corporate Transfer of Interest to Lender: Shareholders' complaint, filed January 6, 1986, included counts of breach of loan agreements, fraud and negligent misrepresentation, negligence, tortious interference with business, and alleged vicarious liability against their lender, Norwest, Inc. (Norwest). On August 11, 1987, shareholders moved to amend their complaint to add their corporation, Nordak Industries, USA, Inc. (Nordak), of which they were sole shareholders and directors, as party plaintiff. The District Court denied amendment after finding that Nordak's claims against Norwest were barred because Nordak expressly and voluntarily transferred and assigned to Norwest all its assets, including legal claims, on August 25, 1983. The District Court also correctly found that any claim Nordak had against Norwest was barred by the statute of limitations because the cause of action against Norwest accrued at the time of the transfer, more than 3 years before the proposed amendment. The denial of leave to amend was clearly an appropriate exception to this rule. Walstad v. Norwest Bank of Great Falls, 240 M 322, 783 P2d 1325, 46 St. Rep. 2160 (1989), distinguishing Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115 (1986).

Mistake as to Identity of Proper Parties: The District Court did not err in allowing plaintiffs to amend their complaint pursuant to this rule to name certain school district employees as new parties after the expiration of the statute of limitations. There was no mistake as to the identity of the school district employees who were involved in the circumstances that led to the filing of this negligence suit, but there was a mistake as to the identity of the proper parties as contemplated by this rule. State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989).

Rejecting Motion to Amend — Abuse of Discretion: In a personal injury action, the District Court abused its discretion by refusing to allow plaintiff to amend his original complaint to add a new plaintiff asserting a new cause of action. A motion to amend can properly add a plaintiff and a new cause of action. The new plaintiff's claim can relate back under Rule 15(c). Priest v. Taylor, 227 M 370, 740 P2d 648, 44 St. Rep. 1157 (1987).

Relation Back of Second Plaintiff's Cause of Action to Date Original Complaint Was Filed — Identical Claims and Interests: Father was original insured and was added as second plaintiff nearly 5 years after insurance coverage was denied his son. The insurance company claimed father's cause of action could not relate back to the date of the original complaint because he alleged separate claims and sought damages in his own right. The Supreme Court found that: (1) the claims of both plaintiffs were nearly identical and arose from the same conduct; (2) there was a clear identity of interest between father and son; (3) the pleadings contained the same causes of

action; and (4) the only difference in the two pleadings was damages. The court held that the insurance company was not prejudiced or undermined in its ability to defend itself by permitting relation back of father's claims to the date of the son's original complaint. Tynes v. Bankers Life Co., 224 M 350, 730 P2d 1115, 43 St. Rep. 2243 (1986).

Amendment of Complaint to State Alternative Basis of Liability: District Court denied plaintiff's motion to amend his complaint to state alternative basis of liability after the Statute of Limitations had run. Supreme Court reversed, finding that the alternative theory of liability was based on the same operative facts, that there was no bad faith or desire to delay, and that the amended complaint related back to the filing date of the original complaint under Rule 15(c), M.R.Civ.P. Sooy v. Petrolane Steel Gas, Inc., 218 M 418, 708 P2d 1014, 42 St. Rep. 1702 (1985), followed in Flanigan v. Prudential Fed. S&L Ass'n, 221 M 419, 720 P2d 257, 43 St. Rep. 941 (1986).

Real Estate Fraud — Joinder of Parties Relating Back to Original Complaint: In an action against the defendant real estate company for fraud and negligence in the sale of real property to the plaintiffs, the complaint was properly filed in August 1979 and the owners of the company were dismissed by stipulation from the action in June 1980. When the plaintiffs made a motion in 1982 to rejoin the owners as defendants, the defendant company argued that the joinder was barred by the 2-year Statute of Limitations. On appeal, the Supreme Court found that the amendment satisfied the conditions of Rule 15(c), M.R.Civ.P., related back to the date of the filing of the action, and was therefore not barred. The owners were corporate officers, and both knew of the lawsuit and knew or should have known of their potential liability. The joinder is therefore not precluded by the Statute of Limitations. White v. Lobdell, 208 M 295, 678 P2d 637, 41 St. Rep. 346 (1984).

Water Damage to Land — Accrual of Action at Time Damages Stabilize: Plaintiffs own a farm surrounded on three sides by the Flathead River and Flathead Lake. After Kerr Dam was built in 1939, the water table in the area began to rise. In 1960 plaintiffs filed suit, claiming inverse condemnation of their land and damages due to the rising of the water table. The complaint was amended four times over the years and was finally tried in 1979. Defendant claimed that the cause was barred by prescription and the Statute of Limitations. At all times defendant denied any damage. The court found that a rising water table is a "taking" of land and actionable, and that the cause of action accrued at the time that damages stabilized and became permanent (1959-1960). The action was not barred by the Statute of Limitations, and the Statute tolled from the time the first complaint was filed. All amendments related back to the date of the original pleadings. Blasdel v. Mont. Power Co., 196 M 417, 640 P2d 889, 39 St. Rep. 219 (1982).

Service on State Governmental Division as Service on Board — Substance Over Form: Retail clerks went on strike against petitioner in a labor dispute. The clerks claimed unemployment benefits. Benefits are denied during a strike if unemployment results from a "stoppage of work" existing because of a labor dispute. A deputy of the Employment Security Division found claimants disqualified from benefits. Claiming strikers appealed to a referee who sustained the denial of benefits. Claimants then appealed to the Board of Labor Appeals, which reversed the referee. Petitioner filed petitions for review with the District Court, naming as respondent the Board of Labor Appeals. Following a motion to dismiss the petition, the appellants and counsel for the Employment Security Division entered into an agreement to substitute the Division for the Board, and the court ordered the substitution. The clerks were not made parties, and at the time service was made on the Board, appellants did not provide sufficient copies. The clerks' union moved to intervene, and the motion was granted. The District Court granted summary judgment to respondents, concluding that failure to name all parties and failure to provide a sufficient number of copies of the petition for service were fatal jurisdictional flaws. Since the Board and the Division are housed within the same department of state government and were represented by the same counsel, granting summary judgment on purely technical grounds would be an unconscionable elevation of form over substance. F.W. Woolworth Co., Inc. v. Employment Sec. Div., 192 M 289, 627 P2d 851, 38 St. Rep. 694 (1981).

Amended Petition for Judicial Review of Administrative Decision — No Relation Back Because of Lack of Service of Original Petition: An amended petition for judicial review of an adverse administrative decision initiated under 2-4-702, filed and served 16 months after the original petition was filed in District Court, cannot relate back to avoid dismissal for failure to promptly serve the agency if the original petition was never served. Rierson v. St., 188 M 522, 614 P2d 1020 (1980).

Notice Required to Toll Statute Under Fictitious Name Defendant: A plaintiff may utilize the fictitious name statute and may amend a complaint to substitute the true name of the defendant when discovered. If the amendment occurs after the Statute of Limitations has run, however, the

real or intended defendant must have either been served or otherwise received notice of the institution of the action under the conditions for relation back provided in Rule 15(c), M.R.Civ.P. It is fundamental that the purpose of the Statute of Limitations is to provide a cutoff point for stale claims. Rule 15(c) carries out this policy by requiring notice of the action within the time limitations of the Statute of Limitations before an amendment adding new parties will relate back to the date of the original pleading. Vincent v. Edwards, 184 M 92, 601 P2d 1184 (1979), reversed in Sooy v. Petrolane Steel Gas, Inc., 218 M 418, 708 P2d 1014, 42 St. Rep. 1702 (1985).

"Relation Back": Because plaintiff did not sue and serve the correct party before the statutory time limit had run, the "misnomer" rule does not apply. Also, the party sought to be sued did not have notice of the institution of the action. Thus the doctrine of "relation back" does not apply to this case and plaintiff's action is barred by the 3-year Statute of Limitations. LaForest v. Texaco, Inc., 179 M 42, 585 P2d 1318 (1978), followed in Keller v. Stembridge Gun Rentals, 221 M 352, 719 P2d 764, 43 St. Rep. 886 (1986).

Avoidance of Statute of Limitations to Be Considered by Court: Although the Statute of Limitations need not be negated in the complaint, the court should consider whether a motion to amend a complaint relates back to the original complaint and so avoids the bar of the Statute of Limitations. Prentice Lumber Co. v. Hukill, 161 M 8, 504 P2d 277 (1972).

Amendment After Running of Limitations: If original complaint is timely filed, amended complaint dealing with same transaction set out in original complaint will relate back to original complaint even though amended complaint changes legal theory of action, adds claim arising out of same transaction, or states facts more specifically and even though amended complaint is filed after running of Statute of Limitations. Rozan v. Rosen, 150 M 121, 431 P2d 870 (1967).

Response to Amended Pleading Required — Default: Upon service and filing of a second amended complaint, the original and first amended pleadings became functus officio, and defendant was required to answer, and for failure to do so default was properly entered. Hansen v. Goodrich, 56 M 140, 181 P 739 (1919), distinguished in Monarch Lumber Co. v. Haggard, 139 M 105, 360 P2d 794 (1961).

Original Pleading Functus Officio: Upon the filing of an amended complaint, the original pleading is superseded and becomes functus officio. Hansen v. Goodrich, 56 M 140, 181 P 739 (1919); Am. Sur. Co. of New York v. Kartowitz, 54 M 92, 166 P 685 (1917); Ben Kress Nursery Co. v. Oreg. Nursery Co., 45 M 494, 124 P 475 (1912), distinguished in Monarch Lumber Co v. Haggard, 139 M 105, 360 P2d 794 (1961); Bordeaux v. Bordeaux, 43 M 102, 115 P 25 (1911); Butte Butchering Co. v. Clarke, 19 M 306, 48 P 303 (1897); Gettings v. Buchanan, 17 M 581, 44 P 77 (1896); Newell v. Meyendorff, 9 M 254, 23 P 333 (1890), distinguished in Hansen v. Goodrich, 56 M 140, 181 P 739 (1919); Raymond v. Thexton, 7 M 299, 17 P 258 (1888).

Amendment After Demurrer Allowed: The effect of sustaining a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to the complaint is not to terminate the action. The court may allow the pleader in fault to amend, and when the amended complaint is filed, it supersedes the original. All issues are then determinable as of the date of the commencement of the original action, in absence of supplemental pleadings. Am. Sur. Co. of New York v. Kartowitz, 54 M 92, 166 P 685 (1917).

Law Review Articles

Montana Supreme Court Survey, McLean & Young, 41 Mont. L. Rev. 292, 294 (1980).

Rule 15(d). Supplemental pleadings.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule, except that subdivision (d) follows the amendment proposed by the Federal Advisory Committee by adding at the end of the first sentence, "whether or not the original pleading is defective in its statement of a claim for relief or defense." The Federal Advisory Committee explains: "There has developed a gloss on Rule 15(d) to the effect that a supplemental complaint is proper only where the original complaint states a claim on which relief can be granted. . . . This requires a distinction between a supplemental and an amended pleading. . . . Such a distinction and the rule-gloss from which it stems have been criticized by commentators . . . and seemingly not followed by other courts. . . . The amendment . . . will end uncertainty. . . . A supplemental complaint will be tested on its own merits."

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: A 1963 amendment to the Federal Rule adopted the proposed amendment referred to in the commission notes above, but did so by inserting a new second sentence rather than by adding a clause at the end of the first sentence. As of May 1, 1990, the Federal Rule and the Montana Rule were still the same in substance.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

No Error in Denial of Untimely Supplemental Pleading: Although Rule 15, M.R.Civ.P., generally favors allowing amendments to pleadings, a trial court is justified in denying a motion to amend for an apparent reason, such as undue delay. Here, in light of the fact that the deadline for amendments to pleadings in the initial federal action had passed some 9 months earlier, summary judgment motions were pending, and plaintiff waited 3 months after revocation of his hospital work privileges before filing a state court supplemental complaint for tortious interference with prospective business advantage, the trial court did not abuse its discretion in denying plaintiff's motion to supplement the original complaint. Hughes v. Pullman, 2001 MT 216, 306 M 420, 36 P3d 339 (2001).

Lack of Notice — Effect: Appellant was properly denied leave to file a supplemental pleading because he gave insufficient notice of his motion. Montgomery v. Gehring, 145 M 278, 400 P2d 403 (1965).

Notice of Motion Required: Trial court was justified in refusing to grant defendants' motion to amend their answer by adding an affirmative defense of compromise and settlement, even though it was represented that some sort of compromise settlement had been reached after filing of complaint and answer, since defendants had not given plaintiffs notice of this motion as required by this section. Montgomery v. Gehring, 145 M 278, 400 P2d 403 (1965).

Amendment of Answer to Raise Testimony in Other Proceedings: Where two workmen brought separate suits against a construction company, one in federal court and one in state court, defendant in the latter case asked leave to amend its answer to conform to testimony of plaintiff in federal court indicating the existence of a partnership between the two claimants, by alleging such relationship, as well as payment of the claim by satisfying the federal judgment. The court abused its discretion in denying the motion to amend. State ex rel. Barnard-Curtiss Co. v. District Court, 113 M 107, 122 P2d 419 (1942).

Original and Supplemental Complaints to Be Combined: Where a supplemental complaint was made necessary by acts of the defendant subsequent to filing of the original complaint, the supplement is merely an addition to the original and the two pleadings are to be taken as one. Merchants Fire Assurance Corp. v. Watson, 104 M 1, 64 P2d 617 (1937).

Purpose of Supplemental Pleading — Discretion of Court: The proper method of pleading a fact material to a cause occurring after the filing of a former pleading is by way of a supplemental pleading; such application is addressed to the discretion of the trial court. Story Gold Dredging Co. v. Wilson, 106 M 166, 76 P2d 73 (1935).

Refusal of Amendment to Include Counterclaim as Abuse of Discretion: Where, in an action for services rendered, defendant company 2 weeks before trial applied for permission to amend its answer by the insertion of a counterclaim, acting promptly after its existence became known to it and presenting a reasonable showing why it had failed to include it in the original answer, refusal to grant permission was an abuse of discretion. State ex rel. Gold Creek Min. Co. v. District Court, 99 M 33, 43 P2d 249 (1935).

Different Relief Sought by Supplemental Pleading: The filing of an amended and supplemental complaint in one pleading is permissible and the relief asked therein may be different from that prayed in the original complaint. Nat'l Bank of Mont. v. Bingham, 83 M 21, 269 P 162 (1928).

Delay in Defense of Bankruptcy — No Abuse of Discretion: Where defendant in an action on an open account did not move for leave to file a supplemental answer for the purpose of setting up his discharge in bankruptcy, until 20 months after he had been adjudged a bankrupt and 6 months after his final discharge, and did not offer any excuse for the delay, refusal to grant the motion was not an abuse of discretion. Pue v. Bushnell, 72 M 265, 233 P 124 (1925).

Time of Motion for Supplemental Pleading: The matter of filing a supplemental pleading is not one which a party may demand as of right, but is addressed to the discretion of the trial court, and in order to entitle the movant to favorable action the motion must be made within a reasonable time after the facts material to the cause come to his knowledge. Pue v. Bushnell, 72 M 265, 233 P 124 (1925).

Continuation of Nonpayment of Rent: Where, in an action on the defendant's guaranty for the payment of rent, the plaintiff makes out a prima facie case of nonpayment of the rent by means of

his deposition read in evidence but a new trial is had, the burden is upon the defendant, on the second trial, in which the same deposition is put in evidence, to overcome such prima facie case. This is true though the plaintiff has filed no supplemental pleading. Isman v. Altenbrand, 42 M 188, 111 P 849 (1910).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Pleading *key* 273, et seq.
71 C.J.S. Pleading §§456 through 475.
61A Am. Jur. 2d Pleading §§715 through 736.
Raising issue of last clear chance doctrine in supplemental pleadings. 25 ALR 2d 277.

Rule 16. Pretrial conferences — scheduling — management

Advisory Committee Note

Advisory Committee's Note to October 9, 1984, Amendment: The amendment conforms the rule essentially to the 1983 Amendment of the Federal Rule and is a significant change from the prior rule. It is strongly recommended that the lengthy advisory committee note to the Federal Rule be consulted. The Montana Rule eliminates references to "magistrates" in the Federal Rule and adds to the language of subdivision (c)(11) in order to make specific reference to proposed findings of fact and conclusions of law, proposed instructions, and forms of special verdicts. The Commission favors the use of motions in limine and although no specific reference is made in the Rule, the Commission believes that the change in subdivision (c)(3) is sufficient for that purpose.

Case Notes

Admission in Pretrial Order Not Considered Judicial Admission Precluding Introduction of Evidence in Support of Defense at Trial: Plaintiffs alleged that defendant failed to make a downward adjustment in the price of their home and subsequently overcollected $3,383.30. Defendant's counterclaim alleged that plaintiffs owed in excess of $3,800 for services related to the construction of the home. In defendant's written contentions in the pretrial order, he admitted owing plaintiffs $1,441 for changes made during construction, but claimed that that amount was intended to be an acknowledgment of a credit against what plaintiffs owed and that he intended to introduce evidence at trial disputing the overcollection claim. The District Court determined that there was conflicting evidence on the issue and allowed the jury to resolve it. On appeal, plaintiffs contended that defendant's admission in the pretrial order constituted a judicial admission and that the District Court thus erred in allowing defendant to introduce contrary evidence at trial because defendant did not claim an affirmative defense of setoff. The Supreme Court disagreed. In order for a judicial admission to be binding on a party, the admission must be an unequivocal statement of fact rather than a conclusion of law or the expression of an opinion. Defendant's pretrial contention was an admission that money was owed, but did not say that the matter was closed to the extent that the sum could not be used as an offset. The District Court did not err in allowing the issue to go to the jury and in allowing defendant to offer evidence on the defense of setoff. Plath v. Schonrock, 2003 MT 21, 314 M 101, 64 P3d 984 (2003). See also Nentwig v. United Indus., Inc., 256 M 134, 845 P2d 99 (1992), and DeMars v. Carlstrom, 285 M 334, 948 P2d 246 (1997).

Jury Instruction Regarding Contractor's Involvement in Trade or Commerce — Waiver of Defense by Failure to Include in Final Pretrial Order: Defendant objected to a jury instruction stating defendant's involvement in trade or commerce, contending that that determination and the applicability of the Consumer Protection Act to his business were questions of fact for the jury. However, the final pretrial order did not contain any factual issue, legal theory, or defense that defendant was contesting the applicability of the Montana Unfair Trade practices and Consumer Protection Act of 1973 to his business, so that theory or defense was waived as an issue to be determined by the trier of fact at trial. The Supreme Court found that the agreed facts in the pretrial order supported a determination that defendant was in fact engaged in trade or commerce, as defined in 30-14-102, so giving of a jury instruction to that effect was not in error. Plath v. Schonrock, 2003 MT 21, 314 M 101, 64 P3d 984 (2003).

No Error in City Court's Denial of Motion for Continuance After Similar Motions Granted: Over 2 years after charges were filed and after numerous motions of continuance were granted, a trial date was set pursuant to Robertson's motion for continuance to permit him to make travel arrangements after moving to California. Three weeks before trial, Robertson again moved for a continuance on the same grounds, but the City Court declined to grant it, and Robertson was tried in absentia. However, it was Robertson, not the court, who caused the trial to go forward

without him. Not only did he have ample time to arrange for an appearance in Montana, but rescheduling trial dates upon motion is within the trial court's discretion and will be affirmed absent a showing that the court abused its discretion by acting arbitrarily without conscientious judgment or exceeding the bounds of reason, resulting in substantial injustice. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000). See also Campbell v. Canty, 1998 MT 278, 291 M 398, 969 P2d 268 (1998).

No Reciprocal Right to Attorney Fees When Issue Not Contained in Pretrial Order or Raised at Trial: Plaintiff sought $900,000 in attorney fees, posttrial, based on a request for attorney fees by defendant in its pleading, arguing that under 28-3-704, the award of attorney fees should be reciprocal. The District Court did not abuse its discretion in denying the request because it was not contained in the pretrial order or raised at trial and thus was not properly before the court. Simmons Oil Corp. v. Wells Fargo Bank, N.A., 1998 MT 129, 289 M 119, 960 P2d 291, 55 St. Rep. 508 (1998), distinguished in In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999).

No Error in Granting Motion In Limine — Plaintiff Allowed to Introduce Evidence Allegedly Excluded: The lower court granted the Butte Water Company's motion in limine to exclude evidence regarding the authority of the newly elected board of directors. The Supreme Court held that a review of the trial transcript revealed that Mannix had been allowed to introduce the evidence that he claimed had been wrongly excluded and that therefore there had been no error on the lower court's part. Mannix v. Butte Water Co., 259 M 79, 854 P2d 834, 50 St. Rep. 691 (1993).

Issue Not in Pretrial Order Raised by Court — No Abuse of Discretion: After reviewing the provisions of a disputed lease contract, the District Court recognized that the issue of vagueness or indefiniteness had not been raised in a timely fashion in the pretrial order, but nevertheless, in the interests of preventing manifest injustice to the parties, the court dismissed the jury and provided the parties an opportunity to argue the issue in briefs. Nentwig contended that failure to raise the issue in the pretrial order resulted in waiver of consideration of the issue. However, the issue was implicit in the issues that were raised, and the court overcame any prejudice to Nentwig by allowing a full opportunity to brief the issue without requiring any new evidence or the development of further facts. The court did not abuse its wide discretion by raising the issue of vagueness. Nentwig v. United Indus., Inc., 256 M 134, 845 P2d 99, 49 St. Rep. 1172 (1992).

No Ruling on Motion In Limine Prior to Trial — Waiver of Objection: Plaintiff presented District Court with a motion in limine during pretrial conference, seeking to preclude defendant's mention at trial of a collateral source of insurance. The court reserved ruling on the matter. Plaintiff did not request a ruling prior to trial, object during trial, or present the court with any motions for mistrial or to strike the alleged testimony when insurance was first mentioned by defendant at trial. Failure to object or request corrective action after the subject was mentioned constituted a waiver of objection on the issue. Stewart v. Fisher, 235 M 432, 767 P2d 1321, 46 St. Rep. 116 (1989).

Disqualification of Judge Upon Failure of Pretrial Settlement Negotiations: Where a judge is to be the trier of fact and he participates in pretrial settlement negotiations that subsequently fail, he should, upon request, disqualify himself from sitting as the trial judge. Shields v. Thunem, 220 M 449, 716 P2d 217, 43 St. Rep. 518 (1986).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Trial *key* 9(1).

88 C.J.S. Trial §§43 through 59.

62A Am. Jur. 2d Pretrial Conference and Procedure §§1 through 10.

Rule 16(a). Pretrial conferences — objectives.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the rule was identical with the Federal Rule.

Amendment: The amendment of October 9, 1984, in introduction inserted "and any unrepresented parties" and "or conferences before trial", and substituted "for such purposes as" for "to consider"; and inserted (1) through (5).

Case Notes

Dismissal of Complaint With Prejudice Unwarranted When Delay Reasonable and No Prejudice Shown: The District Court set a scheduling conference, but plaintiff's counsel did not attend because of a computer problem. The District Court then dismissed the complaint with

prejudice and denied a motion to reopen the case. On appeal, the Supreme Court reversed, applying the factors in Becky v. Norwest Bank Dillon, N.A., 245 M 1, 798 P2d 1011 (1990), and Hobble-Diamond Cattle Co. v. Triangle Irrigation Co., 272 M 37, 899 P2d 531 (1995), to determine whether the District Court abused its discretion in dismissing the action for failure to prosecute. In this case, plaintiff's delay in prosecuting the case was reasonable, and defendant suffered no actual prejudice, so the District Court abused its discretion in dismissing the complaint with prejudice. Vermeer of Wash., Inc. v. Jones, 2004 MT 77, 320 M 435, 87 P3d 516 (2004), distinguishing E. Livestock Co., Inc. v. O'Neal, 285 M 90, 945 P2d 931 (1997).

Failure to Deny Allegation of Pretrial Pleading — Summary Judgment: Court was correct in adopting uncontested statement of fact in pretrial pleading in making its findings of fact for summary judgment. Glacier St. Elec. Supply v. Hoyt, 152 M 415, 451 P2d 90 (1969); Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Discretion of Court: Pretrial procedure is optional, it being left to trial court's discretion whether to utilize procedure and to what extent. Lenz v. Mehrens, 149 M 394, 427 P2d 297 (1967).

Constitutionality: The permission granted the court to require a pretrial conference does not violate the constitutional guarantee of a jury trial. State ex rel. Kennedy v. District Court, 121 M 320, 194 P2d 256 (1948).

Purpose of Pretrial Conference — Bill of Particulars: A pretrial conference is not especially for the purpose of disclosure or discovery and the fact that plaintiff furnished defendant with a bill of particulars does not dispense with the reason for a pretrial conference. State ex rel. Kennedy v. District Court, 121 M 320, 194 P2d 256 (1948).

Requirement for Conference as Affected by Disqualification of Judge: Where a rule is adopted requiring a pretrial conference before a jury trial, such rule is not revoked in a particular case when the judge of the court is disqualified to act. State ex rel. Kennedy v. District Court, 121 M 320, 194 P2d 256 (1948).

Rule Requiring Conference Before Trial: The District Court has power to establish by rule a pretrial calendar, and to make the rule effective it is within the power of the District Court to provide that no jury case shall be set for trial until pretrial conference thereon is had. State ex rel. Kennedy v. District Court, 121 M 320, 194 P2d 256 (1948).

Time of Trial After Conference: Where rule required pretrial conference before setting jury cases for trial it was not required that the rule contain any definite time for the calling of a jury after the pretrial conference. State ex rel. Kennedy v. District Court, 121 M 320, 194 P2d 256 (1948).

Calling of Pretrial Conferences — Time: Where District Court determined by court rule that all actions must be subjected to pretrial conference before being set for trial, either by the District Court alone or before a jury, the District Court should, as a matter of routine, call such pretrial calendars as cases become at issue in order to accomplish their speedy disposition. State ex rel. Carlin v. District Court, 118 M 127, 164 P2d 155 (1945).

Right to Jury Trial: The effect of the rule is not such as to deprive a litigant, in a case involving questions of fact, of the right to have controverted fact questions disposed of by a jury as prescribed by Art. III, sec. 23, 1889 Mont. Const. (now Art. II, sec. 26, 1972 Mont. Const.). State ex rel. Carlin v. District Court, 118 M 127, 164 P2d 155 (1945).

Collateral References

Pretrial conference procedure as affecting right to discovery. 161 ALR 1151.

Rule 16(b). Scheduling and planning.

Compiler's Comments

Source: All new material based on Federal Rule—added by October 9, 1984, amendments to Rule 16. See advisory committee's note under Rule 16.

Identity With Federal Rule: As of May 1, 1990, the rule was identical with the Federal Rule except the latter includes "or a magistrate when authorized by district court rule" after "judge" in two places.

Case Notes

No Estate Inventory and Inventory Discovery Required Prior to Grant of Statutory Homestead, Exempt Property, and Family Allowances to Surviving Spouse: No estate inventory or scheduling order was filed prior to the District Court award of a homestead allowance, an exempt property allowance, and a family allowance to the surviving spouse. The decedent's son and sister contested the award, relying on this rule for the proposition that they were entitled to an inventory and related discovery before the allowances were granted. The Supreme Court found

that application of the rule to probate proceedings would be administratively inefficient and contrary to the purposes of the rule. The District Court properly found that the surviving spouse was entitled to the allowances as a matter of law, and because these were legal issues, it was within the court's discretion to decide them prior to a scheduling order or estate inventory. In re Estate of Martelle, 2001 MT 194, 306 M 253, 32 P3d 758 (2001).

Products Liability Case Elements — Failure to Comply With Case Management Order — Reliance Upon Material Safety Date Sheets Unjustified — Summary Judgment Held Proper:

In this companion case to Schelske, id., involving identical case management orders and similar affidavits and reports from the same doctors, the District Court reviewed the Schelske affidavits and concluded that the affidavits in this case did not go further than the deficient affidavits in Schelske; therefore, the court struck one of the doctors' affidavits in its entirety, which in turn became the basis for summary judgment as to all products and all manufacturers. On appeal, the Supreme Court distinguished Schelske and recognized that, based on the information provided, some of the products in question could properly be considered for dismissal. However, it was error to strike the entire affidavit because plaintiff provided sufficient information in pretrial proceedings to allow the case to move forward and to enable the cosmetic manufacturers to proceed with discovery by further deposition of the experts who submitted affidavits, which could have served to eliminate those products for which insufficient information was provided. Although plaintiff may not have completely complied with the case management order as to every product listed, the four requirements of the case management order were satisfied by the information as to many of the products, so summary judgment was improper. Meyer v. Creative Nail Design, Inc., 1999 MT 74, 292 M 46, 975 P2d 1264, 56 St. Rep. 306 (1999).

Mischelle, a plaintiff in a products liability lawsuit, was required by the terms of a case management order (CMO) entered by the District Court to provide a list of products that she had come in contact with, the circumstances of the alleged exposures, an identification of each specific chemical that caused harm, and a physician's opinion of the causal connection between the exposures and the injuries. In response to the CMO, her attorney filed affidavits by several physicians and material safety data sheets (MSDS). The Supreme Court held that the issuance of the CMO was totally within the discretion of the District Court. The District Court dismissed the action on the motions of defendants based upon the plaintiff's affidavits. The case was properly dismissed because the affidavits failed to establish the elements of a products liability case, as required by the CMO. The Supreme Court noted that in violation of the CMO, the affidavits listed only generic products and not toxic substances within those products, failed to note the specific times Mischelle came in contact with the products, and failed to provide a medical opinion that specific chemicals actually caused Mischelle's illnesses. The medical affidavits stated only that the chemicals listed on the MSDS were "associated with" certain diseases. The Supreme Court also held that Mischelle was not entitled to rely solely upon the MSDS to prove the elements of her case. The MSDS did not demonstrate that the products were defective and did not demonstrate a medical basis for the chemicals having caused Mischelle's diseases. Additionally, the Supreme Court held that although a plaintiff does not have to apportion damage among several defendants, Mischelle must still show that the defendants caused her diseases, which she failed to prove. Schelske v. Creative Nail Design, Inc., 280 M 476, 933 P2d 799, 54 St. Rep. 21 (1997).

Lack of Good Cause to Modify Discovery Order: The parties were given 6 months to complete discovery and, during that time, failed to move to extend the discovery deadline. After the deadline passed, no formal advisement was given the court of the status of discovery or a motion made to reopen discovery. Accordingly, good cause did not exist to modify the discovery order and the court did not abuse its discretion by adhering to the discovery order. In re Marriage of Smith, 270 M 263, 891 P2d 522, 52 St. Rep. 174 (1995).

Insufficient Cause to Amend Scheduling Order: The date allowed for discovery and listing expert witnesses was set by stipulation as June 1, 1989. Plaintiff learned on June 21, 1989, that the expert it had retained would not provide expert testimony, but plaintiff did not move to extend discovery and add experts until August 29, 1989. The motion was not timely and appeared to be the result of plaintiff's procrastination and failure to act diligently. The District Court did not err in finding there was not good cause to amend the scheduling order. Lindey's, Inc. v. Professional Consultants, Inc., 244 M 238, 797 P2d 920, 47 St. Rep. 1570 (1990).

Deposition Taken After Court's Deadline: Where a deposition is taken after the time the District Court establishes as a deadline for pretrial discovery, the District Court cannot be held in error on the basis of documents not before it at that time. Reaves v. Reinbold, 189 M 284, 615 P2d 896 (1980).

Granting Motion In Limine: Authority for granting of motion in limine rests in inherent power of court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties. Wallin v. Kenyon Estate, 164 M 160, 519 P2d 1236 (1974).

Purpose of Pretrial Conference — Bill of Particulars: A pretrial conference is not especially for the purpose of disclosure or discovery and the fact that plaintiff furnished defendant with a bill of particulars does not dispense with the reason for a pretrial conference. State ex rel. Kennedy v. District Court, 121 M 320, 194 P2d 256 (1948).

Rule Requiring Conference Before Trial: The District Court has power to establish by rule a pretrial calendar, and to make the rule effective it is within the power of the District Court to provide that no jury case shall be set for trial until pretrial conference thereon is had. State ex rel. Kennedy v. District Court, 121 M 320, 194 P2d 256 (1948).

Time of Trial After Conference: Where rule required pretrial conference before setting jury cases for trial it was not required that the rule contain any definite time for the calling of a jury after the pretrial conference. State ex rel. Kennedy v. District Court, 121 M 320, 194 P2d 256 (1948).

Calling of Pretrial Conferences — Time: Where District Court determined by court rule that all actions must be subjected to pretrial conference before being set for trial, either by the District Court alone or before a jury, the District Court should, as a matter of routine, call such pretrial calendars as cases become at issue in order to accomplish their speedy disposition. State ex rel. Carlin v. District Court, 118 M 127, 164 P2d 155 (1945).

Rule 16(c). Subjects to be discussed at pretrial conferences.

Advisory Committee Note

Advisory Committee's Note to October 9, 1984, Amendment: The amendment conforms the rule essentially to the 1983 Amendment of the Federal Rule and is a significant change from the prior rule. It is strongly recommended that the lengthy advisory committee note to the Federal Rule be consulted. The Montana Rule eliminates references to "magistrates" in the Federal Rule and adds to the language of subdivision (c)(11) in order to make specific reference to proposed findings of fact and conclusions of law, proposed instructions, and forms of special verdicts. The Commission favors the use of motions in limine and although no specific reference is made in the Rule, the Commission believes that the change in subdivision (c)(3) is sufficient for that purpose.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the rule was identical with the Federal Rule except the latter contains a reference in (6) to magistrate, and in (11) the State Rule contains the following language not found in the Federal Rule: "the time for submission of proposed findings of fact and conclusions of law in a non-jury action, or proposed instructions to the jury and the form of verdict in a jury action and".

Amendment: The amendment of October 9, 1984, inserted introduction; in (1) inserted "formulation and" and "including the elimination of frivolous claims or defenses"; in (3) inserted "stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence"; inserted (4); in (5) substituted present language for "(4) the limitation of the number of expert witnesses"; in (6) substituted present language for "(5) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury"; inserted (7) through (10); in (11) substituted present language for "(6) such other matters as may aid in the disposition of the action"; and new Rules 16(d), (e), and (f) were adopted to replace the last paragraph of Rule 16, which read: "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions."

Case Notes

Easement by Grant Upheld on Basis of Stipulation and Circumstantial Evidence: Tanners and others purchased property on Flathead Lake. Tanners and the others obtained access to their property by driving on roads located on Daly's property to the north. When Daly erected a fence across the roads and blocked access to their property, Tanners and the others brought suit, alleging that they had purchased with their properties an easement by grant for the use of the roads. The Supreme Court held that inasmuch as Daly had stipulated to the admissibility of the

chain of title documents without foundation testimony and had not objected to introduction of the exhibits at trial, Daly could not now refute the authenticity of the deeds of Tanners' predecessors by arguing that the deeds bore no signatures or notary seal. The Supreme Court also noted that Daly testified that she knew of the roads at the time that she purchased her property and could therefore not claim to be a bona fide purchaser without notice. The Supreme Court also held that even though there was no direct evidence that the present roads were the ones referred to in the 1932 deed, there was circumstantial evidence in the form of testimony from two elderly witnesses that the same roads existed in the mid-1930s and were well traveled at that time, and Daly's attorney had admitted in correspondence that road A existed in 1932. Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996).

Violation of Motion In Limine Not Warranting Reversal: In a suit for wrongful termination of employment, the lower court ruled that statements made in newspaper articles were not admissible. The appellant argued that reference to the articles had been made by the plaintiff and his counsel and that the lower court erred in failing to grant a mistrial. The Supreme Court held that the lower court had not abused its discretion in finding that the references were not so prejudicial as to warrant a reversal. Barrett v. Asarco, 245 M 196, 799 P2d 1078, 47 St. Rep. 1980 (1990).

Objection to Matter Agreed to at Pretrial Properly Denied: An objection to a fire department report on a fire, on grounds of hearsay, was properly denied when objecting party had agreed in pretrial order to the admission of the report as requiring no foundation or proof. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981). See also Benson v. Heritage Inn, Inc., 1998 MT 330, 292 M 268, 971 P2d 1227, 55 St. Rep. 1341 (1998).

Failure to List Exhibit in Pretrial Order — Evidence Improperly Admitted: Where defendant's counsel agreed to a pretrial order purporting to list all exhibits the parties intended to introduce but failed to include an exhibit consisting of a movie, failed to show any justification for his failure to mention the movie at the pretrial conference, and failed to allow the plaintiff to preview the movie as a condition of its admission into evidence, it was an abuse of discretion for the court to allow the movie into evidence. The purpose of pretrial orders and pretrial discovery is to prevent surprise, simplify the issues, and permit counsel to prepare their case for trial on the basis of the pretrial order. Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980), followed in Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999).

Pretrial Stipulation — Stipulated Matter Raised on Appeal: Prior to trial, all parties agreed that documentary evidence pertaining to warning devices at the railroad crossing where the accident occurred was unnecessary if the State and Burlington Northern would admit to the date they received notice of the dangerous nature of the crossing. All parties then entered into a stipulation regarding the date of notice. The stipulation was properly before the jury during the trial. It is improper to raise an issue on appeal as to a question of law or fact after the parties have entered into a stipulation as to that law or fact. Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980).

Hearsay — Waiver of Objection by Stipulation: In an action by the respondent for damages occasioned by wrongful discharge from employment, the court correctly received a copy of a report of the United States Equal Employment Opportunity Commission (EEOC) into evidence over the objection of appellant that the report constituted hearsay. The report was not hearsay since it was not offered to prove the truth of the matter asserted but only to show that the EEOC had not terminated its investigation. Counsel for appellant also waived any valid hearsay objection by agreeing to a pretrial stipulation of exhibits. Strong v. St., 183 M 410, 600 P2d 191 (1979).

Rules Regarding Effect of Stipulations: Court did not go beyond agreed statement of facts in making its findings. In considering an agreed statement of facts a court may make any reasonable inference of which the facts might be susceptible as if the facts had been gleaned from testimony. When a court feels it needs evidence beyond that in the agreed statement to make its decision, it may refer to evidence outside of the agreed statement. Grinde v. Tindall, 172 M 199, 562 P2d 818 (1977).

Advance Disclosure of Rebuttal Witness: District Court's instruction that rebuttal testimony be limited to affecting weight and credibility of defendant's evidence and for impeachment purposes was error as the substantive effect of rebuttal evidence cannot be diminished to accomplish full disclosure of witnesses in advance of trial. Wilson v. Swanson, 169 M 328, 546 P2d 990 (1976).

Granting Motion In Limine: Authority for granting of motion in limine rests in inherent power of court to admit or exclude evidence and to take such precautions as are necessary to afford a fair trial for all parties. Wallin v. Kenyon Estate, 164 M 160, 519 P2d 1236 (1974).

Failure to Deny Allegation of Pretrial Pleading — Summary Judgment: Court was correct in adopting uncontested statement of fact in pretrial pleading in making its findings of fact for summary judgment. Glacier St. Elec. Supply v. Hoyt, 152 M 415, 451 P2d 90 (1969); Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Right to Jury Trial: The effect of the rule is not such as to deprive a litigant, in a case involving questions of fact, of the right to have controverted fact questions disposed of by a jury as prescribed by Art. III, sec. 23, 1889 Mont. Const. (now Art. II, sec. 26, 1972 Mont. Const.). State ex rel. Carlin v. District Court, 118 M 127, 164 P2d 155 (1945).

Collateral References

Statements of parties or witnesses as subject of pretrial disclosure, production, or inspection. 73 ALR 2d 12.

Relief from stipulations on pretrial hearings. 161 ALR 1198.

Pretrial conference procedure as affecting right to discovery. 161 ALR 1151.

Rule 16(d). Final pretrial conference.

Compiler's Comments

Source: All new material based on Federal Rule—added by October 9, 1984, amendments to Rule 16. See advisory committee's note under Rule 16.

Identity With Federal Rule: As of May 1, 1990, this rule was identical to the Federal Rule.

Rule 16(e). Pretrial orders.

Compiler's Comments

Source: All new material based on Federal Rule—added by October 9, 1984, amendments to Rule 16. See advisory committee's note under Rule 16.

Identity With Federal Rule: As of May 1, 1990, this rule was identical to the Federal Rule.

Case Notes

No Error in District Court Refusal to Supplement Record With Stipulated Information Not Addressed at Trial: The District Court decided that Boadle Road was a public road. About 2 months after trial, the parties stipulated that the District Court should supplement the record to apply the evidence pertaining to Boadle Road to also determine the status of another road to which Boadle Road connected, ostensibly to avoid future litigation. The District Court declined to supplement the record, and on appeal, the Supreme Court affirmed. Under Rule 15(b), M.R.Civ.P., parties may be entitled to an amendment of the pleadings only when the issue was tried by express or implied consent and there was sufficient evidence introduced at trial to support the amendment. In this case, the parties attempted to force the District Court through stipulation to decide an issue not presented at trial. The District Court therefore properly relied on a strict application of this rule in adhering to the issues in the pretrial order and denying the motion to supplement the record on an issue not addressed at trial. Pub. Lands Access Ass'n, Inc. v. Jones, 2004 MT 394, 325 M 236, 104 P3d 496 (2004), following Wollaston v. Burlington N., Inc., 188 M 192, 612 P2d 1277 (1980), and distinguishing Bell v. Richards, 228 M 215, 741 P2d 788 (1987), and Webb v. Wolfe, 230 M 322, 749 P2d 531 (1988).

Introduction of Evidence of Acts Not Referred to in Pretrial Order — Not Grounds for New Trial: As a result of a dispute, the relationship between neighbors Lopez, Monroe, and Josephson deteriorated until assault charges were filed against Josephson. The operative contentions in the pretrial order were that Josephson assaulted Lopez by pointing a firearm at Lopez's face and assaulted Monroe verbally and fired a weapon toward Monroe's property. The District Court found it impossible to determine from the allegations the dates, times, and places that the alleged assaults took place, but the court concluded that the pretrial order nevertheless placed Josephson on notice that he was being accused of assault on multiple occasions over an unspecified period of time. Josephson moved for a new trial on grounds that plaintiffs were improperly allowed to introduce evidence of acts not referred to in the pretrial order, evidence of bad character, and evidence of other crimes, wrongs, or acts. However, because Josephson waited until the day of trial to clarify which assaults formed the basis of the case against him, rather than using available pretrial motions and rules of discovery, the District Court was not found to have abused its discretion in giving plaintiffs latitude in their proof of the various assaults at trial, including allowing evidence of bad character to impeach Josephson's testimony. The District Court did properly preclude evidence of assaults by Josephson on nonparty persons. Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Amendment of Pretrial Order to Include Attorney Fees Not Listed in Pretrial Order — No Requirement to Plead Attorney Fees in Marriage Dissolution Case: During the second day of trial in a marriage dissolution case, the wife offered copies of her attorney fee bills, and the District Court, over the husband's objection, allowed the pretrial order to be amended on the issue of attorney fees. The husband cited Naftco Leasing Ltd. Partnership 301 v. Finalco, Inc., 254 M 89, 835 P2d 729 (1992), and contended that because the wife made no showing of manifest injustice, as required by this rule, to modify the pleadings, the District Court erred by awarding the wife her attorney fees and costs when they were not listed in the pretrial order. The Supreme Court distinguished Naftco, noting that that case was not a dissolution action and that the trial court in Naftco never had the opportunity to consider amending the pleadings at trial. Further, this rule must be read together with Rule 15(b), M.R.Civ.P., which requires a showing by the objecting party that amendment of the pleadings would be prejudicial. The husband never claimed prejudice or sought a continuance to enable him to meet the wife's attorney fee evidence. Although it is good practice to plead attorney fees, it is not required in marriage dissolution actions under 40-4-110. Rather, that section gives the trial court the discretion to order payment from time to time, after considering the financial resources of the parties. The husband failed to demonstrate an abuse of the court's discretion, and the Supreme Court affirmed the fee award. In re Marriage of Schmieding, 2000 MT 237, 301 M 336, 9 P3d 52, 57 St. Rep. 983 (2000).

Failure to List Fire Marshal's Report in Pretrial Order — Report Not Considered Rebuttal Evidence and Thus Properly Excluded: At an arson trial, Andersen sought to introduce into evidence a report written by a Deputy State Fire Marshal who had assisted local law enforcement in investigating the fire but who had died prior to trial and was unavailable to testify. Andersen contended that, even though it had not been endorsed as an exhibit in the pretrial order, the report was admissible under Rule 803(6), M.R.Ev. (Title 26, ch. 10), as a record kept in the ordinary course of business. The District Court disallowed the report under Rule 803(8)(i), M.R.Ev., because it was an investigative report. The Supreme Court did not reach the question of whether the report was admissible under Rule 803, M.R.Ev., because Andersen conceded that the report had not been endorsed as an exhibit in the pretrial order; moreover, the report could not be considered rebuttal evidence because it was not offered to counter new evidence, but rather had been presented during plaintiff's case in chief. Because Andersen failed to list the report in the pretrial order, it was properly excluded. Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999). See also Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980), and State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

No Requirement That Stand-Alone, Statutorily Mandated Attorney Fees Be Included in Pretrial Order: It was not error for the District Court to award attorney fees to the personal representatives in a will contest pursuant to 72-12-206, despite the fact that the issue of attorney fees was not included in the pretrial order. The purposes of pretrial orders are to prevent surprise, simplify the issues, and permit the parties to prepare for trial. However, in the case of a stand-alone, statutorily mandated award of fees to the prevailing party, as contained in 72-12-206, requiring inclusion in the pretrial order would accomplish none of these purposes and thus is not required. In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999), distinguishing Naftco Leasing Ltd. Partnership 301 v. Finalco, Inc., 254 M 89, 835 P2d 729, 49 St. Rep. 644 (1992), and Simmons Oil Corp. v. Wells Fargo Bank, 1998 MT 129, 289 M 119, 960 P2d 291 (1998).

No Reciprocal Right to Attorney Fees When Issue Not Contained in Pretrial Order or Raised at Trial: Plaintiff sought $900,000 in attorney fees, posttrial, based on a request for attorney fees by defendant in its pleading, arguing that under 28-3-704, the award of attorney fees should be reciprocal. The District Court did not abuse its discretion in denying the request because it was not contained in the pretrial order or raised at trial and thus was not properly before the court. Simmons Oil Corp. v. Wells Fargo Bank, N.A., 1998 MT 129, 289 M 119, 960 P2d 291, 55 St. Rep. 508 (1998), distinguished in In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999).

Appellate Review Not Limited to Uncontested Facts in Pretrial Order: A pretrial order includes only facts that are uncontested and does not preclude a party from attempting to prove additional facts that remain in dispute. A pretrial order does not, in and of itself, limit the scope of review by the Supreme Court to the uncontested facts in the pretrial order. On appeal, the Supreme Court may consider any evidence that is part of the record although it was not part of the pretrial record. Heisler v. Hines Motor Co., 282 M 270, 937 P2d 45, 54 St. Rep. 345 (1997), distinguishing Johnson v. Killingsworth, 271 M 1, 894 P2d 272 (1995).

Pleading of Statute of Limitations Superseded by Pretrial Order: In response to a civil action brought against him by the State Fund, Berg pleaded the affirmative defense of the statute of limitations. Later, in response to interrogatories propounded by the State Fund, Berg indicated that it was his intent to drop the defense of the statute of limitations and did not object to the failure of a pretrial order to include the statute of limitations as an issue. After judgment against him, Berg raised the defense of the statute of limitations on appeal. Citing Zimmerman v. Robertson, 259 M 105, 854 P2d 338 (1993), the Supreme Court held that Berg had waived the defense of the statute of limitations and that the pretrial order superseded the pleading and governed the subsequent course of the civil action. State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Extraneous Conclusions of Law Not Affecting Substantial Rights — Harmless Error: Issues of negligence that were not explicitly or implicitly raised in the pretrial order or at trial were not properly before the trial court, and it was error for the court to enter conclusions of law on the irrelevant issues. However, because the court's entry of extraneous conclusions did not affect the substantial rights of the parties, the error was harmless. Ducham v. Tuma, 265 M 436, 877 P2d 1002, 51 St. Rep. 595 (1994).

Failure to Raise Issue in Pretrial Order: Zimmerman argued that the lower court had erred in refusing to allow testimony on the issue of whether he had given his informed consent to a surgical procedure used on his horse. The Supreme Court ruled that the lower court had not abused its discretion in refusing to allow testimony on the consent issue because Zimmerman had not identified it as an issue in the pretrial order. Zimmerman v. Robertson, 259 M 105, 854 P2d 338, 50 St. Rep. 703 (1993), distinguished in King v. Zimmerman, 266 M 54, 878 P2d 895, 51 St. Rep. 659 (1994). Zimmerman v. Robertson was followed in State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Attorney Fees Not Recoverable Under Contract — Failure of Either Party to Raise Issue of Attorney Fees in Pretrial Order as Precluding Reciprocal Award: Although both parties claimed attorney fees in the pleadings, the final pretrial order did not include any reference to attorney fees, the fees were not listed as a contention at trial, and the amount to be awarded to the prevailing party was not listed as a fact to be considered at trial. Because attorney fees were not recoverable by defendant under the contract language and no evidence was presented on the issue at trial, failure by either party to raise the issue in the pretrial order placed the issue outside the record of the District Court and it was error for the court to amend the judgment to grant fees to defendant on grounds of reciprocity. Naftco Leasing Ltd. Partnership 301 v. Finalco, Inc., 254 M 89, 835 P2d 729, 49 St. Rep. 644 (1992), distinguishing Bell v. Richards, 228 M 215, 741 P2d 788 (1987), and distinguished in In re Estate of Lande, 1999 MT 179, 295 M 277, 983 P2d 316, 56 St. Rep. 701 (1999).

Allowing Witness Not Listed in Pretrial Order to Testify — Abuse of Discretion: Neither a scheduling order nor a pretrial order listed Goacher as a witness; rather, Stokes was listed as the witness who would provide foundation for the survey of an accident scene. One week before trial, defendant learned it was Goacher who had prepared the survey and would testify, but there was not time to depose Goacher prior to trial. At trial, defendant objected to Goacher's testimony on the grounds of surprise and prejudice. The objection was overruled, and defendant did not request a continuance. Failure to reveal the information regarding witness testimony in a timely fashion resulted in surprise and prejudice to defendant and constituted reversible error, notwithstanding defendant's failure to request a continuance. Bache v. Gilden, 252 M 178, 827 P2d 817, 49 St. Rep. 203 (1992), overruling Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27 (1988), and Sikorski v. Olin & Rolin Mfg., 174 M 107, 568 P2d 571 (1977), to the extent that they held that failure to request a continuance at trial constituted a waiver of the right to claim error on appeal, and followed in Glacier Nat'l Bank v. Challinor, 253 M 412, 833 P2d 1046, 49 St. Rep. 503 (1992).

Failure to List Amount of Loss in Pretrial Order — Hearsay Insufficient to Prove Costs — Dismissal for Failure to Prove Damages: Plaintiff alleged that because a title company failed to disclose a sanitary restriction, she was entitled to recover for the cost of a new well. The agreed statement of facts in the pretrial order did not raise any specific contention or agreement as to the cost of the well. Plaintiff did not introduce specific evidence of damages, contending by hearsay as to what the cost would be. She later argued that because the cost of the well was not a factual issue enumerated in the pretrial order, she did not have to present evidence on costs. That the issue was not listed in the pretrial order was immaterial. Damages were listed as a plaintiff's contention, and as part of the pleadings, the question was properly before the court. Because her hearsay statement was insufficient to prove the cost of the well and was inadmissible as proof of costs, the trial court properly concluded that no evidence was presented

on the issue and dismissed the case for failure to prove damages. Adlington v. First Mont. Title Ins. Co., 245 M 304, 800 P2d 1051, 47 St. Rep. 2132 (1990).

Contract Providing Attorney Fees as Part of Record — Fees Mentioned in Pretrial Order: A motion to amend pursuant to Rules 52(b) and 59(a), M.R.Civ.P., to include attorney fees was denied on the basis that defendants abandoned their claim for attorney fees by neglecting to state a claim in their pretrial order and because no evidence relative to fees was introduced at trial and therefore could not be added as a posttrial issue. The Supreme Court noted that attorney fees were contractually agreed to by the parties, so the issue of whether fees should be awarded was not one that would have been argued at trial. Further, since the contract was before the court as evidence and since the issue of attorney fees was raised twice in the pretrial order, the issue was not outside the court's record. The case was remanded for determination of reasonable attorney fees. Bell v. Richards, 228 M 215, 741 P2d 788, 44 St. Rep. 1467 (1987), followed in Ottersen v. Rubick, 246 M 93, 803 P2d 1066, 47 St. Rep. 2274 (1990).

Issues Raised in Pretrial Order — Effect Upon Appeal:

Appellant raised for the first time, on appeal, an issue that was not included on the pretrial order as an issue in dispute. The Supreme Court refused to review that issue since it was not raised in the trial court. Morse v. Cremer, 200 M 71, 647 P2d 358, 39 St. Rep. 1162 (1982).

When party makes certain contentions in pretrial order and attempts to appeal based upon inconsistent contentions, the Supreme Court will not review those questions as they were not raised at trial. Davis v. Davis, 159 M 355, 497 P2d 315 (1972).

Issues of waiver and breach of contract not covered by pretrial order could not be raised on appeal. Davis v. Davis, 159 M 355, 497 P2d 315 (1972).

Objection to Matter Agreed to at Pretrial Properly Denied: An objection to a fire department report on a fire, on grounds of hearsay, was properly denied when objecting party had agreed in pretrial order to the admission of the report as requiring no foundation or proof. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Failure to List Exhibit in Pretrial Order — Evidence Improperly Admitted: Where defendant's counsel agreed to a pretrial order purporting to list all exhibits the parties intended to introduce but failed to include an exhibit consisting of a movie, failed to show any justification for his failure to mention the movie at the pretrial conference, and failed to allow the plaintiff to preview the movie as a condition of its admission into evidence, it was an abuse of discretion for the court to allow the movie into evidence. The purpose of pretrial orders and pretrial discovery is to prevent surprise, simplify the issues, and permit counsel to prepare their case for trial on the basis of the pretrial order. Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980). See also Travelers Indem. Co. v. Andersen, 1999 MT 201, 295 M 438, 983 P2d 999, 56 St. Rep. 782 (1999).

Collateral References

Binding effect of court's order entered after pretrial conference. 22 ALR 2d 599.

Relief from stipulations on pretrial hearings. 161 ALR 1198.

Rule 16(f). Sanctions.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Source: All new material based on Federal Rule—added by October 9, 1984, amendments to Rule 16. See advisory committee's note under Rule 16.

Identity With Federal Rule: As of May 1, 1990, this rule was identical to the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Dismissal of Complaint With Prejudice Unwarranted When Delay Reasonable and No Prejudice Shown: The District Court set a scheduling conference, but plaintiff's counsel did not attend because of a computer problem. The District Court then dismissed the complaint with prejudice and denied a motion to reopen the case. On appeal, the Supreme Court reversed, applying the factors in Becky v. Norwest Bank Dillon, N.A., 245 M 1, 798 P2d 1011 (1990), and Hobble-Diamond Cattle Co. v. Triangle Irrigation Co., 272 M 37, 899 P2d 531 (1995), to determine whether the District Court abused its discretion in dismissing the action for failure to

prosecute. In this case, plaintiff's delay in prosecuting the case was reasonable, and defendant suffered no actual prejudice, so the District Court abused its discretion in dismissing the complaint with prejudice. Vermeer of Wash., Inc. v. Jones, 2004 MT 77, 320 M 435, 87 P3d 516 (2004), distinguishing E. Livestock Co., Inc. v. O'Neal, 285 M 90, 945 P2d 931 (1997).

Wait of Thirteen Months to Question Whether Sanctions Should Be Imposed — Adequate Notice and Opportunity to Be Heard: Defendant sought sanctions against Palmer, plaintiff's attorney, under Rules 11 and 37, M.R.Civ.P., for Palmer's defiance of scheduling and pretrial orders, and the District Court awarded sanctions under Rule 37. Palmer alleged that his due process rights were violated because he did not receive notice and an opportunity to be heard, but the due process arguments were not supported in the record. The Supreme Court agreed that when a person is sanctioned with attorney fees and costs under Rule 37, that person is entitled to notice and an opportunity to be heard before sanctions are imposed. However, in this case, Palmer waited more than 13 months after defendants moved for sanctions to question whether they should be imposed. Notice was adequate, and Palmer also was allowed to argue the appropriateness of sanctions at a hearing. Palmer's argument on appeal, that Rule 37 did not apply to him because he was a nonparty deponent, was not addressed because the issue was raised for the first time on appeal. The Supreme Court noted that this rule clearly allows sanctions in cases like this one, in which an attorney defies a District Court's scheduling and pretrial orders. Dambrowski v. Champion Int'l Corp., 2000 MT 149, 300 M 76, 3 P3d 617, 57 St. Rep. 581 (2000).

Failure to Comply With Scheduling Order — Sanction Appropriate: The purpose of this rule is to deter parties from being unresponsive to the judicial process, regardless of the intent or lack of intent behind the unresponsiveness. Here, plaintiff failed to comply with a scheduling order despite having substantial time within which to prepare an expert witness list, so it was not an abuse of District Court discretion to sanction plaintiff by prohibiting the testimony of a proposed expert witness. Seal v. Woodrows Pharmacy, 1999 MT 247, 296 M 197, 988 P2d 1230, 56 St. Rep. 959 (1999), distinguishing Smith v. Butte-Silver Bow County, 276 M 329, 916 P2d 91, 53 St. Rep. 421 (1996).

Party's Continuous Delay and Failure to Mediate — Sanctions Proper: The District Court did not abuse its discretion in imposing sanctions in the form of an $18,000 default judgment against a party who continually delayed litigation and repeatedly failed to participate in court-ordered mediation. E. Livestock Co., Inc. v. O'Neal, 285 M 90, 945 P2d 931, 54 St. Rep. 1058 (1997).

IV. Parties

Rule 17. Parties plaintiff and defendant — capacity

Law Review Articles

Recent Developments in Montana Land Use Law, Goetz, 38 Mont. L. Rev. 97 (1977).

Environmental Defense Fund v. Hoerner Waldorf Corporation: Environment, Industry and Constitutional Rights, Mudd, 32 Mont. L. Rev. 161 (1971).

Standing: Who Speaks for the Environment?, McCann, 32 Mont. L. Rev. 1930 (1971).

Wrongful Death of Minor—Proper Party Plaintiff, Olsson, 11 Mont. L. Rev. 81 (1950).

Contracts: Rights of Persons Not a Party to a Contract to Sue in Montana, 3 Mont. L. Rev. 97 (1942).

Rule 17(a). Real party in interest.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 17(a), as amended 1966.

A bailee is added to the list of real parties in interest; and a minor change is made in the text to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule, and carry no negative implications.

The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, etc., keeps pace with modern decisions which, in the interests of justice, are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is filed.

Advisory Committee's Note to October 9, 1984, Amendment

The amendment conforms the rule to the terminology of the Uniform Probate Code.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: With the exception of references to the State of Montana and substitution of "personal representative" for "executor, administrator", the Montana Rule as of May 1, 1990, was still identical to the Federal Rule.

Amendments: The amendment of September 29, 1967, deleted the conjunction "but" between the present first and second sentences and made them separate sentences, and added the third sentence.

The amendment of October 9, 1984, in second sentence substituted "A personal representative" for "An executor, administrator".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 683
Assignments 689
Insurance Companies 690
Corporate Stockholders 691

GENERAL

No Standing to Recover Damages by Party Not Owner of Property — Fax Not Considered Valid Assignment of Damage Claim: Koelzer owned an inn by a mining and power generation site near Colstrip. Koelzer discovered that mining activity had damaged the inn and filed a complaint in 1994 against the mining and power generation companies, but did not pursue the damage claim. In 1996, Dale and Shawonda Lewis approached Koelzer about purchasing the inn, and the issue of the damages and Koelzer's claim came up. The Lewises inspected the inn and discovered additional damages, which led Koelzer to reassert the damage claim, but the claim was again unresolved. Nevertheless, the Lewises offered to buy the inn, and title was eventually conveyed to Dale's parents, who were able to secure financing. Koelzer notified the companies by fax that the inn had been sold and requested that the companies work with Dale on the structural damage discussed in the past. About 1 year later, Dale received an estimate of $91,000 to repair the damages and filed a complaint seeking compensation from the companies. Dale's parents eventually filed for bankruptcy, and the Lewises finally became the owners of record in 1998. When the companies discovered that the Lewises were not the owners of the inn at the time that the suit was filed, they moved for summary judgment, which was granted by the District Court on grounds that the Lewises had no standing to assert a claim for damages arising before they acquired title. On appeal, the Supreme Court cited the general rule that persons cannot recover for damages to property that they do not own. Further, even though property damage claims have long been recognized as assignable, the fax did not meet the statutory requirements of a valid assignment and was unenforceable. Thus, on the issue of prepurchase damages, no material question of fact existed regarding ownership or assignment, so the Lewises had no standing to bring a claim for damages prior to their ownership of the inn. Summary judgment was affirmed. Lewis v. Puget Sound Power & Light Co., 2001 MT 145, 306 M 37, 29 P3d 1028 (2001).

Assignee of Vendor's Interest in Contract for Deed as Real Party in Interest: Ranch Recovery Limited Liability Company (Ranch Recovery) was the assignee of the vendor's interest in real property that was subjected to a mortgage foreclosure brought by First Security Bank of Missoula (First Security). Upon the vendee's default, the District Court awarded summary judgment to First Security. Ranch Recovery moved for reconsideration and for permission to amend its counterclaim based on newly discovered evidence. First Security alleged that Ranch Recovery was not the real party in interest and thus should not be entitled to assert its proposed counterclaims. Citing this rule, the Supreme Court held that as successor to the vendor's interest in the agreement, Ranch Recovery assumed not just the vendor's obligations but also inherited the vendor's rights and was therefore the real party in interest for purposes of asserting those rights. First Sec. Bank of Missoula v. Ranch Recovery Ltd. Liab. Co., 1999 MT 43, 293 M 363, 976 P2d 956, 56 St. Rep. 188 (1999).

Vagueness of Statute — Standing to Challenge Vagueness — "Reasonable and Prudent" Speed Limit Held Void: Stanko was arrested by Officer Breidenbach of the Montana Highway Patrol for driving 85 miles an hour on a stretch of Highway 200 that was narrow, that had no shoulders,

that had occasional frost heaves in the surface of the highway, and where Stanko's view of the road was occasionally obstructed by hills and curves in the highway. Relying on Parker v. Levy, 417 US 733 (1974), the Supreme Court held that Stanko's conduct was, under the circumstances, not so clearly prohibited that Stanko lacked standing to challenge the speed limit on the basis of facial vagueness. The Supreme Court held, citing Grayned v. Rockford, 408 US 104 (1972), Kolender v. Lawson, 461 US 352 (1983), Whitefish v. O'Shaughnessy, 216 M 433, 704 P2d 1021 (1985), and St. v. Crisp, 249 M 199, 814 P2d 981 (1991), that 61-8-303(1) was void for vagueness because there was no numerical speed limit in the statute and because it was dependent upon each driver of a motor vehicle or each law enforcement officer to determine what the speed limit was under any given set of circumstances. St. v. Stanko, 1998 MT 321, 292 M 192, 974 P2d 1132, 55 St. Rep. 1302 (1998).

Capacity of Plaintiff Not Stated in Notice of Filing of Foreign Judgment — Foreign Judgment Not Defective: After a foreign judgment of a Missouri Bankruptcy Court was filed against him, Lurie argued that the judgment was defective because the notice of filing failed to disclose that the plaintiff, a liquidating bankruptcy trustee, acted in his capacity as trustee. The Supreme Court held that there is nothing in 25-9-504 that requires the capacity of the plaintiff to be stated. The Supreme Court also noted that under this rule, Blackwell, the bankruptcy trustee, was allowed to bring suit in his own name and pointed out that the judgment of the Bankruptcy Court clearly identified Blackwell as the liquidating trustee and that because of the prior bankruptcy proceedings in which Lurie participated, Lurie must have known or should have known that Blackwell was bringing the action in his capacity as liquidating trustee and not in his individual capacity. Blackwell v. Lurie, 284 M 351, 943 P2d 1318, 54 St. Rep. 916 (1997). See also Lurie v. Blackwell, 285 M 404, 948 P2d 1161, 54 St. Rep. 1215 (1997).

Option of Real Party to Bind Itself by Ratification, Joinder, or Substitution: In order to protect individuals from harassment and multiple suits by persons not bound by the claim, under this rule, an action must be prosecuted by the real party in interest. The real party in interest has the option of binding itself to litigation by ratification, joinder, or substitution, although the real party in interest does not have the option of ratification as the assignee of plaintiff's claim. The District Court must ensure that one of these methods is adhered to after an objection is made under this rule. Once the objection to appellant as plaintiff is made, the real party has the option of binding itself to the suit through substitution. Gordon v. Hedman, 277 M 96, 918 P2d 680, 53 St. Rep. 558 (1996), following State ex rel. Bohrer v. District Court, 171 M 116, 556 P2d 899 (1976).

Chippewa-Cree Tribal Member Without Standing to Challenge Gas Tax — Incidence of Tax Upon Distributor: Carter, an enrolled member of the Chippewa-Cree Tribe, sold gasoline from a convenience store on the Rocky Boy's Reservation. Carter held a business license issued by the tribe and was not licensed by the state. She alleged that the gasoline tax was unconstitutionally applied to sales by tribal members inside the reservation because the tax is preempted by federal law. The District Court granted summary judgment, holding that Carter lacked standing. Citing Okla. Tax Comm'n v. Chickasaw Nation, 515 US 450, 132 L Ed 2d 400, 115 S Ct 2214 (1995), the Supreme Court affirmed, holding that the incidence of the tax fell upon the distributor and not upon the retailer and that the distributor is not a member of the tribe. For this reason, Carter was not directly and adversely affected by the tax and had no standing to bring the action. Carter v. Dept. of Transportation, 274 M 39, 905 P2d 1102, 52 St. Rep. 1111 (1995).

Person Not Party to Action May Not Be Party to Judgment: The lower court ruled that a prescriptive easement existed for Dawson even though he was not a party to the lawsuit. The Supreme Court held that a person who is not a party to an action may not be a party to the judgment. Warnack v. Coneen Family Trust, 266 M 203, 879 P2d 715, 51 St. Rep. 739 (1994), followed in Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Claim Under 42 U.S.C. 1983 Not Barred by Res Judicata — Prior Summary Judgment No Bar to Consideration of Motion to Dismiss — Differing Parties: Plaintiff brought an action against the city of Great Falls to recover damages for violation of 42 U.S.C. 1983 in connection with a discharge from employment. The District Court granted the city's motion for summary judgment. Plaintiff then filed an action against her immediate supervisor, in the supervisor's official and individual capacity, making the same allegations. The supervisor moved the District Court to dismiss on the basis that the section 1983 claim was res judicata by reason of the summary judgment in the former action, and the District Court granted the motion. The Supreme Court reversed, holding that under Rule 12(b), M.R.Civ.P., the District Court's consideration of the first action was limited to consideration of the pleadings. The Supreme Court also stated that because the immediate supervisor was not a party to the first action, neither the plaintiff nor the defendant was able to present all the facts and theories in the first

case that are present in the second. For these reasons, the Supreme Court held that the second action was not barred. Dagel v. Manzer, 251 M 176, 823 P2d 874, 48 St. Rep. 1166 (1991).

Involuntary Dismissal of Action in Bankruptcy Estate — Substitution of Parties and Notice of Dismissal of Action Not Required: Plaintiffs filed a lender liability action against several banks after plaintiffs had filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code. On motion of the plaintiffs' creditors, the Bankruptcy Court involuntarily converted that a proceeding from Chapter 11 to a Chapter 7 liquidation. Pursuant to federal case law, upon the conversion to a Chapter 7 proceeding, the lender liability action in District Court became an asset of the trustee in bankruptcy. The trustee and defendants in the lender liability action reached a stipulated settlement for a dismissal of that action, and plaintiffs appealed the dismissal. Citing Fed. Land Bank of Spokane v. Reilly, 240 M 147, 783 P2d 917 (1989), the Supreme Court held that it has no authority to substantively review issues that are appropriately before the Bankruptcy Court and that the only issue the Supreme Court could review was the propriety of a lack of notice of the dismissal to the plaintiffs. On this issue, the Supreme Court held that the trustee was not required to give notice because all of plaintiffs' interest in the state court action was transferred to the trustee and held that plaintiffs therefore lacked standing to object to the dismissal. The Supreme Court also held that the trustee was not required to substitute the bankruptcy estate as the real party in interest in the state court proceeding because Rule 25(c), M.R.Civ.P., rather than this rule, governed substitution and because under this rule, substitution was not mandatory. Reilly v. Citizens St. Bank, 251 M 155, 822 P2d 1088, 48 St. Rep. 1140 (1991).

Who Considered Proper Parties When Party Not Before the Court Benefits by Contracting Party's Conduct: A contract binds no one but the contracting parties. Therefore, if the contracting parties are before the court, they are the proper parties even though a party not before the court had the benefit of one contracting party's performance. Fordyce v. Musick, 245 M 315, 800 P2d 1045, 47 St. Rep. 2137 (1990), following Gambles v. Perdue, 175 M 112, 572 P2d 1241 (1977).

Bar Owner Not Real Party in Interest — Injunction Denied: Employees of a bar were arrested for violating a city ordinance that prohibits nude dancing in establishments selling alcoholic beverages. The bar owners sought a preliminary injunction, alleging that the ordinance violates the employees' constitutional right of free speech. The Supreme Court held that under 27-19-103, an injunction cannot be granted to prevent the execution of a public statute for the public benefit without a showing of irreparable harm or a violation of a constitutional right as required by 27-19-201. Money damages are not considered to be irreparable harm because recovery of money damages is available in an action at law without resort to equity. The question of whether the ordinance is a violation of the constitutional right of free speech was not properly before the court because the bar owners were not directly affected by enforcement of the ordinance. Under this rule, the persons actually arrested and prosecuted are the real parties in interest and they are not parties to this action for an injunction. The bar owners' interest in the enforcement of ordinances against bar employees is monetary, not constitutional. The New Club Carlin, Inc. v. Billings, 237 M 194, 772 P2d 303, 46 St. Rep. 731 (1989), followed in Dicken v. Shaw, 255 M 231, 841 P2d 1126, 49 St. Rep. 914 (1992).

Use Right of State in Bean Lake — Standing of Stockgrowers Association to Enter Suit — General Test for Any Association: As part of the statewide water rights adjudication process, the Department of Fish, Wildlife, and Parks filed a claim for a pre-1973 "use" water right appropriation for recreation, fishing, and wildlife purposes in the waters of Bean Lake. The Montana Stockgrowers Association was a proper party in the case. The Water Court required statewide notice and invitation for others to appear. The Association stated that its members could be affected, and the two other potential appropriators in Bean Lake were members of the Association. The Supreme Court adopted the following as the test to determine the standing of an association to appear as a party on behalf of its members: (1) its members would otherwise have standing in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the suit. In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228, 45 St. Rep. 1948 (1988).

Plaintiffs Not Parties to Loan Contract: Plaintiffs, who were not parties to the loan contract in issue, were not the real parties in interest so far as issues concerning the loan contract were concerned. Lythgoe v. First Sec. Bank of Helena, 222 M 163, 720 P2d 1184, 43 St. Rep. 1140 (1986).

Determination of Real Party in Interest Prior to Ratification, Joinder, or Substitution: Defendants appealed from a judgment denying a motion to allow amendment to pleadings to add

their incorporated business entity as a party plaintiff. The Supreme Court remanded the case, holding that before it could be determined if ratification, joinder, or substitution should be allowed, it was necessary to determine whether the corporate entity was a real party in interest on the counterclaim. First Sec. Bank of Glendive v. Gary, 221 M 329, 718 P2d 1345, 43 St. Rep. 852 (1986).

Deceased Defendant in Tort Action — Unmarried Without Children or Estate — Action Against Parents as Successors in Interest: Where the defendant in a tort action was deceased, it was not error to dismiss the deceased and his estate and substitute his parents as successors in interest to the deceased. The deceased was unmarried and childless at the time of his death and left no estate. There was no representative, and under this section his parents, as successors in interest, are the proper parties. Such substitution is permitted under this rule without adversely affecting any applicable Statute of Limitations. White v. Phillips, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Determination of Public's Right to Use Dearborn River — Standing of Coalition of Citizens: In action for determination of the public's right to use the Dearborn River, whether the Montana Coalition for Stream Access, Inc., had standing to bring suit was immaterial because the Department of State Lands (functions now transferred to Department of Natural Resources and Conservation) and the Department of Fish, Wildlife, and Parks were also plaintiffs. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Citizen Taxpayer — Standing: Plaintiff filed a complaint for declaratory judgment in the Supreme Court seeking to determine the validity of several acts of the Legislature allowing the issuance of state revenue bonds. Plaintiff, in his complaint, alleged that he was a citizen, resident, elector, and taxpayer. Prior cases held that in order to establish standing to sue a governmental entity: (1) the issue for review must represent a case or controversy; (2) the complaining party must allege past, present, or threatened injury to a property or civil rights; and (3) the alleged injury must be distinguishable from injury to the public generally, but need not be exclusive to the complaining party. The Supreme Court added a further exception. The court stated that it would recognize the standing of a taxpayer, without more, to question the constitutional validity of a tax or use of tax money where the issue or issues presented directly affect the constitutional validity of the state or its political subdivisions acting to collect the tax, issue bonds, or use the proceeds thereof. The court said it would accept original jurisdiction of such suits when special circumstances, presenting issues of urgent or emergency nature, exist requiring speedy determination. Grossman v. St., 209 M 427, 682 P2d 1319, 41 St. Rep. 804 (1984), followed in Montanans for the Coal Trust v. St., 2000 MT 13, 298 M 69, 996 P2d 856, 57 St. Rep. 73 (2000).

Rights of Legal Heir Represented by Special Administrator — Intervention Denied: After a special administrator was appointed to continue prosecution of an action begun before the testatrix's death, the heir to the estate sought to intervene in the case but was denied. Although holding that ruling nonappealable, the Supreme Court did grant the heir's Writ of Supervisory Control. Nonetheless, it found the heir was not a proper intervenor in the suit because her interest was represented adequately by the special administrator, noting that the heir had no right to pursue the action herself unless the personal representative failed to act on the claim, which was not the case here. Further, an administrator could sue in his own name without joining with him the party for whose benefit the action is brought. State ex rel. Palmer v. District Court, 190 M 185, 619 P2d 1201, 37 St. Rep. 1876 (1980).

Parties to Contract — Effect of Property Disposition: Because the obligations of a contract are limited to the contracting parties, plaintiff properly sued defendant for recovery on two retail installment contracts executed by defendant, even though the object of the contracts became part of a property disposition to defendant's wife in a divorce decree which transferred the indebtedness along with the subject property. Gambles v. Perdue, 175 M 112, 572 P2d 1241 (1977).

Election Cases — County Clerk and Recorders: County Clerk and Recorders are not necessary parties in disputes regarding election ballots because the Secretary of State has the statutory duty of prescribing the form of ballots. Yunker v. Murray, 170 M 427, 554 P2d 285 (1976).

Out-Of-State Bank Not Party to Be Joined: Interest in loans transferred to out-of-state bank under participation agreement between lending Montana bank and out-of-state bank prior to commencement of action does not make out-of-state bank true party in interest or person to be joined if feasible when borrower sued on loan agreement and notes payable to lending Montana bank. This is because loan agreement only establishes rights and liabilities between lending Montana bank and borrower, while participation agreement only establishes rights and liabilities between lending Montana bank and out-of-state bank. Neither establishes any

contractual relationship, rights, or liabilities between borrower and out-of-state bank. Additionally, lending Montana bank is owner and sole payee on notes and as holder of notes is entitled to sue in its own name. State ex rel. Drum v. District Court, 169 M 494, 548 P2d 1377 (1976).

Method of Joinder Optional With Real Party in Interest: District Court does not have discretionary power to determine mode of compliance as the rule provides that the method of compliance is optional with the real party in interest. He may bind himself to the suit by ratification, joinder, or substitution. State ex rel. Nawd's T.V. & Appliance, Inc. v. District Court, 168 M 456, 543 P2d 1336 (1975).

Insurer With Subrogation Rights: Plaintiff should be given the opportunity to join a real party in interest when defendant objects to the failure to join an insurance company as a real party in interest on the basis of its subrogation interest. Bergh v. Rogers, 167 M 243, 536 P2d 1190 (1975).

Action on Account — Undisclosed Transferee: Son was not real party in interest in action on stated account, based on oral gift to son, where buyer of goods was never aware that son was owner but dealt entirely through father. Hanlon v. Anderson, 160 M 279, 502 P2d 51 (1972).

Necessary and Proper Writ: When Liquor Control Board members petitioned the Supreme Court to dismiss removal petition, notwithstanding availability of appeal, issuance of a Writ of Supervisory Control was necessary and proper. State ex rel. Arnot v. District Court, 155 M 344, 472 P2d 302 (1970).

Party's Loss of Interest After Commencement of Action: Judge properly used discretion in not dismissing party as real party in interest although agreement was made after commencement of the case which relieved party of any interest in the outcome of the case. Lapke v. Hunt, 151 M 450, 443 P2d 493 (1968).

Real Party in Interest — Effect of Assignment: An assignee for collection of another's claim against a third party can maintain an action in its own name against the third party. Legal title to the claim is the only requirement to constitute the assignee the real party in interest. Wash. Water Power Co. v. Morgan Elec. Co., 152 M 126, 448 P2d 683 (1968).

Real Party in Interest — Effect of Assignment of Chose in Action: Court's order denying motion to dismiss when plaintiff had irrevocably assigned his chose in action was without foundation in law and an abuse of discretion. Plaintiff was not real party in interest. State ex rel. Cominco Am. Inc. v. District Court, 147 M 412, 412 P2d 577 (1966).

Real Party in Interest — Surety Bonds: The Department of Agriculture was not the only real party of interest in actions based on surety bonds for grain sales because the surety bond was entered for the benefit of the seller of grain, not of the State. State ex rel. Farmers' Elevator Co. v. District Court, 147 M 72, 410 P2d 160 (1966).

Parties Not "Necessary" — Trustees and Tenants in Common Distinguished: Court was correct in finding that third parties were not necessary parties. Lowe v. Flank Oil Co., 144 M 499, 398 P2d 608 (1965).

Action by Divorced Wife: District Court was directed to deny petition of decedent's divorced wife, guardian ad litem of decedent's and her children, to intervene in action for wrongful death under 27-1-513 commenced by the widow as administratrix and trustee for the decedent's minor children, and to strike from the files the complaint in intervention as an attempted substitution of party plaintiffs in a wrongful death action. State ex rel. Carroll v. District Court, 139 M 367, 364 P2d 739 (1961).

Authority of Ward After Attaining Majority: In a suit by a minor brought by his guardian, the ward is the plaintiff and the real party in interest, and upon the ward attaining his majority, the guardian's authority to conduct lawsuits in his behalf automatically ceases, but a suit brought does not abate. After the ward attains his majority, he has the right to conduct the litigation, including the selection of his attorney, and thereafter he is no longer authoritatively represented either by his guardian or by the attorney employed by the guardian. Mitchell v. McDonald, 114 M 292, 136 P2d 536 (1943).

Requirement for Action by Trustee: All that is necessary to constitute a party plaintiff the real party in interest is that he be vested with the legal title. The trustee of an express trust can maintain an action in his own name. Rae v. Cameron, 112 M 159, 114 P2d 1060 (1941), overruling in part State ex rel. Freebourn v. Merchants' Credit Serv., 104 M 76, 66 P2d 337 (1937), Streetbeck v. Benson, 107 M 110, 80 P2d 861 (1938), and N. Mont. Ass'n of Credit Men v. Hauge, 111 M 56, 105 P2d 1102 (1940), explained in 300 F2d 88 (9th Cir. 1962), affirming McNeil Constr. Co. v. Livingston St. Bank, 185 F. Supp. 197 (D.C. Mont. 1960).

Litigation Discouraged: Section 93-2801, R.C.M. 1947 (superseded by Rule 17(a), M.R.Civ.P.), providing that every action must be prosecuted in the name of the real party in

interest, and subsection (1) of 37-61-408, declaring that an attorney must not directly or indirectly buy or be in any manner interested in buying a thing in action with the purpose of bringing an action thereon, by clear implication intend to discourage litigation and keep it within certain bounds in the interest of a sound public policy. Streetbeck v. Benson, 107 M 110, 80 P2d 861 (1938), explained in N. Mont. Ass'n of Credit Men v. Hauge, 111 M 56, 105 P2d 1102 (1940), and Rae v. Cameron, 112 M 159, 114 P2d 1060 (1941).

State Action on Warehouseman's Bond: An action on a public warehouseman's bond in favor of the State for the use and benefit of holders of warehouse receipts is properly brought in the name of the State. Fidelity & Deposit Co. of Md. v. Mont., 92 F2d 693 (9th Cir. 1937), affirming St. v. Fidelity & Deposit Co., 16 F. Supp. 489 (D.C. Mont, 1936).

Form of Ownership Immaterial: In an action by several individuals allegedly copartners to recover on a trade acceptance, the fact that plaintiffs failed to prove that they constituted a partnership, which allegation was denied by defendant, was unimportant. If they were the owners of the paper they were the real parties in interest, and as such entitled to sue. Best v. Boyer, 98 M 40, 37 P2d 331 (1934).

Enforcement of Bond for Benefit of Others: Irrigation district under contract and bond was entitled to enforce bond for benefit of laborers and materialmen. Cove Irrigation District v. Am. Sur. Co. of New York, 42 F2d 957 (9th Cir. 1930).

Action on Bond — Recovery by County: In action against surety on robbery and burglary policy issued to County Treasurer to recover for loss of county money and securities stolen from Treasurer, county was proper, though not necessary, party plaintiff, where surety agreed to pay assured for loss sustained by assured or by owner, and county paid premiums on policy and was owner of property stolen. Nat'l Sur. Co. v. Sheridan County, 33 F2d 473 (9th Cir. 1929).

Action on Notes by Trustee: A bank taking a mortgage in its own name but for convenience assigning two of the notes secured thereby to two of its directors, became a trustee of an express trust to the extent that the two notes and security were owned by the directors and as such was entitled to maintain suit in foreclosure without joining them as parties plaintiff, and to secure judgment in its own name. First St. Bank v. Mussigbrod, 83 M 68, 271 P 695 (1928).

Action for Accounting: In an action for an accounting and to have defendant bank declared trustee of a resulting trust, the finding that plaintiff's husband and not she was the real party in interest was correct, and therefore the court properly rendered judgment in favor of defendant. Kelly v. Gullickson, 75 M 66, 241 P 623 (1925).

Pleading of Incapacity — Waiver: Where it does not appear from the face of the complaint that plaintiff is not the real party in interest, the defect can only be reached by answer and is waived by failure to so plead. La Bonte v. Mut. Fire & Lightning Ins. Co. of Richland County, 75 M 1, 241 P 631 (1925).

Action Over Public Funds — Taxpayer's Suit Improper: An action to recover county funds unlawfully paid must be brought by the County Attorney in the name of the county, it being the real party in interest, and it cannot be maintained by a taxpayer. Gregg v. Bayers, 73 M 165, 235 P 337 (1925).

Complaint to Show Interest: To state a cause of action, plaintiff must disclose his interest in the subject matter of the litigation, i.e., he must make it appear that he is the real party in interest. Lefebure v. Baker, 69 M 193, 220 P 1111 (1923).

Action on State Bail Bond for Benefit of County: In an action on a bail bond in the form prescribed by section 94-8717, R.C.M. 1947 (repealed), running to the state, the state and not the county is the proper party plaintiff though under 46-18-603 and 61-12-703 (since repealed) the money recovered goes to the county and not to the state. Wheatland County v. Van, 64 M 113, 207 P 1003 (1922).

Action by Devisees for Fraud: Devisees may maintain an action for damages for fraud practiced upon them in the procurement of an agreement to sell the real property of testator, even though at the time the estate was in process of administration and distribution had not been made. Rumney v. Skinner, 64 M 75, 208 P 895 (1922).

Evidence of Another's Benefit Excluded: Plaintiff, vested with the legal title to the judgment on which he sought to recover, was the real party in interest within the meaning of section 93-2801, R.C.M. 1947 (superseded by Rule 17(a), M.R.Civ.P.), and evidence that he had bought it for the benefit of another was properly excluded. Genzberger v. Adams, 62 M 430, 205 P 658 (1922).

Landlord and Tenant — Actions Upon Interests: While a landlord has a right of action against a third person for a permanent injury to the reversion, the right of action for a trespass upon the possession of the tenant, or for an injury to his estate, is in the tenant; but for a wrong

that affects both of these distinct interests, the law gives a right of action to the owner of each. Custer Consol. Mines Co. v. Helena, 45 M 146, 122 P 567 (1912).

Trespass Action Brought by Administrator: An administrator has a right to the possession of the real estate of the decedent and may bring ejectment in his own name as administrator against a trespasser. Black v. Story, 7 M 238, 14 P 703 (1887). See also In re Higgins' Estate, 15 M 474, 39 P 506 (1895); Kohn v. McKinnon, 90 F 623 (9th Cir. 1898).

ASSIGNMENTS

Standing to Compel Release of Oil and Gas Leases Gained by Assignment: Lessors of five oil and gas leases assigned plaintiff the right to sue defendant to compel release of the oil and gas leases. Defendant asserted that plaintiff lacked standing to sue, because under 82-1-202, the owner of the leased premises may sue, but plaintiff was not the owner of the leases. The Supreme Court noted the longstanding rule that rights assigned from contracts between private individuals are assignable, that nonassignability is the exception, and that in the absence of a nonassignability clause, either party may generally make an assignment of contract rights. Further, under this rule, a party vested with legal title is considered a real party in interest. Each of the leases in question provided for assignment of rights, one of which was the right to compel termination of a lessee's interest. Thus, plaintiff, having been vested with legal title by assignment, had standing to compel release of the leases. Somont Oil Co., Inc. v. A&G Drilling, Inc., 2002 MT 141, 310 M 221, 49 P3d 598 (2002).

Unresolved Issues Regarding Royalty Interests — Summary Judgment Precluded: Prior to 1955, McDonald & Eide, Inc. (M&E) owned the entire working interest in a lease on a producing oil well. On July 12, 1955, M&E assigned 100% of its interest in the south half and 50% of its interest in the north half to H. W. McDonald, but this assignment was not recorded until 1963. After M&E's corporate charter was repealed for failure to pay taxes, corporate officers of M&E purported to assign M&E's total working interest to V. Eide and J. Von DeLinde in 1961, but this assignment conflicted with the one previously made to McDonald, who filed a quiet title action. Thereafter, all three entered an agreement with Continental Oil Company (Continental) assigning to the company an undivided one-half interest in the lease. While the quiet title action was pending, McDonald assigned undivided interests to G. Huntley, D. Iverson, and A. Larson with the intent to convey to each the respective share "held in suspense by Continental". In 1964, final judgment quieted title in McDonald subject to the agreement with Continental. In 1965, M&E stockholders appointed F. Gunnip as receiver, and he sued M&E corporate officers to recover the lease and other property. A 1970 judgment voided the 1961 agreement, and in 1976, final judgment provided that Gunnip owned one-half interest in the north half of the lease while Eide, Von DeLinde, and Continental were held to have no interest. Shell Oil Company, responsible for disbursing the lease proceeds, continued to pay Continental one-half of the proceeds under the agreement with McDonald, and although Gunnip was owner of a 50% interest, he received only a 25% share of proceeds. In 1981, Gunnip assigned a 3.75% interest in the north half to Huntley and a 2.5% interest in the north half to R. Schwinn. Huntley became aware that Gunnip was not receiving his full share, so Gunnip, Huntley, and Schwinn sued Continental, requesting an additional one-eighth of the proceeds. The District Court granted summary judgment to Continental in 1985, but the Supreme Court reversed on appeal, holding that: (1) unresolved issues of material fact remained regarding Continental's interest; (2) a trial must be had to assess Continental's interest considering potential application of adverse possession, waiver, and estoppel; and (3) Continental's asserted 50% interest in the north half of the lease must be tested against the interest of McDonald's assignees and successors in interest. The case was remanded for further proceedings. Gunnip v. Cont. Oil Co., 223 M 141, 727 P2d 1315, 43 St. Rep. 1605 (1986). On remand, the District Court neglected to assess Continental's interest as directed. On later appeal, the Supreme Court granted supervisory control and determined that: (1) plaintiffs failed to present substantial evidence to support a theory of adverse possession, waiver, or estoppel against Continental; (2) Continental owned an undivided one-half interest in the working interest in the north half of the lease; and (3) Gunnip and his assigns owned the remaining half of the working interest in the north half. Cont. Oil Co. v. Elks Nat'l Foundation, 235 M 438, 767 P2d 1324, 46 St. Rep. 121 (1989).

Unlawful Detainer — Right of Lessor With Unrecorded Title to Sue: Plaintiff leased land to defendants and assigned her interest in the land to a trust. The assignment was recorded. The trust later reassigned the interest back to plaintiff through an unrecorded quitclaim deed. Plaintiff sued defendants when they refused to vacate at the end of the lease. Record title and legal title are not synonymous, and plaintiff had valid legal title even though it was not record title. Recording has the purposes of giving notice to subsequent purchasers and encumbrancers

and of establishing priority, but has nothing to do with conveying title. Defendants' only interest in the property was a lease, and they were not within the scope of the recording statutes' protection. Plaintiff, contrary to defendants' claim, was the real party in interest, not the trust, and was entitled to bring the suit. The party with legal title is the real party in interest in real property disputes. Blakely v. Kelstrup, 218 M 304, 708 P2d 253, 42 St. Rep. 1601 (1985).

Assignee for Collection as Real Party in Interest: Assignees of claim paid by their liability insurer were real parties in interest and entitled to sue their indemnitor and its insurer in their own names because the assignees had legal title to the claim and this was sufficient to constitute the assignees the real parties in interest. Wash. Water Power Co. v. Morgan Elec. Co., 152 M 126, 448 P2d 683 (1968).

Transfer of Interest by Assignment: Though every action must be prosecuted in the name of the real party in interest, where an action on a claim is pending at the time of its assignment it may under 27-1-501 be continued in the name of the assignor. White v. Connor, 138 M 1, 354 P2d 722 (1960); Osborne v. McDonald, 91 M 83, 5 P2d 568 (1931).

Assignment for Collection Only: An assignment for collection, without any consideration being paid by the assignee, vests the legal title in the assignee, which is sufficient to enable him to recover, although the assignor retains an equitable interest in the thing assigned. Rae v. Cameron, 112 M 159, 114 P2d 1060 (1941), overruling in part State ex rel. Freebourn v. Merchants' Credit Serv., 104 M 76, 66 P2d 337 (1937), and Streetbeck v. Benson, 107 M 110, 80 P2d 861 (1938), explained in 300 F2d 88 (9th Cir. 1962), affirming McNeil Constr. Co. v. Livingston St. Bank, 185 F. Supp. 197 (D.C. Mont. 1960).

Purchase of Accounts by Trustee: In an action by plaintiff trustee upon various accounts which defendant owed to five companies it was error to deny plaintiff's motion to file its amended and supplemental complaint showing that it had, subsequent to filing of action, purchased the accounts and was the legal owner, and to deny its motion to strike the word "trustee" from the papers in the action. N. Mont. Ass'n of Credit Men v. Hauge, 111 M 56, 105 P2d 1102 (1940).

Simulated Assignment Ineffective: A simulated assignment of a chose in action cannot make the assignee the real party in interest in an action to recover thereon. Streetbeck v. Benson, 107 M 110, 80 P2d 861 (1938), distinguished in N. Mont. Ass'n of Credit Men v. Hauge, 111 M 56, 105 P2d 1102 (1940), and Rae v. Cameron, 112 M 159, 114 P2d 1060 (1941).

Assignee of Oil and Gas Permittee as Real Party in Interest: The assignee of an oil and gas permittee whose lease had been assigned to an operator who had obligated himself to pay a sum of money when a paying well was brought in, was the real party in interest and entitled to bring action against the operator for the recovery of said sum of money. Herigstad v. Hardrock Oil Co., 101 M 22, 52 P2d 171 (1935).

Action on Notes by Trustee: A bank taking a mortgage in its own name but for convenience assigning two of the notes secured thereby to two of its directors, became a trustee of an express trust to the extent that the two notes and security were owned by the directors and as such was entitled to maintain suit in foreclosure without joining them as parties plaintiff, and to secure judgment in its own name. First St. Bank v. Mussigbrod, 83 M 68, 271 P 695 (1928).

Action Brought by Assignee Directly: An assignment of a judgment may not only be made for the benefit of a cosurety, but it may be made directly to the person who is to benefit by it, and he may enforce it in his own name. This is in conformity with the spirit of the statute providing that the real party in interest shall prosecute the action in his own name. Merchants Nat'l Bank v. Great Falls Opera House Co., 23 M 33, 57 P 445 (1899).

INSURANCE COMPANIES

Required Ratification by Bond Underwriter Held No Different in Substance Than Substitution of Underwriter: Holm-Sutherland contracted with the town of Shelby to construct sewer and water improvements within the town. When a dispute arose, Holm-Sutherland sued Shelby for breach of contract. During the litigation, Shelby discovered that Holm-Sutherland had assigned all of its rights under the contract to its bond underwriter, Safeco, as collateral security to repay all loss and expense to Safeco. After the discovery of the assignment, Shelby moved to substitute Safeco as the real party in interest pursuant to this rule. The District Court instead required Safeco to ratify the action against Shelby. The Supreme Court noted that the rule provides that "ratification . . . or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest". Because of this language in the rule, the Supreme Court held that Safeco's ratification relates back to the beginning of the action against Shelby, that Safeco would be treated as if it were the party originally performing each action or causing each filing by Holm-Sutherland, and that the District Court did not err when it

required that ratification. Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053, 56 St. Rep. 595 (1999).

Insurance Company Cannot Be Sued Directly by Third-Party Claimant in Place of Insured Tortfeasor: The plaintiff sued the owner of a vehicle driven by the owner's adult daughter. The District Court granted the owner's motion for summary judgment and granted the plaintiff's motion to add the owner's insurance carrier as a party defendant. The general rule is that a direct action against an insurer does not lie until the liability of the insured has been established. This rule is not a direct action statute. The District Court erred in allowing the joinder of the insurer as a party defendant. Ulrigg v. Jones, 274 M 215, 907 P2d 937, 52 St. Rep. 1198 (1995).

Joinder of Insurance Company: Partially subrogated insurers who had joined as parties plaintiff were entitled to change of mind and to proceed by ratification because defendants were not subjected to double jeopardy or otherwise prejudiced. State ex rel. Bohrer v. District Court, 171 M 116, 556 P2d 899 (1976).

Substitution of Plaintiffs: Insurer which has paid the entire loss suffered by its insured thereby becomes fully subrogated to his claim against the wrongdoer who caused it and, because the insured no longer has a right of action, becomes a real party in interest in any litigation concerning the loss. Therefore, the District Court properly ordered the named plaintiff's insurer substituted for it as a party. State ex rel. Nawd's T.V. & Appliance, Inc. v. District Court, 168 M 456, 543 P2d 1336 (1975).

Plaintiff's Claim Paid by Insurance Company — Joinder: Where plaintiff's insurance company paid all but $25 of plaintiff's loss, so recovery from defendant would inure to benefit of insurance company, plaintiff's motion to add insurance company as real party in interest should have been granted by District Court, even though Statute of Limitations had run on plaintiff's claim. Bergh v. Rogers, 167 M 243, 536 P2d 1190 (1975).

Real Party in Interest — Subrogated Interest of Insurer: In an action for the recovery of damages for property damage and personal injury, an insured may prosecute an action for the full amount of the loss or either the insured or the insurer may separately sue for his portion of the loss. If the action is instituted by either one alone, the defendant can compel joinder of the other or may waive joinder. State ex rel. Slovak v. District Court, 166 M 485, 534 P2d 850 (1975).

CORPORATE STOCKHOLDERS

Corporation Considered Real Party in Interest on Claim for Lost Corporate Profits — No Exception for S. Corporations: Gullett paid $10,000 earnest money for the purchase of real property. The money was drawn on the account of Gullett's corporation. When defendants refused to return the money after the purchase agreement failed, Gullett filed a complaint for return of the money and for profits allegedly suffered by the corporation's business through lack of the funds. Although the money was ultimately repaid to Gullett, the District Court summarily dismissed the claim for lost business profits on grounds that the corporation, not Gullett, was the real party in interest. On appeal, the Supreme Court affirmed. The cause of action for recovery of lost business profits belonged to the corporation, not to a shareholder. Gullett's argument that he should not be barred from the claim because the corporation was an S. corporation also failed because even though an S. corporation is treated differently for taxation purposes, it remains a corporation in all other ways, and the corporation and its shareholders remain separate entities. Gullett v. Van Dyke Constr. Co., 2005 MT 105, 327 M 30, 111 P3d 220 (2005), following Richland Nat'l Bank & Trust v. Swenson, 249 M 410, 816 P2d 1045 (1991). See also Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel, 20 F3d 1311 (4th Cir. 1994).

No Right of Individual Guarantor to Sue on Behalf of Corporation: Under this rule, an action must be brought by the person who is entitled to enforce the right according to the governing substantive law and will not necessarily be brought in the name of the person who will ultimately benefit from the recovery. In the case of corporations, neither the Montana Business Corporation Act nor the Montana Close Corporation Act provides for an individual guarantor to sue on behalf of the corporation. Therefore, the District Court did not err in determining that claims for misuse and misappropriation of corporate funds could not be brought by individual plaintiffs. Kondelik v. First Fidelity Bank of Glendive, 259 M 446, 857 P2d 687, 50 St. Rep. 874 (1993).

Contract Action — Sole Owners Asserting Wrongs Done to Corporation: In bank's action against corporation to collect on corporation's note, two sole owners of the corporation did not, as individuals and sole owners, have a right to assert any cause of action arising from bank's refusal to continue financing the corporation because sole owners were attempting to assert as wrongs to themselves claims that belonged to the corporation. Richland Nat'l Bank & Trust v. Swenson,

249 M 410, 816 P2d 1045, 48 St. Rep. 730 (1991), followed in Kondelik v. First Fidelity Bank of Glendive, 259 M 446, 857 P2d 687, 50 St. Rep. 874 (1993).

Action by Stockholders — General Rule: As a general rule stockholders may not sue upon a cause of action belonging to their corporation whether in their own names or in the name of the corporation itself. Nor generally may they defend for it an action brought against the corporation as defendant. Malcom v. Stondall Land & Inv. Co., 129 M 142, 284 P2d 258 (1955), followed in Bottrell v. Am. Bank, 237 M 1, 773 P2d 694, 46 St. Rep. 561 (1989), and in Moats Trucking Co., Inc. v. Gallatin Dairies, Inc., 231 M 474, 753 P2d 883, 45 St. Rep. 772 (1988). See also Walstad v. Norwest Bank of Great Falls, 240 M 322, 783 P2d 1325, 46 St. Rep. 2160 (1989), and Kondelik v. First Fidelity Bank of Glendive, 259 M 446, 857 P2d 687, 50 St. Rep. 874 (1993).

Corporate Remedy Adequate: Sole or majority stockholders of a corporation cannot maintain an action for the corporation. Equity will deny them any such relief, if asked, because their remedy within the corporation is adequate. Malcom v. Stondall Land & Inv. Co., 129 M 142, 284 P2d 258 (1955).

Action by Single Stockholder: Single stockholder has no authority to bring action to quiet title where he alleges that corporation "is the sole and exclusive owner in fee simple title of the lands". Noble v. Farmers Union Trading Co., 123 M 518, 216 P2d 925 (1950), distinguished in Malcom v. Stondall Land & Inv. Co., 129 M 142, 284 P2d 258 (1955).

Law Review Articles

Procedure: The Status of the Assignee for Collection Under Real Party in Interest Statutes, Dugan, 2 Mont. L. Rev. 120 (1941).

Collateral References

Executors and Administrators *key* 438(1) through (11); Parties *key* 1 through 12, 21 through 23; Trusts *key* 257.

34 C.J.S. Executors and Administrators §769; 67A C.J.S. Parties §17; 90 C.J.S. Trusts §457.

59 Am. Jur. 2d Parties §§34 through 37.

Proper party plaintiff to action against tortfeasor for damages to insured property where insurer is entitled to subrogation to extent of loss paid by it. 157 ALR 1242; 96 ALR 865.

Right of person furnishing material or labor to maintain action on contractor's bond to owner or public body, or on owner's bond to mortgagee. 118 ALR 57; 77 ALR 21.

Wright & Miller, Federal Practice and Procedure: Civil §1555.

Rule 17(b). Capacity to sue or be sued.

Commission Notes

Subdivision (b) omits the provisions of the Federal Rule which state the rules by which capacity is to be determined; the rule merely refers to the appropriate statutory provision to determine capacity.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

One Governmental Subdivision Not Subject to Suit by Another: School districts sued the county for recovery of lost revenue and investment income on decreased reserve funds. The Supreme Court found that dismissal of the suit was proper because absent specific statutory or constitutional authority, one governmental subdivision may not sue another for damages. School District No. 55 v. Musselshell County, 245 M 525, 802 P2d 1252, 47 St. Rep. 2249 (1990).

Certified Question — Interspousal Tort Immunity Abolished: In an original proceeding for declaratory judgment on two certified questions from U.S. District Court, the Supreme Court held that it abolished the defense of interspousal tort immunity in Miller v. Fallon County, 222 M 214, 721 P2d 342, 43 St. Rep. 1185 (1986), because historical reasons for that immunity were no longer valid. Therefore, that doctrine did not bar claim of wife-passenger against her husband-driver for negligence in operation of motor vehicle. (See also 40-2-109 enacted in 1979.) Noone v. Fink, 222 M 273, 721 P2d 1275, 43 St. Rep. 1258 (1986).

Partnerships — Capacity to Sue in Own Name: On certification from the Ninth Circuit Court of Appeals, the Montana Supreme Court held that a joint venture between two out-of-state corporations had the capacity to bring suit as a plaintiff against a corporation under Montana law. Relying on the Uniform Partnership Act and Montana statutes that allow a partnership to be sued in its own name and to sue in Small Claims Court, the Supreme Court found clear legislative intent to treat partnerships as distinct entities with the power to sue. Decker Coal Co. v. Commonwealth Edison Co., 220 M 251, 714 P2d 155, 43 St. Rep. 337 (1986).

Collateral References

Standing of zoning board of appeals or similar body to appeal reversal of its decision. 13 ALR 4th 1130.

Rule 17(c). Infants or incompetent persons.

Commission and Advisory Committee Notes

Subdivision (c) omits specific reference to "committee" and "conservator" as types of fiduciaries, and adds the last clause permitting the court to appoint a guardian ad litem even though a general guardian may have appeared.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still similar to the Federal Rule. As alluded to in the commission note above, the Montana Rule adds the phrase "or in any case where the court deems it expedient a guardian ad litem may be appointed to represent an infant or incompetent person, even though the infant or incompetent person may have a general guardian and may have appeared by him".

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

No Power of Guardian to Bring Dissolution Proceeding on Behalf of Incapacitated Person: When George's health began to fail, his daughter Judy was appointed temporary guardian. George subsequently filed for divorce from Agnes, but the District Court ultimately found that George lacked the capacity to bring a dissolution action. Judy requested and was granted permanent guardianship and conservatorship over George and filed an amended dissolution petition on George's behalf. The petition was granted, and Agnes appealed. The Supreme Court noted that under 72-5-321, a guardian of an incapacitated person has the same powers, rights, and duties respecting the ward that a parent has respecting an unemancipated child. The court also cited this rule as authority for a guardian to litigate on the behalf of a ward. However, the specific provisions of 72-5-321 control over the general provisions of this rule, so the only proceedings that the guardian of an incapacitated person may bring on behalf of the ward are those types of proceedings that a parent may bring on behalf of an unemancipated minor child, and this does not include the right to bring a dissolution proceeding. Therefore, because nothing in 72-5-321 grants a guardian of an incapacitated person the authority to bring a dissolution action on behalf of a ward, the District Court committed reversible error in holding otherwise. In re Marriage of Denowh, 2003 MT 244, 317 M 314, 78 P3d 63 (2003).

Parents Sued in Capacity of Guardians — Notice Insufficient to Establish Individual Liability: Defendants were sued in their capacity as guardians of their minor son for the expenses incurred in connection with the birth of an illegitimate child fathered by their son. A default judgment was rendered against defendants. The Supreme Court reversed and vacated the default judgment, holding that the guardians' duty to safeguard the rights of their son during the legal proceeding did not subject them to personal liability for their son's allegedly wrongful acts. The Supreme Court also held that because the title of the case, the allegations in the complaint, and all motions at trial addressed the defendants in their capacity as guardians, they had insufficient notice of any likelihood of personal liability. Breuer v. Poe, 245 M 22, 797 P2d 944, 47 St. Rep. 1812 (1990).

Termination of Parental Rights — Appointment of Guardian for Incompetent Parent or Waiver of Right to Appear Required: Where mother was under order of commitment and was confined at Montana State Hospital at time of entry of order terminating her parental rights, the Supreme Court reversed and remanded on grounds that she was incompetent and either a guardian ad litem should have been appointed for her under Rule 17(c) or a waiver of her right to appear under 53-21-119(2) should have been entered. The fact that she was represented by appointed counsel does not meet the requirements of Rule 17(c). Custody of R.A.D., 44 St. Rep. 2018 (1987). Opinion withdrawn but issue affirmed in Custody of R.A.D. & J.D., 231 M 143, 753 P2d 862, 45 St. Rep. 496 (1988).

Issue of Incompetency — Duty of Court to Determine Competency: Once the issue of competency is raised, it is the duty of the court to determine whether the party is competent and to appoint a guardian ad litem if the party is incompetent. Absent that determination, an

adjudication affecting the rights of the alleged incompetent cannot stand. State ex rel. Perman v. District Court, 213 M 130, 690 P2d 419, 41 St. Rep. 2002 (1984).

Rescission of Guardian Ad Litem's Appointment — No Effect on Jurisdiction: In an action initiated by a guardian ad litem on behalf of an alleged incompetent person, the District Court did not lack jurisdiction to dismiss the complaint after rescission of the guardian's appointment. Neither Rule 17(c), M.R.Civ.P., nor 25-5-301 provides that a guardian ad litem is a party to a lawsuit; rather, the court held that the guardian ad litem appears in a representative capacity only, and hence his removal has no effect on District Court jurisdiction. State ex rel. Perman v. District Court, 213 M 130, 690 P2d 419, 41 St. Rep. 2002 (1984).

Workers' Compensation Lump-Sum Advance — Guardian Ad Litem Appointments: A mother received a lump-sum workers' compensation advance payment. Her child had a separate, legally cognizable interest in present and future benefits, which might be prejudiced by any lump-sum payment to the mother; therefore, the Workers' Compensation Court should have either appointed a guardian ad litem to represent the child or made a finding stating why appointment was not necessary, and it was error to fail to do so. However, reversal was not required as there was a mutual benefit to mother and child in the payment of the benefits and the method of lump-sum advance repayment presented a very limited chance of financial loss to the child. Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981).

Damages Allowed: Damages awarded for injury to a minor cover both the child's cause of action and the parents' cause of action, pursuant to 27-1-512. Chavez v. U.S., 192 F. Supp. 263 (D.C. Mont. 1961).

Injury to Minor — Two Causes of Action: In the case of an injury to a minor, there arise two causes of action, one in favor of the minor and the other in favor of the parents under 27-1-512. Chavez v. U.S., 192 F. Supp. 263 (D.C. Mont. 1961).

Failure to Appoint Attorney — No Effect on Property Sale: Fact that no attorneys were appointed to represent minors in proceeding for sale of real estate by administrator of estate did not affect the validity of the proceedings under section 91-4316, R.C.M. 1947 (repealed). Haugan v. Yale Oil Corp., 124 M 1, 217 P2d 1084 (1950).

Default Judgment Against Infant Properly Vacated: Since an infant defendant could not have appeared in an action against him prior to the appointment of a guardian ad litem had he so desired, and no such guardian had been appointed at the time judgment by default was entered against him, the default was properly vacated against the contention of plaintiff that counsel employed by the father of defendant had made an insufficient showing of inadvertence or excusable neglect. Maloney v. Schandelmier, 65 M 531, 212 P 493 (1923).

Guardian Required — Plaintiff's Duty Prior to Default: An infant defendant can appear only by his general guardian or by a guardian ad litem. The mere fact that a parent is the natural guardian of the child not entitling him or her to appear and defend for it and where it appears that an infant has no such guardian, it is the duty of plaintiff to bring the matter to the attention of the court before proceeding to default or judgment. Maloney v. Schandelmier, 65 M 531, 212 P 493 (1923).

Error Waived by Guardian: An infant plaintiff represented in an action at law by a guardian ad litem may not complain on appeal of errors occurring at the trial not affecting his substantial rights, where experienced counsel failed to make objections and save exceptions, and where there is no evidence of fraud or collusion on the part of counsel. Byrnes v. Butte Brewing Co., 44 M 328, 119 P 788 (1911).

Waiver of Incapacity: Where minors bring an action by their guardian, the action is not by the guardian but by the minors who are required to appear through or by a guardian. Any objection to the capacity of the minors to sue, if not taken as prescribed, is deemed waived. O'Donnell v. Butte, 44 M 97, 119 P 281 (1911).

Action by Parents or Guardian Ad Litem: A minor may maintain an action for personal injuries by his guardian ad litem, the provisions of 27-1-512 not being exclusive. Flaherty v. Butte Elec. Ry., 40 M 454, 107 P 416 (1910).

Appointment of Guardian Ad Litem — Refusal as Abuse of Discretion: Where the daughter of an insane father, as his next friend, files a complaint and demands judgment that a decree of divorce granted to the wife of the incompetent be set aside because personal service of summons was not had upon him and asks that the court appoint a guardian ad litem to prosecute the action, his general guardian having refused to act, the court should make the appointment. It is an arbitrary abuse of discretion to refuse to do so. State ex rel. Happel v. District Court, 38 M 166, 99 P 291 (1909).

Guardian Required: An incompetent, whether plaintiff or defendant, must appear either by his general guardian or, in case he has none or the guardian fails or refuses to appear, by a

guardian ad litem appointed by the court. State ex rel. Happel v. District Court, 38 M 166, 99 P 291 (1909).

Probate Proceedings: Section 93-2805, R.C.M. 1947 (superseded by Rule 17(c), M.R.Civ.P.), requiring appearance by guardian and authorizing appointment of a guardian ad litem, referred to civil actions as distinguished from probate proceedings. State ex rel. Eakins v. District Court, 34 M 226, 85 P 1022 (1906).

Amendment of Complaint to Be Allowed: Where it is disclosed by proof upon the trial that the plaintiff is a minor and the complaint is then amended to show the minority and emancipation of plaintiff, the court upon the suggestion of plaintiff's minority should clothe him with capacity to sue by the appointment of a guardian and allow amendment of his complaint by inserting the name of such guardian. Hoskins v. White, 13 M 70, 32 P 163 (1893).

Collateral References

Guardian and Ward *key* 116(1); Infants *key* 76 through 87; Mental Health *key* 484.

39 C.J.S. Guardian and Ward §§171 through 173; 43 C.J.S. Infants §§321 through 326; 56 C.J.S. Mental Health §§265 through 274.

42 Am. Jur. 2d Infants §160.

Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name. 71 ALR 2d 1247.

Federal Civil Procedure Rule 17(c) relating to representation of incompetent person. 68 ALR 2d 752.

Appointment of guardian ad litem for child in action for divorce, separation, or annulment involving issue of paternity, legitimacy, or legitimation. 65 ALR 2d 1392.

Rule 18. Joinder of claims and remedies

Rule 18(a). Joinder of claims.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 18(a), as amended 1966.

Explanation of change: Under the prior rule some courts have inferred that the standards of Rules 19, 20, and 22 relate to and limit Rule 18(a) in multiple party cases. Thus, Rule 20(a) resulted in a holding that, unless each claim arose from a single transaction or series of transactions and involved a question common to all defendants, there could be no joinder. Federal Housing Admr. v. Christianson, 26 F Supp 419 (D. Conn. 1939). This amendment is designed to overcome such decisions and to state clearly that a party asserting a claim (original claim, counterclaim, cross-claim, third party claim) may join as many claims as he has against an opposing party regardless of the fact that there are multiple parties. The joinder is subject to the court's power to direct appropriate procedure for trying the claims. See Rules 42(b), 20(b), 21. Joinder of parties is governed by other rules operating independently.

In addition to the changes in the Federal Rules the words "or co-party" are added to the Montana amendment for consistency with the provisions of this amendment for cross-claims and Rule 13(g).

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: The 1967 amendment substantially rewrote this rule to conform to the Federal Rule. As of May 1, 1990, this rule was still substantially the same as the Federal Rule, with the exception that the Federal Rule provides for the joinder of maritime claims and makes no reference to claims against a coparty, as pointed out in the advisory committee's note above.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 696
Alternative Claims 696
Multiple Parties 697
Divorce Proceedings 697

GENERAL

Partner Suing Bank — Joinder of Partnership and Other Partner Denied: Bank depositor sued his bank and his partner in separate actions arising from the same events. The bank, in the action against it, added the partnership and the partner as third-party defendants in order to try together those issues where depositor claimed the same damages against the bank and his partner. The bank alleged contractual indemnity as the basis for relief. It would not have been error to permit the third-party defendants to remain in the case, but it was not an abuse of discretion to dismiss the third-party complaint without stating the reason. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Motion to Consolidate — Denied: When plaintiff made a valid assignment of his interest in a promissory note and filed a supplemental complaint dropping him as a party plaintiff, the action on the note could not properly be joined with another action to which he was a party. Keller v. Llewellyn, 175 M 164, 573 P2d 166 (1977).

Res Judicata — Collateral Estoppel — Joinder — Interrelationship: Whether a party proceeded in the procedural manner most conducive to a full settlement of the dispute is irrelevant; an unadjudicated claim based upon unlitigated issues will receive its day in court. W. Mont. Prod. Credit Ass'n v. Hydroponics, Inc., 147 M 157, 410 P2d 937 (1966).

Joinder of Actions for Trespass: Where plaintiff is grazing cattle of several other persons on his lands and defendant on two separate occasions commits a trespass against such cattle the causes of action may be joined. Cormier v. Fraser, 130 M 170, 296 P2d 1021 (1956).

Joinder of State Claim With Federal Action — No Waiver of State Trial: A plaintiff did not waive right to trial in state court by joining, with cause of action under Federal Employers' Liability Act, a cause of action under similar state statutes based on identical facts, and action was not removable to federal court. Hoepfner v. N. Pac. Ry., 61 F. Supp. 819 (D.C. Mont. 1945).

Waiver of Misjoinder: Where defendant failed to object to a complaint which blended two causes of action contrary to the provisions of section 93-3203, R.C.M. 1947 (superseded by Rule 18(a), M.R.Civ.P.), the defect will be deemed to be waived by such failure to object. Ayotte v. Nadeau, 32 M 498, 81 P 145 (1905).

Joinder of Actions for Defamation: A plaintiff may elect to unite several causes of action for injury to character, but he is not required to do so. Paxton v. Woodward, 31 M 195, 78 P 215 (1904).

ALTERNATIVE CLAIMS

Pleading Three Separate Causes Under One Set of Facts: An employee set forth all factual allegations, followed by separate statements of three causes of action: wrongful discharge, breach of express and implied contract, and breach of the covenant of good faith and fair dealing. All of the factual allegations were essentially incorporated into each cause. An employee sufficiently indicated the intent to plead the causes as separate and independent. Mere joinder of alternative or inconsistent claims does not require dismissal of an otherwise legitimate claim, nor does the Wrongful Discharge From Employment Act limit a claimant's right to plead an independent cause of action in conjunction with a claim under the Act. Beasley v. Semitool, Inc., 258 M 258, 853 P2d 84, 50 St. Rep. 522 (1993).

Action on Lease — Express Contract and Reasonable Value: While generally speaking a departure in pleading is not permissible, trial courts may in their discretion permit joinder in different counts to meet exigencies presented by the evidence, and when grounds of recovery are more or less uncertain, a count upon express contract and one on quantum meruit may properly be joined. Here plaintiff owner joined a count on the express agreement to pay a specified rent with a second cause on the reasonable value of the premises since defendant claimed nonliability under the lease. Wilson v. Milner Hotels, 116 M 424, 154 P2d 265 (1944).

Same Cause Stated in Two Counts: The trial court may in its discretion permit the same cause of action to be stated in different counts in order to meet the exigencies of the case as presented by the evidence. Lowry v. Carrier, 55 M 392, 177 P 756 (1918); Waite v. C. E. Shoemaker & Co., 50 M 264, 146 P 736 (1915); Neuman v. Grant, 36 M 77, 92 P 43 (1907); Blankenship v. Decker, 34 M 292, 85 P 1035 (1906).

Claims in Two Counts to Be Consistent — No Prejudice Shown: There is nothing in the Code to prohibit the plaintiff, acting in good faith, from stating a single cause of action in two counts in a suit to foreclose a mechanics' lien (now construction lien) when the averments of each are not so inconsistent as to be contradictory and the allegations of either or both may be true, dependent upon the evidence to be produced, where the defendant is not misled to his prejudice and the exigencies of the case seem to demand such form of pleading. Neuman v. Grant, 36 M 77, 92 P 43 (1907).

MULTIPLE PARTIES

Action on Group Insurance Contract: In an action on a group insurance policy covering hospital and medical expenses and involving claimed injuries incurred by several employees covered under the policy, the court did not err in overruling the company's motion to require plaintiffs separately to state and number their causes of action since there was but one contract and the one main issue was simply the existence or nonexistence of the group insurance contract on a certain date. Cantrell v. Benefit Ass'n of Ry. Employees, 136 M 426, 348 P2d 345 (1959).

Nuisance — Causes of Action Against Former and Present Owners: Cause of action against former owner and operator of oil refinery for damage caused by flow of crude oil onto adjacent slaughterhouse premises did not affect purchaser of refinery, and after sale former owner was not a proper party to action to abate nuisance allegedly created by such flow of oil while refinery was operated by purchaser, and hence causes of action against successive owners and operators to abate nuisance and for damages were improperly joined. Midland Empire Packing Co. v. Yale Oil Corp., 119 M 36, 169 P2d 732 (1946).

Cause of Action Against One Party — Misjoinder: Causes of action may be united only when they affect all the parties to the action. Hence, where one of two causes of action affected only one of several defendants there was a misjoinder and the court erred in overruling a special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to the complaint based on that ground. Baker v. Hanson, 72 M 22, 231 P 902 (1924).

DIVORCE PROCEEDINGS

Equitable Division of Property — No Plea Required: In a divorce action a District Court may completely divest the wife of her interest in property, no matter how it is held, and provide for the payment of alimony in lieu thereof. No particular pleading is required to raise question of equitable division of property; any pleading is sufficient which gives notice of pleader's intent to raise the issue and specific relief need not be requested. Libra v. Libra, 157 M 252, 484 P2d 748 (1971), overruling Emery v. Emery, 122 M 201, 200 P2d 251 (1948), affirming Johnson v. Johnson, 137 M 11, 349 P2d 310 (1960). See also Cook v. Cook, 159 M 98, 495 P2d at 593 (1972), as overruling Emery.

No Request for Relief — Joinder Proper: In divorce proceedings, jointly held property may be partitioned by the District Court, which has the power to settle and to adjust property jointly accumulated, regardless of whether the pleadings contain a specific prayer for partition. Hodgson v. Hodgson, 156 M 469, 482 P2d 140 (1971).

Divorce and Property Dispute Joined: Where wife brought suit for divorce and husband filed cross-complaint for adjudication of his right to property acquired by their joint effort, the general equity powers of the court were properly invoked by joining in a single action the prayer for divorce and adjudication of the dispute between the parties concerning property rights. Tolson v. Tolson, 145 M 87, 399 P2d 754 (1965), explained in Libra v. Libra, 157 M 252, 484 P2d 748 (1971); accord, Bloom v. Bloom, 150 M 511, 437 P2d 1 (1968).

Divorce Action Joined With Contract Claims: Claims arising out of contract to recover specific real and personal property, and against a trustee, cannot be joined in an action for a divorce. Emery v. Emery, 122 M 201, 200 P2d 251 (1948), distinguished in Johnson v. Johnson, 137 M 11, 349 P2d 310 (1960).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Action *key* 39 through 60.

1A C.J.S Actions §187, et seq.; 71 C.J.S. Pleading §§149 through 151.

1 Am. Jur. 2d Actions §§74 through 102.

Simultaneous injury to person and property as giving rise to single cause of action—modern cases. 24 ALR 4th 646.

Rule 18(b). Joinder of remedies — fraudulent conveyances.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule, except that the clarifying last sentence has been added to subdivision (b).

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Finding of Fraudulent Conveyance Rather Than Payment in Preference Affirmed: Plaintiffs who leased mineral rights to a peat extraction operation from Foss obtained a $118,343.59 default judgment against Foss for intentional interference with access to the peat resources and for assault on one of the plaintiffs with a rifle. Foss conveyed his 44% interest in the property to his then-wife Fedder for $1, which gave her an 88% interest, and Foss's children from a previous marriage held the remaining 12% interest. Their marriage was subsequently dissolved. The District Court held that the property conveyance was fraudulent and allowed plaintiffs to levy execution upon the property. Fedder maintained on appeal that the transfer of title to her was in effect a payment in preference, allowable under 31-2-104, that was made in recognition that she would be entitled to maintenance or support from Foss when they dissolved their marriage. However, Fedder produced no evidence that she was a creditor of Foss at the time of the conveyance. The marriage was intact at the time of the conveyance, and the property transfer was not part of the dissolution, but rather preceded it. The District Court's decision was affirmed. Farmers Plant Aid, Inc. v. Fedder, 2000 MT 87, 299 M 206, 999 P2d 315, 57 St. Rep. 375 (2000).

Prosecution of Fraudulent Conveyance Action After Filing of Bankruptcy Petition Proper: Plaintiffs who leased mineral rights to a peat extraction operation from Foss obtained a $118,343.59 default judgment against Foss for intentional interference with access to the peat resources and for assault on one of the plaintiffs with a rifle in 1989. Foss transferred his 44% interest in the property to his then-wife Fedder for $1, which gave her an 88% interest, and Foss's children from a previous marriage held the remaining 12% interest. The marriage was subsequently dissolved, and Foss filed a bankruptcy petition in 1994, listing numerous creditors and no assets. Foss was dropped as a defendant, and plaintiffs pursued a fraudulent conveyance action against Fedder to collect on their judgment. The District Court voided the conveyance from Foss to Fedder, and granted defendants the right to levy execution upon the property. Fedder appealed, asserting that when Foss filed the bankruptcy petition, the bankruptcy trustee acquired the right to avoid prepetition fraudulent conveyances and that plaintiffs thus lost their standing to pursue their claim. The Supreme Court noted that section 524(e) of the Bankruptcy Code provides that discharge of a debt does not affect the liability of any other entity for the debt. After the close of a bankruptcy, creditors are free to resume or commence a fraudulent conveyance action against the transferee in state court independent of the bankruptcy trustee, even when collection efforts may have occurred during pendency of the bankruptcy. Here, the trustee was appointed after this action was filed, and the Bankruptcy Court and the trustee had notice of the action during pendency of the bankruptcy, so the District Court did not err in granting the fraudulent conveyance judgment after conclusion of the bankruptcy proceedings. Further, pursuant to Cahill-Mooney Constr. Co. v. Ayres, 140 M 464, 373 P2d 703 (1962), plaintiffs were not required to obtain a lien prior to bringing the fraudulent conveyance claim. Nothing mandates that a plaintiff file a proof of claim in Bankruptcy Court to preserve the right to pursue a fraudulent conveyance action against a third party transferee like Fedder. Farmers Plant Aid, Inc. v. Fedder, 2000 MT 87, 299 M 206, 999 P2d 315, 57 St. Rep. 375 (2000). See also Fed. Deposit Ins. Corp. v. Davis, 733 F2d 1083 (4th Cir. 1984), and Kathy B. Enterprises, Inc. v. U.S., 779 F2d 1413 (9th Cir. 1986).

Fraudulent Conveyance: A creditor may join with his cause of action alleging indebtedness a second cause of action under 31-2-301 through 31-2-325 (all repealed), alleging that debtor's giving of mortgages and conveyance of certain property was without fair consideration and made him insolvent, and a third cause of action alleging that after executing the mortgages he had unreasonably small capital in his business. Cahill-Mooney Constr. Co. v. Ayres, 140 M 464, 373 P2d 703 (1962).

Principal and Surety: Under the rule that a separate liability of the principal cannot be joined in an action on the bond against the surety, an action by a county against its assessor to recover from him money lost to it by reason of his willful failure and neglect to assess property, was improperly joined with an action against a surety company on the official bond of that officer. Silver Bow County v. Kelly, 68 M 194, 216 P 1106 (1923).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Construction, application, and effect of Rule 18 pertaining to joinder in a single action of two claims although one was previously cognizable only after the other had been prosecuted to a conclusion. 61 ALR 2d 688.

Rule 19. Joinder of persons needed for just adjudication

Case Notes

Form of Pleadings When Information in Exclusive Control of Culpable Party: Plaintiff was injured on the job but did not know whether there was a meritorious cause of action or whether there were any culpable parties. He argued that he could not file a complaint and conduct discovery under the Rule 11, M.R.Civ.P., requirement of certification that the complaint be grounded in fact because the information needed to certify the facts was in the exclusive control of the potentially culpable parties. However, Rule 11 only requires that a party make reasonable inquiry and then certify based on knowledge, information, and belief. Rule 11 does not require a guarantee or certification that every detailed fact has been thoroughly investigated and found to be correct. The Supreme Court cited the practices of joinder of parties and the filing of a fictitious "Doe" pleading as alternative ways to commence an action under such circumstances. Temple v. Chevron U.S.A. Inc., 254 M 455, 840 P2d 561, 49 St. Rep. 661 (1992).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 19(a). Persons to be joined if feasible.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: This is a substitution for existing Rule 19 in its entirety. The changes are intended to make clear that whenever feasible the persons materially interested in the subject of an action should be joined as parties so that they may be heard and a complete disposition made. When this comprehensive joinder cannot be accomplished the case should be examined pragmatically and a choice made between the alternatives of proceeding with the action in the absence of particular interested persons, and dismissing the action.

Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.

The change straightens out difficulties in the wording of the old rule. The word "indispensable" is used only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors mentioned in subdivision (b), it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it. The factors mentioned in subdivision (b) of the rule are not intended to be exclusive and others may be applicable in particular situations. The court is to determine whether in equity and good conscience the action should proceed among the parties already before it, or should be dismissed.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: The amendment of September 29, 1967, rewrote this rule. As of May 1, 1990, the rule was still substantially the same as the Federal Rule. The Federal Rule, however, provides for joinder of persons subject to service of process only if their joinder will not deprive the court of jurisdiction over the subject matter.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Joinder Not Appropriate if Party Not Indispensable: Defendant pledged personal property to plaintiff as collateral for loans. Defendant failed to make payments, and plaintiff notified defendant that the property had been repossessed. The same day, several members of defendant's company resigned and formed a new company, to which defendant then leased its personal property for $100 a month. Two other codefendants also claimed an interest in the collateral and sought to join the new company as a party to the action. The District Court denied the joinder motion, and on appeal, the Supreme Court affirmed. The new company held no legal interest in the property, was not a party to any of the security agreements at issue, and held no interest in the outcome of the foreclosure action or in the disposition of funds received from the sale of the property. As such, the new company was not an indispensable party to the action, and the District Court did not err in denying the motion to join the new company as a party. Mtn. W. Bank v. Mine & Mill Hydraulics, Inc., 2003 MT 35, 314 M 248, 64 P3d 1048 (2003), following Mohl v. Johnson, 275 M 167, 911 P2d 217 (1996).

Joinder in Partition Action — Unnecessary Nonparty: In a suit for partition of two pieces of traditionally linked property owned by Green and Gremaux as cotenants, Green conveyed her interest in the property to her attorney, Stone. Gremaux sought to include Stone as third-party defendant and to require that both tracts of land be partitioned in the same action in order to protect against depriving Gremaux of the opportunity to obtain the highest overall value for Gremaux's interest in the land. It is within the discretion of the trial court to determine whether joinder would result in prejudice by allowing separate partition actions. Citing Mohl v. Johnson, 275 M 167, 911 P2d 217 (1996), the Supreme Court recognized that there may be cases in which the partitioning of all the lands of an original cotenancy in one action is necessary to avoid prejudice and to afford the parties complete relief; however, joining Stone and partitioning both tracts in the same action were not necessary to provide meaningful relief in this case. Because Green received more than eight times the price from Stone than was offered by Gremaux and because the parcels were not adjacent but rather 15 miles apart, there was no basis for concluding that Gremaux would be prejudiced or unable to obtain complete relief if the two tracts were not partitioned in one action. Further, under this rule, the person sought to be joined as a party must first claim an interest in the action. Stone claimed no interest in the partition; therefore, Stone was not a necessary party to the action. In re Green v. Gremaux, 285 M 31, 945 P2d 903, 54 St. Rep. 1029 (1997).

Blackfeet Tribe Real Party in Interest — Tribe Necessary Party Even Though Not Party to Contract — Risk of Multiple and Inconsistent Obligations — Case Dismissed for Failure to Join Indispensable Party: Blaze Construction contracted with Glacier Electric Cooperative to construct 25 homes on the Blackfeet Reservation in conformance with the super good cents incentive program. Under the program, the builder (Blaze) or owner (Blackfeet Tribe) is entitled to reimbursement for additional weatherization costs of up to $1,500 for each home. Both Blaze and the tribe claimed reimbursement of the funds due under the incentive program. Blaze sued Glacier Electric in state court, alleging breach of contract for failure to pay Blaze the reimbursement payment. Glacier Electric moved to dismiss the state suit for failure to join the tribe as an indispensable party and for lack of jurisdiction over the parties. The District Court held that the tribe was an indispensable party even though it was not a party to the incentive program contract and that, given the tribe's claimed interest, Glacier Electric was in substantial risk of incurring multiple and inconsistent obligations. Recognizing that it did not have jurisdiction over the tribe, the court concluded that it would be unable to fashion any meaningful relief that would address the claims of the tribe and avoid the risk of further litigation to Glacier Electric. The court also recognized two other forums, tribal court and U.S. District Court, with jurisdiction over all three parties. The District Court dismissed for failure to join the tribe as an indispensable party and the Supreme Court affirmed. Blaze Constr., Inc. v. Glacier Elec. Co-op, Inc., 280 M 7, 928 P2d 224, 53 St. Rep. 1274 (1996).

Employer Not Indispensable Party to Negligence Action Against Employee — Dismissal Improper: Johnson injured Mohl in a vehicle accident while Johnson was an employee of U-Haul. The trial court held that complete relief could not be granted without U-Haul being joined as a party, presumably for purposes of indemnity, and that because the statute of limitations had run against U-Haul, the action should be dismissed because of the inability to join U-Haul as an indispensable party. The Supreme Court disagreed that as employer and potential indemnitor, U-Haul was an indispensable party to the negligence suit against the employee Johnson. There was no need for an indemnity action to be resolved simultaneously with the negligence claim because the indemnity suit would arise out of and be subsequent to the negligence claim. Because the underlying negligence case had not been decided, an indemnity

claim against U-Haul had not yet arisen and the statute of limitations had not yet begun to run. Dismissal of the suit constituted reversible error, and the case was remanded for continuation of the trial. Mohl v. Johnson, 275 M 167, 911 P2d 217, 53 St. Rep. 96 (1996), followed in In re Green v. Gremaux, 285 M 31, 945 P2d 903, 54 St. Rep. 1029 (1997). See also Blaze Constr., Inc. v. Glacier Elec. Co-op, Inc., 280 M 7, 928 P2d 224, 53 St. Rep. 1274 (1996).

Joinder of Claims Against Defendant in Official and Personal Capacities: In the interests of judicial economy, plaintiff who filed separate claims against a former supervisor in both official and personal capacities should have been allowed to join the supervisor as party defendant in both capacities because both actions arose out of the same transaction, occurrence, or series of transactions or occurrences. Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991).

Surrounding Property Owners Not Necessary Parties to Easement Dispute: In a dispute between owners of a reserved easement and owners of the servient tenement, surrounding property owners are not indispensable parties because they are not persons materially interested in the subject of the action. The easement lies completely within the perimeter of the land owned by the easement and servient tenement owners. Strahan v. Bush, 237 M 265, 773 P2d 718, 46 St. Rep. 789 (1989).

Use Right of State in Bean Lake — Standing of Stockgrowers Association to Enter Suit — General Test for Any Association: As part of the statewide water rights adjudication process, the Department of Fish, Wildlife, and Parks filed a claim for a pre-1973 "use" water right appropriation for recreation, fishing, and wildlife purposes in the waters of Bean Lake. The Montana Stockgrowers Association was a proper party in the case. The Water Court required statewide notice and invitation for others to appear. The Association stated that its members could be affected, and the two other potential appropriators in Bean Lake were members of the Association. The Supreme Court adopted the following as the test to determine the standing of an association to appear as a party on behalf of its members: (1) its members would otherwise have standing in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the suit. In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228, 45 St. Rep. 1948 (1988).

Reliance on Federal Labor Law to Determine Termination Status of Employee — Employer Not a Party: In an action relating to retirement benefits, it was not error for a judge to rely on the National Labor Relations Act (NLRA) to determine whether employees had been involuntarily terminated without allegations of misconduct even though the employer was not a party to the action, the District Court did not have NLRA subject matter jurisdiction, and the applicable federal Statute of Limitations had run on the discharge. The employees' discharge status was a crucial issue in the case, and the NLRA was relied on solely to answer a question of state law pertinent to the issue raised. Felton Inv. Group v. Taurman, 222 M 238, 722 P2d 1135, 43 St. Rep. 1228 (1986).

Determining Public's Right to Use Dearborn River — Indispensable Parties: Stream access coalition, the Department of State Lands (functions now transferred to Department of Natural Resources and Conservation), and the Department of Fish, Wildlife, and Parks sued landowner along the Dearborn River, seeking a determination of the public's right to use the river. The District Court did not err for failure to dismiss the plaintiffs' claims for failure to join indispensable parties. When litigation seeks vindication of a public right, those who may be adversely affected by a decision do not thereby become indispensable parties. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Venue — Action Against Multiple Counties: In 1981, Silver Bow County erroneously reissued the registration number of plaintiff's vehicle to another automobile. The automobile was subsequently reported stolen. The vehicle was recovered but not shown as such on county records. Defendant, a Jefferson County Deputy Sheriff, saw plaintiff's vehicle and requested status information. The vehicle was shown as stolen. Plaintiff was arrested and later released upon discovery of the error. Plaintiff brought suit against both Silver Bow and Jefferson Counties in Silver Bow District Court seeking damages on several grounds. Jefferson County moved for a change of venue, which was denied. The Supreme Court found that if the provisions of the venue statutes and the Rules of Civil Procedure were applied strictly, plaintiff would be placed in an impossible situation whereby both counties were indispensable parties and either could object to venue and be entitled to a change or dismissal. The court, relying on State ex rel. Mont. Deaconess Hosp. v. Park County, 142 M 26, 381 P2d 297 (1963), affirmed the refusal to grant a change of venue because both counties were necessary parties and because venue was proper at least as to Silver Bow County. Hutchinson v. Moran, 207 M 330, 673 P2d 818, 40 St. Rep. 2081 (1983).

Administrative Boards Not Indispensable Parties for Judicial Review: The construction and general laborer's union filed an unfair labor practice charge with the Board of Personnel Appeals. A hearing was held in which the hearings examiner confirmed the unfair labor practice charge. The Board of Personnel Appeals reviewed the hearings examiner's conclusions and confirmed the recommended order. Appellant petitioned the District Court for judicial review of the Board's order. The appellant failed to name the Board as a party as provided in 2-4-702. The District Court found that the Board was an indispensable party and dismissed the action. On appeal, the Supreme Court found that the administrative boards are not indispensable parties for purposes of judicial review. Young v. Great Falls, 194 M 513, 632 P2d 1111, 38 St. Rep. 1317 (1981).

Determination of Indispensable Parties — Agency Alone Insufficient: The mere fact that an individual is alleged to be acting as an agent, whether disclosed or undisclosed, for another is not sufficient to make the individual an indispensable party. Preste v. Mtn. View Ranches, Inc., 180 M 369, 590 P2d 1132 (1979).

Suit Over Alleged Defect in Easement — Indispensable Parties: When appellants sued the party from whom they had purchased land and his real estate broker on the grounds of breach of contract and fraud for an alleged defect in an easement allowing appellants the use of a swimming pool located on adjacent land, appellants should have first litigated the existence of the easement and joined the owners of the purported servient estate, who were indispensable parties. Van Ettinger v. Pappin, 180 M 1, 588 P2d 988 (1978).

Rules Not Designed to Promote Litigation: When defendant in a personal injury accident attempted to compel a potential litigant to appear and bring suit by naming her as a defendant in a third-party declaratory judgment action, the trial court properly dismissed the complaint since the third-party defendant was not an indispensable party or compelled to litigate a claim which she had no intention of pursuing. If equity was to be done in a situation such as this, attorney fees were properly awarded the third-party defendant. Foy v. Anderson, 176 M 507, 580 P2d 114 (1978).

Parties to Contract — Effect of Property Disposition: Because the obligations of a contract are limited to the contracting parties, plaintiff properly sued defendant for recovery on two retail installment contracts executed by defendant, even though the object of the contracts became part of a property disposition to defendant's wife in a divorce decree which transferred the indebtedness along with the subject property. Gambles v. Perdue, 175 M 112, 572 P2d 1241 (1977), distinguished in Blaze Constr., Inc. v. Glacier Elec. Co-op, Inc., 280 M 7, 928 P2d 224, 53 St. Rep. 1274 (1996).

Copromisor Should Be Joined: If a copromisor on a contract may be limited in exercising his right of contribution from the promisor on the debt by a finding of liability of the promisor in the absence of the copromisor, he should be joined as a party so that he is not deprived of due process. S-W Co. v. Schwenk, 173 M 481, 568 P2d 145 (1977).

Out-of-State Bank Not Party to Be Joined: Interest in loans transferred to out-of-state bank under participation agreement between lending Montana bank and out-of-state bank prior to commencement of action does not make out-of-state bank true party in interest or person to be joined if feasible when borrower sued on loan agreement and notes payable to lending Montana bank because loan agreement only establishes rights and liabilities between lending Montana bank and borrower, while participation agreement only establishes rights and liabilities between lending Montana bank and out-of-state bank. Neither establishes any contractual relationship, rights, or liabilities between borrower and out-of-state bank. Additionally, lending Montana bank is owner and sole payee on notes and as holder of notes is entitled to sue in its own name. State ex rel. Drum v. District Court, 169 M 494, 548 P2d 1377 (1976), distinguished in Blaze Constr., Inc. v. Glacier Elec. Co-op, Inc., 280 M 7, 928 P2d 224, 53 St. Rep. 1274 (1996).

Real Party in Interest — Subrogated Interest of Insurer: In an action for the recovery of damages for property damage and personal injury, an insured may prosecute an action for the full amount of the loss or either the insured or the insurer may separately sue for his portion of the loss. If the action is instituted by either one alone the defendant can compel joinder of the other or may waive joinder. State ex rel. Slovak v. District Court, 166 M 485, 534 P2d 850 (1975).

Stipulation to Be Bound by Prior Judgment — Improper Joinder: Stipulation of owner of bulldozer to be bound by prior judgment even though not a party to previous action precluded subsequent complaint for damages to bulldozer, and there was no need to join him as a party to the previous action. Morris v. McCarthy, 159 M 236, 497 P2d 102 (1972).

Injured Party in Dispute Between Insurers: Party who brought original action for injuries but who was not party to either of policies of insurance involved and was only indirectly interested in outcome of litigation between two insurance companies was improper party in declaratory action

to determine which of two insurance companies was liable. Nat'l. Farmers Union Property & Cas. Co. v. Gen. Guar. Ins. Co., 150 M 297, 434 P2d 708 (1967).

Broad View of Joinder — Adopted: In view of the fact of the protection afforded a party under the Rules of Civil Procedure and although joinder would not be proper under Rule 19, the Supreme Court adopted the broadest possible reading of the permissive language of Rule 20 in allowing joinder of defendant. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965).

Assignee Under Security Device: The assignee of ranch tenant's net proceeds from the sale of livestock was not a necessary party to an action on the lease by the tenant against the landlord, where the assignment was not absolute and the instrument was clearly a security device on its face. Green v. Wolff, 140 M 413, 372 P2d 427 (1962).

Lack of Prejudice — Failure to Join Not Error: In an action on account for the balance due on stumpage from timber sold to the defendant, it was not error to fail to join the plaintiff's wife or the vendors from whom the plaintiff and his wife had contracted to purchase the land since it did not appear that their rights would be prejudiced by a decision in their absence. Ballenger v. Tillman, 133 M 369, 324 P2d 1045 (1958).

Action Against School District — Public Contractors Indispensable: Where electors brought action to enjoin a school district from carrying out contracts for construction of a gymnasium, the contractors were indispensable parties without whose presence the court is without jurisdiction to proceed with the case, particularly to a trial on the merits. Miller v. Cut Bank High School District, 130 M 499, 305 P2d 319 (1956).

Action to Partition — Co-Owners Indispensable: Where wife asks court to partition various parcels of real property in which she and her husband have an interest it is necessary that co-owners be made parties. Emery v. Emery, 122 M 201, 200 P2d 251 (1948).

Attorney's Lien — Attorney Not Plaintiff: Fact that plaintiff's attorney claimed a lien for services for more than half the amount sued for did not render the attorney a real party in interest so that defendant could require him to join as a plaintiff. Phelps v. Union Cent. Life Ins. Co., 108 M 78, 88 P2d 58 (1939).

Personal Property — Action by Multiple Owners: In an action for injury to personal property all the owners of it, whether as partners or otherwise, must join in the action as parties plaintiff, the purpose of the rule being to save defendant from further vexation at the hands of other claimants to the same demand. Thompson v. Shanley, 93 M 235, 17 P2d 1085 (1932).

Law Review Articles

Montana Supreme Court Survey, McLean & Young, 41 Mont. L. Rev. 292, 296 (1980).

Collateral References

Parties *key* 13 through 20 ½, 24 through 35, 78 through 84.

67A C.J.S. Parties §§33 through 41, 52 through 54, 139 through 152.

59 Am. Jur. 2d Parties §§96, 107, 112.

Necessary parties defendant to independent action on injunction bond. 55 ALR 2d 545.

Necessary parties defendant to action to set aside conveyance in fraud of creditors. 24 ALR 2d 395.

Trust beneficiaries as necessary parties to action relating to trust or its property. 9 ALR 2d 10.

Who must be joined in action as person "needed for just adjudication" under Rule 19(a), of Federal Rules of Civil Procedure. 22 ALR Fed. 765.

Rule 19(b). Determination by court of whenever joinder not feasible.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: See advisory committee's note under Rule 19(a).

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: The amendment of September 29, 1967, rewrote this rule. As of May 1, 1990, this rule was still identical to the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Blackfeet Tribe Real Party in Interest — Tribe Necessary Party Even Though Not Party to Contract — Risk of Multiple and Inconsistent Obligations — Case Dismissed for Failure to Join Indispensable Party: Blaze Construction contracted with Glacier Electric Cooperative to construct 25 homes on the Blackfeet Reservation in conformance with the super good cents incentive program. Under the program, the builder (Blaze) or owner (Blackfeet Tribe) is entitled to reimbursement for additional weatherization costs of up to $1,500 for each home. Both Blaze and the tribe claimed reimbursement of the funds due under the incentive program. Blaze sued Glacier Electric in state court, alleging breach of contract for failure to pay Blaze the reimbursement payment. Glacier Electric moved to dismiss the state suit for failure to join the tribe as an indispensable party and for lack of jurisdiction over the parties. The District Court held that the tribe was an indispensable party even though it was not a party to the incentive program contract and that, given the tribe's claimed interest, Glacier Electric was in substantial risk of incurring multiple and inconsistent obligations. Recognizing that it did not have jurisdiction over the tribe, the court concluded that it would be unable to fashion any meaningful relief that would address the claims of the tribe and avoid the risk of further litigation to Glacier Electric. The court also recognized two other forums, tribal court and U.S. District Court, with jurisdiction over all three parties. The District Court dismissed for failure to join the tribe as an indispensable party and the Supreme Court affirmed. Blaze Constr., Inc. v. Glacier Elec. Co-op, Inc., 280 M 7, 928 P2d 224, 53 St. Rep. 1274 (1996).

Determination of Real Party in Interest Prior to Ratification, Joinder, or Substitution: Defendants appealed from a judgment denying a motion to allow amendment to pleadings to add their incorporated business entity as a party plaintiff. The Supreme Court remanded the case, holding that before it could be determined if ratification, joinder, or substitution should be allowed, it was necessary to determine whether the corporate entity was a real party in interest on the counterclaim. First Sec. Bank of Glendive v. Gary, 221 M 329, 718 P2d 1345, 43 St. Rep. 852 (1986).

Administrative Boards Not Indispensable Parties for Judicial Review: The construction and general laborer's union filed an unfair labor practice charge with the Board of Personnel Appeals. A hearing was held in which the hearings examiner confirmed the unfair labor practice charge. The Board of Personnel Appeals reviewed the hearings examiner's conclusions and confirmed the recommended order. Appellant petitioned the District Court for judicial review of the Board's order. The appellant failed to name the Board as a party as provided in 2-4-702. The District Court found that the Board was an indispensable party and dismissed the action. On appeal, the Supreme Court found that the administrative boards are not indispensable parties for purposes of judicial review. Young v. Great Falls, 194 M 513, 632 P2d 1111, 38 St. Rep. 1317 (1981).

Determination Where Joinder Not Feasible — Dismissal Inequitable: In an action by a Montana bank to enforce notes held by it, but subject to a participation agreement between it and a national bank located out of state, joinder of the national bank was prohibited by federal law. Thus, even if the national bank was deemed an indispensable party, the action was properly allowed without joinder of the national bank since to hold otherwise would inequitably deny the Montana bank any remedy in the courts of its own state. State ex rel. Drum v. District Court, 169 M 494, 548 P2d 1377 (1976), distinguished in Blaze Constr., Inc. v. Glacier Elec. Co-op, Inc., 280 M 7, 928 P2d 224, 53 St. Rep. 1274 (1996).

Rule 19(c). Pleading reasons for nonjoinder.

Advisory Committee's Note to September 29, 1967, Amendment

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: See advisory committee's note under Rule 19(a).

Compiler's Comments

Identity With Federal Rule: The amendment of September 29, 1967, rewrote this rule. As of May 1, 1990, this rule was still identical with the Federal Rule.

Rule 19(d). Exception of class actions.

Advisory Committee's Note to September 29, 1967, Amendment

Source: Fed. R. Civ. P. 19, as amended 1966.

Explanation of change: See advisory committee's note under Rule 19(a).

Compiler's Comments

Identity With Federal Rule: The amendment of September 29, 1967, rewrote this rule. As of May 1, 1990, this rule was still identical to the Federal Rule.

Rule 20. Permissive joinder of parties

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 20(a). Permissive joinder.

Advisory Committee's Note to September 29, 1967, Amendment

Source: Fed. R. Civ. P. 20(a), as amended 1966.

This amendment fits into the amendment to Rule 18, and clarifies the antecedent of the word "them."

Compiler's Comments

Identity With Federal Rule: The amendment of September 29, 1967, rewrote this rule. As of May 1, 1990, this rule was still substantially the same as the Federal Rule and differs only in that no reference is made to vessels, cargo, or other property subject to admiralty process in rem.

Case Notes

General 705
Sureties 706

GENERAL

Joinder of Claims Against Defendant in Official and Personal Capacities: In the interests of judicial economy, plaintiff who filed separate claims against a former supervisor in both official and personal capacities should have been allowed to join the supervisor as party defendant in both capacities because both actions arose out of the same transaction, occurrence, or series of transactions or occurrences. Dagel v. Great Falls, 250 M 224, 819 P2d 186, 48 St. Rep. 919 (1991).

Determination of Real Party in Interest Prior to Ratification, Joinder, or Substitution: Defendants appealed from a judgment denying a motion to allow amendment to pleadings to add their incorporated business entity as a party plaintiff. The Supreme Court remanded the case, holding that before it could be determined if ratification, joinder, or substitution should be allowed, it was necessary to determine whether the corporate entity was a real party in interest on the counterclaim. First Sec. Bank of Glendive v. Gary, 221 M 329, 718 P2d 1345, 43 St. Rep. 852 (1986).

Partner Suing Bank — Joinder of Partnership and Other Partner Denied: Bank depositor sued his bank and his partner in separate actions arising from the same events. The bank, in the action against it, added the partnership and the partner as third-party defendants in order to try together those issues where depositor claimed the same damages against the bank and his partner. The bank alleged contractual indemnity as the basis for relief. It would not have been error to permit the third-party defendants to remain in the case, but it was not an abuse of discretion to dismiss the third-party complaint without stating the reason. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Joinder of Insurance Company: Partially subrogated insurers who had joined as parties plaintiff were entitled to change of mind and to proceed by ratification because defendants were not subjected to double jeopardy or otherwise prejudiced. State ex rel. Bohrer v. District Court, 171 M 116, 556 P2d 899 (1976).

Action on Surety Bond — Nonjoinder of Principal: Action was properly brought against surety for enforcement of obligation on bond without joinder of principal. Morgen & Oswood Constr. Co. v. USF&G Co., 167 M 64, 535 P2d 170 (1975).

Indispensable Parties — Joint and Several Obligations: When a principal and surety under a surety bond had joint and several obligations, the plaintiff could choose to sue only the surety and not both the surety and principal. Joinder of the principal was permissive and not mandatory. Morgen & Oswood Constr. Co. v. USF&G Co., 167 M 64, 535 P2d 170 (1975).

Res Judicata — Collateral Estoppel — Joinder — Interrelationship: Whether a party proceeded in the procedural manner most conducive to a full settlement of the dispute is irrelevant; an unadjudicated claim based upon unlitigated issues will receive its day in court. W. Mont. Prod. Credit Ass'n v. Hydroponics, Inc., 147 M 157, 410 P2d 937 (1966).

Broad View of Joinder — Adopted: In view of the fact of the protection afforded a party under the Rules of Civil Procedure and although joinder would not be proper under Rule 19, the Supreme Court adopted the broadest possible reading of the permissive language of Rule 20 in allowing joinder of defendant. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965).

Scope of Rule — No Effect on Substantive Rights: The scope of this rule is procedural in nature and removes obstacles to joinder without affecting the substantive rights of the parties, so that in a suit by real estate agents against buyer and seller, judgment for plaintiff would not in

effect make the buyer a party to a prior contract between the agents and the seller. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965).

Declaratory Judgment — Joinder of Parties and Theories: In an action under the Uniform Declaratory Judgments Act (27-8-101 to 27-8-303) by insured against insurer, the insurer's general agent and local insurance agent, there was no misjoinder of causes of action and parties defendant even though action against the local agent was for tort and action against the insurer and general agent was on a contract, since the rights of all of the parties were intimately connected by the one transaction and the presence of all of the parties was necessary to a determination of their rights. The liability of the insurer depended upon the existence of an amendment to the contract and the liability of the local agent depended upon an absence of that same amendment. Adams & Gregoire, Inc. v. Nat'l Indem. Co., 141 M 103, 375 P2d 112 (1962).

Group Insurance — Joinder of All Insured: In an action on a group insurance policy covering hospital and medical expenses, where all the plaintiffs were employees of a company and the policy was made directly with the employees who paid the required premium and where the main issue was whether the policy was in effect on a certain date or whether it had been canceled, all the plaintiffs were interested in the question and the trial court did not abuse its discretion in overruling a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) on the ground of misjoinder of parties plaintiff. Cantrell v. Benefit Ass'n of Ry. Employees, 136 M 426, 348 P2d 345 (1959).

Debts of Husband and Wife — Joinder Improper: Joining of husband and wife by a collection agency in all actions where a claim against either was involved, although the facts in nowise justified the practice, at least amounted to sharp practice. State ex rel. Freebourn v. Merchants' Credit Serv., Inc., 104 M 76, 66 P2d 337 (1937).

Contract Parties — Nonjoinder Improper: In action to enjoin defendant from operating as a motor carrier without having obtained a certificate from the Railroad Commission, where the defense was that defendant carried only goods of a voluntary association of business, under contract with the association, the members of the association interested in the contract could and should have been made parties defendant. Bd. of R.R. Comm'rs v. Reed, 102 M 382, 58 P2d 271 (1936).

Conversion of Personal Property — Owners and Possessors: Where one plaintiff was the owner of cattle at the time of their alleged conversion, and the other was entitled to their possession under an agreement whereby he was to care for them in consideration of one-half the net proceeds of sale, both had a sufficient interest to entitle them to join as plaintiffs. Frost v. Long & Co., 66 M 385, 213 P 1107 (1923).

Equitable Interest in Wage Claim: One who has an equitable interest in a claim for wages is properly made a party defendant, to the end that a complete determination of the controversy may be had in one action. Reid v. Hennessy Co., 45 M 462, 124 P 273 (1912).

Partnership Creditors — Action on Promissory Note: In an action upon a promissory note, made between former partners, providing that it is to be subject to all defenses which the maker may have against the payee on account of any debts of the firm which the maker may be compelled, or become liable to pay, where the complaint alleges that the maker resists payment on the ground of an outstanding liability of the firm, but that no such liability exists, the parties to whom the maker claims liability are proper parties defendant. Hoskins v. McGirl, 12 M 563, 31 P 544 (1892).

SURETIES

Liability of Indemnitor Upon Settlement of Original Claim — Standard for Liability: Where the plaintiff equipment supplier sued the defendant manufacturing company in a third-party action for breach of warranty, after giving the defendant an opportunity to defend or approve a settlement of the original case, the plaintiff sustained its burden of proof by proving potential liability in the original action. Because the defendant was given the opportunity to either defend the plaintiff or approve a settlement and declined to do either, the plaintiff needed only to show potential rather than actual liability in the original action in order to recover from the defendant, and there was sufficient evidence in the record of potential liability. Iowa Mfg. Co. v. Joy Mfg. Co., 206 M 26, 669 P2d 1057, 40 St. Rep. 1479 (1983).

Reformation of Contract: In an action on a bond executed jointly by the principal and a surety company it was optional with plaintiff to proceed against either or both of the obligors, but where it was also sought to reform the contract and the surety moved that the principal be served with process, it was error to deny the motion. Foster v. Royal Indem. Co., 83 M 170, 271 P 609 (1928); Comerford v. USF&G Co., 59 M 243, 196 P 984 (1921).

Principal Not Indispensable Party: If an official bond joint and several in character has been signed by the principal an action may be maintained against a surety thereon without joining the principal. Deer Lodge County v. USF&G Co., 42 M 315, 112 P 1060 (1921).

Joint Defendants With Principal: Sureties bound with their principal as original promisors on the same contract may be sued jointly with the principal. Cole Mfg. Co. v. Morton, 24 M 58, 60 P 587 (1900).

Separate Contract: Where a bond is executed by sureties for the fulfillment of a contract entered into by their principals in a separate instrument, both principals and sureties may be sued jointly in an action for a breach of the contract. Wibaux v. Grinnell Live Stock Co., 9 M 154, 22 P 492 (1889).

Collateral References

Parties *key* 13 through 16, 24 through 27.

67A C.J.S. Parties §§33 through 36, 43 through 50.

59 Am. Jur. 2d Parties §§95, 108, 112, et seq.

Corporation as necessary or proper party defendant in proceedings to determine validity of election or appointment of corporate director or officer. 21 ALR 2d 1048.

Joinder of insurer and insured in action by injured person. 20 ALR 2d 1095; 106 ALR 520; 85 ALR 41.

Appealability of order with respect to motion for joinder of additional parties. 16 ALR 2d 1023.

Joinder or representation of several claimants in action against carrier or utility to recover overcharge. 1 ALR 2d 160.

Joinder in one action of sureties on different bonds relating to the same matter. 137 ALR 1044; 106 ALR 90.

Joinder of manufacturer or packer and retailer or other middleman as defendant in action for injury to person or damage to property of purchaser or consumer of defective article. 119 ALR 1356.

Rule 20(b). Separate trials.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Abuse of Discretion to Provide Separate Trials on Issues of Liability and Damages: In any case the issue of punitive damages is so interwoven with the proof—first of negligence and second of willfulness, wantonness, malice, or oppression—that their separation under this rule, for decision by a single jury seriatim or by different juries, is an abuse of discretion by the trial court. The separation would result in extended and needless litigation. State ex rel. Fitzgerald v. District Court, 217 M 106, 703 P2d 148, 42 St. Rep. 1061 (1985).

Disqualification of Judge — Res Judicata Inapplicable: Disqualification of trial judge did not make his previous order denying a severance of action against multiple defendants either res judicata or the law of the case, and successor District Judge could order severance on a new motion. State ex rel. Stenberg v. Nelson, 157 M 310, 486 P2d 870 (1971).

Severance of Action Into Separate Cases: Judge did not abuse his discretion by severing plaintiff's action into three separate cases. State ex rel. Stenberg v. Nelson, 157 M 310, 486 P2d 870 (1971).

Liberal Joinder — Effect Upon: The provisions of this rule adequately protect defendants and thus allow a liberal use of joinder guided by the discretion of trial courts. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965).

Collateral References

Trial *key* 3.

88 C.J.S. Trial §§17 through 30.

75 Am. Jur. 2d Trial §§117, 119, 134, 135, 146, 147, 152, 153, 155.

Rule 21. Misjoinder and nonjoinder of parties.

Commission Notes

The rule is identical with the Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Service Upon Limited Liability Company Not Constituting Service Upon Individual Company Members — No Joinder of Member Solely for Executing on Judgment Against Company: Plaintiff obtained a judgment against a limited liability company, but when plaintiff discovered that the company had no assets to levy against, plaintiff moved to levy judgment against defendant personally. The motion was dismissed without prejudice, and plaintiff appealed, but the Supreme Court affirmed. Although defendant knew of the lawsuit involving the company, defendant was not separately served, and service upon the company did not constitute service upon the individual members of the company. Further, the District Court did not err in refusing to join defendant after judgment was rendered solely for the purpose of executing judgment because doing so would have deprived defendant of the due process right to notice and the opportunity to be heard. Ioerger v. Reiner, 2005 MT 155, 327 M 424, 114 P3d 1028 (2005), following S-W Co. v. Schwenk, 173 M 481, 568 P2d 145 (1977), Hadford v. Credit Bureau of Havre, Inc., 1998 MT 179, 289 M 529, 962 P2d 1198 (1998), Mtn. W. Bank v. Mine & Mill Hydraulics, Inc., 2003 MT 35, 314 M 248, 64 P3d 1048 (2003), and Baltrusch v. Baltrusch, 2003 MT 357, 319 M 23, 83 P3d 256 (2003).

Joinder Not Appropriate if Party Not Indispensable: Defendant pledged personal property to plaintiff as collateral for loans. Defendant failed to make payments, and plaintiff notified defendant that the property had been repossessed. The same day, several members of defendant's company resigned and formed a new company, to which defendant then leased its personal property for $100 a month. Two other codefendants also claimed an interest in the collateral and sought to join the new company as a party to the action. The District Court denied the joinder motion, and on appeal, the Supreme Court affirmed. The new company held no legal interest in the property, was not a party to any of the security agreements at issue, and held no interest in the outcome of the foreclosure action or in the disposition of funds received from the sale of the property. As such, the new company was not an indispensable party to the action, and the District Court did not err in denying the motion to join the new company as a party. Mtn. W. Bank v. Mine & Mill Hydraulics, Inc., 2003 MT 35, 314 M 248, 64 P3d 1048 (2003), following Mohl v. Johnson, 275 M 167, 911 P2d 217 (1996).

Failure to Serve Original Summons Cured by Service of Amended Summons — Failure to Obtain Leave of Court to Amend Summons and Remove Party From Summons Not Fatal to Service of Process: Schmitz filed a pro se action for medical malpractice against Vasquez and Sanz on April 5, 1994. On April 1, 1997, after determining that her claim against Sanz had not gone through the Montana Medical Legal Panel procedure, Schmitz amended her complaint without permission of the District Court and, through counsel, filed the amended complaint. A new summons was issued by the Clerk of District Court on April 1, 1997, and was served on Vasquez the same day. The amended complaint and the new summons were identical to those previously filed and issued except that they did not include any claim against or notice to Sanz. The District Court dismissed the suit because the original summons had not been served within 3 years of its issuance, as required by Rule 41(e), M.R.Civ.P. Relying upon Yarborough v. Glacier County, 285 M 494, 948 P2d 1181 (1997), and distinguishing Ass'n of Unit Owners v. Big Sky, 224 M 142, 729 P2d 469 (1986), and Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364 (1996), the Supreme Court held that since the amended complaint and new summons had only the effect of deleting Sanz as a defendant, Vasquez received the same notice from the amended complaint and second summons that he would have received from the first complaint and summons and therefore was not prejudiced by Schmitz's failure to serve the first complaint within 3 years and failure to obtain leave of court to amend the summons by removing Sanz as a defendant. For these reasons and because the purpose of the Montana Rules of Civil Procedure is to obtain a just, speedy, and inexpensive determination of every action, the Supreme Court held that Schmitz complied with the substance and purpose of Rule 41(e) and that the District Court erred in dismissing the suit. Schmitz v. Vasquez, 1998 MT 314, 292 M 164, 970 M 1039, 55 St. Rep. 1288 (1998).

Employer Not Indispensable Party to Negligence Action Against Employee — Dismissal Improper: Johnson injured Mohl in a vehicle accident while Johnson was an employee of

U-Haul. The trial court held that complete relief could not be granted without U-Haul being joined as a party, presumably for purposes of indemnity, and that because the statute of limitations had run against U-Haul, the action should be dismissed because of the inability to join U-Haul as an indispensable party. The Supreme Court disagreed that as employer and potential indemnitor, U-Haul was an indispensable party to the negligence suit against the employee Johnson. There was no need for an indemnity action to be resolved simultaneously with the negligence claim because the indemnity suit would arise out of and be subsequent to the negligence claim. Because the underlying negligence case had not been decided, an indemnity claim against U-Haul had not yet arisen and the statute of limitations had not yet begun to run. Dismissal of the suit constituted reversible error, and the case was remanded for continuation of the trial. Mohl v. Johnson, 275 M 167, 911 P2d 217, 53 St. Rep. 96 (1996), followed in In re Green v. Gremaux, 285 M 31, 945 P2d 903, 54 St. Rep. 1029 (1997). See also Blaze Constr., Inc. v. Glacier Elec. Co-op, Inc., 280 M 7, 928 P2d 224, 53 St. Rep. 1274 (1996).

Order Denying Joinder of Parties Not Appealable Absent Certification: In an action against the defendant real estate company for fraud and negligence in the sale of property to the plaintiffs, the District Court denied the plaintiffs' motion for joinder of the owners of the company as a party defendant, and on appeal the defendant challenged the jurisdiction of the Supreme Court, alleging that the notice of appeal should have been filed within 30 days after the order denying the motion for joinder. The Supreme Court held that absent certification under Rule 54(b), M.R.Civ.P., an order denying joinder of parties is not a final judgment. Thus, denial of the motion was not ripe for appeal until completion of the trial. White v. Lobdell, 208 M 295, 678 P2d 637, 41 St. Rep. 346 (1984).

Refusal to Allow Joinder Upon Remand Abuse of Discretion: In an action against the defendant real estate company for fraud and negligence in the sale of real property to the plaintiffs, the Supreme Court found that a stipulated dismissal with prejudice of the company's owners was actually a substitution of parties. Upon remand, the District Court again refused to allow joinder of the owners because of the previous stipulation. On a second appeal, the Supreme Court found that while joinder of parties is a matter within the discretion of the trial court, the District Court had, under the rationale in Holiday Publishing Co. v. Gregg, 330 F. Supp. 1326 (S.D. NY 1971), and Foman v. Davis, 371 US 178, 9 L Ed 2d 222, 83 S Ct 227 (1962), acted contrary to the spirit of the Rules of Civil Procedure and abused its discretion in denying the joinder motion. White v. Lobdell, 208 M 295, 678 P2d 637, 41 St. Rep. 346 (1984).

Substitution of Corporation Rather Than Dismissal of Employee: A suit was brought against several defendants, including "Robert Payne and James Payne, d/b/a Ponderosa Realty". At the time of trial it was disclosed that Ponderosa Realty is a corporation. The parties stipulated that Ponderosa Realty was a proper party and dismissed the suit against the two Paynes. At the end of the plaintiffs' case, Ponderosa Realty moved to dismiss, arguing that the dismissal of the two Paynes, in effect, was a dismissal of Ponderosa Realty, since the corporation could only be liable through the actions of its employees or agents. The court rejected the argument, saying that what occurred was not a substantive dismissal with prejudice of an agent or employee but rather the substitution of a proper party before the court. White v. Fidelity Real Estate, 196 M 156, 638 P2d 1053, 39 St. Rep. 1 (1982).

Jurisdiction Not Conferred by Rule — Proper Parties and Timeliness — Labor Dispute: Retail clerks went on strike against petitioner in a labor dispute. The clerks claimed unemployment benefits. Benefits are denied during a strike if unemployment results from a "stoppage of work" existing because of a labor dispute. A deputy of the Employment Security Division found claimants disqualified from benefits. Claiming strikers appealed to a referee, who sustained the denial of benefits. Claimants then appealed to the Board of Labor Appeals, which reversed the referee. Petitioner filed petitions for review with the District Court, naming as respondent the Board of Labor Appeals. Following a motion to dismiss the petition, the appellants and counsel for the Employment Security Division entered an agreement to substitute the Division for the Board, and the court ordered the substitution. The clerks were not made parties, and at the time service was made on the Board, appellants did not provide sufficient copies. The clerks' union moved to intervene, and the motion was granted. The District Court granted summary judgment to respondents, concluding that failure to name all parties and failure to provide sufficient copies of the petition for service were fatal jurisdictional flaws. Petitioners argued that intervention by the union conferred jurisdiction. It did not. The answer raised lack of jurisdiction. Petitioners argued the applicability of Rule 21, M.R.Civ.P., which provides that parties may be added or dropped at any stage of the proceeding. The rule presupposes in personam jurisdiction. The rule does not confer that jurisdiction. Under 39-51-2410, the decision of the Board became final as to claimants 30 days after notification of the decision. The District Court thereafter had no

jurisdiction over the clerks and could acquire none. Claimants' benefits could not be adversely affected, but they are not indispensable to a review of legal questions by the District Court. There is a justiciable controversy between petitioners and the Employment Security Division concerning "work stoppage". F. W. Woolworth Co., Inc., v. Employment Sec. Div., 192 M 289, 627 P2d 851, 38 St. Rep. 694 (1981).

Severance of Action Into Separate Cases: Judge did not abuse his discretion by severing plaintiff's action into three separate cases. State ex rel. Stenberg v. Nelson, 157 M 310, 486 P2d 870 (1971).

Liberal Joinder — Effect Upon: The provisions of this rule adequately protect defendants and thus allow a liberal use of joinder guided by the discretion of trial courts. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965).

Condemnation Proceedings — Addition of Parties on Appeal: In a condemnation proceeding, the condemner should be permitted to add a necessary party defendant after an appeal has been perfected by the condemner from an assessment by the commissioners. The assessment by the commissioners is not a judgment but merely an award by the lay commissioners of damages contained in their report. State ex rel. Highway Comm'n v. District Court, 136 M 362, 348 P2d 132 (1959).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Parties *key* 50, et seq., 65, 77 through 92.
67A C.J.S. Parties §§65 through 67, 88, et seq., 139 through 160.
59 Am. Jur. 2d Parties §§259 through 278.

Rule 22. Interpleader

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 22(a). By joinder, cross-claim or counterclaim.

Commission and Advisory Committee Notes

Subdivision (a) of the rule is identical with [subdivision (1) of] the Federal Rule. Subdivision (2) of the Federal Rule is omitted as applying to particular statutory proceedings in federal courts.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 710
Merits of Conflicting Claims 711

GENERAL

Interpleader Purporting to Release Potentially Liable Individuals Remanded for Clarification That Only Insurer Released Upon Payment of Policy Limits: The District Court granted an insurer's request in a prayer for interpleader for an order "enjoining and restraining each and all of the defendants from instituting or prosecuting further any proceeding on account of the incident or the insurance policy". Defendants claimed that the order infringed on their right to seek further relief from other potentially liable persons individually after the maximum policy limits were distributed. The Supreme Court noted that the measure of damages for negligence, notwithstanding available insurance proceeds, is the amount that will compensate the injured for all detriment proximately caused, but in this instance, it was not clear whether the insurer specifically requested additional relief for other parties or intended such a comprehensive exclusion of remedies. Pursuant to the principles of subject matter jurisdiction, the District Court should have released only the insurer from further claims, not the other potentially liable

individuals involved. The case was remanded for a clarification of the order. Infinity Ins. Co. v. Dodson, 2000 MT 287, 302 M 209, 14 P3d 487, 57 St. Rep. 1196 (2000).

Attorney Fees Not Allowable: When plaintiff, by using less than prudent banking practices in handling defendants' account, placed itself in a position necessitating interpleader to avoid double vexation and was not a disinterested stakeholder, attorney fees were not allowable. First Nat'l Bank of Circle v. Garner, 173 M 195, 567 P2d 40 (1977).

Impartiality of Plaintiff Required: An attitude of perfect disinterestedness, excluding even an indirect interest of the plaintiff, is necessary if plaintiff is to maintain a bill of interpleader. Cent. Mont. Stockyards v. Fraser, 133 M 168, 320 P2d 981 (1957).

Showing of Plaintiff's Interest Improperly Stricken: In an interpleader action, allegations of defendants tending to show that plaintiff was not a disinterested stakeholder and that it had incurred an independent liability to defendants, were improperly stricken on the plaintiff's motion since by such motion plaintiff failed to maintain its position as a disinterested stakeholder. Cent. Mont. Stockyards v. Fraser, 133 M 168, 320 P2d 981 (1957).

Action on Storage Contract — Affirmative Relief Sought: An action in interpleader by an elevator company against rival claimants to grain in storage asking for affirmative relief by recovery of storage charges and cancellation of excess storage tickets was proper under section 88-117, R.C.M. 1947 (repealed), a part of the Uniform Warehouse Receipts Act. Rocky Mtn. Elevator Co. v. Bammel, 106 M 407, 81 P2d 673 (1938).

Forms of Interpleader: Both at law and in equity, interpleader results (1) where a stakeholder brings an action to compel the claimants to interplead; and (2) where one of the claimants brings the action against the stakeholder who petitions the court for permission to deposit the fund in court, that the claimants be substituted in his place as parties, and that they then interplead and have their rights determined. If the petition is granted there is a substitution of parties, and thereafter interpleader. Union Bank & Trust Co. v. St. Bank of Townsend, 103 M 260, 62 P2d 677 (1936).

Deposit in Court: One bringing an interpleader action under the provision for initiation of the action by the interpleader, which did not provide for payment into court, did not relieve himself of responsibility by placing the money in the clerk's hands. If he does so and the clerk receives it, it is not in the latter's official custody, and by receiving it without authority to do so the clerk becomes a mere bailee for the depositor. Doggett v. Johnson, 82 M 21, 265 P 673 (1928).

MERITS OF CONFLICTING CLAIMS

Contents of Petition or Affidavit: The petition or affidavit in interpleader must disclose some reasonable basis of conflicting claims to the fund or property. Cent. Mont. Stockyards v. Fraser, 133 M 168, 320 P2d 981 (1957).

Determination by Appeal — Interpleader Inapplicable: Where the rights and claims of parties to a debt had been fully determined by the Supreme Court in a prior action, the findings as to these matters were res judicata and there was no longer any conflict that could justify interpleader by the debtor. Cent. Mont. Stockyards v. Fraser, 133 M 168, 320 P2d 981 (1957).

Attorney's Fees From Insurance Proceeds: In an action in interpleader to determine the rights of attaching creditors and of an attorney who had taken an assignment of insurance proceeds to the extent of such sum as might be due him for fees, the court erred in not deciding an issue raised between the attorney and the creditors as to the reasonable value of the attorney's services. Davis v. Claxton, 82 M 574, 268 P 787 (1928).

Collateral References

Interpleader *key* 1 through 43.

48 C.J.S. Interpleader §§1 through 50.

45 Am. Jur. 2d Interpleader §§36 through 44.

Interpleader for distribution among multiple claimants of proceeds of liability insurance policy inadequate to pay all claims in full. 70 ALR 2d 419.

Jurisdiction and venue of federal court, under federal interpleader statutes, to entertain cross-claim by one interpleaded party against another. 17 ALR 2d 741.

Allowance of interest on interpleaded or impleaded disputed funds. 15 ALR 2d 473.

Right of trustee, executor, or administrator to maintain interpleader. 152 ALR 1122.

Right to interpleader by obligor in bond or other contract the obligation or benefit of which extends to a class. 108 ALR 1250.

Rule 22(b). By substitution.

Commission and Advisory Committee Notes

Subdivision (b) of the rule is added to permit substitution of defendants by order of court in appropriate cases, in addition to interpleader by cross-claim or counterclaim as provided in subdivision (a).

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: The rule has no counterpart in the Federal Rules.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Attorney Fees and Costs for Interpleader: A stakeholder, disinterested in the result, who interpleads money or property so that the court may decide the true owner, is entitled to costs and reasonable attorney fees, which may be charged against the stake to be distributed. Whether the stake must then be replenished by the losing party is within the discretion of the court. Generally the losing party is under no absolute duty to pay the interpleader's attorney fees and costs if a bona fide conflict existed. Soha v. West, 196 M 95, 637 P2d 1185, 38 St. Rep. 2153 (1981).

Time for Defensive Interpleader: Where defendant filed a cross-complaint seeking substitution of parties and plaintiff asked that it either be dismissed or that defendant make a deposit and proceed under the interpleader statute, plaintiff may not thereafter raise the point that the deposit is untimely because made after answer, and defendant should be permitted to proceed with such petition, deposit, and showing by affidavit to obtain an order allowing substitution, and the erroneous papers stricken. State ex rel. Bedord v. District Court, 112 M 192, 114 P2d 265 (1941).

Withdrawal Refused: The District Court may refuse to permit the withdrawal of a party whose presence is necessary unless withdrawal is definite and irrevocable determination of the rights of that party. Union Bank & Trust Co. v. St. Bank of Townsend, 103 M 260, 62 P2d 677 (1936).

Cross-Complaint Insufficient for Substitution: A cross-complaint filed by defendant as part of his answer was not susceptible of interpretation as a complaint in interpleader, in the absence of compliance with section 93-2825, R.C.M. 1947 (superseded by Rule 22, M.R.Civ.P.), requiring that defendant before answering file the affidavit provided for or apply for an order substituting attaching creditors in his place. The pleading was insufficient to bring it within the concluding part of the section, which provided for discharge of the interpleading party. Sec. St. Bank of Roy v. Melchert, 67 M 535, 216 P 340 (1923).

Substitution by Interpleader Assumed: Where the answer shows that persons appear as defendants, who were not originally defendants, but were by the order of the court substituted as such, it may be inferred from such fact that the substitution was made in pursuance of the interpleader statute. Mettler v. Adamson, 38 M 198, 99 P 441 (1909).

Irregularity of Proceedings Waived by Substituted Defendant: Where an application for substitution is made on an amended answer, and the party substituted becomes defendant without objection, he waives irregularities in the mode of substitution. Anderson v. Red Metal Min. Co., 36 M 312, 93 P 44 (1907).

Claim and Delivery — Control Over Property Required: In an action in claim and delivery, the court cannot make an order substituting in place of defendant a claimant of the property, on application of defendant who has no control over the property and no power to deliver it on the order of the court. State ex rel. Weinstein Co. v. District Court, 28 M 445, 72 P 867 (1903).

Collateral References

Parties *key* 57 through 63.

67A C.J.S. Parties §§58 through 63.

Appealability of order granting or denying substitution of parties. 16 ALR 2d 1057.

Rule 23. Class actions

Case Notes

Water Supply Company Not Entitled to Attorney Fees if Successful Defending Against Class Action: Certain residents of Butte brought a class action against the local water company alleging that the water was polluted and was a health problem. The company argued that the

lower court should have included in the notice sent to residents concerning the class action a statement that if the residents chose to join in the action, they might be liable for the water company's attorney fees if the company was successful in defending against the suit. The Supreme Court held that the contract between the company and the residents for the supply of water did not contain an express provision providing for attorney fees and therefore the prevailing party had no contractual right to fees and further held that the lower court had properly excluded any reference to attorney fees from the notice. McDonald v. Washington, 261 M 392, 862 P2d 1150, 50 St. Rep. 1374 (1993).

Class Action — Venue: Venue for a class action is determined just as it is for a comparable nonclass action. Thus, venue must be satisfied as to all named class representatives, just as it must be to all plaintiffs and defendants in a nonclass action. State ex rel. Kesterson v. District Court, 189 M 20, 614 P2d 1050 (1980).

Law Review Articles

Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 347 (1981).

The Transferee Judge—The Unsung Hero of Multidistrict Litigation, McDermott, 35 Mont. L. Rev. 19 (1974).

Environmental Defense Fund v. Hoerner Waldorf Corporation: Environment, Industry and Constitutional Rights, Mudd, 32 Mont. L. Rev. 161 (1971).

Standing: Who Speaks for the Environment?, McCann, 32 Mont. L. Rev. 130 (1971).

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 23(a). Prerequisites to a class action.

Compiler's Comments

Identity With Federal Rule: The amendment of September 29, 1967, revised Rule 23 in general and rewrote Rule 23(a) in particular. This amendment made the Montana Rule identical with the Federal Rule, as the Federal Rule was revised in 1966. As of May 1, 1990, the Montana and Federal Rules were still identical.

Case Notes

Remand for Failure of District Court to Consider Commonality of Fact in Determining Whether Class Action Prerequisites Met: In an alleged effort to identify budget overruns, defendant railroad published the names, residences, and Social Security numbers of its 300 top overtime earners in 24 different states, including 18 employees from Montana. Five employees from four different states filed a class action suit in Montana, basing the cause of action on wrongful publication of private information, breach of fiduciary duty, and negligent management. The District Court held that plaintiffs failed to meet the commonality requirements of subsection (a)(2) of this rule because the proposed class did not share common questions of law or fact and failed to certify the proposed class. On appeal, the Supreme Court declined to disturb the decision that the proposed class did not share common questions of law. However, commonality is also satisfied when there is a common core of salient facts coupled with disparate legal remedies within the class, and it did not appear that the District Court considered whether plaintiffs shared a common core of salient facts. Because the requirements for showing commonality are in the disjunctive, the Supreme Court remanded for further consideration of whether plaintiffs shared a common core of salient facts sufficient to establish a class action. Sieglock v. Burlington N. Santa Fe Ry. Co., 2003 MT 355, 319 M 8, 81 P3d 495 (2003).

Prerequisites for Class Action Met in Suit Concerning Butte Water Supply: Residents of Butte filed a class action against the local water supplier, which argued that the lower court erred when it concluded that the lawsuit should be adjudicated as a class action. The Supreme Court held that the prerequisites for a class action had been met in that the plaintiffs had shown that: (1) the class, which included nearly all water consumers, was so numerous that it would be impractical to join all members of the class; (2) all counts in the action stemmed from the failure to provide potable water and adequate service, therefore the class members shared common issues of law and fact; (3) the typicality requirement was met in that the injuries suffered by the named plaintiffs were the same as those suffered by the class and all injuries stemmed from the same course of conduct allegedly displayed by the defendant; (4) the named representatives would adequately protect the interests of the class because the representatives' interests in potable water and adequate service were coextensive with those of the remaining class members; (5) although the individual damages of the class could vary, the individual issues of causation and damages would not preclude certification as a class action; and (6) the claims involved in the

case would be unresolved without a class action because most of them were minor in and of themselves. McDonald v. Washington, 261 M 392, 862 P2d 1150, 50 St. Rep. 1374 (1993).

Trial Court Error in Excluding Certain Persons From Class Action: Residents of Butte sought to initiate a class action suit against the local water supplier because of the health hazards presented by consumption and use of the water. The plaintiffs argued that the class should be certified to include all persons using the water, but the District Court limited the class to those persons and entities billed for using the water. The Supreme Court held that the lower court could not arbitrarily limit the class to billed consumers when nonbilled consumers also allegedly suffered damages similar to and in addition to the damages allegedly suffered by billed consumers. McDonald v. Washington, 261 M 392, 862 P2d 1150, 50 St. Rep. 1374 (1993).

Showing of "Typicality" Prerequisite for Class Action: Nine injured workers whose weekly benefit payments had been discontinued filed a class action suit in the Workers' Compensation Court for restitution of the benefits. In denying class certification, the District Court ruled that the workers' claims and defenses were not typical of those of the whole class. Citing La Mar v. H&B Novelty & Loan Co., 489 F2d 461 (9th Cir. 1973), which construed the requirements of this rule, the Supreme Court affirmed the lower court decision, holding that the workers were not entitled to bring a class action against defendants with whom they had no dealing. Murer v. St. Comp. Mut. Ins. Fund, 257 M 434, 849 P2d 1036, 50 St. Rep. 344 (1993).

Prerequisites Met: In a suit brought by a condominium unit owner, the Supreme Court remanded a District Court decision denying a case as a class action upon finding that: (1) the class of unit owners was so numerous that joinder of all members was impractical; (2) the claims of plaintiffs were typical of the claims of the class; and (3) there was a sufficient identity to the types of claims made by the various unit owners that the representative parties would fairly and adequately protect the interests of the class. State ex rel. Boyne USA, Inc. v. District Court, 228 M 314, 742 P2d 464, 44 St. Rep. 1550 (1987).

Requirement of Demand: While the making of a demand may not be required under all circumstances, the plaintiff must set forth the reasons for not making such demand. S-W Co. v. John Wight, Inc., 179 M 392, 587 P2d 348 (1978).

Requirements to Bring Action: It is not necessary that derivative action plaintiffs have the support of a majority of the shareholders or even that they be supported by all minority shareholders. The standard is whether the plaintiff represents other shareholders similarly situated. S-W Co. v. John Wight, Inc., 179 M 392, 587 P2d 348 (1978).

Law Review Articles

Class Actions in Montana Under Rule 23(a)(3), Fredricks, 23 Mont. L. Rev. 201 (1962).

Collateral References

Parties *key* 9 through 12.

67A C.J.S. Parties §§21 through 32.

59 Am. Jur. 2d Parties §§43 through 57.

Propriety of class action in state courts to recover taxes. 10 ALR 4th 655.

Maintainability in state court of class action for relief against air or water pollution. 47 ALR 3d 769.

Value of property or right involved in class suit, value or interest of individual in whose name suit is brought, or value of aggregate interest of members of class, as criterion of jurisdictional amount. 141 ALR 569.

Judgment as conclusive as against, or in favor of, one not a party of record or privy to a party, who prosecuted or defended the suit on behalf and in the name of party. 139 ALR 9.

Necessity that living members of the same class be parties to give court jurisdiction, under the doctrine of representation, in respect of interest of unborn contingent remaindermen. 120 ALR 876.

Rule 23(b). Class actions maintainable.

Advisory Committee's Note to September 29, 1967, Amendment

Source: Fed. R. Civ. P. 23, as amended 1966.

Explanation of change: The amended rule describes in more practical terms than existed under the old rule the occasions for maintaining class actions; provides that all actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions. It is designed to clear up difficulties in drawing distinctions between joint, common, secondary or several rights, and in

defining categories in terms of "true," "hybrid," and "spurious," and to give a better guide to the extent and binding effect of judgments.

Compiler's Comments

Identity With Federal Rule: The amendment of September 29, 1967, rewrote this rule. As of May 1, 1990, this rule was still identical to the Federal Rule, which was itself revised in 1966.

Case Notes

Standing of Taxpayers: Affected taxpayers had standing under this rule to ask for declaratory judgment against Boards of County Commissioners which increased appraisals on ground that State Board of Equalization (functions now divided between Director of the Department of Revenue and the State Tax Appeals Board) used wrong rates in assessing timberlands. State ex rel. Conrad v. Managhan, 157 M 335, 485 P2d 948 (1971).

Group Insurance Policy — Joinder of Policy Holders: In an action on a group insurance policy covering hospital and medical expenses where all the plaintiffs were employees of a company and the policy was made directly with the employees who paid the required premium and where the main issue was whether the policy was in effect on a certain date or whether it had been canceled, all the plaintiffs were interested in the question and the trial court did not abuse its discretion in overruling a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) on the ground of misjoinder of parties plaintiff. Cantrell v. Benefit Ass'n of Ry. Employees, 136 M 426, 348 P2d 345 (1959).

Equity Actions — Sufficient Representation: A suit brought under section 93-2821, R.C.M. 1947 (superseded by Rule 23, M.R.Civ.P.) by a creditor of a defunct bank for the benefit of all its creditors was in equity, and therefore the parties were not entitled to a jury trial. In such a suit it is not necessary that those creditors whose names do not appear as plaintiffs should be "similarly situated" as the party who brings it, it being sufficient if they are commonly or generally interested in the subject matter involved. State ex rel. Lewis & Clark County v. District Court, 90 M 213, 300 P 544 (1931).

Creditors as Class — Allegations of Representation: A complaint in an action by a number of creditors of an insolvent bank alleging that they were filing the complaint for and in behalf of themselves and all other creditors of the bank, that the number of creditors was more than 1,000, that their names were unknown to plaintiffs, etc., and praying for an order permitting them to maintain the action on behalf of all the creditors of the bank, was sufficient. Rohr v. Stanton, 78 M 494, 254 P 869 (1927).

Representation of Class — Allegations of Complaint: Where an action is brought by a few persons in a representative capacity, that fact must be alleged in the pleading, the usual averment being that the action is brought not only for the benefit of the plaintiffs but also for the benefit of all others similarly interested who may elect to come in and contribute to the costs and expenses of the suit. Rohr v. Stanton, 78 M 494, 254 P 869 (1927).

Joint Obligation — Imputed Knowledge by Agent: An obligation running to a combination of persons jointly could not be changed into one actionable by any member of it, by the fact that defendant's agent knew from previous transactions that plaintiff was a member of the combination, and that failure to perform would result in damage to the latter. Am. Livestock & Loan Co. v. Great N. Ry., 48 M 495, 138 P 1102 (1914).

Joint Obligees — All Obligees to Be Made Parties: Neither in actions ex contractu nor in actions ex delicto can the plea of an obligation to the plaintiff individually be sustained by the proof of an obligation running to himself and others jointly, for the reason that to maintain a joint obligation all the obligees must be parties to the action. This was the rule at common law. Am. Livestock & Loan Co. v. Great N. Ry., 48 M 495, 138 P 1102 (1914). See Scott v. Waggoner, 48 M 536, 139 P 454 (1914).

Action on Joint Bond — Necessary Parties: In an action for debt on an injunction bond, all of the obligees are necessary parties to the action, the bond being as to them jointly and not severally, and the fact that some of the obligees had no interest in the subject of the suit in which the injunction was granted does not change the rule. Mont. Min. Co. v. St. Louis Min. & Mill. Co., 19 M 313, 48 P 305 (1897).

Collateral References

Class actions in state mass tort suits. 53 ALR 4th 1220.

Inverse condemnation state court class actions. 49 ALR 4th 618.

Rule 23(c). Determination by order whether class action to be maintained — notice — judgment — actions conducted partially as class actions.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 23, as amended 1966.

Explanation of change: In order to avoid the necessity for awaiting final judgment before obtaining review by the supreme court of an order under subdivision (c)(1) refusing to permit a class action to be maintained as such, Rule (1)(b) of the Montana Rules of Appellate Procedure is amended to make such an order appealable. There does not seem to be a corresponding necessity for direct appeal, as distinct from appeal from the final judgment, where the court determines that the action may be maintained as a class action.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: The amendment of September 29, 1967, rewrote this rule. As of May 1, 1990, this rule was still identical to the Federal Rule, which was itself revised in 1966.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Maintaining Class Action — Appeal From Order Allowing: Supreme Court refused to issue Writ of Supervisory Control to party seeking relief from order denying their motion for declaration that action against them could not be maintained as a class action. State ex rel. Anaconda Aluminum Co. v. District Court, 158 M 228, 490 P2d 351 (1971).

Collateral References

59 Am. Jur. 2d Parties §§78 through 81.

Absent or unnamed class members in class action in state court as subject to discovery. 28 ALR 4th 986.

Rule 23(d). Order in conduct of actions.

Compiler's Comments

Identity With Federal Rule: The amendment of September 29, 1967, rewrote this rule. As of August 1, 1987, this rule was still identical to the Federal Rule, which was itself revised in 1966.

Rule 23(e). Dismissal or compromise.

Compiler's Comments

Identity With Federal Rule: The amendment of September 29, 1967, added this rule. As of May 1, 1990, this rule was still identical to the Federal Rule, which was itself revised in 1966.

Collateral References

Compromise and Settlement *key* 4.

15A C.J.S. Compromise and Settlement §6.

Rule 23(f). Security for costs.

Advisory Committee's Note to September 29, 1967, Amendment

Explanation of change: In addition to the changes of the Federal Rule [23], subdivision (f) is added to the Montana Rules in order to afford protection against selection of a representative party who may not be responsible for costs and charges.

Compiler's Comments

Identity With Federal Rule: The amendment of September 29, 1967, added this rule. There is no counterpart in the Federal Rules.

Rule 23.1. Derivative actions by shareholders.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 23.1, as adopted 1966.

Explanation of change: A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise when the plaintiff is one of a group of shareholders or members.

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members.

The Montana amendment conforms to the 1966 federal amendment, except that it omits the federal provision that the complaint be verified and allege "(1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have." No reason is apparent for requiring a verified complaint in this type of action and not in others, and the allegations required by the federal amendment and omitted from this proposal appear to be designed to prevent abuse of federal jurisdiction and to be unnecessary in state practice.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above advisory committee's note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Failure of Limited Partners to Request General Partner to Initiate Suit: The limited partners sued the bank, alleging that the bank had forced the general partner to breach his fiduciary duty to the limited partners. The lower court dismissed the complaint for failure to state a claim, holding that the plaintiffs had not alleged that they were suing in a derivative capacity and that they had failed to set forth with particularity their efforts to obtain action by the general partner. The Supreme Court ruled that under Rule 9(a), M.R.Civ.P., the plaintiffs did not need to allege that they were suing in a derivative capacity. The court also held that although Rule 23.1, M.R.Civ.P., and 35-12-1403 require the plaintiffs to set out with particularity their efforts to get the general partner to take action, the lower court should have given the plaintiffs a chance to amend their complaint. Larson v. First Interstate Bank, 241 M 350, 786 P2d 1176, 47 St. Rep. 344 (1990).

Collateral References

Corporations *key* 211.

Actions by shareholders in business trust. 88 ALR 3d 783.

Minority stockholders' right to enjoin further or additional issuance of stock. 38 ALR 2d 1366.

Dissolved corporation as an indispensable party to a stockholders' derivative action. 172 ALR 691.

Stockholder's right to maintain action against third person as affected by corporation's right of action for the same wrong. 167 ALR 279.

Rule 23.2. Actions relating to unincorporated associations.

Advisory Committee's Note

Source: Fed. R. Civ. P. 23.2, as adopted 1966.

Explanation of change: Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17. Rule 23.2 deals separately with these actions, referring where appropriate to Rule 23.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the rule was still identical to the Federal Rule.

Rule 24. Intervention

Case Notes

Grants of Intervention Not Appealable: The plaintiff appealed the lower court's decision to let a third party intervene in the plaintiff's suit against the defendant. The Supreme Court held that granting intervention was interlocutory and not subject to appeal. Whitefish Credit Union Ass'n, Inc. v. Glacier Wilderness Ranch, Inc., 242 M 471, 791 P2d 1363, 47 St. Rep. 892 (1990).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 24(a). Intervention of right.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 24(a), as amended 1966.

Explanation of change: Subdivision (2) is changed because a class member who claims that his "representative" does not adequately represent him, and is able to establish that proposition with sufficient probability, should not, as was required under the prior rule, be put to the risk of having a judgment entered in the action which by its terms extends to him, and be obliged to test the validity of the judgment as applied to his interest by a later collateral attack. Rather he should, as general rule, be entitled to intervene in the action.

The amendment provides that an applicant is entitled to intervene in an action when his position is comparable to that of a person under Rule 19(a)(2)(i), as amended, unless his interest is already adequately represented in the action by existing parties. The Rule 19(a)(2)(i) criterion imports practical consideration, and the deletion of the "bound" language similarly frees the rule from undue preoccupation with strict considerations of res judicata.

The representation whose adequacy comes into question under the amended rule is not confined to formal representation like that provided by a trustee for his beneficiary or a representative party in a class action for a member of the class. A party to an action may provide practical representation to the absentee seeking intervention although no formal relationship exists between them, and the adequacy of this practical representation will then have to be weighed.

Subdivision (3) is deleted for if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene, and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of as was required under that subdivision. Intervention of right is here seen to be a kind of counterpart to Rule 19(a)(2)(i) on joinder of persons needed for a just adjudication: where, upon motion of a party in an action, an absentee should be joined so that he may protect his interest which as a practical matter may be substantially impaired by the disposition of the action, he ought to have a right to intervene in the action on his own motion.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still substantially the same as the Federal Rule, which was itself revised in 1966.

Amendments: The amendment of September 29, 1967, rewrote item (2), substituting it for former items (2) and (3), allowing intervention when representation of applicant's interest might be inadequate and he might be bound by judgment and when applicant would be adversely affected by court's disposition of property.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Failure of District Court to Determine Indian Status of Children Prior to Termination of Parental Rights Warranting Reversal: Absent a conclusive determination from the affected tribes, it was reversible error for the District Court to terminate a mother's parental rights without definitely resolving the threshold question of whether the children were Indian children within the meaning of the Indian Child Welfare Act. In this case, the District Court was presented with insufficient evidence regarding the children's status because of the mother's

failure to present crucial evidence regarding the children's possible tribal affiliation and the tribe's delay in intervening. However, the tribe's right to intervene was not impaired by the delay, and the court should not have proceeded absent a conclusive determination that the children were not tribal members. In re A.G., W.G., T.A., & J.A., 2005 MT 81, 326 M 403, 109 P3d 756 (2005).

Appropriateness of Intervention in Action Challenging Enforcement of Ballot Initiative: Two sporting groups sought to intervene in an action challenging the enforcement of a ballot initiative that prohibited the shooting of alternative livestock for a fee. The District Court denied the motion, and the groups appealed. After accepting supervisory control, the Supreme Court noted that an application for intervention as a matter of right must satisfy each of the following factors: (1) timeliness; (2) interest in the subject matter of the litigation; (3) a showing that protection of the interest may be impaired by disposition of the action; and (4) a showing that the interest is not adequately represented by an existing party. In the present case, timeliness was not disputed. Regarding the second factor, the Supreme Court cited Idaho Farm Bureau Fed'n v. Babbitt, 58 F3d 1392 (9th Cir. 1995), for the proposition that a public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure that the group has supported. The District Court did not address the third factor because it determined that the groups had no legally protectable interest in the litigation. However, the Supreme Court found that an adverse decision in the suit would impair the groups' interest in the management and protection of Montana's game animals, so the third factor was met. Finally, the District Court determined that the groups failed to demonstrate that the Attorney General, on behalf of the Department of Fish, Wildlife, and Parks, would not zealously defend the groups' position in the suit. The Supreme Court concluded that the groups that actively drafted and supported the initiative may be in the best position to defend their interpretation of the resulting legislation and may not have been adequately represented by the Department. Thus, all four factors were met, and the Supreme Court ordered the District Court to permit the groups to intervene in the case. Sportsmen for I-143 v. District Court, 2002 MT 18, 308 M 189, 40 P3d 400 (2002).

Criteria for Intervention in Adoption Proceeding — Unfounded and Untimely Motion to Intervene Properly Denied: Couple A adopted a child through a judicial decree in the District Court of the Twenty-First Judicial District. Couple B also wanted to adopt the child and filed a motion, in the District Court of the Twelfth Judicial District where they lived, to intervene and set aside the final decree of adoption, despite the fact that some 6 months had passed since the final adoption decree was issued. Initially, neither District Court was aware of the competing adoption petitions. The Department of Public Health and Human Services had been reviewing both couples as potential adoptive resources at the same time and ultimately determined that because the child had formed a strong bond during placement with couple A for nearly 2 years, it would be in the child's best interests to be adopted by couple A. Couple B contended that the child was a member of their extended family and that the Department should have given them priority as adoptive parents. The Twenty-First District Court held that couple B had no standing to intervene as a matter of right pursuant to this rule and that permissive intervention under Rule 24(b), M.R.Civ.P., was untimely and would undermine the purpose of adoption to the detriment of the child. Couple B's motion to set aside the final decree pursuant to Rule 60(b), M.R.Civ.P., was also denied on grounds that as nonparties to couple A's adoption petition, couple B had no standing to make the motion and that, in any case, it was untimely because it was made more than 180 days after the final decree. Couple B appealed the denial of both motions, arguing first that they had a legal interest by virtue of the family placement preference in the Indian Child Welfare Act (ICWA) and legislative and Departmental policies favoring adoptive placement with extended family members. The Supreme Court noted that a mere claim of interest is insufficient to support intervention as a matter of right and that a party seeking intervention must make a prima facie showing of a direct, substantial, legally protectable interest in the proceedings. No such showing was made here because the child was not Indian and therefore not subject to the ICWA, nor did the relationship of second cousins meet the definition of extended family member. Couple B next argued that they should have been allowed to intervene under the permissive standard of Rule 24(b), M.R.Civ.P., because the competing adoption petitions had common issues of law and fact. Couple B contended that their delay should be excused by their reliance on misrepresentations made by the Department. The Supreme Court agreed that the Department could have taken a more forthright approach and saved all the parties considerable time and expense, but couple B bore the responsibility for ensuring the timely filing of the motion to intervene. The Supreme Court noted that timeliness is a threshold issue when intervention is sought and that, although none of the factors are dispositive, most courts look to four factors in considering whether a motion to intervene is timely filed: (1) the length of time that the

intervenor knew or should have known of its interest in the case before moving to intervene; (2) prejudice to the original parties, if intervention is granted, resulting from the intervenor's delay; (3) prejudice to the intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely. The Supreme Court considered each factor in detail. Although the third factor weighed in favor of couple B, because denial of the motion to intervene effectively precluded any hope of their adoption of the child, the other factors weighed strongly against them. The District Court made a reasoned analysis when it determined that the motion to intervene was untimely and did not abuse its discretion in denying the motion. Last, because couple B did not address the threshold issues of Rule 60(b) on appeal, the Supreme Court concluded that denial of the motion to set aside the final adoption decree on grounds of standing and timeliness was proper. In re Adoption of C.C.L.B., 2001 MT 66, 305 M 22, 22 P3d 646 (2001).

Easement Property — Defendant and Intervenor Held to Have Differing Interests: In 1890, the Missoula County Commission granted a petition declaring a road to be a public highway, and in 1937, DeVoe's predecessors in interest granted the state a right-of-way easement for construction of a highway adjacent to the 1890 highway. After receiving the easement, the state built a curving intersection of the 1890 highway with another road on the land granted by the 1937 easement but later, in 1983, removed the curving intersection in favor of a 90-degree intersection. Devoe claimed that the land subject to the 1937 easement reverted to him by abandonment under the terms of the easement and brought a declaratory judgment action against the state. The city intervened in the action over DeVoe's objection. The Supreme Court held that intervention of right was properly granted because the city had demonstrated to the District Court that it had a statutory duty, unchallenged by DeVoe, to maintain the road and also had a future interest in the property because of the property's relationship to the city's overall transportation plan. Thus, the city had a separate and distinct interest in the property subject to the easement, even though the state's name appeared on the written easement. The Supreme Court also noted that DeVoe's argument that the city had no interest in the 1890 highway as a result of the alleged abandonment in 1983 begs the question because it asks the Supreme Court to judge the merits of intervention based upon the ultimate outcome of the declaratory judgment action. DeVoe v. St., 281 M 356, 935 P2d 256, 54 St. Rep. 207 (1997).

Nonresidents of Subdivision Without Standing to Enforce Covenants of Subdivision: The adjacent neighbors of a subdivision sued the county and the residents of the subdivision either to have the county enforce the subdivision's restrictive covenants, approved by the county, or to have the District Court require the subdivision residents to abide by the covenants. The Supreme Court held that, without an ownership interest in the property, the neighbors and the public do not have the right to insist that the local government enforce restrictive covenants previously approved by the local government as part of the subdivision. The Supreme Court also ruled that the neighbors do not share the mutuality of the benefits and burdens as between grantees of the subdivision and therefore lack standing to enforce the restrictive covenants. The issue of whether a resident of the subdivision could seek enforcement of the covenants by the local government was not before the Supreme Court. Patton v. Madison County, 265 M 362, 877 P2d 993, 51 St. Rep. 536 (1994).

Intervention in Divorce Denied to Parents Merely Claiming Mortgage Interest in Couple's Home: The District Court Judge did not err in denying parents' motion to intervene in their son's marriage dissolution proceeding to protect parents' interest in a home the parents alleged was built with the parents' $63,630 loan to the married couple. The daughter-in-law sought the home free and clear of any obligation to her husband's parents. Parents' rights in the home were not the central issue in the case, and any decree would not prohibit them from bringing separate proceedings against the son, the daughter-in-law, or both. Furthermore, parents had no prima facie case because they had no written evidence of a debt, and a mortgage on real property can only be created by a written instrument. In re Marriage of Aniballi, 255 M 384, 842 P2d 342, 49 St. Rep. 995 (1992), distinguished in DeVoe v. St., 281 M 356, 935 P2d 256, 54 St. Rep. 207 (1997).

Prima Facie Showing of Interest, Not Mere Claim, Required: This rule does not require intervention to be allowed whenever a mere claim, without more, of an interest relating to the property or transaction is made. Intervention requires a direct, substantial, legally protectable interest, and a prima facie showing must be made that an interest exists before intervention should be allowed. In re Marriage of Aniballi, 255 M 384, 842 P2d 342, 49 St. Rep. 995 (1992), distinguished in DeVoe v. St., 281 M 356, 935 P2d 256, 54 St. Rep. 207 (1997).

Timeliness of Motion to Intervene: A motion to intervene must be timely regardless of whether intervention is sought as of right or by permission. Estate of Schwenke v. Becktold, 252

M 127, 827 P2d 808, 49 St. Rep. 180 (1992), followed in Connell v. Dept. of Social and Rehabilitation Services, 2003 MT 361, 319 M 69, 81 P3d 1279 (2003).

Interested Party May Intervene in Mandamus Action: Party opposed to transfer of a liquor license is an interested party under 16-4-411 and therefore has standing to intervene in mandamus action. A person having an interest in the subject matter of a mandamus action may be permitted to intervene for the purpose of resisting the granting of the writ. Christopherson v. St., 226 M 350, 735 P2d 524, 44 St. Rep. 712 (1987).

Right to Intervene in Adoption of Indian Child — State Commitment to Indian Child Welfare Act: Prior to birth, Nellie Silk, paternal aunt of M.E.M., expressed an interest in caring for the child because she was aware of the parents' problems with parenting; however, after the child was born he was placed in foster care by the Hill County Department of Social and Rehabilitation Services (SRS). Upon learning of the placement, Silk wrote to SRS requesting custody. SRS responded that placement with Silk would be inappropriate because of SRS efforts to reintegrate the family, but that Silk would be considered if adoption were to occur. After parental rights were terminated (see In re M.E.M., 209 M 192, 679 P2d 1241, 41 St. Rep. 636 (1984)), Silk was not informed of the proceedings, of M.E.M.'s availability for adoption, or of M.E.M.'s preadoptive placement with a non-Indian family. Silk's subsequent petition for adoption and motion to intervene were denied by the District Court. On appeal, the Supreme Court found that Silk had an interest in adoption stemming from the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. 1901, et seq., and that the state had a strong and independent commitment to the principles embodied in the ICWA. Silk also had a right to intervene under Rule 24(a), M.R.Civ.P. (Title 25, ch. 20), and although the District Court had ruled that her motion was not timely, the Supreme Court held that the motion must be granted in light of the fact that she was kept in ignorance and could not have been more diligent or earlier in her petition or motion. In re M.E.M., 223 M 234, 725 P2d 212, 43 St. Rep. 1684 (1986). See also In re K.H. & K.L.E., 1999 MT 128, 294 M 466, 981 P2d 1190, 56 St. Rep. 515 (1999).

Error to Refuse Intervention in Proceeding to Enforce Foreign Divorce Decree: An Oregon divorce decree awarded Montana property to the wife. Before the wife filed an action under 26-3-203 to enforce the foreign decree, husband conveyed the Montana property to Christiana, who later proposed to intervene in the instant action. The Supreme Court held that the District Court erroneously refused intervention. Insofar as the Oregon court attempted to directly transfer husband's Montana property to wife, its act was not effective in this state. The District Court erred in treating the foreign decree as a direct and self-executing transfer of Montana property. However, in an enforcement action in this state, the Oregon decree is an enforceable determination of the rights and equities of husband and wife with respect to the Montana real property in question. Gammon v. Christiana, Inc., 210 M 463, 684 P2d 1081, 41 St. Rep. 1161 (1984). For application of principle to effect of Montana divorce decree on out-of-state property, see In re Marriage of Bahm, 225 M 331, 732 P2d 846, 44 St. Rep. 279 (1987).

Intervention — Third-Party Practice: Plaintiff agreed to lend Prospect Associates, Inc. (Prospect) money to finance construction of a subdivision. As part of the security for the loan, Prospect was required to obtain a letter of credit with plaintiff as beneficiary. Prospect defaulted on the promissory note evidencing the loan. Defendant refused payment on the letter of credit, contending it was a guaranty on which it was not primarily liable. The District Court granted summary judgment to plaintiff, and defendant appealed. Prospect contended the District Court erred in denying its motion to intervene in the letter of credit action. The Supreme Court found that defendant's liability on the letter of credit arose without regard to the underlying instruments and therefore Prospect had no claim or defense that would have a common question of law or fact to the letter of credit suit. The letter of credit action could not be consolidated with the underlying action between Prospect and plaintiff for the same reason. Defendant, however, filed a third-party complaint against Prospect for indemnity on plaintiff's claim against it. The court held that Prospect could assert its claims against plaintiff as a third-party defendant in the underlying indemnity action following remand. Sherwood & Roberts, Inc. v. First Security Bank, 209 M 402, 682 P2d 149, 41 St. Rep. 787 (1984).

Untimely Motion:

Appellant and his wife are each 50% shareholders in a family ranch corporation. The parties separated and divorced in 1976, and since that time appellant has been inactive in the corporation. In May 1981, the District Court ordered the corporation to pay respondents for debts owed to them. The order was pursuant to a consent decree to which the corporation agreed in May 1980. In August 1980, appellant filed a motion to intervene in the matter on behalf of the corporation, which was denied. The District Court held that the motion was not timely made, and the Supreme Court affirmed. As a 50% shareholder, appellant had an interest giving an

intervention of right. Appellant was given notice of the original complaint prior to April 17, 1980. He did not file his motion until more than 4 ½ months after he became aware of the initial claim. As a 50% shareholder and inactive director of the corporation, he had every right to contact the board of directors to ascertain the progress of the proceedings. He failed to do so and is not entitled to avoid the "timeliness" requirement by asserting he was unaware of the proceedings until June 1980, when corporate counsel enlightened him. Appellant could pursue his claims in the corporation dissolution proceeding pending before the same District Court Judge. Grenfell v. Duffy, 198 M 90, 643 P2d 1184, 39 St. Rep. 786 (1982).

When motion to intervene was made for the first time at the beginning of trial after intervenor sat on his claimed right for 2 ½ years, the judge correctly denied the motion on the basis of untimeliness. Archer v. LaMarch Creek Ranch, 174 M 429, 571 P2d 379 (1977).

Rights of Legal Heir Adequately Represented by Special Administrator — Intervention Denied: After a special administrator was appointed to continue prosecution of an action begun before the testatrix's death, the heir to the estate sought to intervene in the case but was denied. Although holding that ruling nonappealable, the Supreme Court did grant the heir's Writ of Supervisory Control. Nonetheless, it found the heir was not a proper intervenor in the suit because her interest was represented adequately by the special administrator, noting that the heir had no right to pursue the action herself unless the personal representative failed to act on the claim, which was not the case here. Further, an administrator could sue in his own name without joining with him the party for whose benefit the action is brought. State ex rel. Palmer v. District Court, 190 M 185, 619 P2d 1201, 37 St. Rep. 1876 (1980).

Purpose of Intervention: The purpose of provisions for intervention is to avoid circuity of action and multiplicity of suits. State ex rel. Westlake v. District Court, 119 M 222, 173 P2d 896 (1946); Burgess v. Hooks, 103 M 245, 62 P2d 228 (1936); St. Bank of Outlook v. Sheridan County, 72 M 1, 230 P 1097 (1924); Moreland v. Monarch Min. & Mill. Co., 55 M 419, 178 P 175 (1919). See also In re Marriage of Glass, 215 M 248, 697 P2d 96, 42 St. Rep. 328 (1985), Goodover v. Lindey's, Inc., 232 M 302, 757 P2d 1290, 45 St. Rep. 1068 (1988), and Cont. Ins. Co. v. Bottomly, 233 M 277, 760 P2d 73, 45 St. Rep. 1486 (1988).

Interest of Intervening Sheriff — Trust Agreement Alleged: In an action in claim and delivery to recover a carload of ore, complaint in intervention by a Sheriff who alleged that pursuant to an agreement between labor claimants and defendant against whom they had secured judgments on which executions were issued, he had shipped the ore as their trustee and as such was lawfully entitled to the proceeds derived from the ore, was sufficient to show a creation of trust in, and acceptance thereof by him, as against the assertion that the Sheriff had no interest in the subject matter of the action and therefore was not entitled to intervene. Stephenson v. Combination Leasing & Dev. Co., 86 M 322, 283 P 1110 (1929).

Refusal to Permit Intervention as Error: Refusal to permit a party to intervene is error where such party makes a prima facie showing of interest in the subject matter of the litigation. Equity Co-op Ass'n of Roy v. Equity Co-op Mill. Co. of Mont., 63 M 26, 206 P 349 (1922).

Lienholder Intervening: A demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to a complaint in intervention will be sustained, where the intervenor's notice of lien was so defective as not to support the lien, since the right to intervene is dependent upon the existence of a valid lien in the subject matter of the action. Interstate Lumber Co. v. Magill-Nevin Plumbing & Heating Co., 57 M 334, 188 P 144 (1920).

Attached Property as Basis for Intervention: A third party, who claimed to own property which had been attached to secure any judgment which might be recovered in an action, had such an interest in the subject matter of the litigation as to entitle him to intervene and have his rights determined. Moreland v. Monarch Min. & Mill. Co., 55 M 419, 178 P 175 (1919).

Attachment Remedy — Intervention Not Precluded: The fact that a party claiming an interest in attached property may have a remedy after seizure or sale under 27-18-602, or by an action in conversion or replevin, does not deprive him of his right to intervene in the action in which the attachment was procured. Moreland v. Monarch Min. & Mill. Co., 55 M 419, 178 P 175 (1919).

Action to Enjoin County Printing — Contractor Intervening: To a suit by a taxpayer against the commissioners and clerk of a county brought for the purpose of having the execution of a county printing contract enjoined, the successful bidder was an indispensable party who was rightfully permitted to intervene and as such party was entitled to file, among other papers, an affidavit disqualifying the District Judge for imputed bias and prejudice. State ex rel. Sherman v. District Court, 51 M 220, 152 P 32 (1915).

Probate Proceedings: Section 93-2826, R.C.M. 1947 (superseded by Rule 24, M.R.Civ.P.), providing a right of intervention, did not apply to the filing of grounds for contesting a will. State ex rel. Donovan v. District Court, 25 M 355, 65 P 120 (1901).

Mining Claims — Filing of Claim Required: One who has not filed his adverse claim under the federal statute cannot intervene in an action to determine adverse claims to a mining location, though he claims an interest in the premises adverse to both plaintiff and defendant. Murray v. Polglase, 23 M 401, 59 P 439 (1899), distinguished in Poore v. Kaufman, 44 M 248, 119 P 785 (1911).

Law Review Articles

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).

Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 348 (1981).

Collateral References

Parties *key* 37 through 48.

67A C.J.S. Parties §§68 through 87.

59 Am. Jur. 2d Parties §§124 through 154.

Right of insurer issuing "uninsured motorist" coverage to intervene in action by insured against uninsured motorist. 35 ALR 4th 757.

When is representation of applicant's interest by existing parties inadequate and applicant bound by judgment so as to be entitled to intervention as of right under Federal Rule 24(a)(2) and similar state statutes or rules. 84 ALR 2d 1412.

Time within which right to intervene may be exercised. 37 ALR 2d 495.

Right of nonparties to move for the vacation of a judgment to intervene in action or proceeding in respect of a matter in which they have an interest common with or similar to that of the parties. 112 ALR 434.

Construction of Federal Civil Procedure Rule 24(a)(2), as amended in 1966, insofar as dealing with prerequisites of intervention as a matter of right. 5 ALR Fed. 518, §4(q) superseded by 132 ALR Fed. 147.

Rule 24(b). Permissive intervention.

Commission Notes

The rule is identical with the Federal Rule, except for the omission of references to the federal government and provisions peculiarly designed to federal procedure and the substitution of language to adapt the rule to state practice.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Criteria for Intervention in Adoption Proceeding — Unfounded and Untimely Motion to Intervene Properly Denied: Couple A adopted a child through a judicial decree in the District Court of the Twenty-First Judicial District. Couple B also wanted to adopt the child and filed a motion, in the District Court of the Twelfth Judicial District where they lived, to intervene and set aside the final decree of adoption, despite the fact that some 6 months had passed since the final adoption decree was issued. Initially, neither District Court was aware of the competing adoption petitions. The Department of Public Health and Human Services had been reviewing both couples as potential adoptive resources at the same time and ultimately determined that because the child had formed a strong bond during placement with couple A for nearly 2 years, it would be in the child's best interests to be adopted by couple A. Couple B contended that the child was a member of their extended family and that the Department should have given them priority as adoptive parents. The Twenty-First District Court held that couple B had no standing to intervene as a matter of right pursuant to Rule 24(a), M.R.Civ.P., and that permissive intervention under this rule was untimely and would undermine the purpose of adoption to the detriment of the child. Couple B's motion to set aside the final decree pursuant to Rule 60(b), M.R.Civ.P., was also denied on grounds that as nonparties to couple A's adoption petition, couple B had no standing to make the motion and that, in any case, it was untimely because it was made more than 180 days after the final decree. Couple B appealed the denial of both motions, arguing first that they had a legal interest by virtue of the family placement preference in the Indian Child Welfare Act (ICWA) and legislative and Departmental policies favoring adoptive placement with extended family members. The Supreme Court noted that a mere claim of interest is insufficient to support intervention as a matter of right and that a party seeking intervention must make a prima facie showing of a direct, substantial, legally protectable interest in the proceedings. No such showing was made here because the child was not Indian and therefore not subject to the ICWA, nor did the relationship of second cousins meet the definition of extended family member. Couple B next argued that they should have been allowed

to intervene under the permissive standard of this rule because the competing adoption petitions had common issues of law and fact. Couple B contended that their delay should be excused by their reliance on misrepresentations made by the Department. The Supreme Court agreed that the Department could have taken a more forthright approach and saved all the parties considerable time and expense, but couple B bore the responsibility for ensuring the timely filing of the motion to intervene. The Supreme Court noted that timeliness is a threshold issue when intervention is sought and that, although none of the factors are dispositive, most courts look to four factors in considering whether a motion to intervene is timely filed: (1) the length of time that the intervenor knew or should have known of its interest in the case before moving to intervene; (2) prejudice to the original parties, if intervention is granted, resulting from the intervenor's delay; (3) prejudice to the intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely. The Supreme Court considered each factor in detail. Although the third factor weighed in favor of couple B, because denial of the motion to intervene effectively precluded any hope of their adoption of the child, the other factors weighed strongly against them. The District Court made a reasoned analysis when it determined that the motion to intervene was untimely and did not abuse its discretion in denying the motion. Last, because couple B did not address the threshold issues of Rule 60(b) on appeal, the Supreme Court concluded that denial of the motion to set aside the final adoption decree on grounds of standing and timeliness was proper. In re Adoption of C.C.L.B., 2001 MT 66, 305 M 22, 22 P3d 646 (2001).

Dismissal of Intervention Action Not Clear Error: A husband and wife owed about $6,000 in back taxes on their property, which was in jeopardy of being sold at a tax sale. The couple was unable to obtain a loan because of a prior bankruptcy, so they arranged to transfer the property to the husband's mother, who then took out a loan to pay the taxes, using the property as collateral. When the couple later sought to dissolve their marriage, their petition made no mention of any real property acquired during the marriage. The husband testified at the hearing, but the wife did not attend, and dissolution was granted without addressing the wife's interest in the property. The wife moved to set aside the judgment pursuant to 40-4-135. The District Court subsequently voided the deed transferring the property to the mother, subject to her right to intervene to assert her right to the property. Following a hearing, the court dismissed the mother's motion to intervene, issued a court deed naming the mother as grantor and the husband and wife as grantees to hold the property as tenants in common, and included the property in the marital estate. The mother contended that dismissal of her intervention action constituted a denial of her constitutional rights under Art. II, sec. 16 and 17, Mont. Const., because she was not properly joined as a party. The Supreme Court noted that the mother was served with a summons and a copy of motions to set aside the dissolution decree and was directed to appear at the initial show cause hearing. Her constitutional rights were not violated despite dismissal of her motion to intervene. In re Marriage of Bell, 2000 MT 88, 299 M 219, 998 P2d 1163, 57 St. Rep. 381 (2000).

Intervention With Conditions or for Limited Purpose: Shilhaneks were injured in a vehicle accident. At trial, an insurance company moved to intervene for the limited purpose of providing factual information to correct errors regarding the company that were made by Shilhaneks' attorneys. The District Court found that the company's motion to intervene met the criteria necessary for permissive intervention and granted the motion, but declared that the company be treated as any other party in the action. Pursuant to this rule, a court may allow intervention with conditions or for a limited purpose, and it was not an abuse of the court's discretion to condition the company's intervention on being treated as a full party to the action. Shilhanek v. D-2 Trucking, Inc., 2000 MT 16, 298 M 101, 994 P2d 1105, 57 St. Rep. 89 (2000). See also 6 Moore's Fed. Prac. 24.23 (3d Ed. 1998).

Timeliness of Motion to Intervene: A motion to intervene must be timely regardless of whether intervention is sought as of right or by permission. Estate of Schwenke v. Becktold, 252 M 127, 827 P2d 808, 49 St. Rep. 180 (1992), followed in Connell v. Dept. of Social and Rehabilitation Services, 2003 MT 361, 319 M 69, 81 P3d 1279 (2003).

Constitutionality of Law — Intervention Allowed: A retail merchant who competed with other merchants giving or not giving trading stamps had an interest in an action by another retailer for a declaratory judgment that sections 84-2805 to 84-2812, R.C.M. 1947 (declared unconstitutional in this case), providing for the licensing of any merchant advertising or giving trading stamps, were unconstitutional, and should have been permitted to intervene in support of the constitutionality of such statute. State ex rel. Abel v. District Court, 140 M 117, 368 P2d 572 (1962).

Intervention as Improper Substitution of Parties: District Court was directed to deny petition of decedent's divorced wife, guardian ad litem of decedent's and her children, to intervene in action for wrongful death under 27-1-513 commenced by the widow as administratrix and trustee for the decedent's minor children, and to strike from the files the complaint in intervention as an attempted substitution of party plaintiffs in a wrongful death action. State ex rel. Carroll v. District Court, 139 M 367, 364 P2d 739 (1961).

Intervention by State Taxing Agency: Where a taxpayer filed an action against the county for a refund of taxes, the State and the State Board of Equalization (functions now split between Director of Department of Revenue and State Tax Appeals Board) have an interest in the subject matter of the litigation so as to enable them to intervene in the action, not only because part of the tax collected was a state levy but also because the determinative questions raised are of vital interest and concern as they pertain to the tax laws, the procedure thereto, and the public fiscal policy of the sovereign state. Carlson v. Flathead County, 130 M 24, 293 P2d 273 (1956).

Indemnity Bond as Basis for Intervention: An allegation in complaint in intervention that intervenors made and delivered to defendant Sheriff their indemnity bond shows their interest in success of defendant. Smith v. Armstrong, 118 M 290, 166 P2d 793 (1946).

Liberal Allowance of Intervention: Courts of equity are liberal in allowing the right to intervene in an action where the petitioner's rights will be directly affected by the decree, for the purpose of doing complete justice. State ex rel. Thelen v. District Court, 93 M 149, 17 P2d 57 (1932).

Mandamus Proceedings: A person having an interest in the matter or thing sought to be compelled by mandamus may be permitted to intervene for the purpose of resisting the granting of the writ. State ex rel. Miles City v. N. Pac. Ry., 88 M 529, 295 P 257 (1930).

Collateral References

Intervention by other stockholders in stockholder's derivative action, discretion of court as to. 69 ALR 2d 568.

Intervention by stockholder for purpose of interposing defense for corporation, discretion of court as to. 33 ALR 2d 481.

Right to intervene in suit to determine validity or construction of law or governmental regulations. 169 ALR 851.

Rule 24(c). Procedure.

Commission and Advisory Committee Notes

COMMISSION NOTES

The rule is identical with the Federal Rule, except for the omission of references to the federal government and provisions peculiarly designed for federal procedure and the substitution of language to adapt the rule to state practice.

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 24(a), as amended 1963.

Explanation of change: This amendment conforms to the amendment of Rule 5(a). See note to that amendment.

Compiler's Comments

1997 Amendment: Deleted former fourth sentence that read: "When the constitutionality of an act of the legislative assembly affecting the public interest is drawn in question in any action to which neither the state nor any agency or officer thereof is a party, the court shall notify the attorney general of the state and the attorney general may within 20 days thereafter intervene in the same manner on behalf of the state." Amendment effective October 1, 1997.

Identity With Federal Rule: As of May 1, 1990, the above advisory committee note was still applicable.

Amendment: The amendment of September 29, 1967, in the first sentence, substituted "the" for "all" before "parties" and "as provided in Rule 5" for "affected thereby" after "parties".

Case Notes

New Trial Granted Because of Intervenor's Failure to Serve All Parties: In a dissolution action, Keaster and his ex-wife stipulated that he was not the natural parent of her child. The ex-wife subsequently named Fleming as the natural father, and the Child Support Enforcement Division initiated proceedings to collect support payments from Fleming. Fleming intervened in the dissolution proceedings without giving notice to Keaster. The lower court reinstated Keaster's support payments and denied Keaster's motion for a new trial on the basis that it had

not been timely made. The Supreme Court reversed the lower court's decision and held that by rule, Fleming had to serve all parties to the action in which he was intervening. In re Marriage of Keaster, 259 M 48, 853 P2d 1191, 50 St. Rep. 669 (1993).

Intervention Improper When Party Only Seeks to Relitigate Issue: Although not often granted, a motion to intervene made after a judgment is not per se untimely. However, a party will not be allowed to intervene following a judgment if he only seeks to relitigate an issue concerning which the original parties had sufficient opportunity to present evidence at trial. In re Marriage of Glass, 215 M 248, 697 P2d 96, 42 St. Rep. 328 (1985).

Waiver of Objection for Failure to File and Serve Motion: An individual did not file and serve upon the parties a motion for leave to intervene, as required by this rule, but did file a third-party complaint as a coplaintiff. The responses to the third-party complaint did not raise the issue of failure to properly intervene, and no one objected until the trial began. The individual would have been able to intervene as a matter of right. Failure to object to the individual's presence in the case until trial began constituted a waiver of any objection, and when the court overruled that objection, it constituted an authorization of the intervention. However, the Supreme Court warned that future litigants should not attempt to use this ruling to circumvent the clear requirements of this rule. Schulz, Davis & Warren v. Marinkovich, 203 M 12, 661 P2d 5, 40 St. Rep. 262 (1983).

Disqualification of Judge by Intervenor: An intervenor being a party to the action and in a proper situation may file an affidavit of disqualification. Allman v. Potts, 140 M 312, 371 P2d 11 (1962); State ex rel. Sherman v. District Court, 51 M 220, 152 P 32 (1915).

Pleading Not Required to Be Served: Although it is regarded as the best practice to serve and tender proposed complaint in intervention along with application for permission to intervene, the proposed complaint is not a necessary part of the application, its chief mission being as a pleading in the main action after intervention is granted. State ex rel. Westlake v. District Court, 118 M 414, 167 P2d 588 (1946).

Rights of Intervenor as Party: While an intervenor must accept the action in which he intervenes as he finds it at the time of intervention, his rights thereafter are as broad as those of the original parties to it. State ex rel. Westlake v. District Court, 118 M 414, 167 P2d 588 (1946); St. Bank of New Salem v. Schultze, 63 M 410, 209 P 599 (1922).

Rules of Pleading Applicable: Ordinary rules of pleading apply under statute to complaint in intervention. State ex rel. Westlake v. District Court, 118 M 414, 167 P2d 588 (1946).

Interpleader by Intervention: In real estate mortgage foreclosure, a grain company filed complaint in intervention to determine, by interpleader, conflicting claims of mortgagor and mortgagee to grain delivered to it which had been harvested from the land. The mortgagor was entitled to file a cross-complaint to the complaint in intervention, seeking judgment for the price of the grain, as he could have done had the intervenor commenced an original interpleader suit against him. State ex rel. Union Cent. Life Ins. Co. v. District Court, 102 M 371, 58 P2d 491 (1936).

Appellate Intervention Not Allowed: On application to the Supreme Court to review the action of the District Court in denying a petition for interpleader, one not a party to such petition in the lower court, nor a party to the action in which interpleader is sought, will not be permitted to intervene; his remedy lies in a petition for intervention in the District Court. State ex rel. St. Bank of Townsend v. District Court, 94 M 551, 25 P2d 396 (1933).

Pleadings to Be Served With Petition: One desiring to intervene should, when he files his petition for leave to intervene, serve a copy of his complaint in intervention upon the parties to the action with the petition and, if leave be granted, forthwith file his complaint. State ex rel. Thelen v. District Court, 93 M 149, 17 P2d 57 (1932).

Complaint Adverse to All Parties — Pleadings Required: Where a complaint in intervention is adverse to both parties in which filed, both are considered as defendants as respects the intervenor and they must plead to his complaint as defendants in an ordinary action. St. Bank of New Salem v. Schultze, 63 M 410, 209 P 599 (1922).

Intervention After Default Prohibited: A party will not be permitted to file a complaint in intervention after defendant's default for want of an answer has been entered, and when nothing remains to be done but to enter the judgment. Safely v. Caldwell, 17 M 184, 42 P 766 (1895).

Leave of Court Required — Pleading Properly Ignored: A party who is a stranger to a suit as commenced, but who without a showing by complaint or obtaining leave of court appears upon his own motion and demurs to the complaint is not an intervenor and his demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) so filed may be properly disregarded by the trial court. Dietrich v. Steam Dredge & Amalgamator, 14 M 261, 36 P 81 (1894).

Law Review Articles

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).

Collateral References

Parties *key* 44.

67A C.J.S. Parties §§81 through 83.

Rule 25. Substitution of parties

Law Review Articles

Montana's Survival Statute—A Constitutional Quandary, Anderson, 24 Mont. L. Rev. 123 (1963).

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 25(a). Death.

Commission Notes

Subdivisions (a)(2) and (c) of the rule are identical with the original Federal Rule. Subdivisions (a)(1) and (d) follow amendments proposed by the Federal Advisory Committee: in subdivision (a)(1) "a reasonable time" is substituted for the six-month period contained in the first sentence of the original rule; Subdivision (a)(3) has been added in the rule.

Compiler's Comments

Identity With Federal Rule: A 1963 amendment to the Federal Rule, instead of adopting the "reasonable time" provision suggested by the Federal Advisory Committee and embodied in the last sentence of subdivision (1) of the Montana Rule, adopted a provision requiring dismissal as to the deceased party unless motion for substitution is made "not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion". As of May 1, 1990, the above commission note with respect to subdivisions (a)(2) and (c) was still applicable.

Case Notes

Waiver of Substitution Requirements: Failure of plaintiff to substitute executrix of doctor's estate for doctor, in tort action initiated against doctor before his death was waived where attorneys for doctor were also attorneys for executrix, attorneys and executrix were present at trial of action and attorneys for executrix had filed motion for additional time in which to perfect appeal from judgment against doctor. Nagaard v. Feda, 149 M 190, 425 P2d 79 (1967).

Collateral References

Parties *key* 57 through 63.

67A C.J.S. Parties §§58 through 64.

59 Am. Jur. 2d Parties §218.

Construction of Federal Rule 25(a)(1) as permitting substitution, as a party, of personal representative of a nonresident decedent. 79 ALR 2d 332.

Right of substitution of successive personal representatives as party plaintiff. 164 ALR 702.

Substitution of plaintiff as proper subject for amendment of complaint. 135 ALR 325.

Rule 25(b). Incompetency.

Commission and Advisory Committee Notes

[S]ubdivision (b) has been changed to refer to "guardian" rather than "representative" and to permit the court to appoint a guardian ad litem for the purpose of permitting the action to continue.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Rule 25(c). Transfer of interest.

Commission Notes

Subdivisions (a)(2) and (c) of the rule are identical with the original Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Involuntary Dismissal of Action in Bankruptcy Estate — Substitution of Parties and Notice of Dismissal of Action Not Required: Plaintiffs filed a lender liability action against several banks after plaintiffs had filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code. On motion of the plaintiffs' creditors, the Bankruptcy Court involuntarily converted that a proceeding from Chapter 11 to a Chapter 7 liquidation. Pursuant to federal case law, upon the conversion to a Chapter 7 proceeding, the lender liability action in District Court became an asset of the trustee in bankruptcy. The trustee and defendants in the lender liability action reached a stipulated settlement for a dismissal of that action, and plaintiffs appealed the dismissal. Citing Fed. Land Bank of Spokane v. Reilly, 240 M 147, 783 P2d 917 (1989), the Supreme Court held that it has no authority to substantively review issues that are appropriately before the Bankruptcy Court and that the only issue the Supreme Court could review was the propriety of a lack of notice of the dismissal to the plaintiffs. On this issue, the Supreme Court held that the trustee was not required to give notice because all of plaintiffs' interest in the state court action was transferred to the trustee and held that plaintiffs therefore lacked standing to object to the dismissal. The Supreme Court also held that the trustee was not required to substitute the bankruptcy estate as the real party in interest in the state court proceeding because this rule, rather than Rule 17(a), M.R.Civ.P., governed substitution and because under Rule 17(a), substitution was not mandatory. Reilly v. Citizens St. Bank, 251 M 155, 822 P2d 1088, 48 St. Rep. 1140 (1991).

Dismissal of Bank Not Requiring Dismissal of Bank Officers — Substitution: Defendants who were former bank officers were sued for damages. The District Court, relying on an order in a related proceeding, dismissed the bank from the action. Defendants contended that the claims against them were based on master-servant law, arguing that dismissal of the bank required dismissal of defendants as the bank's servants. Noting the arrangements by which defendants sold the bank, the ongoing adversarial relationship between defendants and the bank buyers, and defendants' continued control over the present litigation, the Supreme Court concluded that dismissal of the bank constituted substitution of parties, rather than dismissal of a principal and retention of agents. Stensvad v. Towe, 232 M 378, 759 P2d 138, 45 St. Rep. 1129 (1988).

Determination of Real Party in Interest Prior to Ratification, Joinder, or Substitution: Defendants appealed from a judgment denying a motion to allow amendment to pleadings to add their incorporated business entity as a party plaintiff. The Supreme Court remanded the case, holding that before it could be determined if ratification, joinder, or substitution should be allowed, it was necessary to determine whether the corporate entity was a real party in interest on the counterclaim. First Sec. Bank of Glendive v. Gary, 221 M 329, 718 P2d 1345, 43 St. Rep. 852 (1986).

Motion to Consolidate — Denied: When plaintiff made a valid assignment of his interest in a promissory note and filed a supplemental complaint dropping him as a party plaintiff, the action on the note could not properly be joined with another action to which he was a party. Keller v. Llewellyn, 175 M 164, 573 P2d 166 (1977).

Parties to Contract — Effect of Property Disposition: Because the obligations of a contract are limited to the contracting parties, plaintiff properly sued defendant for recovery on two retail installment contracts executed by defendant, even though the object of the contracts became part of a property disposition to defendant's wife in a divorce decree which transferred the indebtedness along with the subject property. Gambles v. Perdue, 175 M 112, 572 P2d 1241 (1977).

Collateral References

Construction and application of statutory provision that, in case of transfer of subject matter of action pendente lite, the action may proceed in name of original party, or that the transferee may be substituted. 149 ALR 829.

Rule 25(d). Public officers — death or separation from office.

Commission and Advisory Committee Notes

COMMISSION NOTE

Subdivisions (a)(1) and (d) follow amendments proposed by the Federal Advisory Committee[. I]n subdivision (d) the arbitrary limitation of the original rule on substitution of a public officer to a period of six months after he takes office has been eliminated and provision is made for

action by or against an officer in his official capacity. Also, subdivision (d) has been adapted to state practice by omitting reference to officers of the United States, District of Columbia, Canal Zone, a territory, and insular possession.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

The amendment conforms the rule to the 1961 Amendment of the Federal Rule which has not previously been adopted by Montana. Subdivision (d) applies only if the public officer is sued "in his official capacity". Excluded from the operation of the amended rule will be the relatively infrequent actions which are directed to securing money judgments against the named officers enforceable against their personal assets. In these cases Rule 25(a)(1) applies to the question of substitution.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: A 1961 amendment to the Federal Rule completely rewrote subdivision (d), then the Montana Supreme Court incorporated those amendments in 1984 rendering the above commission note obsolete. As of May 1, 1990, the Montana Rule was identical to the Federal Rule.

Amendments: The amendment of October 9, 1984, substituted present language for "When an officer of the state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the constitution of the state. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. If substitution is not made within a reasonable time, the action may be dismissed as to such public officer. When an officer of the class described herein may sue or be sued in his official capacity, he may be described as a party by his official title and not by name, subject to the power of the court, upon motion or on its own initiative, to require his name to be added. Unless his name is so added, no formal order of substitution is necessary."

The May 1, 1990, amendment made language in the rule gender neutral.

V. Depositions and Discovery

Part Case Notes

Participation in Discovery Not Preclusive of Right to Arbitration — Waiver Not Shown: Downeys presented a number of claims against Christensen and Baker Boy Bake Shops, Inc. (Baker Boy), a donut franchise, alleging fraud, breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence stemming from a franchise agreement between Downeys and Baker Boy. Immediately after serving the complaint, Downeys began discovery by serving requests for production, which were answered separately by Christensen and Baker Boy, who subsequently began their own discovery procedures. The District Court denied a motion to compel arbitration and stay proceedings, finding that participation in discovery constituted a waiver of arbitration. Failure to compel the parties to submit their claims to arbitration was error, given a clause in the franchise agreement requiring arbitration rather than civil litigation, when the waiver was not proved by actions inconsistent with the right to arbitrate or by a showing of prejudice arising from any inconsistent actions. Downey v. Christensen, 251 M 386, 825 P2d 557, 49 St. Rep. 88 (1992).

Objective of District Court Discovery Control: The objective of the District Court in controlling and regulating discovery is to ensure a fair trial to all concerned, neither according one party an unfair advantage nor placing the other at a disadvantage. Hobbs v. Pac. Hide & Fur Depot, 236 M 503, 771 P2d 125, 46 St. Rep. 544 (1989).

Negligent Suppression of Evidence — Harmless Error: In an appeal involving the negligent suppression of evidence, the court agreed with appellant that the state acted improperly in suppressing four taped witness statements during discovery and a possibly incriminating

statement made by appellant during his arrest and in endorsing an additional witness on the first day of trial. However, the court found that the suppressed evidence was either repetitive of other testimony or minimally supportive of a self-defense theory, and that since the defense knew of the additional witness' connection with and importance in the case, it could not convincingly claim surprise at the endorsement. Therefore, all errors were held to be harmless and not grounds for reversal. St. v. Wallace, 223 M 454, 727 P2d 520, 43 St. Rep. 1908 (1986), followed, with regard to application of harmless error rule to admissibility of hearsay testimony, in St. v. Alexander, 265 M 192, 875 P2d 345, 51 St. Rep. 474 (1994).

District Court Control Over Discovery: Under its authority to control trial administration, the District Court has inherent discretionary power to control discovery, and control over discovery is best exercised by that court as it is in a better position than the Supreme Court to supervise the day-to-day operations of discovery. The requirement of exhaustion of District Court remedies before seeking intervention by the Supreme Court through an extraordinary writ will promote and support the District Court's authority to control day-to-day trial administration. State ex rel. Guarantee Ins. Co. v. District Court, 194 M 64, 634 P2d 648, 38 St. Rep. 1682 (1981), followed in In re Marriage of Malquist, 266 M 447, 880 P2d 1357, 51 St. Rep. 914 (1994), and Preston v. District Court, 282 M 200, 936 P2d 814, 54 St. Rep. 312 (1997).

Interlocutory Review of Interrogatories Rulings — Judicial Policy: Policy considerations supported refusal of the Supreme Court to accept jurisdiction over a petition for an extraordinary writ to review denial of objections to interrogatories propounded to a party who did not exhaust his remedies in the District Court and who made untimely application for the writ. A Supreme Court policy of interjecting itself into interlocutory review of lower court rulings on interrogatories and objections thereto would make it difficult for the lower courts to control day-to-day trial administration, open a Pandora's box of abuses, defeat the goal of speedy, inexpensive, and just discovery of the facts upon which each party's right of action depends, and might bury the Supreme Court in a paper blizzard of applications for supervisory control to review lower court rulings on pretrial discovery. State ex rel Guarantee Ins. Co. v. District Court, 194 M 64, 634 P2d 648, 38 St. Rep. 1682 (1981), followed in Preston v. District Court, 282 M 200, 936 P2d 814, 54 St. Rep. 312 (1997).

Part Collateral References

Appellate Procedure, State Bar of Montana C.L.E. publication, April 1987.

Document Discovery in Major Cases Including Insurance Bad Faith Cases, State Bar of Montana C.L.E. publication, March 1987.

Recent Amendments to the Montana Rules of Civil Procedure and Appellate Civil Procedure, State Bar of Montana C.L.E. publication, April 1985.

Rule 26. General provisions governing discovery

Case Notes

Sufficient Discovery Allowed Regarding Results of DUI Breath Test: Weldele moved in limine to exclude the results of a DUI breath test on grounds that the state failed to provide full discovery regarding the tests. The District Court denied the motion on grounds that the state had provided sufficient information upon which Weldele could prepare a defense. The Supreme Court affirmed. Although the state's production was not as extensive as requested, documents provided confirmed that: (1) the officers were certified to operate the Intoxilyzer and preliminary breath test equipment; (2) the Intoxilyzer received an annual certification less than 5 months before Weldele used it; (3) the Intoxilyzer solution was approved and used in compliance with applicable regulations; (4) the Intoxilyzer was properly calibrated before and after Weldele's test; and (5) the preliminary breath test instrument was properly field-certified. This information was adequate for both Weldele's and the state's purposes, and the Supreme Court declined to disturb the District Court's findings in that regard. St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003).

Refusal to Admit Letter Introduced During Trial Not Error: In a dispute over the charges for the care and training of horses, the parties agreed that Watkins would accept $5,000 for his services. The Williamses gave Watkins two checks for $2,500, but they stopped payment on the second check and refused to tender the rest of the money on the basis that one of the horses had been mistreated. The jury returned a verdict in favor of Watkins for $20,191 for services. The Williamses argued that the lower court erred in excluding a letter introduced during trial that purported to contain material terms of compensation for Watkins' services. The Supreme Court ruled that the lower court had not erred in excluding the letter because the Williamses had failed to produce the letter in response to discovery requests and had not listed it as an exhibit as

required by the lower court's scheduling order. Watkins v. Williams, 265 M 306, 877 P2d 19, 51 St. Rep. 489 (1994).

Defense Communication With Plaintiff's Physician: It was not error to allow defense counsel to communicate with the plaintiff's treating physician during the trial. As the plaintiff stated he did not intend to call the physician as a witness and because the inquiry was made during the course of the trial, normal discovery limitations did not apply. Ostermiller v. Alvord, 222 M 208, 720 P2d 1198, 43 St. Rep. 1180 (1986).

Admission of Genuineness of Documents — Privilege: A request for admission of genuineness of documents under Rule 36, M.R.Civ.P., is limited by Rule 26, M.R.Civ.P., to the genuineness of documents that are not privileged and that are discoverable under Rule 26. Kuiper v. District Court, 193 M 452, 632 P2d 694, 38 St. Rep. 1288 (1981).

Law Review Articles

Rule 37 Sanctions: Deterrents to Discovery Abuses, Irigoin, 46 Mont. L. Rev. 95 (1985).

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Propriety of discovery order permitting "destructive testing" of chattel in civil case. 11 ALR 4th 1245.

Rule 26(a). Discovery methods.

Advisory Committee Notes

Advisory Committee's Note to December 31, 1975, Amendment: It is the concensus [sic] of the Advisory Committee that the discovery procedure in the Montana Courts should coincide with the Federal practice.

Advisory Committee's Note to October 9, 1984, Amendment: Subdivisions 26(a), (b), and (g). These amendments conform the rule to the 1983 Amendments of the Federal Rule. For a discussion of the amendments see the advisory committee note to the Federal Rule.

Compiler's Comments

Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to conform with Rule 26, Fed.R.Civ.P.

This subdivision of the Federal Rule was amended effective August 1, 1983, to delete the provision for lack of limitations on frequency of discovery, in order to conform with Federal Rules 26(b) and (g). These amendments were incorporated into the State Rule in 1984. As of May 1, 1990, the rule was still identical to the Federal Rule.

Amendment: The amendment of October 9, 1984, deleted last sentence which read: "Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited."

Case Notes

Failure to Identify Experts or Supplement Discovery Request — Reversible Error: Miranti failed to provide the identity of expert witnesses even though he agreed to do so in his answers to interrogatories. He also failed to comply with his continuing obligation to supplement his answers and submit a list of experts prior to trial even though he was given numerous opportunities to do so. These failures severely limited cross-examination of the witnesses after they were qualified as experts and had testified as such over objection. Allowing this evidence amounted to an abuse of discretion and constituted reversible error. Miranti v. Orms, 253 M 231, 833 P2d 164, 49 St. Rep. 478 (1992).

District Court Without Authority to Order "Interviews" of Witnesses — Supervisory Control: In a personal injury case, the defendant obtained a court order stating that the plaintiff had waived her physician-patient privilege and that the plaintiff's doctors were to be treated as any other witnesses in the case. On appeal, the Supreme Court agreed with the order on its face but held that the District Court did not have the power under the rules of discovery to order private interviews between counsel for one party and possibly adverse witnesses, expert or not. The Supreme Court noted that other rules of discovery serve to supplement Rule 26(a), M.R.Civ.P. The District Court must relate discovery it allows and enforces to one of the methods provided for in that rule. A Writ of Supervisory Control was issued in this case. Jaap v. District Court, 191 M 319, 623 P2d 1389, 38 St. Rep. 280 (1981).

Law Review Articles

Rule 37 Sanctions: Deterrents to Discovery Abuses, Irigoin, 46 Mont. L. Rev. 95 (1985).

Failure to Disclose Names and Addresses of Witnesses in Discovery Proceedings, Greef, 35 Mont. L. Rev. 144 (1974).

Rule 26(b). Scope of discovery.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO DECEMBER 31, 1975, AMENDMENT

It is the concensus [sic] of the Advisory Committee that the discovery procedure in the Montana Courts should coincide with the Federal practice.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivisions 26(a), (b), and (g). These amendments conform the rule to the 1983 Amendments of the Federal Rule. For a discussion of the amendments see the advisory committee note to the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to conform with Rule 26, Fed.R.Civ.P.

This subdivision of the Federal Rule was rewritten effective August 1, 1983, to require the court to limit the frequency or extent of discovery if required facts are found by the court. This change was incorporated into the State Rule in 1984. As of May 1, 1990, the rule is identical to the Federal Rule.

Amendments: The amendment of October 9, 1984, in (1) inserted second paragraph.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Information in Interrogatory Regarding Expert Witness Sufficient to Meet Policy Underlying Procedural Rule — Discretion Abused in Dismissal of Case Based on Insufficient Answer: In their interrogatories, defendants sought information regarding plaintiff's potential expert witness. Plaintiff responded that the expert was yet undetermined. Defendants submitted a supplemental interrogatory requesting further information, and plaintiff responded with the expert's name and the substance of the facts and opinions to which the expert was expected to testify. The District Court held that the answer was deficient and sanctioned plaintiff by barring the expert's testimony and dismissing the case pursuant to this rule. Plaintiff appealed. The Supreme Court concluded that plaintiff's answer, although brief and tardy, nevertheless provided a sufficient indication of the expert's testimony to eliminate the possibility of surprise and to promote effective cross-examination, which is the policy underlying the rule. Thus, the District Court abused its discretion when it determined that plaintiff's answer was inadequate and in sanctioning plaintiff and dismissing the case. Hawkins v. Harney, 2003 MT 58, 314 M 384, 66 P3d 305 (2003).

Reversible Error in Failure to Disclose Expert Witness — Prejudice to Opposing Party: Despite its continuing duty to disclose the identity of each person expected to be called as an expert witness, the subject matter on which the person is expected to testify, and the substance of the person's testimony, defendant failed to disclose an expert witness prior to trial despite several opportunities to do so. Failure to disclose an expert witness constitutes reversible error and will usually prejudice the opposing party because the opposing party has no time to: (1) prepare for the witness; (2) effectively plan for cross-examination of the witness; and (3) obtain an expert to refute or question the testimony of the witness. Here, plaintiff initially listed a person as a witness, but not as an expert, and did not learn that the person would be called as a witness until he was called by defendant as an expert to refute plaintiff's experts. Therefore, plaintiff was prejudiced by defendant's failure to identify the person as an expert witness in response to discovery requests and in the scheduling order agreed upon by the parties, and the District Court abused its discretion by allowing the person to testify. The case was reversed and remanded for a new trial. Superior Enterprises, LLC v. Mont. Power Co., 2002 MT 139, 310 M 198, 49 P3d 565 (2002).

Failure of State to Respond to Discovery Requests During Driver's License Reinstatement Proceedings — Sanctions Proper: Responding to a 9-1-1 emergency dispatch, an officer found Patterson slumped over the steering wheel of a running vehicle, fast asleep. Patterson refused to take a Breathalyzer test, so he was arrested for DUI, and his license was seized. Patterson

challenged the suspension of his driver's license pursuant to 61-8-403 and through discovery requests sought a copy of the 9-1-1 report, but no copy was provided. The hearing was continued twice because of the absence of the report, and the District Court warned the state that if it failed to produce the report, Patterson's license would be reinstated and the suspension would be dismissed. On the day of the hearing, the state informed the court that it was unable to obtain the 9-1-1 report, so Patterson's motion for reinstatement of his driver's license was granted. The state appealed on grounds that the District Court erred by reinstating the license based on the state's failure to comply with an order compelling production of the report. The Supreme Court affirmed. To determine whether the sanction for the discovery abuse constituted an abuse of the District Court's discretion, the Supreme Court applied the factors in Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124 (2000). The 9-1-1 report was treated as relevant information absent a timely objection by the state to Patterson's request for production, and the state's failure to produce the report compromised Patterson's ability to prepare and present a defense, suspended the progress of the case, and prejudiced Patterson. The state was warned that reinstatement would result from failure to produce the report, and reinstatement was an appropriate sanction for the state's repeated failure to comply with discovery. Patterson v. Dept. of Justice, 2002 MT 97, 309 M 381, 46 P3d 642 (2002).

Failure to Disclose Experts by Scheduled Date — Inadequate Testimony to Establish Prima Facie Case: Romans was required by the original and amended scheduling orders to disclose experts by certain dates. Romans failed to do so, and the District Court twice ordered him to disclose. Expert disclosure was ultimately filed after the final date set by the court and was of record but not noticed when the District Court summarily dismissed the case for failure to produce the expert testimony needed to establish a prima facie case. Even though filing was not timely, the Supreme Court considered whether the filing was sufficient to avoid summary judgment, agreeing that because the testimony failed to address the standard of care applicable to the administration of a functional capacities evaluation, which was the basis of the suit, a prima facie case was not established by the expert testimony and summary judgment was proper. Romans v. Lusin, 2000 MT 84, 299 M 182, 997 P2d 114, 57 St. Rep. 363 (2000).

Denial of Will Contestants' Discovery Requests for Probate and Adoption Files Affirmed: The will contestants questioned Lande's testamentary capacity and asserted undue influence, claiming District Court error in failing to strike privilege-based objections from the record and to require production of Lande's complete estate planning files, particularly Lande's wife's file and a son's adoption file. The suggestion that the court was required to strike privilege-based objections, in addition to rejecting the applicability of the privilege, was raised without supporting authority as required by Rule 23(a)(4), M.R.App.P. (Title 25, ch. 21), and thus was disregarded as without merit. The Supreme Court, citing Duck Inn, Inc. v. Mont. St. Univ., 285 M 519, 949 P2d 1179 (1997), stated that having failed to advance supporting authority, the contestants cannot establish error in this regard. Lande's wife's file was irrelevant because it had been completed years prior, and the question of when it was prepared bore no connection to the underlying questions of Lande's testamentary capacity or undue influence. The adoption file was also irrelevant because the contestants conceded that the adopted son had long been a substantial devisee and they did not challenge the son's adoption or status as a beneficiary. The contestants further failed to show that the entire estate planning files were not produced and thus failed to meet their burden of establishing District Court error. In re Estate of Lande, 1999 MT 162, 295 M 160, 983 P2d 308, 56 St. Rep. 642 (1999).

Limitation of Discovery Regarding Similar Product Models and Prior Injuries Improper: Preston alleged defective design of an N12 model pneumatic roofing nailer. The District Court limited discovery to information about the N12 nailer only and to information on the N12 from the time of manufacture to the date of Preston's injury. The Supreme Court held that the discovery limitations were arbitrary and improper. Evidence of prior injuries by similar, although not identical, products is relevant. Although evidence subsequent to the date of injury is not relevant to the alternative design issue, it is relevant to the unreasonably dangerous design issue. The fact that the same design continues to cause injuries is relevant to establishing the dangerousness of the product. Allowing the discovery restrictions to stand would have not only unfairly disadvantaged Preston but would have also defeated the purpose of the rules of procedure by requiring Preston to endure the time and expense of trial and an appeal before obtaining discoverable evidence essential to the case. That portion of the District Court's order restricting discovery was vacated, and the case was remanded. Preston v. District Court, 282 M 200, 936 P2d 814, 54 St. Rep. 312 (1997).

Failure to Provide Evidence That "Least-Cost Factor" Used in Farm Loan Restructuring Denial — Disallowance of Discovery as Reversible Error: Robsons' motion to compel discovery

sought information regarding the "least-cost" calculations performed by AgAmerica in processing the Robsons' second application to restructure their farm loan under the federal Agricultural Credit Act of 1987. The information was both the crux of the Robsons' affirmative defense to the foreclosure action and a mandatory consideration in AgAmerica's processing of the application. By not requiring AgAmerica to come forward with the evidence and instead allowing denial of the restructuring for other reasons, the District Court allowed AgAmerica to select the parts of the Act with which it chose to comply, an abuse of discretion by the District Court warranting reversal. AgAmerica, FCB v. Robson, 272 M 413, 901 P2d 100, 52 St. Rep. 800 (1995).

State Job Requirement — Many Years' Worth of Witnesses' Records With State and Others Not Relevant: In an action for judgment declaring that the state requirement that firefighters working for it at an airport and protecting civilian and military aircraft be members of the Montana Air National Guard was unconstitutional, the state asked three firefighter witnesses for the petitioner to produce 20 years' worth of any correspondence with the state, 25 years' worth of any correspondence with the National Guard, numerous types of records of the firefighters' union, and the last 4 years' worth of records of the union's payments to its law firm. The request was overbroad, none of the material may have been relevant to the proceeding, and it was proper to grant the petitioner's motion to quash and for a protective order. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

District Court in Best Position to Determine Good Faith Discovery Efforts: In a products liability case, judgment in favor of the plaintiff was appealed by the defendant on several grounds, including discovery abuses. On appeal, the Supreme Court held that while neither party was altogether cooperative, when the District Court Judge found no abuse, the Supreme Court would not overturn. The District Court Judge is in the best position to determine good faith discovery efforts, and when the court did not abuse its discretion, its determinations relating to disclosure of experts and discovery in general will not be disturbed. Lutz v. Nat'l Crane Corp., 267 M 368, 884 P2d 455, 51 St. Rep. 810 (1994). See also Deonier & Associates v. Paul Revere Life Ins. Co., 2004 MT 297, 323 M 387, 101 P3d 742 (2004).

Denial of Discovery Motions at Trial Made by Party Who Had Eight Months to Discover: It was not an abuse of discretion to deny motions for discovery made after the trial began by a party who had 8 months before the trial to engage in discovery, absent aggravating circumstances, which were not shown in this case. In re Marriage of Caras, 263 M 377, 868 P2d 615, 51 St. Rep. 98 (1994). See also Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Protection of Work-Product Materials in Bad Faith Insurance Action — Ordinary Work Product Versus Opinion Work Product: The District Court ordered production of all of an insurer's claim files dated after the date that plaintiff's attorney expressed that plaintiff would proceed with a bad faith action for failure to settle a claim. Insurer contended that the order was in error because some of the materials were immune from discovery under the work-product doctrine. Normally, claim files are commenced in anticipation of litigation and an investigation must be geared toward the eventuality of litigation; thus, work-product protection applies from the time a claim file is opened (Kuiper v. District Court, 193 M 452, 632 P2d 694 (1981)). However, in a bad faith case, the investigation is not geared toward ultimate bad faith litigation from the time the file is opened because the insurer would have no reason to anticipate litigation and investigations are not made with the expectation of litigation. Materials consisting of work product prepared in anticipation of litigation have a qualified immunity from discovery under this rule, but immunity depends on the type of work product being sought. Ordinary work product that relates to factual matters is discoverable to the extent that it is not privileged and is relevant to the pending action. Opinion work product that relates to mental impressions, opinions, conclusions, or legal theories is provided additional protection because it is necessary to provide a privileged area within which an attorney can analyze and prepare the client's case (U.S. v. Nobles, 422 US 225, 45 L Ed 141, 95 S Ct 2160 (1975)). In a bad faith case in which the issue is whether the insurer had a reasonable basis for denying a claim, the mental impressions and opinions of the insurer are directly at issue. Therefore, a party may discover the opinion work product of the representatives whose mental impressions are at issue only upon a showing of compelling need beyond the substantial need/undue hardship test required by this rule. In this case, admission of the opinion work-product materials affected the insurer's right to a fair trial, warranting a remand. Palmer v. Farmers Ins. Exch., 261 M 91, 861 P2d 895, 50 St. Rep. 1210 (1993).

Standards for Testimonial Waiver of Work Product: The standards for waiver by testimonial use of the work product differ between opinion and ordinary work product. With ordinary work product, once a witness makes testimonial use of the files, the witness implicitly waives the

protections of the work-product doctrine with respect to factual matters covered in the testimony of the witness. However, waiver by testimonial use does not apply to opinion work product unless the testimony directly discloses the witness's impressions. Palmer v. Farmers Ins. Exch., 261 M 91, 861 P2d 895, 50 St. Rep. 1210 (1993). See also In re Martin Marietta Corp., 856 F2d 619 (4th Cir. 1988).

Defendant's Late Disclosure of Expert Caused by Plaintiff's Failure to Make Complete Medical Disclosure: Plaintiff's failure to make complete disclosure of past medical providers started a sequence of late discovery of medical information that to some degree led to defendant's late disclosure of a doctor as a proposed expert witness. The court continued the trial to allow plaintiff time to prepare for cross-examination of defendant's expert. The court did not abuse its discretion when it refused to exclude the expert's testimony. Mason v. Ditzel, 255 M 364, 842 P2d 707, 49 St. Rep. 986 (1992).

Failure to Disclose Identity of Expert Witnesses During Discovery — Reversible Error: It was an abuse of the trial court's discretion to allow the testimony of a land use consultant, a real estate agent, and an appraiser as to the market value of a parcel of land when none of the witnesses were named in interrogatories as experts. Determining the value of the land required expert testimony beyond the scope of ordinary training and intelligence to aid the trier of fact in determining facts in issue. Failure to disclose the names of the witnesses during discovery constituted a violation of this rule and was reversible error. United First Fed. S&L Ass'n v. White-Stevens, Ltd., 253 M 242, 833 P2d 170, 49 St. Rep. 490 (1992).

In Camera Inspection of Private Employment Records — Court Discretion in Suppressing Discovery Proper: The state attempted to compel discovery of defendant's personnel files from the Helena Catholic Diocese. The State sought information regarding reports of similar misconduct, disciplinary actions, transfer records, and witness names to use in rebutting and cross-examining defendant's character witnesses. After initial refusal to surrender the records, the parties agreed to an in camera review of the records by the presiding judge. The judge ruled that the information was not discoverable because it contained personal and private information. The in camera review and the subsequent prohibition on discovery of material that was not probative were held to be within the discretionary power of the judge in controlling discovery. Absent an abuse of that discretion, denial of access to the records was affirmed. St. v. Burns, 253 M 37, 830 P2d 1318, 49 St. Rep. 353 (1992).

Expert Testimony on "New Material" Not Brought Out by Adverse Party: The defendant appealed the exclusion of certain testimony by its expert witness intended to rebut statements made by the plaintiff's witness in response to the defendant's cross-examination. The Supreme Court held that the expert's rebuttal testimony went beyond the scope of his expertise as set out by the defendant in answer to interrogatories and that rebuttal material was only admissible to rebut new material introduced by the adverse party and not to rebut new material brought in as the result of the defendant's cross-examination. Billings Clinic v. Peat Marwick Main & Co., 244 M 324, 797 P2d 899, 47 St. Rep. 1464 (1990).

Incomplete Answers to Interrogatories — Expert Testimony Excluded: The plaintiff in a property condemnation action objected to the testimony of the defendants' expert witnesses on the basis that the interrogatories answered by the defendants did not set forth the basis on which the witnesses would arrive at their conclusions. The Supreme Court held that the answers did not reveal the basis for the witnesses' valuation of just compensation and that therefore the lower court did not abuse its discretion in excluding the testimony. Mont. Power Co. v. Wax, 244 M 108, 796 P2d 565, 47 St. Rep. 1434 (1990).

Court-Ordered Payment of Expert Witness Deposition Fees Contingent on Court-Ordered Discovery: This rule does not require a court to order payment of expert witness deposition fees unless the court orders the discovery, and even then a court may not order payment if manifest injustice would result. Schweigert v. Fowler, 240 M 424, 784 P2d 405, 47 St. Rep. 1 (1990).

Incomplete Answers to Interrogatories Regarding Expert Witness — Expert Testimony Allowed: Plaintiff claimed the trial court erred in allowing the testimony of defendant's expert because defendant failed to adequately answer the discovery request for the substance of the expert's opinion. While the answers were not as complete as they should have been, the expert was not a surprise witness, and plaintiff neglected to compel further answers during the 3 years between the time the answers were made and the time of trial. Refusing to allow the expert to testify would have been an extreme sanction, given that defendant's offense was incompleteness in its answers, not failure to answer. Scott v. E.I. DuPont De Nemours & Co., 240 M 282, 783 P2d 938, 46 St. Rep. 2126 (1989).

Refusal to Allow Deposition of Defense Counsel — Presence of Alternative Methods of Impeachment: The trial court did not err in refusing to allow plaintiff to depose defense counsel

in light of ample alternatives to the deposition by which plaintiff could impeach a witness. These included: (1) the court advising the jury of evidence directly conflicting with the witness's deposition testimony; (2) the court offering to allow into evidence two postdeposition statements written by the witness, despite their hearsay character; and (3) testimony of a second witness that would have asserted recantation of the deposition testimony by the first witness. Scott v. E.I. DuPont De Nemours & Co., 240 M 282, 783 P2d 938, 46 St. Rep. 2126 (1989).

Disclosure of Identity of Nonwitness Experts: The Supreme Court followed the decision in Ager v. Jane C. Stormont Hosp. & Training, 622 F2d 496 (10th Cir. 1980), in holding that the identity of nonwitness experts is discoverable under subsection (4)(B) of this rule only upon a showing of exceptional circumstances. An order of the District Court requiring disclosure of identity was reversed absent a showing of need for the information. State ex rel. Burlington N. RR Co. v. District Court, 239 M 207, 779 P2d 885, 46 St. Rep. 1625 (1989).

Corporate Tax Records and Salary Information to Be Available in Wrongful Discharge Suit: In remanding a wrongful discharge suit in which plaintiff claimed the District Court erred in controlling discovery and pretrial proceedings, the Supreme Court found that upon a proper request for discovery, information that may be used by either party in direct or cross-examination of witnesses must be supplied in accordance with the production request. In this case, that would include copies of federal and state tax records of the defendant corporation as well as salary and bonus information relating to employees in employment situations similar to plaintiff. Hobbs v. Pac. Hide & Fur Depot, 236 M 503, 771 P2d 125, 46 St. Rep. 544 (1989).

Discovery of "Bad Faith" Litigation in Other Jurisdictions: In a federal action for bad faith by an insured against an insurer based upon diversity jurisdiction, the District Court held that information concerning similar "bad faith" litigation against the insurer in other jurisdictions is discoverable if the discovering party establishes to the court's satisfaction that the obligations imposed on the insurer by the other jurisdiction are sufficiently similar to Montana law to warrant a conclusion that the information could reasonably be expected to lead to the discovery of admissible evidence. Baker v. CNA Ins. Co., 45 St. Rep. 2400 (D.C. Mont. 1988) (apparently not reported in Federal Supplement).

Motion to Compel Discovery Denied — Remoteness of Records: Father in a child custody case moved to compel discovery of some of the mother's medical records as relevant to her fitness as a parent. After reviewing the material in camera, the trial court denied the motion, stating that the medical records were too remote in time to be relevant. The trial record repeatedly pointed to the mother's fitness as a parent, and it was squarely within the court's discretion to deny the motion. In re Marriage of Jacobson, 228 M 458, 743 P2d 1025, 44 St. Rep. 1678 (1987).

Doctor's Report to Insurance Company: The defendant doctor's report to his insurer was made after the initiation of legal proceedings and was made in anticipation of litigation and thus is entitled to the qualified protection from discovery. Clark v. Norris, 226 M 43, 734 P2d 182, 44 St. Rep. 444 (1987).

Negligent Suppression of Evidence — Harmless Error: In an appeal involving the negligent suppression of evidence, the court agreed with appellant that the state acted improperly in suppressing four taped witness statements during discovery and a possibly incriminating statement made by appellant during his arrest and in endorsing an additional witness on the first day of trial. However, the court found that the suppressed evidence was either repetitive of other testimony or minimally supportive of a self-defense theory, and that since the defense knew of the additional witness' connection with and importance in the case, it could not convincingly claim surprise at the endorsement. Therefore, all errors were held to be harmless and not grounds for reversal. St. v. Wallace, 223 M 454, 727 P2d 520, 43 St. Rep. 1908 (1986), followed, with regard to application of harmless error rule to admissibility of hearsay testimony, in St. v. Alexander, 265 M 192, 875 P2d 345, 51 St. Rep. 474 (1994).

Driver's Statement to Defendant's Insurer Not Within Work Product Exception: The driver of a vehicle involved in an accident gave a statement to his employer's insurance company before a complaint was filed. There was no indication that an attorney had been hired or that the statement was made at the request of an attorney. Thus, the Supreme Court held that Kuiper v. District Court, 193 M 452, 632 P2d 694, 38 St. Rep. 1288 (1981), did not apply. An insurance claim file is not the same as an attorney's claim file for purposes of the work product rule. The driver's statement was not made "in anticipation of litigation" under Rule 26(b), M.R.Civ.P. The District Court's order denying plaintiffs' motion to compel discovery was reversed. Cantrell v. Henderson, 221 M 201, 718 P2d 318, 43 St. Rep. 745 (1986), followed in State ex rel. Burlington N. RR Co. v. District Court, 239 M 207, 779 P2d 885, 46 St. Rep. 1625 (1989). See also Tigart v. Thompson, 237 M 468, 774 P2d 401, 46 St. Rep. 974 (1989).

Statute of Limitations — Discovery of Injury — Discovery of Legal Rights: Plaintiff was injured in July 1979 while spraying weeds for the Powell County weed board. His attorney advised him in March 1984 that he might have a third-party claim against the persons and companies involved in production, distribution, and sale of the herbicides and spraying equipment. This advisement came 3 ½ years after the attorney was retained. The applicable Statute of Limitations period for actions in negligence and products liability in tort is 3 years. Plaintiff contended that the Statute of Limitations did not begin running until March 1984 when he "discovered" his legal rights. The Supreme Court expressly declined to extend the discovery doctrine to toll the Statute of Limitations until discovery of legal rights rather than discovery of injury, affirming the District Court judgment that plaintiff's tort claims were barred by the 3-year tort Statute of Limitations which began running in July 1979. Bennett v. Dow Chem. Co., 220 M 117, 713 P2d 992, 43 St. Rep. 221 (1986), followed in Carl v. Chilcote, 255 M 526, 844 P2d 79, 49 St. Rep. 1109 (1992).

Presence of Counsel at Physical Examination: During the discovery phase of a personal injury suit, defense counsel filed a motion to obtain an order compelling a neurological examination of the plaintiff. Plaintiff responded by asking for a protective order allowing plaintiff's counsel to be present during the examination or to have the examination videotaped. The trial court granted the motion for the examination but denied plaintiff's motion. On appeal, the Supreme Court stated that the common-law rule allows a party to have his attorney present at any court-ordered physical examination. This has not always been adhered to in the jurisdictions adopting the Federal Rules of Civil Procedure. The court held that a workable interpretation of Rule 35, M.R.Civ.P., is to allow the attorney's presence as a matter of right during the history-taking part of the examination but to exclude the attorney from the examining room while the physician is actually conducting the examination. The physical examination does not require the presence of counsel to safeguard its objectivity, because in most instances it is nonadversarial. Mohr v. District Court, 202 M 423, 660 P2d 88, 40 St. Rep. 185 (1983).

Attorney Opinion Work Product — No Litigation in Progress: Opinion work product of an attorney is entitled to substantially greater protection than ordinary work product. It extends to those impressions rendered during the investigation of a claim, even where no litigation is in progress. Kuiper v. District Court, 193 M 452, 632 P2d 694, 38 St. Rep. 1288 (1981).

Waiver — Attorney-Client Privilege: Case was remanded with direction to hold a hearing with respect to evidence bearing upon whether the documents were involuntarily produced pursuant to court order (thus no waiver) or disseminated widely enough without legal objection by Goodyear as to constitute a waiver of the attorney-client privilege or work product rule. Kuiper v. District Court, 193 M 452, 632 P2d 694, 38 St. Rep. 1288 (1981).

Work Product of Terminated Litigation in Possession of Opposing Counsel: Even though opposing counsel has possession of documents prepared for litigation and that litigation has terminated, the work product rule may still afford protection against use of those documents in future litigation. Kuiper v. District Court, 193 M 452, 632 P2d 694, 38 St. Rep. 1288 (1981).

Deposition of Expert Witness: When an expert witness is employed for purposes of a lawsuit, his activities prior to the employment for the particular lawsuit are discoverable under Rule 26(b)(1), M.R.Civ.P., even if the prior activities include employment with the same party employing the witness in the present lawsuit. Sullivan v. Sturm, Ruger & Co., Inc., 80 FRD 489, 35 St. Rep. 2023 (D.C. Mont. 1978).

Privileged Matter — P.S.C.: Interrogatories which sought privileged material and were irrelevant were not required to be answered by the Public Service Commission. P.S.C. v. District Court, 162 M 225, 511 P2d 334 (1973).

Utility Rate Case — Privileged Matter: Interrogatories by rate protestors to Public Service Commission, seeking information as to amounts, values, costs, and details of parts of property, were unrelated to main inquiry of lawfulness or reasonableness of rates, and such information was thus privileged and not relevant under this rule. P.S.C. v. District Court, 162 M 225, 511 P2d 334 (1973).

Breach of Insurance Contract — Unreasonable Request: In action by insured against insurance company seeking damages for breach of contract and punitive damages for violations of the insurance code, trial court abused discretion in ordering answer to interrogatory requesting names and addresses of all persons within the state who had made a claim against the insurance company and whose claims the insurance company had either refused to pay or had not paid in full during the last 3 years. Even if relevant and material to issues pleaded, the interrogatory was unreasonable since the value of the information sought did not bear a reasonable relationship to the annoyance and expense involved in answering the interrogatory. State ex rel. Bankers Life & Cas. Co. v. Miller, 160 M 256, 502 P2d 27 (1972).

Failure to Provide Name of Witness — Effect: Court erred in allowing expert witness to testify when the name of the witness was not provided in answer to properly propounded interrogatory. Smith v. Babcock, 157 M 81, 482 P2d 1014 (1971).

Identity of Witnesses Discoverable: The identity of a traffic engineer who will testify in a collision case involving a question of concurrent negligence is discoverable under this rule. Smith v. Babcock, 157 M 81, 482 P2d 1014 (1971).

Inspection of Land: In eminent domain proceeding, the State was granted the right to inspect the condemned land to gather evidence on the issue of lack of water. State ex rel. Highway Comm'n v. District Court, 147 M 348, 412 P2d 832 (1966).

Law Review Articles

Rule 37 Sanctions: Deterrents to Discovery Abuses, Irigoin, 46 Mont. L. Rev. 95 (1985).

Failure to Disclose Names and Addresses of Witnesses in Discovery Proceedings, Greef, 35 Mont. L. Rev. 144 (1974).

Collateral References

Depositions *key* 64(2).

26A C.J.S. Depositions §67.

Discovery, in medical malpractice action, of names and medical records of other patients to whom defendant has given treatment similar to that allegedly injuring plaintiff. 66 ALR 5th 591.

Propriety of allowing state court civil litigant to call nonexpert witness whose name or address was not disclosed during pretrial discovery proceedings. 63 ALR 4th 712.

Propriety or allowing state court civil litigant to call expert witness whose name or address was not disclosed during pretrial discovery proceedings. 58 ALR 4th 653.

Protective orders limiting dissemination of financial information obtained by deposition or discovery in state civil actions. 43 ALR 4th 121.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection. 73 ALR 2d 12.

Propriety of compelling witness to testify, in pretrial proceeding, as to matters which would be prohibited in trial testimony by dead man's statute. 42 ALR 2d 578.

Names and addresses of witnesses to accident or incident as subject of pretrial discovery under Fed.R.Civ.P. 37 ALR 2d 1160.

Privilege of communications or reports between liability or indemnity insurer and insured. 22 ALR 2d 649.

Discovery as available for purpose of determining who should be sued. 125 ALR 861.

Making copies of records or writings part of deposition. 59 ALR 530.

Protection from discovery of attorney's opinion work product under Rule 26(b)(3), Federal Rules of Civil Procedure. 84 ALR Fed. 779.

Pretrial discovery of facts known and opinions held by opponent's experts under Rule 26(b)(4) of Federal Rules of Civil Procedure. 33 ALR Fed. 403.

Rule 26(c). Protective orders.

Advisory Committee's Comment on December 31, 1975, Amendment

It is the concensus [sic] of the Advisory Committee that the discovery procedure in the Montana Courts should coincide with the Federal practice.

Compiler's Comments

Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to conform with Rule 26, Fed.R.Civ.P. The substance of this rule was previously contained in Rule 30(b), M.R.Civ.P., prior to the 1975 amendment of that rule. As of May 1, 1990, the rule was identical to the Federal Rule.

Case Notes

No Prejudice by Inability to Depose or Call Child Accident Victim as Witness: A 3-year-old child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. The state sought to depose the child and call him as a witness in the ensuing trial, but the District Court concluded that because of the child's age, little probative information could be gained by forcing him to testify and that such testimony would be traumatic and unduly burdensome, so testimony at deposition and trial was denied. On appeal, the Supreme Court affirmed. Although there is no minimum age requirement regarding child testimony, nevertheless, child witnesses need protection against the potential emotional and psychological injuries that may occur with regular litigation procedures. Any information that the child could have provided was available from other witnesses and was thus needlessly cumulative and subject to exclusion under Rule 403, M.R.Ev. (Title 26, ch. 10). The state was not

prejudiced by its inability to call the child as a witness, and the District Court did not abuse its discretion in protecting the child from having to testify at deposition and trial. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Order Precluding Counsel From Attending and Recording of Independent Medical Examination Affirmed: The District Court in an automobile accident negligence case ordered Hegwood to obtain an independent medical examination pursuant to Rule 35, M.R.Civ.P., but denied Hegwood's motion to allow her attorney to attend the examination and to allow a court reporter and video recorder to document the entire examination on grounds that the discovery request was overbroad. Hegwood appealed, but the Supreme Court affirmed. A medical examination ordered under Rule 35, M.R.Civ.P., is a nonadversarial proceeding, but when an examinee sufficiently demonstrates subjective predilections or the likelihood of prejudice, the examination shifts from independent in nature to adversarial. Courts and litigants should thus rely on the protective measures in Rule 35(a), M.R.Civ.P., and this rule to negate the inequities. Here, the record did not support the desired intrusion into the examination room, nor did a demonstration that the examiner performed examinations for the insurance industry inherently establish the degree of prejudice or potential for abuse necessary. A District Court has discretion to control discovery to administer trials in order to ensure a fair trial for all concerned and is in a better position than the Supreme Court to supervise day-to-day discovery operations, so an order affecting discovery will not be overturned unless it amounts to an abuse of discretion. Prohibiting attendance by Hegwood's attorney and the recording of the examination was not an abuse of discretion. Hegwood v. District Court, 2003 MT 200, 317 M 30, 75 P3d 308 (2003), clarifying Mohr v. District Court, 202 M 423, 660 P2d 88 (1983).

Supervisory Control Denied to Address Discovery Issues: Petitioner sought a writ of supervisory control to address a District Court order directing petitioner to submit to discovery through an independent medical examination in an automobile accident negligence case. The Supreme Court declined to exercise supervisory control. Typically, orders pertaining to discovery are interlocutory in nature and are not generally reviewable in an original proceeding. Original jurisdiction will be exercised when an order places a party at a significant disadvantage in litigating a case. Supervisory control should issue when a District Court proceeds under a mistake of law, causing a gross injustice for which an appeal is not an adequate remedy, but supervisory control is an extraordinary remedy exercised only in extraordinary circumstances. Absent a showing that procedural protections were inadequate to control discovery in an independent medical examination, supervisory control was inappropriate. Hegwood v. District Court, 2003 MT 200, 317 M 30, 75 P3d 308 (2003).

State Job Requirement — Many Years' Worth of Witnesses' Records With State and Others Not Relevant: In an action for judgment declaring that the state requirement that firefighters working for it at an airport and protecting civilian and military aircraft be members of the Montana Air National Guard was unconstitutional, the state asked three firefighter witnesses for the petitioner to produce 20 years' worth of any correspondence with the state, 25 years' worth of any correspondence with the National Guard, numerous types of records of the firefighters' union, and the last 4 years' worth of records of the union's payments to its law firm. The request was overbroad, none of the material may have been relevant to the proceeding, and it was proper to grant the petitioner's motion to quash and for a protective order. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Refusal to Allow Deposition of Defense Counsel — Presence of Alternative Methods of Impeachment: The trial court did not err in refusing to allow plaintiff to depose defense counsel in light of ample alternatives to the deposition by which plaintiff could impeach a witness. These included: (1) the court advising the jury of evidence directly conflicting with the witness's deposition testimony; (2) the court offering to allow into evidence two postdeposition statements written by the witness, despite their hearsay character; and (3) testimony of a second witness that would have asserted recantation of the deposition testimony by the first witness. Scott v. E.I. DuPont De Nemours & Co., 240 M 282, 783 P2d 938, 46 St. Rep. 2126 (1989).

Motion for Protective Order Not Granted — Motion In Limine Granted — Attorney Fees Appropriate: A motion for a protective order filed under Rule 26(c), M.R.Civ.P. (see Title 25, ch. 20), seeking court guidance as to requested discovery, was never actually granted; however, attorney fees were appropriate under Rule 37(a)(4), M.R.Civ.P. (see Title 25, ch. 20), when the line of discovery was disposed of as irrelevant by the granting of a motion in limine, which in effect granted the motion for the protective order. In re Marriage of Cole, 224 M 207, 729 P2d 1276, 43 St. Rep. 2136 (1986).

Petition to Remove Personal Representative — Discovery Limited: The District Court did not err by ruling that copersonal representatives did not have to answer interrogatories filed in

relation to petitioner's motion to remove the personal representatives. This is within the court's discretion to limit discovery under the Montana Rules of Civil Procedure. In re Estate of Counts, 217 M 350, 704 P2d 1052, 42 St. Rep. 1243 (1985).

Unjustifiably Repetitious Demands: The District Court's issuance of a protective order was proper when the obligor in a child support action was requesting all of his daughter's wage stubs and wage information even though he had already requested and received her W-2 statements containing the same information. A protective order may be issued to prevent harassment of one party by another, including the protection of a party from unjustifiably repetitious demands. State of Oregon ex rel. Worden v. Drinkwalter, 216 M 9, 700 P2d 150, 42 St. Rep. 599 (1985).

Dismissal of Police Officer — Records of Other Disciplinary Proceedings Not Relevant — Protective Order Proper: In a police commission proceeding for dismissal of a police officer, defendant police officer was denied, under Rule 26(c), M.R.Civ.P. (Title 25, ch. 20), access to records of other police disciplinary proceedings which he planned to introduce in support of his defense of "discriminatory law enforcement". The evidence was not relevant to the proceeding, and the protective order was properly granted. In re Raynes, 215 M 484, 698 P2d 856, 42 St. Rep. 569 (1985).

Misrepresentation and Improper Process by Attorney — Sanctions: Since under 33-1-602 defendant, a foreign insurer, could only be served by service upon the Commissioner of Insurance, personal jurisdiction over insurer was not obtained when it was served at its Billings claim office. Thus, when plaintiffs' attorney appealed quashing of the service, the appeal was dismissed. Plaintiffs' attorney represented to the District Court's personnel that he had won the appeal and was entitled to a default judgment, and the personnel entered one against insurer for $150,000 punitive damages and $385 costs. The default judgment was void for want of jurisdiction, and the District Court correctly vacated it. As insurer was not properly served, the District Court properly ruled plaintiffs could not take depositions. The attorney was properly adjudged liable to insurer for $4,031.50 under 37-61-406, stating that an attorney guilty of deceit or collusion with intent to deceive the court or a party forfeits to the party injured by his deceit or collusion treble damages. LaFountaine v. St. Farm Mut. Auto. Ins. Co., 215 M 402, 698 P2d 410, 42 St. Rep. 496 (1985).

Interlocutory Review of Interrogatories Rulings — Exhaustion of Remedies Required: Applicant for a Writ of Supervisory Control seeking reversal of lower court's order denying applicant's objections to interrogatories failed to exhaust its remedies in lower court where it did not apply there for a protective order under this rule or for an order under Rule 37(a)(4), M.R.Civ.P., assessing costs and attorney fees against its opponent should the lower court order be reversed on appeal. State ex rel. Guarantee Ins. Co. v. District Court, 194 M 64, 634 P2d 648, 38 St. Rep. 1682 (1981).

Trade Secrets — When to Be Disclosed and to Whom — Protectable Property: A telephone utility was required to disclose trade secrets to the Public Service Commission (P.S.C.) to aid in a decision on its rate increase request. The utility was entitled to a protective order preventing access to the secrets by the general public, but the Montana Consumer Counsel and any citizen whose interest related to the ratemaking function of the P.S.C. could have access to the information. Use or disclosure of the trade secrets except for purposes of the ratemaking proceeding was prohibited. Mtn. States Tel. & Tel. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181, 38 St. Rep. 1479 (1981). Mtn. States and its progeny were overruled to the extent that those decisions relied on the constitutional balancing test of the right to individual privacy against the public's right to examine documents or observe governmental deliberations as a basis of protecting trade secrets and other confidential proprietary information of nonhuman entities in Great Falls Tribune v. Mont. Pub. Serv. Comm'n, 2003 MT 359, 319 M 38, 82 P3d 876 (2003).

"Public Policy" Not Grounds for Refusal to Testify or for Protective Order: Opposing counsel sought to prevent counsel for plaintiff from deposing Goodyear executives regarding facts contained in the documents that were in discovery dispute and witnesses with knowledge about a National Highway Traffic Safety Administration recall investigation. The District Court erroneously issued a protective order on the basis of the public interest in encouraging frank and open communications with the government. The rule regarding refusal to testify does not provide for refusal on "public policy" grounds. Even if it did, public policy militates in favor of disclosure. Kuiper v. District Court, 193 M 452, 632 P2d 694, 38 St. Rep. 1288 (1981).

Violation of Protective Order — Motion to Strike Granted: Protective relief was granted to strike from an amended complaint quotations and purported quotations from legal opinions prepared by defendant's attorneys for defendant and turned over to plaintiff's attorney in accordance with in camera inspection ordered by the District Court, which provided that the

opinions were to be treated as confidential material and were not to be made a part of the court record or otherwise disclosed to other persons. State ex rel. Union Oil Co. of Calif. v. District Court, 160 M 229, 503 P2d 1008 (1972).

Limitation of Examination: In a libel action it was not error for the trial judge to issue a minute entry order refusing to require the defendant to answer questions submitted by the plaintiff as the court has the power to limit the examination and protect him from annoyance, embarrassment, or oppression. Steffes v. Crawford, 143 M 43, 386 P2d 842 (1963).

Collateral References

Depositions *key* 23, 42, 52.

26A C.J.S. Depositions §§20, 39, 44.

23 Am. Jur. 2d Depositions and Discovery §§84 through 107.

Discovery and production of documents as affected by Rule 30(b), Fed.R.Civ.P., and similar state statutes and rules, relating to preventing, limiting, or terminating the taking of depositions. 70 ALR 2d 777.

In camera trial or hearing and other procedures to safeguard trade secret or the like against undue disclosure in course of civil action involving such secret. 62 ALR 2d 509.

Discovery or inspection of trade secret, formula, or the like. 17 ALR 2d 383.

Rule 26(d). Sequence and timing of discovery.

Advisory Committee's Comment on December 31, 1975, Amendment

It is concensus [sic] of the Advisory Committee that the discovery procedure in the Montana Courts should coincide with the Federal practice.

Compiler's Comments

Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to conform with Rule 26, Fed.R.Civ.P. As of May 1, 1990, the rule was still identical to the Federal Rule.

Case Notes

Allowing Surprise Expert to Testify Two Months Later After Two-Month Delay in Trial: On the first day of a divorce trial, the judge excluded wife's expert because the wife had not timely supplemented interrogatories to notify her husband of the expert. Relying on this, the husband declined the judge's offer of a continuance. At the close of the first day of trial, the husband requested a continuance to brief another issue. Because of scheduling problems, the case resumed nearly 2 months later. The wife's expert was allowed to testify. The husband claimed surprise and that his trial tactics were negated. It was not clear from the record when or why the court retracted its order excluding the wife's expert, but the Supreme Court concluded that no abuse of discretion was shown in view of the 2-month delay. If the husband contends (the case was remanded on other grounds) that he should be allowed to submit additional evidence, he may present that request to the trial court. In re Marriage of Dirnberger, 237 M 398, 773 P2d 330, 46 St. Rep. 898 (1989).

Rule 26(e). Supplementation of responses.

Advisory Committee Notes

NOTE TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 26(e), as amended 1963.

Explanation of change: This amendment conforms to the amendment of Rule 28(b).

COMMENT ON DECEMBER 31, 1975, AMENDMENT

It is the concensus [sic] of the Advisory Committee that the discovery procedure in the Montana Courts should coincide with the Federal practice.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to conform with Rule 26, Fed.R.Civ.P. As of May 1, 1990, the rule was still identical to the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Informal Witness Discovery Process Compromising Ability to Formulate Trial Strategy — Irregularities Constituting Abuse of Discretion Preventing Fair Trial — New Trial Warranted: If a District Court acts arbitrarily or without conscientious judgment or exceeds the bounds of reason in denying a new trial, it constitutes an abuse of discretion so significant as to materially affect the substantial rights of a complaining party. In the present case, the District Court devised a late hour informal expert witness discovery process that provided no opportunity for plaintiffs to obtain information exclusively in possession of defendants' expert prior to trial. Although the control of discovery activities, including the use of interrogatories, is within the discretion of the District Court, each party has a duty to supplement or amend answers to interrogatories in a timely manner, in order to make all relevant facts available to parties in advance of trial and to reduce the possibility of surprise or unfair advantage. Here, plaintiffs' lack of opportunity to depose defendants' expert, in the face of an inadequate discovery response, materially affected plaintiffs' substantial rights. The District Court's informal discovery process compromised plaintiffs' ability to formulate an effective trial strategy and to prepare adequately for witness cross-examination, which placed plaintiffs at a serious disadvantage. The discovery irregularities constituted an abuse of discretion that materially affected plaintiffs' substantial rights, entitling plaintiffs to a new trial, and the District Court's denial of a new trial motion was therefore reversed. Perdue v. Gagnon Farms, Inc., 2003 MT 47, 314 M 303, 65 P3d 570 (2003).

Reversible Error in Failure to Disclose Expert Witness — Prejudice to Opposing Party: Despite its continuing duty to disclose the identity of each person expected to be called as an expert witness, the subject matter on which the person is expected to testify, and the substance of the person's testimony, defendant failed to disclose an expert witness prior to trial despite several opportunities to do so. Failure to disclose an expert witness constitutes reversible error and will usually prejudice the opposing party because the opposing party has no time to: (1) prepare for the witness; (2) effectively plan for cross-examination of the witness; and (3) obtain an expert to refute or question the testimony of the witness. Here, plaintiff initially listed a person as a witness, but not as an expert, and did not learn that the person would be called as a witness until he was called by defendant as an expert to refute plaintiff's experts. Therefore, plaintiff was prejudiced by defendant's failure to identify the person as an expert witness in response to discovery requests and in the scheduling order agreed upon by the parties, and the District Court abused its discretion by allowing the person to testify. The case was reversed and remanded for a new trial. Superior Enterprises, LLC v. Mont. Power Co., 2002 MT 139, 310 M 198, 49 P3d 565 (2002).

Failure to Identify Experts or Supplement Discovery Request — Reversible Error: Miranti failed to provide the identity of expert witnesses even though he agreed to do so in his answers to interrogatories. He also failed to comply with his continuing obligation to supplement his answers and submit a list of experts prior to trial even though he was given numerous opportunities to do so. These failures severely limited cross-examination of the witnesses after they were qualified as experts and had testified as such over objection. Allowing this evidence amounted to an abuse of discretion and constituted reversible error. Miranti v. Orms, 253 M 231, 833 P2d 164, 49 St. Rep. 478 (1992).

Surprise Expert Testimony by CPA Requiring Reversal: In suit involving a complex three-way property exchange between defendants (developer and builders) and plaintiff purchasers, developer, who was a CPA, was allowed, over plaintiffs' objection that it was surprise expert testimony, to testify for defendants as to a document he prepared that analyzed an exhibit by plaintiffs and included calculations regarding the property and exchange. He had not been listed as an expert witness. The testimony was expert testimony and an unfair surprise, requiring reversal of the judgment that, on the whole, went against plaintiffs. Vestre v. Lambert, 249 M 455, 817 P2d 219, 48 St. Rep. 769 (1991).

Improper Admission of Testimony of Expert — Reference to Unintroduced Exhibit — No Surprise: During his testimony, defendants' expert referred to a document that was not listed during discovery as one of the documents upon which he based his opinion and that was not a document to which he had access prior to deposition. Plaintiffs alleged surprise as grounds for a new trial, asserting defendants should have supplemented the expert's responses to his deposition, consistent with this rule, to reveal that the expert had gained access to the report subsequent to deposition. However, the expert also testified that he had formed his opinion prior to receipt of the report and that the report did not affect his analysis or conclusion. Because plaintiffs were unable to show that the surprise had a material bearing on the case or that the result of a new trial would probably be different, they were not entitled to a new trial because of

improper admission of the expert's testimony. Boyd v. St. Medical Oxygen & Supply, Inc., 246 M 247, 805 P2d 1282, 47 St. Rep. 1923 (1990).

No Error to Exclude Expert Testimony: The trial court did not err in excluding proposed expert testimony because the witness had been disclosed prior to trial only as a lay witness, not as an expert. This rule serves to minimize the element of unfair surprise. Massman v. Helena, 237 M 234, 773 P2d 1206, 46 St. Rep. 764 (1989).

Continuing Interrogatory — Unsigned Statement by Other Party: An unsigned "Report of Facts" form filled out by plaintiff for defendant's insurance company shortly after an auto accident should have been produced in response to a continuing interrogatory relating to statements obtained by defendant from anyone, and since it was not produced, it was reversible error for it to be used by defendant to cross-examine plaintiff. Thibaudeau v. Uglum, 201 M 260, 653 P2d 855, 39 St. Rep. 2096 (1982).

Sanctions Not Applicable to Interrogatories Propounded by Other Party Absent Order: When a party failed to correctly provide answers to a continuing interrogatory propounded by the other party, the sanctions of Rule 37(b) do not apply because that rule relates to the failure to comply with a court order compelling discovery. Thibaudeau v. Uglum, 201 M 260, 653 P2d 855, 39 St. Rep. 2096 (1982).

Interview of Unnamed Witness — Consent to Alleged Noncompliance With Duty to Supplement: On appeal, a father suing for injury to his son found submerged in defendant's swimming pool alleged pretrial discovery abuse by defendant in that defendant was allowed to add a witness the day before trial and had known the location of the witness but failed to inform the father of the address, in violation of defendant's duty to supplement its interrogatory answers. It was not reversible error to allow the witness to testify. The testimony was probative on important fact issues, and the father interviewed the witness before trial and rejected an offered continuance. The father was not entitled to have his cake and eat it too. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982).

Law Review Articles

Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 320 (1983).

Rule 26(f). Discovery conference.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 26(f). The amendment conforms the rule to the 1980 Amendment of the Federal Rule which has not previously been adopted by Montana. For a discussion of the amendment see the advisory committee note to the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Source: This rule is based on the new subdivision 26(f) added in 1980 to the Federal Rule.
Identity With Federal Rule: As of May 1, 1990, the rule was identical to the Federal Rule.
Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Rule 26(g). Signing of discovery requests, responses, and objections.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivisions 26(a), (b) and (g). These amendments conform the rule to the 1983 Amendments of the Federal Rule. For a discussion of the amendments see the advisory committee note to the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Source: This rule is based on the new subdivision 26(g) added in 1983 to the Federal Rule.

Identity With Federal Rule: As of May 1, 1990, the rule was identical to the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Discovery Requests Designed to Harass and Embarrass Opposing Counsel Worthy of Sanction: Counsel for the heirs to an estate filed for sanctions against the estate's attorneys, contending that the estate's attorneys had knowingly misrepresented provisions of the Insurance Code and presented unwarranted positions of law to the District Court. The estate's attorneys subsequently filed for a protective order and sanctions against the heirs' attorney, arguing that various discovery requests were abusive, harassing, and constituted a personal attack on the estate's attorneys. The District Court denied the heirs' attorney's motion and granted the estate's attorneys' motion, and the Supreme Court affirmed, finding adequate evidence in the record that the discovery requests in question were not designed to elicit any relevant information, but rather were designed to harass and embarrass opposing counsel and needlessly increase the costs of litigation. In re Estate of Miles v. Miles, 2000 MT 41, 298 M 312, 994 P2d 1139, 57 St. Rep. 191 (2000).

Standard of Review From District Court Order Denying Sanctions: The Supreme Court adopted the following standard of review from a District Court's order denying sanctions pursuant to this rule: (1) The District Court's findings of fact will not be overturned unless clearly erroneous. (2) The District Court's conclusion that the facts do or do not constitute a violation of this rule will not be reversed absent an abuse of discretion. (3) If the District Court concludes that this rule has been violated, sanctions must be imposed upon the offending party, and failure to do so will be considered reversible error. (4) The nature and extent of sanctions imposed by the District Court pursuant to a violation of this rule will not be reversed absent an abuse of discretion. In the case at hand, the District Court did not enter findings pertaining to this rule and did not draw any conclusion as to whether the rule was or was not violated prior to denying plaintiff's motion for sanctions; therefore, the Supreme Court vacated the part of the order denying sanctions and remanded for more specific findings pursuant to this rule. Fjelstad v. St., 267 M 211, 883 P2d 106, 51 St. Rep. 1047 (1994).

Dismissal With Prejudice Proper Sanction For Actively Withholding Relevant Information: In a personal injury suit, the plaintiff and her attorney purposely withheld information concerning the plaintiff's prior medical history. The lower court, relying on Rule 37, M.R.Civ.P., dismissed the plaintiff's case with prejudice. The Supreme Court held that the dismissal was not proper under Rule 37(b) or (d), M.R.Civ.P., but was justified under this rule and therefore upheld the dismissal. Jerome v. Pardis, 240 M 187, 783 P2d 919, 46 St. Rep. 2042 (1989).

Rule 27. Depositions before action or pending appeal

Case Notes

Entitlement to File Claim — Precludes Deposition: A personal injury action arose from an automobile accident. Once the personal injury issue was resolved, plaintiff intended to pursue a bad faith tort action against the insurer. Plaintiff petitioned to perpetuate the testimony of the claims examiner. In Fode v. Farmers Ins. Exch., 221 M 282, 719 P2d 414, 43 St. Rep. 814 (1986), the court held that in cases involving a bad faith insurance claim, the bad faith claim must be suspended until the liability issues have been determined. The bad faith claim may be filed, but no discovery may be engaged in. The ability to file the bad faith claim is the same as the ability to bring an action. Therefore under this rule, the petition to perpetuate testimony was properly denied. In re Petition of Johnson, 224 M 337, 728 P2d 1354, 43 St. Rep. 2232 (1986).

Rule 27(a). Before action.

Commission and Advisory Committee Notes

COMMISSION NOTE

The rule is identical with the Federal Rule, except for changes to conform to state practice. In subdivision (a)(1) "any district court of the State of Montana" is substituted for "any court of the United States." In subdivision (a)(2) the second sentence has been changed: service is to be had under proposed Rule 4, whether personal or by publication or otherwise, and for persons not personally served and who do not appear an attorney is appointed to cross-examine the deponent. In subdivision (a)(4) "district court of the State of Montana" is substituted for "United States district court," and provision for the use of depositions is confined to those taken under these rules.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

The amendment corrects the reference to the wrong rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendments: The amendment of October 9, 1984, in (4) changed internal reference from Rule 26(d) to Rule 32(a).

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Motion to Retake Deposition Denied — No Relevancy — Improper Motion: Denial of motion to retake a deposition was not an abuse of discretion when the subject of the deposition was totally irrelevant to the issues and when movant claimed the other side improperly withheld, during discovery, information that would have made movant's deposition more valuable. Movant, however, failed to use the exclusive remedy of moving for an order compelling discovery. Tocco v. Great Falls, 220 M 221, 714 P2d 160, 43 St. Rep. 310 (1986).

Evidentiary Use Contemplated — Lack of Allegation: Where a petition for the taking of a deposition is barren of any allegation that it is sought for the purpose of perpetuating his testimony or that it is sought for use at a contemplated trial in the event that such person at that time would be unable to give testimony, and in fact the petition shows that it is for the purpose of ascertaining the financial capabilities of the party, it should be denied. State ex rel. Neilson v. District Court, 128 M 445, 277 P2d 536 (1954).

Good Faith Required: An application for perpetuation of testimony must be made in good faith for the purpose of obtaining, preserving, and using material testimony. State ex rel. Neilson v. District Court, 128 M 445, 277 P2d 536 (1954); State ex rel. Woodard v. District Court, 120 M 585, 189 P2d 998 (1948).

Privilege Against Self-Incrimination: Where petition for deposition alleges facts which show that the person whose testimony is desired could be charged with a felony to compel the person to so testify would be a violation of Art. III, sec. 18, 1889 Mont. Const. (now Art. II, sec. 25, 1972 Mont. Const.). State ex rel. Neilson v. District Court, 128 M 445, 277 P2d 536 (1954).

Objection to Order Allowing Discovery: Where order of court on application to perpetuate testimony was complained of, the remedy was to apply to the court to vacate or modify the order under 25-4-103 and not by direct application to the Supreme Court for a Writ of Certiorari. State ex rel. Lichte v. District Court, 121 M 34, 189 P2d 1004 (1948); State ex rel. Woodard v. District Court, 120 M 585, 189 P2d 998 (1948).

Issue to Be Shown: Where a deposition is to be taken an issue should be tendered by the affidavit, application or complaint, sufficiently definite to disclose that the testimony sought is relevant and pertinent to the framed or proposed issue. State ex rel. Woodard v. District Court, 120 M 585, 189 P2d 998 (1948).

Records to Be Produced — Subpoena Required: Where no subpoena duces tecum has been issued, witness named in application for perpetuation of testimony cannot be compelled to bring before the magistrate the records, books, and papers. State ex rel. Woodard v. District Court, 120 M 585, 189 P2d 998 (1948).

Order as Unlawful Search and Seizure: An order for perpetuation of testimony which compels the deponent to come with all his books and records, expose everything he has that tells the story of his business for 25 years, and submit it all to the scrutiny of the man who is planning a lawsuit against him in order that the facts necessary for the complaint may be found, is clearly in violation of the constitutional right against unlawful search and seizure. State ex rel. Pitcher v. District Court, 114 M 128, 133 P2d 350 (1943), distinguished in Woodard v. District Court, 120 M 585, 189 P2d 998 (1948).

Nonresident Defendants: While section 93-2301-2, R.C.M. 1947 (superseded by Rule 27(a), M.R.Civ.P.), did not in express terms provide for perpetuation of testimony where defendant is a nonresident of the state, the only jurisdictional requisite was the contemplation of an action in a court in this state, irrespective of domicile. State ex rel. Cook v. District Court, 102 M 424, 58 P2d 273 (1936).

Adverse Party as Deponent: Since an adverse party may be a witness, his testimony may be taken. State ex rel. Holcomb v. District Court, 54 M 574, 172 P 329 (1918).

Requirements for Order Complied With: A petition for the perpetuation of testimony which recited that the applicant expected to be a party to an action in a District Court of this state, naming the intended adverse parties and stating the nature of the controversy, the residence of the witnesses, and that accounts and records in their keeping, and which they were desired to bring with them, were necessary to illustrate and make understandable their testimony, was sufficient to entitle petitioner to the order prayed for. State ex rel. Holcomb v. District Court, 54 M 574, 172 P 329 (1918), distinguished in State ex rel. Smith v. District Court, 112 M 506, 118 P2d 141 (1941) and State ex rel. Pitcher v. District Court, 114 M 128, 133 P2d 350 (1943).

Collateral References

Depositions *key* 1 through 111(3).

26A C.J.S. Depositions §§1 through 105.

23 Am. Jur. 2d Depositions and Discovery §4.

Existence and nature of cause of action for equitable bill of discovery. 37 ALR 5th 645.

Right to perpetuation of testimony under Rule 27 of Federal Rules of Civil Procedure. 60 ALR Fed. 924.

Rule 27(b). Pending appeal.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Rule Not a Substitute for Discovery: Plaintiff sought to depose an additional witness following the entry of summary judgment against him. The Supreme Court held that after a judgment has been entered in a case, further discovery is inappropriate unless specifically granted under Rule 27(b), M.R.Civ.P. Rule 27(b) is not a substitute for discovery. It is available in special circumstances to preserve testimony which otherwise could be lost. The plaintiff had sufficient opportunity for discovery before the entry of the judgment, and he cannot supplement an inadequate record on appeal by way of reliance upon this deposition. Scott v. Robson, 182 M 528, 597 P2d 1150 (1979).

Rule 27(c). Perpetuation by petition.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule, except that the word "proceeding" had been substituted for "action".

Rule 28. Persons before whom depositions may be taken

Rule 28(a). Within the United States.

Commission Notes

Subdivision (a) is the same as the Federal Rule, except that it is adjusted to state practice by appropriate reference to deposition within the State of Montana and to persons authorized by the laws of this state to administer oaths.

Compiler's Comments

Identity With Federal Rule: Through July 31, 1980, the Montana Rule bore a closer resemblance to the Federal Rule. On August 1, 1980, an amendment to the Federal Rule took effect substituting "jurisdiction" for "dominion" and adding a final sentence stating that the "term officer as used in Rules 30, 31 and 32 includes a person appointed by the court or designated by the parties under Rule 29". As of May 1, 1990, the foregoing comment was still applicable.

Collateral References

Depositions *key* 48 through 54.

26A C.J.S. Depositions §§17 through 21, 59.

Change of place of taking of deposition. 70 ALR 2d 726.

Rule 28(b). In foreign countries.

Advisory Committee's Note to September 29, 1967, Amendment

Source: Fed. R. Civ. P. 28(b), as amended 1963.

Explanation of change: The amendment of clause (1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice.

It makes clear that the appointment of a person by commission in itself confers power upon him to administer any necessary oath.

It negates the judicial requirement sometimes stated that letters rogatory will not issue unless the use of a notice or commission is shown to be impossible or impractical. It permits a sound choice between depositions under a let[t]er rogatory and on notice or by commission in the light of all the circumstances.

In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. The last sentence of the amended subdivision provides, contrary to the implications of some authority, that evidence recorded in such a fashion need not be excluded on that account. Whether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case.

Compiler's Comments

Identity With Federal Rule: As a result of the 1967 amendment to Rule 28(b), M.R.Civ.P., and as of May 1, 1990, this rule was still identical to the Federal Rule which was itself amended in 1963.

Rule 28(c). Disqualification for interest.

Commission Notes

Subdivision (c) of the rule is identical with the Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Rule 28(d). Depositions to be used in other states.

Commission Notes

Subdivision (d) is new. It is deemed essential to continue the power to compel attendance of witnesses now provided by R.C.M. 1947, sec. 93-1801-14 [repealed], and to continue the comity presently provided by R.C.M. 1947, sec. 93-1801-13 [repealed].

Compiler's Comments

2001 Amendment: Near end after "may issue" deleted "pursuant to Rule 45(d)". Amendment effective December 31, 2001.

Sections Repealed and Superseded: The R.C.M. 1947 sections referred to in the commission notes above have been superseded by Rules 26 and 28 through 32, M.R.Civ.P.

Collateral References

Depositions *key* 12, 64(1), 78.

26A C.J.S. Depositions §10.

Rule 28(e). Deposition to be taken in sister states and foreign countries for use in this state.

Advisory Committee Notes

Officials in some sister states have insisted upon some specific authorization for the issuance of subpoenas by them for use in Montana litigation. The amendment provides that authority.

Compiler's Comments

Identity With Federal Rule: This rule has no counterpart in the Federal Rules.

Rule 29. Stipulations regarding discovery procedure.

Advisory Committee Comment on December 31, 1975, Amendment

The Committee recommended that the last portion of the Federal rule which requires Court approval for a stipulation for extension of time be omitted. It was the feeling of the Committee that these stipulations do not present a problem which requires the attention of the Court.

Compiler's Comments

Identity With Federal Rule: With the exception noted in the advisory committee comment above, the 1975 amendment made this rule identical to the Federal Rule. As of May 1, 1990, the foregoing comment was still applicable.

Amendment: The amendment of December 31, 1975, substituted "unless the Court orders otherwise, the parties may by written stipulation (1) provide that" at the beginning of the rule for "if the parties so stipulate in writing", and added subdivision (2).

Case Notes

Rules Regarding Effect of Stipulations: Court did not go beyond agreed statement of facts in making its findings. In considering an agreed statement of facts a court may make any reasonable inference of which the facts might be susceptible as if the facts had been gleaned from testimony. When a court feels it needs evidence beyond that in the agreed statement to make its decision, it may refer to evidence outside of the agreed statement. Grinde v. Tindall, 172 M 199, 562 P2d 818 (1977).

Collateral References

Depositions *key* 54 through 56(7); Stipulations *key* 3.

26A C.J.S. Depositions §§51 through 57, 59, 60; 83 C.J.S. Stipulations §10.

Relief from stipulations. 161 ALR 1161.

Rule 30. Depositions upon oral examination

Case Notes

Summary Judgment — Deposition Costs Recoverable if Deposition Used in Dispositive Manner: In summary judgment actions, deposition costs are recoverable when a deposition is used in a dispositive manner. Here, depositions were not necessary to decide defendant's summary judgment motion because the grant of summary judgment was based purely on statutory interpretation and undisputed facts not derived from the depositions, so defendant's motion for deposition costs was properly denied. Ritchie v. Ennis, 2004 MT 43, 320 M 94, 86 P3d 11 (2004). See also Roy v. Neibauer, 191 M 224, 623 P2d 555 (1981).

Discovery Not "Cut Off" Prematurely by Summary Judgment: Plaintiffs contended defendants resisted taking of depositions of witnesses favorable to plaintiffs' cause and thus the court's granting defendants' motion for summary judgment "cut off" discovery prematurely. The court held that plaintiffs failed to present an affidavit as required by Rule 56(f), M.R.Civ.P., stating why depositions could not be taken; nor did plaintiffs exercise their prerogative under Rules 30, 31, or 37, M.R.Civ.P., at any time during the year or more after the complaint was filed. Morales v. Tuomi, 214 M 419, 693 P2d 532, 42 St. Rep. 60 (1985).

Abuse of Deposition Process — Basis for Tort of Abuse of Process: The plaintiff and his wife were divorced in 1976. The plaintiff sought to have the property agreement set aside as unconscionable and failed. In 1979, he filed a fraud action against his ex-wife and her attorney in conjunction with the dissolution. The ex-wife petitioned the court to hold plaintiff in contempt for failure to comply with the dissolution decree. Plaintiff, residing in Idaho, was served, failed to appear, and was held in contempt. The judge issued a bench warrant for his arrest. Defendants, counsel for the ex-wife in the fraud case, set a time to take plaintiff's deposition in Bozeman. Subsequent to noticing the deposition, defendants notified the District Court Judge that plaintiff would be in Bozeman that day. After taking plaintiff's deposition, defendants notified the judge, who had plaintiff arrested. Plaintiff filed suit against defendants for the tort of malicious abuse of process, and defendants moved for summary judgment. The federal court held that abuse of the power granted under Rule 30, M.R.Civ.P., relating to depositions can serve as the basis for the tort of abuse of process. Factual issues existed, so that the summary judgment motion was denied. Hopper v. Drysdale, 524 F. Supp. 1039, 38 St. Rep. 1970 (D.C. Mont. 1981).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Dismissal of state court action for failure or refusal of plaintiff to appear or answer questions at at deposition or oral examination. 32 ALR 4th 212.

Rule 30(a). When depositions may be taken.

Advisory Committee Notes

Advisory Committee's Note to December 31, 1975, Amendment: This will make all rules pertaining to discovery coincide with the Federal rules.

Advisory Committee's Note to October 9, 1984, Amendment: Subdivision 30(a). The amendment corrects the reference to the wrong rule referred to.

Compiler's Comments

Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to conform with Rule 30, Fed.R.Civ.P. The substance of this rule was previously contained in Rule 26(a), M.R.Civ.P., prior to the 1975 amendment of that rule. As of May 1, 1990, the rule was still identical to the Federal Rule, except for different subdivision references to Rule 4.

Amendment: The amendment of October 9, 1984, in second sentence changed internal reference from Rule 4(c) to Rule 4D.

Case Notes

Deposition of Witness Taken During Trial — Insurer's Counsel Allowed to Testify at Trial — Objection to Testimony Not Preserved for Appeal: Defendant insurer assumed that its attorney was listed as a witness and called the attorney at trial, but the attorney was not a listed witness, so plaintiffs objected. The trial court took steps to abate any prejudice to plaintiffs by continuing the trial, reopening discovery, and allowing plaintiffs to depose the attorney and examine the correspondence file that the attorney would rely on during testimony. When trial resumed the following day, the court noted that it had granted the motion to add the attorney as a witness with the understanding that the relevant files would be made available to plaintiffs and inquired whether the issue had been resolved. Both parties responded affirmatively, plaintiffs stipulated to admitting the correspondence file as an exhibit, and the attorney went on to testify without further objection from plaintiffs. On appeal, plaintiffs contended that the trial court abused its discretion in allowing the attorney to testify. The Supreme Court found no fault in allowing the attorney to testify when plaintiffs' actions indicated agreement and acquiescence with the court's resolution of the initial objection to the testimony. Further, plaintiffs' objection was not preserved for appeal because plaintiffs made no renewed objection following the trial court's resolution of the matter. Nelson v. Farmers Union Mut. Ins. Co., 2003 MT 101, 315 M 268, 68 P3d 689 (2003). See also Schuff v. Jackson, 2002 MT 215, 311 M 312, 55 P3d 387 (2002).

Motion to Retake Deposition Denied — No Relevancy — Improper Motion: Denial of motion to retake a deposition was not an abuse of discretion when the subject of the deposition was totally irrelevant to the issues and when movant claimed the other side improperly withheld, during discovery, information that would have made movant's deposition more valuable. Movant, however, failed to use the exclusive remedy of moving for an order compelling discovery. Tocco v. Great Falls, 220 M 221, 714 P2d 160, 43 St. Rep. 310 (1986).

Misrepresentation and Improper Process by Attorney — Sanctions: Since under 33-1-602 defendant, a foreign insurer, could only be served by service upon the Commissioner of Insurance, personal jurisdiction over insurer was not obtained when it was served at its Billings claim office. Thus, when plaintiffs' attorney appealed quashing of the service, the appeal was dismissed. Plaintiffs' attorney represented to the District Court's personnel that he had won the appeal and was entitled to a default judgment, and the personnel entered one against insurer for $150,000 punitive damages and $385 costs. The default judgment was void for want of jurisdiction, and the District Court correctly vacated it. As insurer was not properly served, the District Court properly ruled plaintiffs could not take depositions. The attorney was properly adjudged liable to insurer for $4,031.50 under 37-61-406, stating that an attorney guilty of deceit or collusion with intent to deceive the court or a party forfeits to the party injured by his deceit or collusion treble damages. LaFountaine v. St. Farm Mut. Auto. Ins. Co., 215 M 402, 698 P2d 410, 42 St. Rep. 496 (1985).

Collateral References

Depositions *key* 1 through 111(3).

26A C.J.S. Depositions §§1 through 105.

23 Am. Jur. 2d Depositions and Discovery §§4, 131, 409.

Admissibility of deposition of child of tender years. 30 ALR 2d 771.

Pretrial conference procedure as affecting right to discovery. 161 ALR 1151.

Jurisdiction to require a nonresident party to an action to submit to adverse examination. 154 ALR 849.

Submitting to jurisdiction by seeking relief as to deposition. 111 ALR 933.

Rule 30(b). Notice of examination; general requirements — special notice — nonstenographic recording — production of documents and things — deposition of organization — deposition by telephone — limitations.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO DECEMBER 31, 1975, AMENDMENT

This will make all rules pertaining to discovery coincide with the Federal rules.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 30(b)(4). The amendment expands the means of recording in view of the addition of subdivision 30(h) which authorizes audio-visual and tape recorded depositions.

Subdivision 30(b)(7). The amendment conforms the rule to the 1980 Amendment of the Federal Rule which has not been previously adopted by Montana. For a discussion of the amendment see the advisory committee note to the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

2001 Amendment: Deleted former (8) that read: "(8) Unless otherwise ordered or stipulated, each deposition shall not last more than eight hours nor take place on more than one day. Additional time may be obtained for good cause by leave of court." Amendment effective December 31, 2001.

1993 Amendment: Inserted (8) limiting time of depositions.

Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to coincide with the previous version of Rule 30, Fed.R.Civ.P. Through July 31, 1980, this rule was still identical to the Federal Rule. On August 1, 1980, an amendment to the Federal Rule took effect rewording subsection (b)(4), providing for objections, changes in the deposition signature of the witness, and certification required by subdivision (f) of this rule to be set forth in a writing to accompany depositions recorded by nonstenographic means. The amendment to the Federal Rule also provides for the parties to agree to or the court to order deposition by telephone. As of May 1, 1990, and in light of 1984 amendments to the Montana Rule, the rule is identical to the Federal Rule except for variations in subsection (b)(4) as noted herein.

Amendments: The amendment of October 9, 1984, in (4) in first sentence inserted "audio-visual, or tape recorded"; and inserted (7).

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Subpoena Issued Prior to Notice Void: A notary public is without authority to issue a subpoena to a witness, in an action pending for the purpose of taking his deposition, until the notice and a copy of the affidavit prescribed by the statute have been served upon the adverse party by the party desiring the deposition. Hence, a subpoena issued prior thereto is void and disobedience thereof does not constitute contempt. Hiber v. Morrill, 105 M 323, 72 P2d 685 (1937); State ex rel. Mangam v. District Court, 91 M 240, 6 P2d 873 (1932).

Collateral References

Depositions *key* 54 through 56(7).

26A C.J.S. Depositions §§51 through 57, 59, 60.

23 Am. Jur. 2d Depositions and Discovery §§139 through 142, 144, 148, 149, 154 through 157, 165, 171, 180.

Permissibility and standards for use of audio recording to take deposition in state civil case. 13 ALR 4th 775.

Answers to interrogatories as limiting answering party's proof at state trial. 86 ALR 3d 1089.

Use of videotape to take deposition for presentation at civil trial in state court. 66 ALR 3d 637.

Service of notice of time and place of examination of party witness as sufficient to require his attendance without subpoena for purposes of deposition. 112 ALR 449.

Recording of testimony at deposition by other than stenographic means under Rule 30(b)(4) of Federal Rules of Civil Procedure. 16 ALR Fed. 969.

Rule 30(c). Examination and cross-examination — record of examination — oath — objections.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO DECEMBER 31, 1975, AMENDMENT

This will make all rules pertaining to discovery coincide with the Federal rules.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 30(c). The amendment changes the reference because the Commission has recommended that Rule 43(b) be abrogated.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the rule is identical to the Federal Rule except that the Montana Rule refers to certain Rules of Evidence instead of referring to the Federal Rules of Evidence.

Amendments: The amendment of December 31, 1975, inserted the first sentence in the first paragraph; substituted the last two sentences of the first paragraph for "The testimony shall be taken stenographically and transcribed unless the parties agree otherwise"; and substituted "parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer" in the last sentence of the second paragraph for "parties served with notice of taking a deposition may transmit written interrogatories to the officer".

The amendment of October 9, 1984, in first sentence substituted "Rules 607, 611(b) and 611(c), Montana Rules of Evidence" for "Rule 43(b)".

The May 1, 1990, amendment made language in the rule gender neutral.

Collateral References

Depositions *key* 64(1), 66, 67, 70.

26A C.J.S. Depositions §§67, 69, 72.

23 Am. Jur. 2d Depositions and Discovery §§151 through 157, 172, 362.

Rule 30(d). Schedule and duration; motion to terminate or limit examination.

Advisory Committee's Comment on December 31, 1975, Amendment

This will make all rules pertaining to discovery coincide with the Federal rules.

Compiler's Comments

2001 Amendment: Inserted (1) through (3) concerning objections, limit on duration, and sanctions; in (4) near beginning of first sentence after "time during" substituted "a deposition" for "the taking of the deposition", in second sentence before "resumed" substituted "may be" for "shall be", and in third sentence before "suspended" substituted "must be" for "shall be". Amendment effective December 31, 2001.

Identity With Federal Rule: As of May 1, 1990, the rule was identical to the Federal Rule.

Amendment: The amendment of December 31, 1975, substituted "the court in the district" in the first sentence for "in the event that the deposition is being taken in an action pending in another state or country, the district court in the county"; substituted "Rule 26(c)" at the end of the first sentence for "subdivision (b)"; substituted the present last sentence for "In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable"; and made minor changes in phraseology and punctuation.

Case Notes

Unilateral Cancellation of Deposition by Plaintiff's Attorney — Sanctions Appropriate for Discovery Abuse: Plaintiff's attorney Palmer was directed to appear at a deposition requested by defendant. Palmer objected to the subpoena under Rule 45(b)(1), M.R.Civ.P., and this rule and failed to appear for the deposition. The District Court sanctioned Palmer for discovery abuses pursuant to Rule 37, M.R.Civ.P., and ordered him to pay defendant's attorney fees and costs. On appeal, Palmer argued that the effect of his objection was to quash the subpoena and suspend the deposition and disclosure of documents until further order of the court. Palmer was mistaken on

both issues. This rule only contemplates a motion to terminate or limit a deposition during the taking of the deposition. Rule 45(b)(1) provides that a District Court may quash a subpoena, not an attorney. By unilaterally canceling the deposition, Palmer violated the deposition order. When Palmer finally was deposed, he refused to answer any questions unless defendant agreed to his stipulations. The Supreme Court considered the relationship between the sanctions and the extent and nature of the discovery abuse and extent of the prejudice to defendant caused by Palmer's failure to appear at the deposition, in light of Smith v. Butte-Silver Bow County, 276 M 329, 916 P2d 91 (1996). Although the District Court could have taken other actions, such as dismissing the underlying action, the sanctions, though severe, related appropriately to the extent of the discovery abuse and prejudice to defendant and were affirmed absent any showing by Palmer that his failure to comply with the discovery orders was substantially justified. Dambrowski v. Champion Int'l Corp., 2000 MT 149, 300 M 76, 3 P3d 617, 57 St. Rep. 581 (2000). See also Pioche Mines Consol., Inc. v. Dolman, 333 F2d 257 (9th Cir. 1964).

Collateral References

Discovery and production of documents as affected by Rule 30(b), Fed.R.Civ.P., and similar state statutes and rules, relating to preventing, limiting, or terminating the taking of depositions. 70 ALR 2d 777.

Rule 30(e). Submission to witness — changes — signing.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO DECEMBER 31, 1975, AMENDMENT

This will make all rules pertaining to discovery coincide with the Federal rules.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the rule was identical to the Federal Rule.

Amendments: The amendment of December 31, 1975, inserted "within 30 days of its submission to him" in the last sentence; inserted "(4)" after "Rule 32(d)" in the last sentence; and made a minor change in punctuation.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Substantive Changes to Deposition Testimony Properly Viewed With Distrust: Albert filed an action to determine a claim for a prescriptive easement and quiet title to a road across Hastetter's property. Hastetter was deposed, and in addition to the original transcript, Hastetter also submitted three pages of corrections, which contained numerous substantive changes to the original testimony. Hastetter died prior to trial, so the entire deposition was entered into evidence. Hastetter's trustee contended that because Hastetter's credibility was not directly attacked at trial, the judge was not at liberty to view the amended testimony with distrust and that the original and amended testimony should stand as probative evidence for every fact stated because Hastetter was presumed to speak the truth. In a case of first impression, the Supreme Court noted that a witness may make any changes in form or substance in altering deposition testimony, but that the witness who changes testimony on a material matter between the giving of the deposition and appearance at trial may be impeached by the former answers and cross-examined as to why the answers were changed. However, Hastetter's death foreclosed Albert's right to cross-examination, raising an issue regarding the evidentiary value of the substantive changes to the deposition testimony and challenging the trial court with conflicting evidence without the benefit of witness cross-examination. In the event that a party deponent is unavailable to address apparent conflicts in amended deposition testimony, the trial court must exercise sound discretion in weighing the value of the evidence, and the Supreme Court will not second-guess a trial court's determination regarding the strength and weight of conflicting evidence. With Hastetter unavailable to explain the extensive changes to his original deposition testimony, the trial court appropriately exercised its discretion in viewing Hastetter's deposition changes with great distrust. Albert v. Hastetter, 2002 MT 123, 310 M 82, 48 P3d 749 (2002). See also Lugtig v. Thomas, 89 F.R.D. 639 (N.D. Ill. 1981), and J.H. Harvey Co. v. Reddick, 522 SE 2d 749 (Ga. 1999).

Unsigned Deposition: A deposition from Arizona was received by counsel the morning of the trial. The deposition was not signed. After reading of the deposition was underway, counsel for defendants objected to it because of the lack of signature. No evidence of prejudice due to the irregularity was introduced. The court held the deposition was admissible, as the irregularity should have been discovered prior to commencing its reading and a motion to suppress made accordingly. Adams v. Cheney, 203 M 187, 661 P2d 434, 40 St. Rep. 383 (1983).

Collateral References

Depositions *key* 67, 69.
26A C.J.S. Depositions §§69, 71.
23 Am. Jur. 2d Depositions and Discovery §§162, 163.

Rule 30(f). Certification and filing by officer — exhibits — copies — notice of filing.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 30(f), as amended 1963.

This proposal is patterned after the 1963 federal amendment, and conforms to provisions of Rule 4 which permit the use of certified mail as an alternative to the use of registered mail.

ADVISORY COMMITTEE'S NOTE
TO DECEMBER 31, 1975, AMENDMENT

This will make all rules pertaining to discovery coincide with the Federal rules.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 30(f)(1). The amendment conforms the second paragraph of the subdivision to the 1980 Amendment of the Federal Rule which has not been previously adopted by Montana. For a discussion of the amendment see the advisory committee note to the Federal Rule.

1988 Amendment: The amendment conforms the rule to the 1987 Montana Uniform District Court Rules, effective on May 1, 1987, in which Rule 4 provides that discovery materials will not be routinely filed.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: Through July 31, 1980, the Montana Rule was identical to the Federal Rule. On August 1, 1980, an amendment to subdivision (f)(1) of the Federal Rule took effect providing for direction by the court as an alternative to the requirements of preparing the deposition for filing, in order to bring the rule into conformance with the amended filing requirements of Rule 5D. The amendment also rewrote the second paragraph of subdivision (f)(1).

As of May 1, 1990, and in light of 1984, 1988, and 1990 amendments to the Montana Rule, the rule is identical to the Federal Rule except for the proviso "Unless otherwise ordered by the court" that appears in the second sentence of subdivision (f)(1) of the Federal Rule and the 1988 amendments explained in the amendment note.

Amendments: The amendment of September 29, 1967, in clause (1), inserted "as certified" before "mail to the clerk" in the last sentence.

The amendment of December 31, 1975, added the second paragraph of subdivision (1); substituted present subdivision (3) for subdivision (3) as it appears in the parent volume; and made minor changes in punctuation.

The amendment of October 9, 1984, in (1) in second paragraph near beginning of first sentence deleted "and returned with" before "the deposition", after "except that" substituted "if" for "(A)", after "materials" inserted "desires to retain them he", substituted "may (A) offer" for "may substitute", inserted "and annexed to the deposition and to serve thereafter as originals", substituted "or (B) offer the originals to be marked for identification, after giving to" for "and (B) if the person producing the materials requests their return, the officer shall mark them, give", substituted "in which event" for "and return them to the person producing them, and", and at end of same sentence deleted "and returned with" before "the deposition".

The amendment of November 1, 1988, in two places in catchline deleted references to "filing"; at end of first paragraph of (1) substituted "deliver it or send it by registered or certified mail to the party taking the deposition" for "file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing"; and in (3), near middle of sentence, substituted "receipt" for "filing".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Failure to File Original Depositions — Harmless Error: Failure of court reporter to file original copies of depositions in accordance with this rule was at most harmless error where there was ample time to discover this fact and no objection was made. Mustang Beverage Co., Inc. v. Schlitz Brewing Co., 162 M 243, 511 P2d 1 (1973).

Collateral References

Depositions *key* 70, 73, et seq.

26A C.J.S. Depositions §73, et seq.

23 Am. Jur. 2d Depositions and Discovery §§164 through 167.

Rule 30(g). Failure to attend or to serve subpoena — expenses.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO DECEMBER 31, 1975, AMENDMENT

This will make all rules pertaining to discovery coincide with the Federal rules.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the rule was identical to the Federal Rule.

Amendments: The amendment of December 31, 1975, deleted "the amount of" before "reasonable expenses" in each subdivision, and made minor changes in phraseology.

The May 1, 1990, amendment made language in the rule gender neutral.

Rule 30(h). Audio-visual and tape recorded depositions.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 30(h). The amendment is entirely new material which does not appear in the Federal Rule. The subdivision is based upon the Uniform Audio-visual Deposition Rule promulgated by the National Conference of Commissioners on Uniform State Laws. Additional language has been added to the Uniform Rule in order to include tape recorded depositions. For comments as to individual subdivisions see the Uniform Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Costs of Filed Depositions Recoverable: Expenses for taking depositions that are not used at trial and that are for the convenience of counsel are not recoverable costs. Expenses incurred in taking depositions that are filed with the District Court and that are used at trial are not for the convenience of the litigant and thus constitute recoverable costs under subsection (5) of this rule. Gilluly v. Miller, 270 M 272, 891 P2d 1147, 52 St. Rep. 178 (1995).

Admissibility of Audiotaped Deposition Despite Procedural Defects — No Prejudice: Defendants contended that an audiotaped deposition should not have been admitted because the rules regarding taped depositions had not been followed. Claimed defects included: (1) the operator's name and business address were not stated on the taped part of the deposition; (2) the tape was not indexed by a time generator or other adequate indexing device; and (3) the original

audiotape was not filed with the Clerk of Court. The Supreme Court noted that while the procedural requirements were at issue, the accuracy of the taped deposition was never challenged. Defendants were afforded adequate opportunities at trial to object and excise specific portions of the testimony. Furthermore, defendants did not object to the technical deficiencies until the day of trial, even though the deposition had been taken and transcribed prior to that time. Defendants had adequate time to bring genuine questions of the tape's accuracy to the court's attention prior to the day of trial. The Supreme Court found no prejudice to defendants despite the technical questions, holding that it was within the broad discretion of the trial court to admit the tape. King v. Zimmerman, 266 M 54, 878 P2d 895, 51 St. Rep. 659 (1994).

Payment for Perpetuation Deposition Transcription Attributable to Party at Whose Convenience Deposition Taken: Defendant's expert was unable to complete testimony at the scheduled hearing, so the parties agreed to a perpetuation deposition to allow the expert to complete the testimony. The trial court did not err in ordering payment by defendant for a transcription of the deposition because the testimony was taken for the convenience of defendant's expert and on defendant's behalf. Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Costs Limited to Those Incurred in Constructing Exhibits Admitted at Trial: The lower court awarded costs to the plaintiff for expenses incurred for videotape depositions, photographic exhibits, telephone calls, and expert witnesses' airfare and hotel bills. The Supreme Court held that only expenses expended on exhibits admitted at trial may be taxed to the losing party. The court specified that telephone calls, airfare, hotel bills, rental car expenses, and other incidental costs incurred in obtaining depositions are not recoverable. Thayer v. Hicks, 243 M 138, 793 P2d 784, 47 St. Rep. 1082 (1990), followed in Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

Costs to Be Borne When Transcription Obtained for Party's Own Use: The District Court erred in requiring plaintiff to pay defendant's costs incurred in transcribing a witness's audio-visual deposition. Although defendant provided transcriptions for use during viewing of the deposition at trial, defendant obtained the transcription for its own use and convenience and must therefore bear the transcribing costs. McGinley v. Ole's Country Stores, Inc., 241 M 248, 786 P2d 1156, 47 St. Rep. 181 (1990).

Admissibility of Videotape With Cautionary Instruction — No Objection — Waiver: An insurer assigned as error the admission to evidence of a doctor's videotaped deposition, contending the deposition was cumulative, had no probative value, and invoked the sympathy and passion of the jury. The videotape was submitted to the jury without any objection by the insurer and under a cautionary instruction from the court that the video was not to be considered for the insured's damages but only to show whether he was physically able to participate in the fire in the way the insurer claimed he did. The District Court Judge, in his order denying the posttrial motions, properly found the objection to submission of the evidence to have been waived. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Rule 31. Depositions upon written questions

Case Notes

Discovery Not "Cut Off" Prematurely by Summary Judgment: Plaintiffs contended defendants resisted taking of depositions of witnesses favorable to plaintiffs' cause and thus the court's granting defendants' motion for summary judgment "cut off" discovery prematurely. The court held that plaintiffs failed to present an affidavit as required by Rule 56(f), M.R.Civ.P., stating why depositions could not be taken; nor did plaintiffs exercise their prerogative under Rules 30, 31, or 37, M.R.Civ.P., at any time during the year or more after the complaint was filed. Morales v. Tuomi, 214 M 419, 693 P2d 532, 42 St. Rep. 60 (1985).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 31(a). Serving questions — notice.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to coincide with Rule 31, Fed.R.Civ.P. As of May 1, 1990, the rule was identical to the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Collateral References

Depositions *key* 67, 69.

26A C.J.S. Depositions §51.

23 Am. Jur. 2d Depositions and Discovery §§168 through 173.

Rule 31(b). Officer to take responses and prepare record.

Advisory Committee Notes

1988 Amendment: The amendment conforms the rule to the 1987 Montana Uniform District Court Rules, effective on May 1, 1987, in which Rule 4 provides that discovery materials will not be routinely filed.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical to the Federal Rule, except as noted in the 1988 amendment note.

Amendments: The amendment of December 31, 1975, substituted "questions" throughout the section for "interrogatories".

The amendment of November 1, 1988, near end of section after "certify, and" substituted "deliver or mail the deposition to the party taking the deposition" for "file or mail the deposition".

The May 1, 1990, amendment made language in the rule gender neutral.

Rule 31(c). Notice of filing.

Advisory Committee Notes

1988 Amendment: The amendment conforms the rule to the 1987 Montana Uniform District Court Rules, effective on May 1, 1987, in which Rule 4 provides that discovery materials will not be routinely filed.

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of December 31, 1975, deleted the former first sentence of the rule; substituted "party taking it" for "clerk of court"; and inserted "other" before "parties". This amendment made the rule identical to the Federal Rule. As of May 1, 1990, this rule was still identical to the Federal Rule, except as noted in the 1988 amendment note.

The amendment of November 1, 1988, substituted current text relating to notice of receipt for former text that read: "Notice of filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties."

Rule 32. Use of depositions in court proceedings

Case Notes

Speculation Insufficient Grounds for Award of Sanctions: Defendants prevailed in an easement case and sought sanctions from plaintiffs for bringing an appeal in bad faith. The Supreme Court noted that although plaintiffs' claims were unsound, there was no evidence that the claims were brought in bad faith, nor did defendants claim that the appeal was unfounded or intended to cause delay. Defendants could only speculate as to the purpose of the appeal, and the court held that speculation provides insufficient grounds for awarding sanctions under this rule. Kullick v. Skyline Homeowners Ass'n, Inc., 2003 MT 137, 316 M 146, 69 P3d 225 (2003).

Attorney Fees Owing for Filing Unfounded Appeal: The District Court repeatedly determined that a child visitation schedule adequately and appropriately provided parenting opportunities between the parties. Nevertheless, the father continually filed motions in District Court and appealed to the Supreme Court, attempting to modify visitation. However, the appeal failed to properly present evidence or authority that the District Court erred in refusing to modify visitation, and the appellate briefs did not comply with the Montana Rules of Appellate Procedure in a form that the mother could intelligently respond to. The Supreme Court held that the appeal was taken without substantial and reasonable grounds, was entirely unfounded, and

was intended to cause delay. The mother's request for attorney fees and costs for having to respond to a frivolous appeal was granted. In re Marriage of Snow, 2002 MT 143, 310 M 260, 49 P3d 610 (2002).

Rule 32(a). Use of depositions.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 32(a)(1). The amendment conforms the rule to the 1980 Amendment of the Federal Rule. For a discussion of the amendment see the advisory committee note to the Federal Rule.

Subdivision 32(a)(3). The amendment adds language to conform the rule to the Federal Rule. The added language appears to have been inadvertently omitted when the rule was originally adopted by Montana.

Subdivision 32(a)(4). The amendment conforms the rule to the 1980 Amendment of the Federal Rule. For a discussion of the amendment see the advisory committee note to the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments — Identity With Federal Rule: The substance of this rule was formerly contained in Rule 26(d), M.R.Civ.P., prior to the 1975 amendment to that rule. Through July 31, 1980, this rule was still identical with the Federal Rule. On August 1, 1980, an amendment to Rule 32(a)(1) and (a)(4) took effect. Subdivision (a)(1) was amended to provide that depositions may be used for any purpose allowed by the Federal Rules of Evidence. Subdivision (a)(4) was amended to delete the requirement in the second paragraph that the former action must have been dismissed and to provide that depositions previously taken may be used for any purpose allowed by the Federal Rules of Evidence.

The amendment of October 9, 1984, in (1) inserted "or for any other purpose permitted by the Montana Rules of Evidence"; in (3) inserted "attendance of the witness by subpoena; or (E) upon application and"; and in (4) inserted last sentence of second paragraph.

As of May 1, 1990, and in light of 1984 amendments to the Montana Rule, the rule was identical to the Federal Rule, except that subsections (a)(1) and (a)(4) designate Rules of Evidence as Federal or Montana as appropriate, and the second paragraph of subsection (a)(4) of the Montana Rule provides "when an action in any court of the United States or of any state has been dismissed and", while the Federal Rule provides "when an action has been brought in any court of the United States or of any state and".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Admissibility of Party Deposition — Failure of Party to Attend Trial — No Evidence Party Offering Deposition Procured Absence of Other Party — Cumulative Evidence Held Harmless Error: Just before trial on a complaint for damages brought by Susan, her husband David, their minor daughter, and their failed business, Rocky Mountain Enterprises, Inc., Susan and her minor daughter decided not to attend the trial because of fear for their safety and sent a declaration from San Diego, California, instead. The District Court denied a request by David and the failed business to introduce the deposition given by Susan in place of her live testimony, citing for its reasoning the fact that Susan had refused on her own volition to attend the trial. Distinguishing In re Marriage of Powell, 231 M 72, 750 P2d 1099 (1988), the Supreme Court held that when a witness's absence is procured by another, the person procuring the absence may not offer a deposition of the witness's testimony because the deposition provides no opportunity for cross-examination. In the case before it, the Supreme Court noted that there was no evidence that David or the company had procured the absence of Susan or the minor daughter and that because those witnesses were more than 100 miles from the place of trial, the District Court erred when it refused to admit Susan's deposition. However, the District Court correctly held that the deposition was cumulative of other evidence, pursuant to 26-1-102, and the Supreme Court held that only harmless error had been committed by the District Court. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Impeachment With Deposition Testimony Not Allowed if Not Clearly Inconsistent: The District Court did not manifestly abuse its discretion in refusing to allow the impeachment of a witness with deposition testimony when the deposition testimony and the trial testimony were not clearly inconsistent. Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994).

Failure to Prove Lack of Hearing Attendance Because of Travel Distance — Depositions Refused: Husband exercised his prerogative not to attend a hearing, so his attorney offered husband's deposition and several affidavits as evidence of husband's testimony. Admission of the deposition was refused, and husband later argued the deposition should have been admitted pursuant to the provision of this rule that allows a party's deposition if the party is at a distance greater than 100 miles from the place of hearing. In affirming, the Supreme Court found no offer of proof that husband was unable to attend because of too great a travel distance, but did note husband was uncooperative with the court and opposing party throughout proceedings and decided not to attend for personal reasons. Husband could not later introduce testimony that could not be verified or cross-examined. In re Marriage of Powell, 231 M 72, 750 P2d 1099, 45 St. Rep. 441 (1988), distinguished in Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Deposition of Managing Agents Erroneously Excluded: The trial court erroneously excluded the deposition of managing agents on the grounds that the plaintiff did not notify the state that the depositions were to be offered, that no cross-examination could be conducted, and that plaintiff made no showing that the witnesses were unavailable. The Supreme Court ruled that there were no such requirements for use of depositions of managing agents. In this case, the witnesses were Highway Department (now Department of Transportation) personnel whose jobs entailed sufficient supervisory responsibility to place them within the status of managing agents for the state. The Supreme Court found considerable evidence upon which to find justifiable reliance by the plaintiff contractor in the area of cost underruns in highway construction and remanded for new trial. Clark Bros. Contractors v. St., 218 M 490, 710 P2d 41, 42 St. Rep. 1765 (1985), followed in Hart-Albin Co. v. McLees, Inc., 264 M 1, 870 P2d 51, 51 St. Rep. 112 (1994).

Use of Part-Time Arizona Resident's Deposition: The deposition of a party could be used at the trial even though the party did not appear. The party lived part of the time in Arizona and was in that state during the trial. Edington v. Creek Oil Co., 213 M 112, 690 P2d 970, 41 St. Rep. 1990 (1984).

No Showing of Unavailability Required: A deposition of one of the parties was admitted without a showing of the party's unavailability. Because of the many hearings prior to trial and because of the representations made to the court that the case would be submitted on depositions and an agreed statement of facts, the deposition was properly admitted. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Parol Evidence Not Made Admissible by Rule: Buechler entered into a contract with Payne, granting him the right to sell Buechler's property. Payne's copy of the contract stated that the listing was exclusive. Buechler offered parol evidence that Payne had written "nonexclusive" on her copy of the contract. Her copy was destroyed and therefore was not introduced. The court held that the parol evidence was inadmissible under the parol evidence rule and that Rule 106, Montana Rules of Evidence, and Rule 32(a)(4), M.R.Civ.P., cannot render this otherwise inadmissible parol evidence admissible. Payne v. Buechler, 192 M 311, 628 P2d 646, 38 St. Rep. 799 (1981).

Deposition Taken After Court's Deadline: Where a deposition is taken after the time the District Court establishes as a deadline for pretrial discovery, the District Court cannot be held in error on the basis of documents not before it at that time. Reaves v. Reinbold, 189 M 284, 615 P2d 896 (1980).

Objection to Lack of Foundation for Impeachment — Reading of Plaintiff's Deposition Properly Refused: The method chosen by the cross-examiner violated Rule 613(b), Montana Rules of Evidence. The witness was not on the stand. The cross-examiner proposed to offer in evidence, in the absence of the witness, a deposition taken of the witness pretrial for the purpose of impeachment. Thus, the deposition itself was extrinsic evidence of a prior inconsistent statement. It was not admissible unless the witness had an opportunity to explain or deny the same, the opposite party was afforded an opportunity to explain or deny the same, and the opposite party was afforded an opportunity to interrogate her on the deposition. This foundational requirement not having been met by the cross-examiner, the District Court was correct in denying the admission into evidence of the deposition or any part of it under Rule 613(b), Montana Rules of Evidence, and Rule 32(b), M.R.Civ.P. Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668 (1980).

No Deviation in Trial and Deposition Testimony: District Court did not err in failing to admit into evidence a deposition of defaulting defendant where his testimony at the trial did not materially deviate from that contained in the deposition and material matters covered by the deposition were not omitted in his testimony at the trial. Walsh-Anderson Co. v. Keller, 139 M 210, 362 P2d 533 (1961). See also Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248, 51 St. Rep. 623 (1994).

Absence of Witness From Jurisdiction — Proof: Before the deposition of a witness may be received in evidence on ground of absence from the jurisdiction, the party offering it must show by positive testimony that the witness had departed from and was at the time of trial out of the state, and the bare statement of counsel that inquiry had been within the state, with address unknown, was insufficient to warrant admission. Healy v. First Nat'l Bank of Great Falls, 108 M 180, 89 P2d 555 (1939).

Previous Deposition Properly Excluded — Identity of Issues and Parties: A deposition taken to be used in a guardianship proceeding was improperly admitted in evidence in a contest involving the question whether the incompetent for whom a guardian was appointed, and who subsequently died of dementia, was sane or insane at the time he executed the will sought to be probated; neither the parties nor the subject matter were the same, and the evidence was inadmissible. In re Murphy's Estate, 43 M 353, 116 P 1004 (1911).

Affidavits of Nonresidents Used to Prove Death: In application for letters of administration where there is no contest, affidavits of nonresident witnesses taken before a notary public may be used to prove death, although no commission was issued and no notice given that the testimony of such witnesses would be taken. The District Judge, if he is not satisfied with the proof thus offered, has the power to order further testimony. In re Liter's Estate, 19 M 474, 48 P 753 (1897).

Collateral References

Depositions *key* 86, 88.

26A C.J.S. Depositions §§88, 89, et seq.

23 Am. Jur. 2d Depositions and Discovery §§174 through 198.

Admissibility of deposition of child of tender years. 30 ALR 2d 771.

Introduction of deposition by party other than one at whose instance it was taken. 134 ALR 212.

Service of notice of time and place of examination on a deposition as sufficient to require attendance of adverse party for examination. 112 ALR 449.

Rule 32(b). Objections to admissibility.

Compiler's Comments

Amendment — Identity With Federal Rule: The substance of this rule was formerly contained in Rule 26(b), M.R.Civ.P., prior to the 1975 amendment to that rule. As of May 1, 1990, this rule was still identical to the Federal Rule.

Case Notes

Objection to Lack of Foundation — Reading of Plaintiff's Deposition Properly Refused: The method chosen by the cross-examiner violated Rule 613(b), Montana Rules of Evidence. The witness was not on the stand. The cross-examiner proposed to offer in evidence, in the absence of the witness, a deposition taken of the witness pretrial for the purpose of impeachment. Thus, the deposition itself was extrinsic evidence of a prior inconsistent statement. It was not admissible unless the witness had an opportunity to explain or deny the same, the opposite party was afforded an opportunity to explain or deny the same, and the opposite party was afforded an opportunity to interrogate her on the deposition. This foundational requirement not having been met by the cross-examiner, the District Court was correct in denying the admission into evidence of the deposition or any part of it under Rule 613(b), Montana Rules of Evidence, and Rule 32(b), M.R.Civ.P. Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668 (1980).

Time for Objections: Where a deposition is taken pursuant to the statutes, unless otherwise provided by stipulation of the parties at the time of taking the original deposition, no objection will be permitted by the trial court unless objections were interposed at the time the deposition was taken. Williams v. Kearns, 138 M 51, 353 P2d 748 (1960).

Collateral References

Depositions *key* 86.

26A C.J.S. Depositions §88.

23 Am. Jur. 2d Depositions and Discovery §§153, 192 through 198.

Rule 32(c). Deleted.

Advisory Committee Note

Advisory Committee's Note to October 9, 1984, Amendment: Subdivision 32(c). The amendment deletes this paragraph because it appears to be no longer necessary in view of the Montana Rules of Evidence. The subparagraph was deleted in the 1972 Amendment to the Federal Rule. For a discussion of the amendment see the advisory committee note to the Federal Rule.

Compiler's Comments

Amendments — Identity With Federal Rule: The substance of this rule was previously contained in Rule 26(e), M.R.Civ.P., prior to the 1975 amendment of that rule. The similar Federal Rule was abrogated in 1972 by P.L. 93-595.

The amendment of October 9, 1984, deleted Rule 32(c), which read: "Rule 32(c). Effect of taking or using depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party."

Case Notes

Conflicting Evidence Not Precluded: Where a plaintiff offers a deposition in evidence, he is not bound by such evidence in the sense that he may not offer evidence that conflicts with it and have all the evidence considered by the jury. McCollum v. O'Neil, 128 M 584, 281 P2d 493 (1954).

Rule 32(d). Effect of errors and irregularities in depositions.

Advisory Committee Notes

1988 Amendment: The amendment conforms the rule to the 1987 Montana Uniform District Court Rules, effective on May 1, 1987, in which Rule 4 provides that discovery materials will not be routinely filed.

Compiler's Comments

Amendment — Identity With Federal Rule: The substance of this rule was previously contained in Rule 32(a), (b), (c), and (d), M.R.Civ.P., prior to the 1975 amendment of that rule. As of May 1, 1990, this rule was still identical to the Federal Rule, except as provided in the 1988 amendment note.

1988 Amendment: Near middle of (4), after "transmitted", deleted "filed". Amendment effective November 1, 1988.

Case Notes

Motion to Edit Deposition Testimony Denied — Waiver: Defendant moved to edit deposition testimony despite the failure to object to the testimony during the deposition. Under this rule, the failure to raise a reasonable objection to the testimony during the deposition constitutes a waiver of errors and irregularities in the testimony. Werre v. David, 275 M 376, 913 P2d 625, 53 St. Rep. 187 (1996).

Unsigned Deposition: A deposition from Arizona was received by counsel the morning of the trial. The deposition was not signed. After reading of the deposition was underway, counsel for defendants objected to it because of the lack of signature. No evidence of prejudice due to the irregularity was introduced. The court held the deposition was admissible, as the irregularity should have been discovered prior to commencing its reading and a motion to suppress made accordingly. Adams v. Cheney, 203 M 187, 661 P2d 434, 40 St. Rep. 383 (1983).

When No Notice: When notice of deposition was not given, this section did not require that opposing counsel make written objection. Groves v. Groves, 173 M 291, 567 P2d 459 (1977).

Waiver of Objections: Where counsel took part in taking of depositions, but raised no objection prior to their introduction in evidence, defendant had waived the objection by failure to move suppression of the depositions prior to commencement of the trial. The party taking deposition is entitled to settlement of admissibility in advance and to remove objections by retaking. Best v. London Guar. & Accident Co., 100 M 332, 47 P2d 456 (1935), explained in Zachariasen v. Meeks, 133 M 278, 322 P2d 1115 (1958).

Collateral References

Depositions *key* 102 through 111(3).

26A C.J.S. Depositions §§99 through 105.

23 Am. Jur. 2d Depositions and Discovery §193.

Rule 33. Interrogatories to parties

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of April 1, 1965 added a third paragraph which read: "A party desiring to serve interrogatories upon an adverse party shall file and serve a copy thereof upon every other party. The party answering the interrogatories shall file the answers in the court in which the action is pending and serve a copy thereof upon every other party."

The amendment of November 28, 1966, in the first paragraph, inserted the second and fourth sentences and substituted "for answer shall serve a copy of the answers upon every party who has made a written appearance" for "shall serve a copy of the answers on the party submitting the interrogatories" in the fifth sentence; and deleted the paragraph added in 1965.

The amendment of December 31, 1975, designated the former first paragraph as subdivision (a) and divided it into two paragraphs; substituted "other party" in the first sentence of the first paragraph of subdivision (a) for "adverse party, who has been served with process or who has appeared"; inserted "or government agency" in the first sentence of the first paragraph of subdivision (a); inserted the second sentence of the first paragraph of subdivision (a); added "unless it is objected to in which event the reasons for objection shall be stated in lieu of an answer" to the first sentence of the second paragraph of subdivision (a); substituted the third and fourth sentences of the second paragraph for "The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served for answer shall serve a copy of the answers upon every party who has made written appearance within 20 days after the service of interrogatories upon him, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time"; substituted the present last two sentences of subdivision (a) for the last two sentences of the former first paragraph as they appear in the parent volume; substituted the present subdivision (b) for the former second paragraph as it appears in the parent volume; added present subdivision (c); and made minor changes in phraseology and punctuation.

The 1975 amendment to this rule made this rule identical to the Federal Rule, with the exceptions that the last sentence in the first paragraph and the second sentence in the second paragraph of the Montana Rule do not appear in the Federal Rule. On August 1, 1980, amendments to Rule 33(c) of the Fed.R.Civ.P. became effective as noted, infra.

Case Notes

Informal Witness Discovery Process Compromising Ability to Formulate Trial Strategy — Irregularities Constituting Abuse of Discretion Preventing Fair Trial — New Trial Warranted: If a District Court acts arbitrarily or without conscientious judgment or exceeds the bounds of reason in denying a new trial, it constitutes an abuse of discretion so significant as to materially affect the substantial rights of a complaining party. In the present case, the District Court devised a late hour informal expert witness discovery process that provided no opportunity for plaintiffs to obtain information exclusively in possession of defendants' expert prior to trial. Although the control of discovery activities, including the use of interrogatories, is within the discretion of the District Court, each party has a duty to supplement or amend answers to interrogatories in a timely manner, in order to make all relevant facts available to parties in advance of trial and to reduce the possibility of surprise or unfair advantage. Here, plaintiffs' lack of opportunity to depose defendants' expert, in the face of an inadequate discovery response, materially affected plaintiffs' substantial rights. The District Court's informal discovery process compromised plaintiffs' ability to formulate an effective trial strategy and to prepare adequately for witness cross-examination, which placed plaintiffs at a serious disadvantage. The discovery irregularities constituted an abuse of discretion that materially affected plaintiffs' substantial rights, entitling plaintiffs to a new trial, and the District Court's denial of a new trial motion was therefore reversed. Perdue v. Gagnon Farms, Inc., 2003 MT 47, 314 M 303, 65 P3d 570 (2003).

Failure to Comply With Discovery Order and Sign Discovery Documents — Sanctions for Discovery Abuse Proper: Defendants failed to comply with discovery requests, so the District Court ordered compliance under Rule 37(a), M.R.Civ.P. Defendants then served their answers in a timely manner, but neglected to sign the documents in violation of this rule. The District Court then determined that discovery sanctions were available under Rule 37(b), M.R.Civ.P., and denied defendants' attempts to introduce additional affidavits not previously submitted through the discovery process. Defendants contended that the District Court erred by imposing sanctions without allowing defendants a second chance to provide signed answers. The Supreme Court disagreed. Defendants' failure to comply with discovery was by no means unintentional, but rather a concerted effort to avoid cooperating with plaintiff and the District Court. Nevertheless,

despite defendants' intransigence, the District Court considered defendants' case on the basis of the record, and the sanctions did not prejudice defendants' case. Therefore, the imposition of sanctions was not an abuse of discretion, and the award was affirmed. Lewistown Propane Co. v. Moncur, 2002 MT 349, 313 M 368, 61 P3d 780 (2002), followed in Winslow v. Mont. Rail Link, Inc., 2005 MT 217, 328 M 260, __P3d__ (2005).

Failure to Move to Compel Answer to Interrogatories or for Discovery Sanctions — Failure to Respond to Discovery Not Precluding Introduction of Evidence: After being turned down by the County Sheriff, Smith requested that the District Court grant him a permit to carry a concealed weapon. During discovery, Smith requested information from the county regarding his criminal file, but the county failed to answer the interrogatories. Nevertheless, the District Court admitted Smith's criminal file as evidence, which Smith alleged was an abuse of court discretion, contending that because the county failed to answer the interrogatories, it was precluded from using the information sought by the interrogatories at trial. The Supreme Court pointed out that there are remedies other than exclusion of the evidence for the county's omissions. Subsection (a) of this rule requires a party to respond to an interrogatory by either answer or objection, but if the party fails to respond, the opposing party may move for an order to compel discovery pursuant to Rule 37(d), M.R.Civ.P. A party may also move for discovery sanctions under Rule 37(a), M.R.Civ.P. In this case, Smith did not move to compel an answer or move for discovery sanctions, nor was the evidence inconsistent with the information in the Sheriff's correspondence. Thus, the District Court did not abuse its discretion in admitting the criminal file, despite the county's failure to respond to Smith's discovery request. Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834, 56 St. Rep. 1318 (1999).

Failure to Disclose Identity of Witnesses: Court's refusal to exclude the testimony of plaintiffs' witnesses whose identities had not been disclosed, despite interrogatories requesting their identities, constituted reversible error when testimony was crucial to plaintiffs' case and motion to exclude was supported with a complete statement of the surrounding facts. Sanders v. Mount Haggin Livestock Co., 160 M 73, 500 P2d 397 (1972).

Law Review Articles

Failure to Disclose Names and Addresses of Witnesses in Discovery Proceedings, Greef, 35 Mont. L. Rev. 144 (1974).

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions. 30 ALR 4th 9.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories. 56 ALR 3d 1109.

Rule 33(a). Availability — procedures for use — limitations.

Commission and Advisory Committee Notes

NOTE TO APRIL 1, 1965, AMENDMENT

This amendment is consistent with Rule 5. The requirement of service of interrogatories and answers upon all other parties to the litigation may save other parties additional time and effort in duplication of interrogatories resultant from lack of knowledge of what other parties have done. The requirement of filing of answers makes them available to judges who may want to see them.

NOTE TO NOVEMBER 28, 1966, AMENDMENT

To put the interrogatories and answers into one document for convenience of use, and to remove any obstacle to the service of interrogatories which may result from the requirement of service upon "every other party."

ADVISORY COMMITTEE NOTE
TO NOVEMBER 1, 1988, AMENDMENT

The amendment conforms the rule to the 1987 Montana Uniform District Court Rules, effective on May 1, 1987, in which Rule 4 provides that discovery materials will not be routinely filed.

Compiler's Comments

1993 Amendment: At end of first paragraph inserted last three sentences limiting interrogatories.

See compiler's comments to Rule 33 generally.

Identity With Federal Rule: As of May 1, 1990, the rule was substantially the same as the Federal Rule, except that the Montana Rule added the last sentence of the first paragraph addressing filing of interrogatories and the second sentence of the second paragraph regarding filing of recopy and answers to interrogatories.

1988 Amendment: At end of first paragraph deleted former last sentence that read: "A party serving interrogatories upon an adverse party shall file the same in the court in which the action is pending"; and in second paragraph, at end of second sentence, deleted "and shall file the answers in the court in which the action is pending". Amendment effective November 1, 1988.

Case Notes

Interrogatories Served After Close of Discovery — Sanctions for Late Response Inappropriate: The District Court's scheduling order provided that the parties' discovery deadline was December 18, 1995, and that the deadline could not be modified without leave of court. Some 6 weeks after the deadline, plaintiff served interrogatories without leave of court. Defendant did not answer the interrogatories within 30 days, as required by this rule. On the first day of trial, plaintiff sought sanctions against defendant pursuant to Rule 37(d)(2), M.R.Civ.P., and requested the court to prohibit defendant from introducing designated matters into evidence. Plaintiff admitted that the interrogatories were late, but asserted that this fact did not excuse defendant from the duty to answer or file objections. However, Rule 37(d)(2), M.R.Civ.P., authorizes sanctions to be applied against a party that fails to serve answers or objections to interrogatories after proper service, which in this case did not occur. Defendant did not abuse discovery procedures or cause unnecessary delay, so, lacking proper service, sanctions were unwarranted. Baldauf v. Arrow Tank & Eng'r Co., Inc., 1999 MT 81, 294 M 107, 979 P2d 166, 56 St. Rep. 337 (1999).

Amendment Would Change Legal Theory and Unduly Prejudice Opponent Who Has Moved for Summary Judgment: At a meeting with plaintiff's attorney, the county claimed that a road on plaintiff's land was created by petition and plaintiff's attorney claimed that it was a private road. Plaintiff's attorney did extensive factual and legal research and mailed the research papers and results to the county. The research cost plaintiff $7,478. The County Attorney responded that the county still maintained that the road was created by petition. Plaintiff sued for a judgment declaring the road private. The county's answers to interrogatories were that the road was created by petition and that the county did not contend that the road was legally created through any other means. Plaintiff moved for summary judgment, and the court refused to let the county amend its interrogatory answers to claim creation of the road by prescription. The court's refusal was proper. To allow the amendment would unduly prejudice plaintiff, which spent considerable time and expense to prove its case in the face of continual county claims that the road was created by petition and in the face of a last minute change of the county's legal theory to claim creation by another means. Eagle Ridge Ranch Ltd. Partnership v. Park County, 283 M 62, 938 P2d 1342, 54 St. Rep. 495 (1997).

Allowing Witness Not Listed in Pretrial Order to Testify — Abuse of Discretion: Neither a scheduling order nor a pretrial order listed Goacher as a witness; rather, Stokes was listed as the witness who would provide foundation for the survey of an accident scene. One week before trial, defendant learned it was Goacher who had prepared the survey and would testify, but there was not time to depose Goacher prior to trial. At trial, defendant objected to Goacher's testimony on the grounds of surprise and prejudice. The objection was overruled, and defendant did not request a continuance. Failure to reveal the information regarding witness testimony in a timely fashion resulted in surprise and prejudice to defendant and constituted reversible error, notwithstanding defendant's failure to request a continuance. Bache v. Gilden, 252 M 178, 827 P2d 817, 49 St. Rep. 203 (1992), overruling Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27 (1988), and Sikorski v. Olin & Rolin Mfg., 174 M 107, 568 P2d 571 (1977), to the extent that they held that failure to request a continuance at trial constituted a waiver of the right to claim error on appeal, and followed in Glacier Nat'l Bank v. Challinor, 253 M 412, 833 P2d 1046, 49 St. Rep. 503 (1992).

Late Disclosure — Evidence Improperly Excluded: The District Court abused its discretion by excluding evidence on the basis of late disclosure of new witnesses by defendant, given the fact that defendant supplemented its interrogatory answers 24 days before trial, plaintiff refused to depose the new witnesses at defendant's expense, and plaintiff failed to request a continuance. Defendant's alleged knowledge of the witnesses before the discovery deadline also did not warrant exclusion, and plaintiff's claim of prejudice by the late discovery did not justify an exclusion that substantially affected defendant's rights. Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27, 45 St. Rep. 1865 (1988), overruled in Bache v. Gilden, 252 M 178, 827 P2d 817, 49 St. Rep. 203 (1992), to the extent that Barrett held that failure to request a continuance at trial

constituted a waiver of the right to claim error on appeal. Bache was followed in Glacier Nat'l Bank v. Challinor, 253 M 412, 833 P2d 1046, 49 St. Rep. 503 (1992). Plaintiff's claim that defense attorneys defrauded the court by obtaining a reversal of this decision by representing that six named witnesses would testify to specific acts of misconduct was properly dismissed through summary judgment because plaintiff chose not to use the means available to him to investigate the truth of the representations made to him. Barrett v. Holland & Hart, 256 M 101, 845 P2d 714, 49 St. Rep. 1156 (1992), and 50 St. Rep. 63 (1993).

Reference to Allegations Insufficient Answer: Mere reference back to complaint allegations is insufficient to answer an interrogatory. Pipinich v. Battershell, 232 M 507, 759 P2d 148, 45 St. Rep. 1237 (1988).

Sanctions Not Applicable to Interrogatories Propounded by Other Party Absent Order: When a party failed to correctly provide answers to a continuing interrogatory propounded by the other party, the sanctions of Rule 37(b) do not apply because that rule relates to the failure to comply with a court order compelling discovery. Thibaudeau v. Uglum, 201 M 260, 653 P2d 855, 39 St. Rep. 2096 (1982).

Amended Answer: The court did not err in allowing amendment of previously answered interrogatories, even though on the eve of trial, because defendants were well aware of the theory broadened by the amended answer and did not request a continuance. Sikorski v. Olin & Rolin Mfg., 174 M 107, 568 P2d 571 (1977), overruled in Bache v. Gilden, 252 M 178, 827 P2d 817, 49 St. Rep. 203 (1992), to the extent that Sikorski held that failure to request a continuance at trial constituted a waiver of the right to claim error on appeal.

Privileged Matter — P.S.C.: Interrogatories which sought privileged material and were irrelevant were not required to be answered by the Public Service Commission. P.S.C. v. District Court, 162 M 225, 511 P2d 334 (1973).

Unreasonable Requests — Annoyance and Expense: In action by insured against insurance company seeking damages for breach of contract and punitive damages for alleged violations of the insurance code, trial court abused its discretion by ordering answer to interrogatory requesting names and addresses of all persons within the State of Montana who had made a claim against the insurance company and whose claims the insurance company had either refused to pay or had not paid in full during the last 3 years. Even if relevant material to issues was pleaded, the interrogatory was unreasonable since the value of the information sought did not bear a reasonable relationship to the annoyance and expense involved in answering the interrogatory. State ex rel. Bankers Life & Cas. Co. v. Miller, 160 M 256, 502 P2d 27 (1972).

Failure to Deny Allegation of Pretrial Pleading — Summary Judgment: Court was correct in adopting uncontested statement of fact in pretrial pleading in making its findings of fact for summary judgment. Glacier St. Elec. Supply v. Hoyt, 152 M 415, 451 P2d 90 (1969); Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Proper Use: This rule cannot be used by a party as a weapon for punishment or forfeiture or an instrument for avoidance of a trial on the merits. Wolfe v. N. Pac. Ry., 147 M 29, 409 P2d 528 (1966), followed in Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27, 45 St. Rep. 1865 (1988).

Collateral References

Discovery *key* 62 through 69.

27 C.J.S. Discovery §§57 through 68.

23 Am. Jur. 2d Depositions and Discovery §199, et seq.

Propriety of discovery interrogatories calling for continuing answers. 88 ALR 2d 657.

Time for filing and serving discovery interrogatories. 74 ALR 2d 534.

Rule 33(b). Scope — use at trial.

Compiler's Comments

See compiler's comments to Rule 33 generally.

Identity With Federal Rule: As of May 1, 1990, the rule was identical to the Federal Rule.

Case Notes

Language of Court Order Following That of Special Interrogatories Not Erroneous: The jury found in answer to special interrogatories that certain money transfers from estate accounts did not constitute undue influence and were thus valid. Plaintiff argued that the court went beyond the jury's verdict in stating in its judgment that the transfers were valid. However, the language in the court's order followed that used in the special interrogatories agreed to by the parties and upon which the jury rendered its verdict; thus, the court did not err in its judgment. Hauck v. Seright, 1998 MT 198, 290 M 309, 964 P2d 749, 55 St. Rep. 838 (1998).

Failure to Impose Sanctions Proper — Information Requested in Interrogatories Available in Other Court Documents: Plaintiff union failed to answer some of defendants' interrogatories because the union objected to the defendants seeking discovery of the legal theories of the complaint. Defendants' motion to dismiss the action on this basis was denied by the District Court. The District Court did not err since the legal theories were readily available to the defendants in earlier documents and briefs. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986).

Collateral References

Discovery *key* 62 through 69.
27 C.J.S. Discovery §§57 through 68.
23 Am. Jur. 2d Depositions and Discovery §§241 through 243.

Rule 33(c). Option to produce business records.

Advisory Committee Note

Advisory Committee's Note to October 9, 1984, Amendment: The amendment changes language in the first sentence to accord with the Federal Rule. The last sentence has been added to conform the rule to the 1980 Amendment to the Federal Rule. For a discussion of the amendment see the advisory committee note to the Federal Rule.

Compiler's Comments

Identity With Federal Rule: Through July 31, 1980, this rule was identical with the Federal Rule. On August 1, 1980, an amendment to the Federal Rule became effective adding a provision requiring specificity in identification of documents. The 1984 amendment to the rule conformed it to the Federal Rule. As of May 1, 1990, the rule was identical to the Federal Rule.

Amendment: The amendment of October 9, 1984, in first sentence substituted "including a compilation" for "or from a compilation" and substituted "summary thereof" for "summary based thereon"; and inserted second sentence.

Collateral References

Discovery *key* 62 through 69.
27 C.J.S. Discovery §§57 through 68.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Propriety of state court's grant or denial of application for pre-action production or inspection of documents, persons, or other evidence. 12 ALR 5th 577.

Dismissal of state court action for failure or refusal of plaintiff to obey request or order for production of documents or other objects. 27 ALR 4th 61.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order for production of documents or other objects. 26 ALR 4th 849.

Propriety of discovery order permitting "destructive testing" of chattel in civil case. 11 ALR 4th 1245.

Rule 34(a). Scope.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to coincide with Rule 34, Fed.R.Civ.P. As of May 1, 1990, the rule was identical to the Federal Rule.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Discovery of Medical Records Upon Commencement of Action for Damages Placing Mental and Physical Condition at Issue — Waiver of Physician-Patient Privilege as to Condition in Controversy: Plaintiff's child fell through the second story railing at the Montana State

University-Bozeman library and suffered brain injuries. Plaintiff brought damage claims related to the child's injuries and claims related to plaintiff's own emotional distress, loss of consortium, and posttraumatic stress disorder. The state moved to compel production of all of plaintiff's health care records from before and after the fall. The District Court denied the motion, holding that the records were constitutionally protected and irrelevant to the case and therefore not discoverable. On appeal, the Supreme Court noted plaintiff's constitutional right to confidentiality of medical records, but cited State ex rel. Mapes v. District Court, 250 M 524, 822 P2d 91 (1991), for the holding that that right must be balanced against a defendant's right to defend itself in an informed manner and that records of prior physical or mental conditions are discoverable only if they relate to currently claimed damages. Here, plaintiff commenced an action for damages that placed in issue the mental and physical condition arising from the accident, thus waiving any physician-patient privilege as to the condition in controversy, and the state had the right to discover evidence related to prior medical conditions that was possibly connected to plaintiff's current damages. Denial of the discovery motion prejudiced the state's right to defend itself in an informed manner, constituting reversible error. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Financial Documents, School Transcripts, and Personnel Records Irrelevant to Medical Damages Claim — Discovery Properly Disallowed: Plaintiff's child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. Plaintiff brought damage claims related to the child's injuries and claims related to plaintiff's own medical problems stemming from trauma associated with the fall. The state moved to compel production of plaintiff's financial documents, school transcript, and personnel records. The District Court denied the motion, finding that plaintiff's statement of damages was sufficient and that the requested documents were unlikely to lead to discovery of any relevant information. On appeal, the Supreme Court affirmed. Plaintiff did not claim lost earnings or lost earning capacity. Only plaintiff's mental and emotional conditions were at issue, and the documents were irrelevant to those legitimate issues, so absent a showing of prejudice to the state's case, denial of discovery was proper. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Unreasonable and Vexatious Multiplication of Court Proceedings — Sanctions Proper: First Interstate Bank was Bayers' court-appointed conservator. McGimpsey claimed to be Bayers' private attorney and began expressing an interest in matters involving Bayers' estate, at which point the conservator became concerned about the extent of McGimpsey's involvement in Bayers' affairs and requested in writing copies of any legal documents that McGimpsey had that may have been executed by Bayers. McGimpsey ignored the request. The conservator moved in District Court to compel production of the requested information and included a request for attorney fees necessitated by the motion. McGimpsey responded with a letter threatening the conservator's counsel with sanctions and listing complaints and criticisms of the conservator's handling of Bayers' estate. McGimpsey then moved to strike scandalous, immaterial, and irrelevant content in the conservator's motion and brief, but the motion was denied. The court instead granted the conservator's motion to compel and for attorney fees. McGimpsey filed another motion to alter or amend the order granting attorney fees. That motion was also denied, and the court ordered a hearing on the amount of sanctions to be awarded unless the parties agreed to the amount of attorney fees being assessed. The conservator agreed to the court's suggestion, but McGimpsey did not, so a hearing on the amount of fees was scheduled. McGimpsey filed another motion to vacate the hearing and to establish a discovery schedule regarding attorney fees. That motion was denied at the beginning of the hearing, and the conservator's counsel testified as to reasonable attorney fees incurred because of McGimpsey's conduct. The court issued an order requiring McGimpsey to pay Bayers' estate $1,500 in attorney fees pursuant to 37-61-421, but McGimpsey filed another motion to alter or amend the order. That motion was also denied, and McGimpsey appealed to the Supreme Court, arguing that in a civil action such as this, all discovery and discovery disputes, including sanctions, should be governed by the Montana Rules of Civil Procedure and not by 37-61-421. Rules 34 and 37, M.R.Civ.P., anticipate the existence of a dispute between opposing parties, but the underlying conservatorship proceeding in this case was not an adversarial proceeding. Formal discovery proceedings were not required for the conservator to obtain documents considered relevant to Bayers' estate. McGimpsey could have provided a straightforward answer as to whether he had any of the requested documents, but instead he chose to force a needless multiplication of proceedings and the pointless involvement of the District Court in the dispute. The court's conclusion that McGimpsey unreasonably and vexatiously prolonged the litigation was not in error. Because McGimpsey continued to force the matter to the Supreme Court, he was also held

responsible under 37-61-421 for the conservator's expenses and attorney fees incurred in the appeal. In re Estate of Bayers, 2001 MT 49, 304 M 296, 21 P3d 3 (2001).

Termination of Parental Rights — Father Not Allowed "In Camera" Inspection of Entire File: In proceedings to terminate a father's parental rights, when the father moved for an "in camera" inspection of the entire Department of Family Services (now Department of Public Health and Human Services) file and the Department objected to disclosure of reports prepared by the foster parents, it was not clearly erroneous for the District Court to deny disclosure of evidence in view of failure on the part of the father's counsel to attempt to limit or specify in any manner the information requested. In re M.A.W. & K.M.W., 256 M 296, 846 P2d 985, 50 St. Rep. 64 (1993).

Equitable Bill of Discovery Allowable Under Limited Circumstances: While modern rules of pleading and practice virtually eliminated the need for an equitable bill of discovery, it is cognizable under the following limited circumstances: (1) it is available only against a person or entity that cannot be a defendant in subsequent litigation; (2) it is available for the names and addresses of potential defendants and for onsite visits to inspect specific items that may have caused a documented injury; and (3) plaintiff in an equitable action must show that the discovery requested cannot be obtained otherwise and has been requested of and denied by the person or entity that, for whatever reason, cannot be a defendant in subsequent litigation. An equitable bill of discovery that did not meet these narrow criteria was properly dismissed under Rule 12(b), M.R.Civ.P., for failure to state a claim for which relief could be granted. Temple v. Chevron U.S.A. Inc., 254 M 455, 840 P2d 561, 49 St. Rep. 661 (1992), distinguishing State ex rel. Pitcher v. District Court, 114 M 128, 133 P2d 350 (1943), and Japp v. District Court, 191 M 319, 623 P2d 1389 (1981).

Relevancy of Real Estate Appraisals: In proceeding to condemn strip of land in front of leased building, Highway Department (now Department of Transportation) could not be compelled by lessee to produce appraisals containing no opinion as to damages to or value of leasehold. Highway Comm'n v. District Court, 149 M 384, 427 P2d 49 (1967).

Inspection of Land: In eminent domain proceeding, the State was improperly denied the right to inspect the condemned land to gather evidence on the issue of lack of water. State ex rel. Highway Comm'n v. District Court, 147 M 348, 412 P2d 832 (1966).

Inspection of Land — Drilling of Wells: State's motion for inspection to drill wells on condemnee's property should have been allowed. State ex rel. Highway Comm'n v. District Court, 147 M 348, 412 P2d 832 (1966).

Relevance of Evidence — Criminal Cases: Even if the discovery statute is made applicable to criminal cases by 46-16-201, defendant was not entitled to the inspection of written materials, where there was no showing as to what the material consisted of, whether it was relevant to the defense or that it was admissible in evidence. State ex rel. Keast v. District Court, 135 M 545, 342 P2d 1071 (1959).

Production as Unreasonable Search and Seizure: A compulsory production of private books and papers by means of a subpoena duces tecum constitutes a violation of the constitutional protection against unreasonable searches and seizures under Art. III, sec. 7, 1889 Mont. Const. (now Art. II, sec. 11, 1972 Mont. Const.), unless the books and documents have first been shown to be material or relevant to the issues in a cause and the court is apprised of the nature of the action and the necessity for their production. Where petitioner made no request or showing, the order violated constitutional guaranty. State ex rel. Smith v. District Court, 112 M 506, 118 P2d 141 (1941).

Work Product of Attorney: The former discovery provision (section 93-8301, R.C.M. 1947 (superseded by Rule 34, M.R.Civ.P.)), assuming it to be applicable to criminal cases by 46-16-201, referred only to such matters as might be introduced in evidence and not to ex parte statements of a prosecuting witness touching the facts and circumstances surrounding the commission of a crime, reduced to writing by and in possession of the County Attorney. St. v. Hall, 55 M 182, 175 P 267 (1918).

Alternative Sources of Evidence: Where on an application for inspection of books and papers it appeared that the evidence sought was desired for use in a pending action, and that it was in defendant's possession, and related to the merits of the action stated by plaintiff, it was not a prerequisite to the granting of such application that plaintiff should also show that the evidence could not be obtained from other sources. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 30 M 206, 76 P 206 (1904).

Copies of Original Documents Not Included: Where an order directed defendant to permit plaintiff to inspect original letters in defendant's possession, a further provision that plaintiff should also be entitled to examine "letter-press copies of such letters" was erroneous. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 30 M 206, 76 P 206 (1904).

Fraud — Scope of Examination to Be Limited: Where, in an action to have defendant declared a constructive trustee of a certain interest in mining property, plaintiff claimed that he had been deprived of the same by reason of a fraudulent conspiracy by defendant and certain others, by means of which defendant acquired title to the property, an order for inspection of defendant's books and papers with reference to such property should have been limited to such of the correspondence between defendant's executive officers and its agents through whom the purchase of the property was made as related to the acquisition of the title to such property. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 30 M 206, 76 P 206 (1904).

Inherent Power of Courts to Order Discovery: In the absence of any statute, the District Court, in the exercise of its inherent powers as a court of equity, could upon a sufficient showing make an order for discovery which would furnish plaintiff all the relief which he could obtain under section 93-8301, R.C.M. 1947 (superseded by Rule 34, M.R.Civ.P.). The legislative enactment added nothing to the power of the court as a court of equity, but on the contrary apparently sought to confer on law courts the authority long exercised by courts of equity independent of statutory authority. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 27 M 441, 71 P 602 (1903).

Collateral References

Discovery *key* 80 through 108.

27 C.J.S. Discovery §§69 through 77.

23 Am. Jur. 2d Depositions and Discovery §§244, 253 through 259.

Spouse's right to discovery of closely held corporation records during divorce proceeding. 38 ALR 4th 145.

Photographs of civil litigant realized by opponent's surveillance as subject to pretrial discovery. 19 ALR 4th 1236.

Right to use discovery procedure to obtain records or reports of physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident. 89 ALR 2d 1001.

Reports of treating physician delivered to litigant's own attorney as subject of pretrial or other disclosure, production, or inspection. 82 ALR 2d 1162.

Pretrial discovery to secure opposing party's private reports or records as to previous accidents or incidents involving the same place or premises. 74 ALR 2d 876.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection. 73 ALR 2d 12.

Discovery and inspection of income tax returns in action between private individuals. 70 ALR 2d 240.

Discovery and inspection of article or premises the condition of which is alleged to have caused personal injury or death. 13 ALR 2d 657.

Necessity and sufficiency, under rules governing modern pretrial discovery practice, of "designation" of documents, etc., in application or motion. 8 ALR 2d 1134.

Production, in response to call therefor by adverse party, of document otherwise inadmissible in evidence, as making it admissible. 151 ALR 1006.

Rule 34(b). Procedure.

Advisory Committee Note

Advisory Committee's Note to October 9, 1984, Amendment: The amendment adds a new paragraph in order to conform the rule to the 1980 Amendment of the Federal Rule. For a discussion of the amendment see the advisory committee note to the Federal Rule.

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to coincide with Rule 34, Fed.R.Civ.P. Through July 31, 1980, this rule was identical to the Federal Rule. On August 1, 1980, an amendment to the Federal Rule became effective adding a provision requiring the producing party to produce the records as kept in the usual course of business or organize them to correspond to the request.

The 1984 amendment conformed the rule to the Federal Rule. As of May 1, 1990, the rule was identical to the Federal Rule.

The amendment of October 9, 1984, inserted third paragraph.

Case Notes

Failure of State to Respond to Discovery Requests During Driver's License Reinstatement Proceedings — Sanctions Proper: Responding to a 9-1-1 emergency dispatch, an officer found

Patterson slumped over the steering wheel of a running vehicle, fast asleep. Patterson refused to take a Breathalyzer test, so he was arrested for DUI, and his license was seized. Patterson challenged the suspension of his driver's license pursuant to 61-8-403 and through discovery requests sought a copy of the 9-1-1 report, but no copy was provided. The hearing was continued twice because of the absence of the report, and the District Court warned the state that if it failed to produce the report, Patterson's license would be reinstated and the suspension would be dismissed. On the day of the hearing, the state informed the court that it was unable to obtain the 9-1-1 report, so Patterson's motion for reinstatement of his driver's license was granted. The state appealed on grounds that the District Court erred by reinstating the license based on the state's failure to comply with an order compelling production of the report. The Supreme Court affirmed. To determine whether the sanction for the discovery abuse constituted an abuse of the District Court's discretion, the Supreme Court applied the factors in Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124 (2000). The 9-1-1 report was treated as relevant information absent a timely objection by the state to Patterson's request for production, and the state's failure to produce the report compromised Patterson's ability to prepare and present a defense, suspended the progress of the case, and prejudiced Patterson. The state was warned that reinstatement would result from failure to produce the report, and reinstatement was an appropriate sanction for the state's repeated failure to comply with discovery. Patterson v. Dept. of Justice, 2002 MT 97, 309 M 381, 46 P3d 642 (2002).

Conversion of Motion In Limine Into Motion to Compel Discovery — No Error: During an initial deposition, a witness in a contested will case asserted the attorney-client privilege and refused to answer questions or to produce requested files. The will contestants then filed a motion in limine to prohibit the witness from testifying at trial, based on their inability to explore the files or the witness's knowledge of the files. The District Court treated the motion in limine as a motion to compel discovery and ordered the witness to produce the files. Eight files were produced, and six were found to be relevant. Thereafter, the deposition was reconvened and completed. The contestants alleged District Court error in implicitly denying their motion in limine. The usual procedure following a party's objection or refusal to respond to discovery is a motion to compel, and failure to comply may result in sanctions. Here, the court did not abuse its discretion by converting the motion in limine into a motion to compel, followed by an in camera inspection, and then compelling production of most of the documents. In re Estate of Lande, 1999 MT 162, 295 M 160, 983 P2d 308, 56 St. Rep. 642 (1999).

Order Without Time Limits for Inspection Void: An order for the examination of defendant's books and papers, containing no limitation on the time within which inspection shall be made, is void. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 27 M 441, 71 P 602 (1903).

Collateral References

Discovery *key* 80 through 108.

27 C.J.S. Discovery §§78 through 86.

23 Am. Jur. 2d Depositions and Discovery §§270 through 281.

Time and place, under pretrial discovery procedure, for inspection and copying of opposing litigant's books, records, and papers. 83 ALR 2d 302.

Discovery and production of documents as affected by Rule 30(b), Fed.R.Civ.P., and similar state statutes and rules, relating to preventing, limiting, or terminating the taking of depositions. 70 ALR 2d 777.

Rule 34(c). Persons not parties.

Advisory Commission Note

COMMISSION NOTE TO 1993 AMENDMENT

The amendment conforms the rule to the 1991 amendments of the Federal Rule.

Compiler's Comments

1993 Amendment: Substituted current text concerning compelling nonparty to produce documents and submit to inspections for former text that read: "This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land."

Amendment — Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to coincide with Rule 34, Fed.R.Civ.P. As of May 1, 1990, the rule was identical to the Federal Rule.

Case Notes

Equitable Bill of Discovery Allowable Under Limited Circumstances: While modern rules of pleading and practice virtually eliminated the need for an equitable bill of discovery, it is cognizable under the following limited circumstances: (1) it is available only against a person or entity that cannot be a defendant in subsequent litigation; (2) it is available for the names and addresses of potential defendants and for onsite visits to inspect specific items that may have caused a documented injury; and (3) plaintiff in an equitable action must show that the discovery requested cannot be obtained otherwise and has been requested of and denied by the person or entity that, for whatever reason, cannot be a defendant in subsequent litigation. An equitable bill of discovery that did not meet these narrow criteria was properly dismissed under Rule 12(b), M.R.Civ.P., for failure to state a claim for which relief could be granted. Temple v. Chevron U.S.A. Inc., 254 M 455, 840 P2d 561, 49 St. Rep. 661 (1992), distinguishing State ex rel. Pitcher v. District Court, 114 M 128, 133 P2d 350 (1943), and Japp v. District Court, 191 M 319, 623 P2d 1389 (1981).

Collateral References

Discovery *key* 80 through 108.

27 C.J.S. Discovery §§69 through 87.

Existence and nature of cause of action for equitable bill of discovery. 37 ALR 5th 645.

Rule 35. Physical and mental examination of persons

Case Notes

Denial of Defendant's Timely Request for Independent Medical Examination Improper: An independent medical examination (IME) is a valid form of discovery when a plaintiff places mental or physical injury in controversy, but the request for an IME must be timely. Here, plaintiff's medical records indicated suffering from emotional distress resulting from her son's injury as early as September 1997, but plaintiff did not indicate that she suffered from posttraumatic stress disorder (PTSD) until October 2001 or assert through expert witness disclosure that she suffered from PTSD until November 2001, 1 month before the discovery deadline on December 15, 2001. As soon as the November disclosure was made, the state reserved the right to conduct an IME of plaintiff and requested that plaintiff undergo an IME 2 weeks later. However, plaintiff did not submit to an IME, so the state requested that the District Court order an emergency IME because the state had not been previously informed of plaintiff's PTSD. The District Court denied the request because it came too late in the proceedings. On appeal, the Supreme Court reversed. The mere existence of the medical records provided insufficient notice that plaintiff was planning to use PTSD as a basis for damages in the suit; yet as soon as the state found out, it filed a timely request for an IME, and the District Court abused its discretion in denying one. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Good Cause Required for Court-Ordered Medical Examination — Scope of Medical Examination Rule: Pursuant to this rule, the District Court ordered plaintiff to undergo an extensive independent medical examination by an expert 750 miles away. The examination would have subjected plaintiff to burdensome, painful, invasive, elective, and potentially harmful procedures. After accepting supervisory control, the Supreme Court reversed. This rule does not permit any proposed examination simply because a plaintiff puts the plaintiff's physical or mental condition at issue. A District Court must consider whether good cause for a proposed examination has been demonstrated because of the constitutional protections afforded to a person's right to privacy, safety, health, and happiness. Good cause for an examination may not constitute good cause for a specific examination requested by a defendant. Further, bringing a suit to recover for personal injury may place a plaintiff's physical or mental condition at issue, but it does not waive the inalienable right to the integrity of and personal control over the plaintiff's body. In determining whether there is good cause, the court should consider both the location and the nature of the examination. Requiring a party to travel any farther than necessary is an abuse of discretion, and out-of-state examinations should be viewed with disfavor when an adequate examination can be conducted in Montana. Here, the District Court abused its discretion in ordering plaintiff to undergo a potentially invasive, painful, and burdensome examination at a distant location when the same test was available in Montana. Simms v. District Court, 2003 MT 89, 315 M 135, 68 P3d 678 (2003).

Supervisory Control Proper to Determine Scope of Court-Ordered Medical Examination: Pursuant to this rule, the District Court ordered plaintiff to undergo an extensive independent medical examination by an expert 750 miles away. The examination would have subjected plaintiff to burdensome, painful, invasive, elective, and potentially harmful procedures. Plaintiff requested that the Supreme Court assume supervisory control, asserting that the District Court

was proceeding on a mistake of law that posed a risk of gross injustice to plaintiff. The Supreme Court agreed. The extent to which this rule permits an individual to be subjected to extensive and potentially harmful procedures is an issue of statewide importance, and an appeal from a mistake of law compelled by the rule would be an inadequate remedy. Therefore, the Supreme Court determined that supervisory control was appropriate to determine whether the District Court was proceeding under a mistake of law in ordering the examination. Simms v. District Court, 2003 MT 89, 315 M 135, 68 P3d 678 (2003). See also Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001).

Independent Claim for Infliction of Emotional Distress Sufficient to Satisfy Good Cause Requirement for Ordering Medical Evaluation: Winslow contended that the District Court improperly ordered him to submit to a psychiatric evaluation pursuant to this rule after finding that the good cause requirement under this rule was satisfied by the fact that Winslow had asserted an independent claim for intentional or negligent infliction of emotional distress. The Supreme Court affirmed. The independent claim placed Winslow's mental condition in controversy, and under Schlangenhauf v. Holder, 379 US 104 (1964), the pleadings themselves can establish good cause for ordering a mental examination. Further, under Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), an independent cause of action for intentional infliction of serious or severe emotional distress will arise when the distress was the reasonably foreseeable consequence of the negligent act or omission. The pleading of Winslow's independent Sacco claim was sufficient to satisfy the good cause requirement of Rule 35. Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001), distinguishing In re Marriage of Binsfield, 269 M 336, 888 P2d 889 (1995).

Tactical Decision to Forego Independent Examination — Reopening of Discovery Denied: Although the plaintiff truck driver, injured in an accident, may have had a duty to disclose the change in his employment status when questioned, the defendant made a tactical decision to attack the plaintiff's credibility in cross-examination rather than to conduct an independent examination and secure its own vocational expert. The District Court did not err in denying a motion to reopen discovery for an examination because of surprise or prejudice since the plaintiff continually asserted an inability to work as a trucker throughout the litigation and defendants had ample time to secure a vocational expert before the close of discovery. Anderson v. Werner Enterprises, Inc., 1998 MT 333, 292 M 284, 972 P2d 806, 55 St. Rep. 1350 (1998).

Presence of Attorney During Psychiatrist's Interview of Client: The plaintiff, Mapes, appealed the lower court's order that his attorney could not be present while he was being interviewed by the defendant's psychiatrist. The Supreme Court held that the attorney could be present to ensure that his client did not make any statements adverse to his position. State ex rel. Mapes v. District Court, 250 M 524, 822 P2d 91, 48 St. Rep. 954 (1991).

Doctor-Patient Privilege as Precluding Physician Private Interviews in Workers' Compensation Case: The doctor-patient privilege set out in 26-1-805 prevents the defendant from conducting private interviews with a claimant's physician. Linton v. St. Comp. Ins. Fund, 230 M 122, 749 P2d 55, 45 St. Rep. 68 (1988), citing Japp v. District Court, 191 M 319, 623 P2d 1389, 38 St. Rep. 280 (1981).

Presence of Counsel at Physical Examination: During the discovery phase of a personal injury suit, defense counsel filed a motion to obtain an order compelling a neurological examination of the plaintiff. Plaintiff responded by asking for a protective order allowing plaintiff's counsel to be present during the examination or to have the examination videotaped. The trial court granted the motion for the examination but denied plaintiff's motion. On appeal, the Supreme Court stated that the common-law rule allows a party to have his attorney present at any court-ordered physical examination. This has not always been adhered to in the jurisdictions adopting the Federal Rules of Civil Procedure. The court held that a workable interpretation of Rule 35, M.R.Civ.P., is to allow the attorney's presence as a matter of right during the history-taking part of the examination but to exclude the attorney from the examining room while the physician is actually conducting the examination. The physical examination does not require the presence of counsel to safeguard its objectivity, because in most instances it is nonadversarial. Mohr v. District Court, 202 M 423, 660 P2d 88, 40 St. Rep. 185 (1983).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 35(a). Order for examination.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

The amendment [relating to psychologists] conforms the rule to the 1988 amendments of the Federal Rules.

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform the rule to the 1991 amendments of the Federal Rule.

Compiler's Comments

1993 Amendment: In first sentence substituted "physical or mental examination by a suitably licensed or certified examiner" for "physical examination by a physician, or mental examination by a physician or psychologist".

Amendments — Identity With Federal Rule: The amendment of December 31, 1975, made this rule identical to the Federal Rule, which was itself revised in 1970. As of May 1, 1990, the Federal and Montana Rules were still identical.

The May 1, 1990, amendment made language in the rule gender neutral. It also substituted "physical examination by a physician, or mental examination by a physician or psychologist" for "physical or mental examination by a physician".

Case Notes

Discovery of Medical Records Upon Commencement of Action for Damages Placing Mental and Physical Condition at Issue — Waiver of Physician-Patient Privilege as to Condition in Controversy: Plaintiff's child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. Plaintiff brought damage claims related to the child's injuries and claims related to plaintiff's own emotional distress, loss of consortium, and posttraumatic stress disorder. The state moved to compel production of all of plaintiff's health care records from before and after the fall. The District Court denied the motion, holding that the records were constitutionally protected and irrelevant to the case and therefore not discoverable. On appeal, the Supreme Court noted plaintiff's constitutional right to confidentiality of medical records, but cited State ex rel. Mapes v. District Court, 250 M 524, 822 P2d 91 (1991), for the holding that that right must be balanced against a defendant's right to defend itself in an informed manner and that records of prior physical or mental conditions are discoverable only if they relate to currently claimed damages. Here, plaintiff commenced an action for damages that placed in issue the mental and physical condition arising from the accident, thus waiving any physician-patient privilege as to the condition in controversy, and the state had the right to discover evidence related to prior medical conditions that was possibly connected to plaintiff's current damages. Denial of the discovery motion prejudiced the state's right to defend itself in an informed manner, constituting reversible error. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Order Precluding Counsel From Attending and Recording of Independent Medical Examination Affirmed: The District Court in an automobile accident negligence case ordered Hegwood to obtain an independent medical examination pursuant to Rule 35, M.R.Civ.P., but denied Hegwood's motion to allow her attorney to attend the examination and to allow a court reporter and video recorder to document the entire examination on grounds that the discovery request was overbroad. Hegwood appealed, but the Supreme Court affirmed. A medical examination ordered under Rule 35, M.R.Civ.P., is a nonadversarial proceeding, but when an examinee sufficiently demonstrates subjective predilections or the likelihood of prejudice, the examination shifts from independent in nature to adversarial. Courts and litigants should thus rely on the protective measures in Rule 26(c), M.R.Civ.P., and this rule to negate the inequities. Here, the record did not support the desired intrusion into the examination room, nor did a demonstration that the examiner performed examinations for the insurance industry inherently establish the degree of prejudice or potential for abuse necessary. A District Court has discretion to control discovery to administer trials in order to ensure a fair trial for all concerned and is in a better position than the Supreme Court to supervise day-to-day discovery operations, so an order affecting discovery will not be overturned unless it amounts to an abuse of discretion. Prohibiting attendance by Hegwood's attorney and the recording of the examination was not an abuse of discretion. Hegwood v. District Court, 2003 MT 200, 317 M 30, 75 P3d 308 (2003), clarifying Mohr v. District Court, 202 M 423, 660 P2d 88 (1983).

Supervisory Control Denied to Address Discovery Issues: Petitioner sought a writ of supervisory control to address a District Court order directing petitioner to submit to discovery through an independent medical examination in an automobile accident negligence case. The Supreme Court declined to exercise supervisory control. Typically, orders pertaining to discovery are interlocutory in nature and are not generally reviewable in an original proceeding. Original jurisdiction will be exercised when an order places a party at a significant disadvantage in litigating a case. Supervisory control should issue when a District Court proceeds under a mistake of law, causing a gross injustice for which an appeal is not an adequate remedy, but supervisory control is an extraordinary remedy exercised only in extraordinary circumstances. Absent a showing that procedural protections were inadequate to control discovery in an independent medical examination, supervisory control was inappropriate. Hegwood v. District Court, 2003 MT 200, 317 M 30, 75 P3d 308 (2003).

General Scope of Examination to Be Specified in Order for Examination: The District Court properly ordered that Winslow submit to a psychiatric examination pursuant to this rule, but neglected to specify the scope of the examination. However, the rule requires that the court, at least in a general sense, define the scope of the examination to determine the existence and extent of the asserted injury without invading the province of the jury by opining whether the claimant is being truthful. The Supreme Court reversed for entry of an order specifying the time, place, manner, conditions, and scope of the examination. Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001), following Schlangenhauf v. Holder, 379 US 104 (1964), and State ex rel. Mapes v. District Court, 250 M 524, 822 P2d 91 (1991).

Husband's Request for Mental Examination of Wife in Divorce Case Properly Denied: The husband, in a dissolution action, requested an order that his wife submit to a mental examination. After holding a hearing on the issue, the lower court denied the motion. The Supreme Court, in adopting the test set forth in Schlagenhauf v. Holder, 379 US 104 (1964), held that the husband, by relying solely on speculative testimony, had failed to demonstrate that his wife's mental competency was "in controversy" and that "good cause" existed for issuing the order. In re Marriage of Binsfield, 269 M 336, 888 P2d 889, 52 St. Rep. 16 (1995), distinguishing In re Marriage of Tesch, 199 M 240, 648 P2d 293 (1982), and St. v. Little, 260 M 460, 861 P2d 154 (1993), and distinguished in Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001).

No Right to Require Psychiatric or Medical Examination of Witness Not a Party: Little was convicted of sexual intercourse without consent and sexual assault. During trial, Little moved for psychiatric and medical examinations of one of the complaining witnesses, which was denied by the District Court. Citing St. v. Crist, 253 M 442, 833 P2d 1052 (1992), the Supreme Court held that Little had no right to force the psychiatric examination of a child victim of a sexual crime. Citing St. v. Goodwin 249 M 1, 813 P2d 953 (1991), the Supreme Court held that Little had no right to require a medical examination of one of the complaining witnesses. Citing St. v. Liddell, 211 M 180, 685 P2d 918 (1984), the Supreme Court also noted that this rule allows the mental or physical examination of a party not a witness. St. v. Little, 260 M 460, 861 P2d 154, 50 St. Rep. 1124 (1993).

Refusal to Require Mental Examination of Rape Victim — Not Error — Prosecution Use of Rape-Trauma Syndrome: It was not error to refuse to compel the victim of the crime of sexual intercourse without consent to be examined by the defendant's psychologist even though the prosecution used expert witnesses to show that the victim suffered from rape-trauma syndrome as evidence that the intercourse was committed without her consent. Rule 35(a), M.R.Civ.P., allows mental or physical examination of a party when the party's mental or physical condition may be in controversy; but no such examination is provided regarding a witness, and in this case the witness' mental condition was not in issue. The issue involved was an act, i.e., whether there was consent to sexual intercourse. St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984), followed in St. v. Gilpin, 232 M 56, 756 P2d 445, 45 St. Rep. 863 (1988), St. v. Goodwin, 249 M 1, 813 P2d 953, 48 St. Rep. 539 (1991), and in St. v. Crist, 253 M 442, 833 P2d 1052, 49 St. Rep. 525 (1992).

Law Review Articles

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).

Collateral References

Damages *key* 206(5); Discovery *key* 78, 79.

25A C.J.S. Damages §174; 27 C.J.S. Discovery §§37, 71(9).

23 Am. Jur. 2d Depositions and Discovery §§295 through 302.

Right of party to have attorney or physician present during physical or mental examination at instance of opposing party. 84 ALR 4th 558.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident. 89 ALR 2d 1001.

Court's power to order physical examination of personal injury plaintiff as affected by distance or location of place of examination. 71 ALR 2d 973.

Power to require physical examination of injured person in action by his parent or spouse to recover for his injury. 62 ALR 2d 1291.

Nature, extent, and conduct of physical examination of party to action or proceeding to recover for personal injury or disability. 135 ALR 883.

Power to require plaintiff to submit to physical examination. 108 ALR 142.

Rule 35(b). Report of examiner.

Advisory Committee Notes

NOTE TO SEPTEMBER 29, 1967, AMENDMENT

This amendment extends the existing modification by Rule 35 of subparagraph 4 of R.C.M. 1947, sec. 93-701-4 [now recodified as 26-1-805, MCA]. The purpose is to facilitate the obtaining of competent medical testimony and the use of testimony of the original attending physician, especially in personal injury cases. The proposal coincides with the view recommended in Wigmore on Evidence (McNaughton Rev. 1961), Vol. VIII, secs. 2380 and 2380a.

NOTE TO DECEMBER 31, 1975, AMENDMENT

It was felt that the provisions found in paragraph (2) relative to waiver of privilege should be retained. Otherwise the rule is amended to coincide with the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

The amendment [relating to psychologists] conforms the rule to the 1988 amendments of the Federal Rules.

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform the rule to the 1991 amendments of the Federal Rule.

Compiler's Comments

1993 Amendment: In (1), in three places, and in (3), in two places, substituted references to examiner for references to examining physician or psychologist; at end of (1), after "trial", deleted "or may hold the physician or psychologist in contempt of court, or both"; and made minor changes in style.

Identity With Federal Rule: As of May 1, 1990, paragraph (1) of the rule was still identical to the Federal Rule with the exception that the provision for holding the physician in contempt of court does not appear in the Federal Rule. This provision has appeared in the Montana Rule since its inception. Paragraph (2) of the rule differs from the Federal Rule as noted above in the advisory committee notes. Paragraph (3) is identical.

Amendments: The amendment of September 29, 1967, rewrote clause (2).

The 1971 amendment inserted "or asserting a defense" near the beginning of clause (2) of the first sentence of subdivision (b)(2); and substituted "a party to the action" for "the party bringing the action" in two places in the same clause.

The amendment of December 31, 1975, substituted the present subdivision (1) for the former subdivision (1); and added subdivision (3).

The May 1, 1990, amendment made language in the rule gender neutral. It also inserted references to psychologist in five places.

Case Notes

Defense Communication With Plaintiff's Physician: It was not error to allow defense counsel to communicate with the plaintiff's treating physician during the trial. As the plaintiff stated he did not intend to call the physician as a witness and because the inquiry was made during the course of the trial, normal discovery limitations did not apply. Ostermiller v. Alvord, 222 M 208, 720 P2d 1198, 43 St. Rep. 1180 (1986).

District Court Without Authority to Order "Interviews" of Witnesses — Supervisory Control: In a personal injury case, the defendant obtained a court order stating that the plaintiff had

waived her physician-patient privilege and that the plaintiff's doctors were to be treated as any other witnesses in the case. On appeal, the Supreme Court agreed with the order on its face but held that the District Court did not have the power under the rules of discovery to order private interviews between counsel for one party and possibly adverse witnesses, expert or not. The Supreme Court noted that other rules of discovery serve to supplement Rule 26(a), M.R.Civ.P. The District Court must relate discovery it allows and enforces to one of the methods provided for in that rule. A Writ of Supervisory Control was issued in this case. Jaap v. District Court, 191 M 319, 623 P2d 1389, 38 St. Rep. 280 (1981).

Waiver of Physician-Patient Privilege — Extent: By filing medical malpractice suit and submitting attending physicians for deposition purposes, patient permanently waived any privilege concerning her eye which was subject matter of suit. An order that defense counsel be allowed private conference with physicians was proper. A waiver of the privilege extends to all communications regarding the whole transaction and cannot be limited to a particular purpose or person. Callahan v. Burton, 157 M 513, 487 P2d 515 (1971), overruled in Jaap v. District Court, 191 M 319, 623 P2d 1389 (1981).

Law Review Articles

Discovery and the Doctor: Expansion of Rule 35(b), Kellner, 34 Mont. L. Rev. 257 (1973).

Medical Discovery in Negligence Actions: Rule 35(b)(2) of Montana Rules of Civil Procedure, Nollmeyer, 30 Mont. L. Rev. 105 (1968).

Collateral References

Federal Rule of Civil Procedure 35(b) pertaining to reports of physician's examination. 36 ALR 2d 946.

Rule 36. Requests for admissions

Case Notes

Failure to Respond to Requests for Admissions — Summary Judgment Proper: Defendant sought to have the Supreme Court relieve it of the effect of Rule 36, M.R.Civ.P., that considers matters in requests for admission that are not responded to as admitted and conclusively established. Defendant argued that, since it had already denied the matter in question in its answer to the complaint, it should not be required to deny the matter again. The court affirmed the order granting summary judgment, finding ample opportunity for defendant to respond to the request for admissions. Holmes & Turner v. Steer-In, 222 M 282, 721 P2d 1276, 43 St. Rep. 1266 (1986).

Failure to Answer Request for Admissions — Invalidity of Unserved Lien: On a question of validity of mechanics' lien, appellant failed to respond to a request for admissions. Under Rule 36, M.R.Civ.P., all unanswered requests for admissions are admitted for all purposes. By failing to answer, appellant admitted that he had not served or billed respondent, so the requirement of 71-3-513 that a copy of a lien must be served on the property owner in order to be valid was not met. The District Court properly found the unserved lien invalid as a matter of law. Toavs v. Billings Fed. Credit Union, 221 M 473, 719 P2d 428, 43 St. Rep. 985 (1986).

Admission of Genuineness of Documents — Privilege: A request for admission of genuineness of documents under Rule 36, M.R.Civ.P., is limited by Rule 26, M.R.Civ.P., to the genuineness of documents that are not privileged and that are discoverable under Rule 26. Kuiper v. District Court, 193 M 452, 632 P2d 694, 38 St. Rep. 1288 (1981).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Collateral References

Permissible scope, respecting nature of inquiry, of demand for admissions under modern state civil rules of procedure. 42 ALR 4th 489.

Formal sufficiency of response to request for admissions under state discovery rules. 8 ALR 4th 728.

Rule 36(a). Request for admission.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to coincide with Rule 36, Fed.R.Civ.P. As of May 1, 1990, the rule was identical to the Federal Rule.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Error in Denial of Opportunity to Respond to Amended Requests for Admission — Late Discovery Responses Properly Denied: Defendant neglected to respond to requests for admission within 30 days. On defendant's motion for summary judgment, the District Court amended two requests for admission, which nullified the matter contained in the requests as being conclusively established. Plaintiff should have been given an opportunity to respond to the amended requests and the District Court abused its discretion in not allowing plaintiff the chance to respond. The Supreme Court reversed the portions of the summary judgment that corresponded to the amended requests for admission, but, in accord with Easton v. Cowie, 247 M 181, 805 P2d 573 (1991), the portions of the summary judgment based on admissions demonstrating no genuine issue of material fact were affirmed because plaintiff did not respond in a timely manner to the discovery requests. Spooner Constr. & Tree Serv., Inc. v. Maner, 2000 MT 161, 300 M 268, 3 P3d 641, 57 St. Rep. 674 (2000).

Notice Required When Counsel Withdraws — Discovery Deadline Tolled: Only 3 days before the deadline for answers to discovery requests, Holms's counsel moved to withdraw, citing irreconcilable personal and professional differences with Holms regarding handling of the case and a breakdown in attorney-client communication. Four days after the discovery deadline, Stanleys moved for summary judgment based to a great extent on matters considered admitted by Holms's failure to respond to requests for admissions pursuant to this rule. Twelve days after the motion for summary judgment, the court heard and granted counsel's motion to withdraw. On the same day, Stanleys served Holms with confirmation of the court's oral instruction to Holms regarding Rule 10, M.U.D.C.R. (Title 25, ch. 19), and with a notice of the hearing on the motion for summary judgment. Seven days before the hearing, Holms's new counsel agreed to undertake representation and the following day moved to amend the pleadings, to file amended responses to Stanleys' first discovery requests, and to continue Stanleys' motion for summary judgment. On the date set for hearing on the summary judgment, the court heard oral argument and granted Stanleys' motion about 3 months later. In its order, the court concluded that the 30-day deadline in this rule, was not tolled because Rule 10, M.U.D.C.R., did not apply. However, pursuant to Rule 10, M.U.D.C.R., and 37-61-405, the opposing party with notice of the withdrawal of counsel has a duty to provide adequate notice to the unrepresented party when that party's attorney ceases to act as such, not just when the attorney dies or is removed, suspended, or actually withdraws, before taking advantage of a default on the part of the other side. The purpose of this notice requirement is to prevent a represented party from taking unfair advantage of the situation of the opposing party who has actually or effectively lost representation and to ensure that the unrepresented party receives a fair trial. The case was remanded for consideration of the motion to amend the pleadings and reconsideration of the summary judgment motion in light of the amended pleadings, the discovery responses, and the state of the record at the time that the motion for summary judgment is heard. Stanley v. Holms, 281 M 329, 934 P2d 196, 54 St. Rep. 195 (1997), following McPartlin v. Fransen, 178 M 178, 582 P2d 1255 (1978). On remand, the District Court did not abuse its discretion in conducting the summary judgment hearing and ruling on Stanley's motion for summary judgment without allowing Holms the opportunity to conduct further discovery. Stanley v. Holms, 1999 MT 41, 293 M 343, 975 P2d 1242, 56 St. Rep. 178 (1999), following Howell v. Glacier Gen. Assurance Co., 240 M 383, 785 P2d 1018, 46 St. Rep. 2216 (1989).

Refusal to Allow Filing of Discovery Response After Sixteen-Day Delay — No Abuse of Discretion: Filing a late response is not a matter of right, but lies within the court's discretion. It was not a manifest abuse of discretion for a District Court to grant summary judgment for defendant and deny plaintiff's motion for an extension of time to answer a request for admission 16 days after the response was due. Easton v. Cowie, 247 M 181, 805 P2d 573, 48 St. Rep. 154 (1991), followed in Spooner Constr. & Tree Serv., Inc. v. Maner, 2000 MT 161, 300 M 268, 3 P3d 641, 57 St. Rep. 674 (2000).

Failure to Respond in Timely Manner — District Court's Refusal to Accept Response Proper: Defendants tendered a written response to plaintiff's request for admission of facts and genuineness of documents approximately 1 ½ years after service of the request. They offered no explanation or justification for their failure to respond in a timely manner. The District Court refused to accept the response. On appeal, the Supreme Court affirmed, ruling that the District

Court had properly exercised its discretion in the matter. Detert v. Lake County, 207 M 460, 674 P2d 1097, 41 St. Rep. 76 (1984).

Failure to Answer — Facts Deemed True — Basis for Summary Judgment: Summary judgment was properly granted plaintiff suing for delinquent payments under lease of bar and lounge equipment where all issues of material fact were resolved when a request for admissions relating to those facts was sent defendants by plaintiff and was not answered for 15 months and the trial court deemed the facts in the request for admissions as true for failure to answer the request within the required 30-day period after service of the request and where defendants did not give any evidence to raise an issue of material fact. All-States Leasing Co. v. Top Hat Lounge, 198 M 1, 649 P2d 1250, 39 St. Rep. 425 (1982), followed in Wight v. Gonzales, 249 M 268, 815 P2d 598, 48 St. Rep. 745 (1991).

No Absolute Right to File Late Answers: A party has no absolute right to file late answers to requests for admissions. The matter rests within the discretion of the trial court, and the court's decision will not be disturbed in the absence of a manifest abuse of discretion. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Delay in Filing Answer to Request for Admissions — Justification: The Supreme Court upheld the District Court's refusal to allow the late filing of answers to requested admissions. The court noted the rule failure to take any action within the period stated in the request results in an admission of the facts stated therein, although the court may permit a late filing of an answer when the delay is not caused by a lack of good faith or in the absence of any prejudice to the party requesting the admission. In view of the fact that 3 months passed after the requests for admission were filed, during which time the appellant could have replied, and considering that no request for an extension of time to answer was filed for 5 months after the request for admission was made, the court affirmed the denial of the request for the time extension. N. Dak. v. Newberger d.b.a. Amusement Conspiracy, 188 M 323, 613 P2d 1002 (1980).

Evasive Answer Treated as Failure to Answer: Rule 36(a), M.R.Civ.P., requires a denial of a request for admission to fairly meet the substance of the requested admission. The responder must admit or deny with particularity if the truth can be ascertained by reasonable inquiry. Under Rule 37(a), M.R.Civ.P., an evasive answer is to be treated as a failure to answer and, thus, an admission. Massaro v. Dunham, 184 M 400, 603 P2d 249 (1979). See also Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985).

Request to Admit Genuineness of Documents — Attachment of Copy Required: Rule 36(a), M.R.Civ.P., requires the attachment of a copy of a document to a request for admission when the genuineness of that document is the matter sought to be admitted. The purpose of this requirement is to give the responding party an opportunity to compare the copy with the original to determine its validity. Massaro v. Dunham, 184 M 400, 603 P2d 249 (1979). See also Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985).

Failure to Answer Request for Admission: When a party fails to answer within 30 days and is not granted an extension by the court, the matter is considered admitted. Rogers v. Relyea, 184 M 1, 601 P2d 37 (1979).

Expected Denial — Requests Not to Be Ignored: Request for admissions could not be ignored simply because it dealt with central issues which might in good faith be considered controverted. Morast v. Auble, 164 M 100, 519 P2d 157 (1974).

Failure to Respond — No Abuse of Discretion: Where defendants in action for wrongful death stemming from automobile accident failed to answer requests for admissions from plaintiffs over period of 8 ½ months, with intervening admonition during pretrial conference, there was no abuse of discretion by District Court in striking response and considering requested facts admitted. Morast v. Auble, 164 M 100, 519 P2d 157 (1974).

Refusal to Permit Late Filing of Response: Refusal to permit late filing by plaintiffs of responses to request for admissions in wrongful death action was not an abuse of discretion where there was an 8 ½-month delay in filing with an intervening admonition to respond made during pretrial conference and where names of an eyewitness and an investigating highway patrolman had been furnished to plaintiffs through answers to their interrogatories. Morast v. Auble, 164 M 100, 519 P2d 157 (1974).

Failure to Make Timely Response: Although party did not make timely response to request for admissions, delay was not in bad faith and judge did not abuse discretion in allowing the filing of answers or in denying motion for summary judgment. Heller v. Osburnsen, 162 M 182, 510 P2d 13 (1973), followed in Aldrich & Co. v. Donovan, 238 M 431, 778 P2d 397, 46 St. Rep. 1393 (1989).

Demand for Admissions — No Response — Summary Judgment: Because plaintiff failed to reply to the demand for admissions within the time stated, the court was bound to grant the

motion for summary judgment. Naegli v. Daniels, 145 M 323, 400 P2d 896 (1965), followed in Garrett v. PACCAR Financial Corp., 245 M 379, 801 P2d 605, 47 St. Rep. 2185 (1990).

Compliance With Rule — Discretion of Trial Court: Where defendant failed to file admissions on plaintiff's request and was not permitted to file them later or to reopen hearing on summary judgment, whether defendant's admissions, which were signed and verified by defendant's counsel as being made from a letter received from the defendant, met the intent of this rule was a matter within the discretion of the trial court. Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Failure to Respond — Action Against Attorney: In suit by client against his attorney for money which attorney failed to forward to client, request for admissions was considered admitted where attorney failed to answer. Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Intent of Rule: The intent of this rule is that the party served shall make a sworn statement of the truth of any relevant matters of fact set forth in the request for admissions. Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Orders Regarding Admissions — Not Necessary: There is no necessity for a court to make specific orders regarding admissions. They are before the court for such consideration as the court considers necessary. Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Collateral References

Discovery *key* 121 through 129.

27 C.J.S. Discovery §§88 through 110.

23 Am. Jur. 2d Depositions and Discovery §314, et seq.; 29 Am. Jur. 2d Evidence §597, et seq.

Permissible scope, respecting nature of inquiry, of demand for admissions under modern state civil rules of procedure. 42 ALR 4th 489.

Formal sufficiency of response to request for admissions under state discovery rules. 8 ALR 4th 728.

Party's duty, under Federal Rule of Civil Procedure 36(a) and similar state statutes and rules, to respond to requests for admission of facts not within his personal knowledge. 20 ALR 3d 756.

What constitutes a "denial" within Fed.R.Civ.P., Rule 36 pertaining to admissions before trial. 36 ALR 2d 1192.

Rule 36(b). Effect of admission.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of December 31, 1975, inserted the first two sentences, and made minor changes in phraseology. This amendment made the Montana Rule identical to the Federal Rule. As of May 1, 1990, the rules were still identical.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Error in Denial of Opportunity to Respond to Amended Requests for Admission — Late Discovery Responses Properly Denied: Defendant neglected to respond to requests for admission within 30 days. On defendant's motion for summary judgment, the District Court amended two requests for admission, which nullified the matter contained in the requests as being conclusively established. Plaintiff should have been given an opportunity to respond to the amended requests and the District Court abused its discretion in not allowing plaintiff the chance to respond. The Supreme Court reversed the portions of the summary judgment that corresponded to the amended requests for admission, but, in accord with Easton v. Cowie, 247 M 181, 805 P2d 573 (1991), the portions of the summary judgment based on admissions demonstrating no genuine issue of material fact were affirmed because plaintiff did not respond in a timely manner to the discovery requests. Spooner Constr. & Tree Serv., Inc. v. Maner, 2000 MT 161, 300 M 268, 3 P3d 641, 57 St. Rep. 674 (2000).

Failure to Answer — Facts Deemed True — Basis for Summary Judgment: Summary judgment was properly granted plaintiff suing for delinquent payments under lease of bar and lounge equipment where all issues of material fact were resolved when a request for admissions relating to those facts was sent defendants by plaintiff and was not answered for 15 months and

the trial court deemed the facts in the request for admissions as true for failure to answer the request within the required 30-day period after service of the request and where defendants did not give any evidence to raise an issue of material fact. All-States Leasing Co. v. Top Hat Lounge, 198 M 1, 649 P2d 1250, 39 St. Rep. 425 (1982).

Amendment of Admission by Court After Trial Held Proper Where No Showing of Prejudice to Opposing Party: In a suit on a sales contract in which the date the contract had been made was at issue, seller submitted requests for admission to buyer, including a request concerning the date of the contract. Buyer did not respond within 30 days. Several months later, seller filed a notice of admission of facts. Subsequently, buyer filed a response to the requests in which he denied that the contract had been made on the date alleged by the seller. Buyer had also denied this date in his answer and counterclaim. After trial, the District Court granted buyer's motion to amend the admissions. Seller appealed. The Supreme Court affirmed, holding that it was within the trial court's discretion to amend, because there was no showing of prejudice to seller and he had been on notice of buyer's denial for more than 2 years prior to the trial. Ag Sales v. Klose, 199 M 400, 649 P2d 447, 39 St. Rep. 1482 (1982).

Grounds for Denying Motion to Amend: Where (1) defendant had previously been granted a motion to amend his answer to requests for admissions and a lengthy delay resulted; (2) defendant had failed to timely argue the substance of the requested admission; (3) grant of a second motion to amend answers would cause further lengthy delay; (4) defendant gave no justification for the second motion; (5) the lower court concluded that witnesses from outside the region were involved; (6) the subjects of the motion went to the foundation of the plaintiffs' case and had been relied upon by the plaintiffs; (7) the motion was due to insufficient and untimely investigation of the facts and issues by defendant; and (8) rules of procedure and orderly disposition of cases would be subverted by granting the motion, denial of the motion was not a manifest abuse of the District Court's discretion and was affirmed. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Failure to Deny Allegation of Pretrial Pleading — Summary Judgment: Court was correct in adopting uncontested statement of fact in pretrial pleading in making its findings of fact for summary judgment. Glacier St. Elec. Supply v. Hoyt, 152 M 415, 451 P2d 90 (1969); Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Demand for Admissions — No Response — Summary Judgment: Because plaintiff failed to reply to the demand for admissions within the time stated, the court was bound to grant the motion for summary judgment. Naegli v. Daniels, 145 M 323, 400 P2d 896 (1965).

Orders Regarding Admissions — Not Necessary: There is no necessity for a court to make specific orders regarding admissions. They are before the court for such consideration as the court considers necessary. Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Collateral References

23 Am. Jur. 2d Depositions and Discovery §§353 through 356.

Withdrawal or amendment of admissions under Rule 36(b) of Federal Rules of Civil Procedure. 64 ALR Fed. 746.

Rule 37. Failure to make discovery: sanctions

Case Notes

Absence of Prejudice or Material Effect on Substantial Rights — Discovery Sanctions Properly Denied: Winslow contended that defendant should be sanctioned for discovery abuses for persistently delaying the proceedings, preventing a fair trial, and precluding the admission of relevant evidence. The District Court denied sanctions, holding that defendant properly responded to discovery and did not obstruct witnesses, conceal information, or improperly state objections. On appeal, the Supreme Court reviewed each of the numerous motions to compel, for protective orders, and for sanctions, concluding that the District Court did not abuse its discretion and that Winslow failed to establish that the District Court's discovery rulings caused prejudice or materially affected Winslow's substantial rights. Denial of sanctions was affirmed. Winslow v. Mont. Rail Link, Inc., 2005 MT 217, 328 M 260, __P3d__ (2005).

Dismissal of Complaint as Sanction for Discovery Abuses: Although Xu received timely notice of the need to respond in writing to defendants' discovery requests within 30 days, Xu filed incomplete, inappropriate, and unacceptable responses, and ultimately defendants sought an order compelling Xu's responses. Then, after defendants' unsuccessful attempts to schedule a deposition, defendants timely notified Xu of their intent to take Xu's deposition on May 11, 2004. Without response or explanation, Xu did not attend the deposition, so defendants sought an order compelling Xu's deposition and requesting sanctions, including dismissal of Xu's claims for failure to attend the May deposition. At a hearing, the District Court carefully explained to Xu

the obligation to answer discovery and attend depositions. The court gave Xu an additional 3 weeks to provide discovery answers and be deposed. In response, Xu filed a pleading to reschedule the deposition, but failed to complete discovery or to attend the court-ordered deposition. On defendants' motion, the court then dismissed Xu's action with prejudice for failing to attend the depositions. Xu appealed, but the Supreme Court affirmed, concluding from the record that Xu knowingly and repeatedly refused to cooperate with discovery request, and that the District Court did not abuse its discretion in dismissing Xu's claim as a sanction. Xu v. McLaughlin Research Institute for Biomedical Science, Inc., 2005 MT 209, 328 M 232, 119 P3d 100 (2005).

Default Proper as Sanction for Discovery Abuses: Alleging that she was defrauded out of nearly $1 million, Cass properly served defendants with a complaint, summons, and discovery requests. Defendants failed to respond to the discovery requests, and the District Court held defendants in default, awarding Cass $1,736,547.20. Defendants moved to set the judgment aside, but the request was denied, and defendants appealed, arguing that the default judgment should have been set aside pursuant to Rule 55, M.R.Civ.P., when Cass filed an amended pleading. However, the record clearly showed that the District Court dismissed the case pursuant to this rule, based on defendants' failure to comply with discovery requests and a court order to answer discovery, rather than on Rule 55, M.R.Civ.P., for defendants' failure to defend. Although default could have been applied under either rule, the District Court obviously faced a litigant who simply was not going to respond to properly served discovery, so entry of default under this rule was not an abuse of discretion, and the judgment was affirmed. Cass v. Composite Indus. of Am., Inc., 2002 MT 226, 311 M 406, 56 P3d 322 (2002).

Failure of State to Respond to Discovery Requests During Driver's License Reinstatement Proceedings — Sanctions Proper: Responding to a 9-1-1 emergency dispatch, an officer found Patterson slumped over the steering wheel of a running vehicle, fast asleep. Patterson refused to take a Breathalyzer test, so he was arrested for DUI, and his license was seized. Patterson challenged the suspension of his driver's license pursuant to 61-8-403 and through discovery requests sought a copy of the 9-1-1 report, but no copy was provided. The hearing was continued twice because of the absence of the report, and the District Court warned the state that if it failed to produce the report, Patterson's license would be reinstated and the suspension would be dismissed. On the day of the hearing, the state informed the court that it was unable to obtain the 9-1-1 report, so Patterson's motion for reinstatement of his driver's license was granted. The state appealed on grounds that the District Court erred by reinstating the license based on the state's failure to comply with an order compelling production of the report. The Supreme Court affirmed. To determine whether the sanction for the discovery abuse constituted an abuse of the District Court's discretion, the Supreme Court applied the factors in Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124 (2000). The 9-1-1 report was treated as relevant information absent a timely objection by the state to Patterson's request for production, and the state's failure to produce the report compromised Patterson's ability to prepare and present a defense, suspended the progress of the case, and prejudiced Patterson. The state was warned that reinstatement would result from failure to produce the report, and reinstatement was an appropriate sanction for the state's repeated failure to comply with discovery. Patterson v. Dept. of Justice, 2002 MT 97, 309 M 381, 46 P3d 642 (2002).

Unreasonable and Vexatious Multiplication of Court Proceedings — Sanctions Proper: First Interstate Bank was Bayers' court-appointed conservator. McGimpsey claimed to be Bayers' private attorney and began expressing an interest in matters involving Bayers' estate, at which point the conservator became concerned about the extent of McGimpsey's involvement in Bayers' affairs and requested in writing copies of any legal documents that McGimpsey had that may have been executed by Bayers. McGimpsey ignored the request. The conservator moved in District Court to compel production of the requested information and included a request for attorney fees necessitated by the motion. McGimpsey responded with a letter threatening the conservator's counsel with sanctions and listing complaints and criticisms of the conservator's handling of Bayers' estate. McGimpsey then moved to strike scandalous, immaterial, and irrelevant content in the conservator's motion and brief, but the motion was denied. The court instead granted the conservator's motion to compel and for attorney fees. McGimpsey filed another motion to alter or amend the order granting attorney fees. That motion was also denied, and the court ordered a hearing on the amount of sanctions to be awarded unless the parties agreed to the amount of attorney fees being assessed. The conservator agreed to the court's suggestion, but McGimpsey did not, so a hearing on the amount of fees was scheduled. McGimpsey filed another motion to vacate the hearing and to establish a discovery schedule regarding attorney fees. That motion was denied at the beginning of the hearing, and the

conservator's counsel testified as to reasonable attorney fees incurred because of McGimpsey's conduct. The court issued an order requiring McGimpsey to pay Bayers' estate $1,500 in attorney fees pursuant to 37-61-421, but McGimpsey filed another motion to alter or amend the order. That motion was also denied, and McGimpsey appealed to the Supreme Court, arguing that in a civil action such as this, all discovery and discovery disputes, including sanctions, should be governed by the Montana Rules of Civil Procedure and not by 37-61-421. Rule 34, M.R.Civ.P., and this rule anticipate the existence of a dispute between opposing parties, but the underlying conservatorship proceeding in this case was not an adversarial proceeding. Formal discovery proceedings were not required for the conservator to obtain documents considered relevant to Bayers' estate. McGimpsey could have provided a straightforward answer as to whether he had any of the requested documents, but instead he chose to force a needless multiplication of proceedings and the pointless involvement of the District Court in the dispute. The court's conclusion that McGimpsey unreasonably and vexatiously prolonged the litigation was not in error. Because McGimpsey continued to force the matter to the Supreme Court, he was also held responsible under 37-61-421 for the conservator's expenses and attorney fees incurred in the appeal. In re Estate of Bayers, 2001 MT 49, 304 M 296, 21 P3d 3 (2001).

Imposition of Liability as Matter of Law as Sanction for Discovery Abuse: Following extensive discovery requests, plaintiffs moved to compel discovery and for sanctions. The District Court imposed liability as a matter of law upon defendants as a sanction for discovery abuse. The court based its decision on findings that defendants: (1) misrepresented their corporate ownership and control; (2) falsely represented in briefs and at hearing that all pertinent documents had been provided; (3) knowingly withheld and concealed significant information; (4) falsely represented their involvement with equipment design and construction standards; and (5) falsely represented that certain investigation documents had been prepared for purposes of litigation. Citing In re Adoption of R.D.T., 239 M 33, 778 P2d 416 (1989), defendants contended on appeal that the court's use of deposition testimony solicited subsequent to defendants' discovery responses invoked the wisdom of hindsight, resulting in a Kafkaesque nightmare. After examining the record and noting sufficient evidence supporting the District Court's findings of defendants' repeated and willful concealment and misrepresentation of facts during discovery, the Supreme Court held that defendants had misconstrued both R.D.T. and Franz Kafka, noting that if anyone in the case were guilty of creating a nightmare, it was defendants through their refusal to comply with rules of discovery and civil procedure and to disclose information necessary for the proper presentation of plaintiffs' case. Imposition of liability as a matter of law as a sanction for discovery abuses was affirmed. Bulen v. Navajo Refining Co., Inc., 2000 MT 222, 301 M 195, 9 P3d 607, 57 St. Rep. 912 (2000), following First Bank v. Heidema, 219 M 373, 711 P2d 1384 (1986).

Criteria Used in Review of Sanction — Sanction Proper for Dilatory Tactics: The District Court accepted a judgment for damages and sanctions determined by a special master for defendant's discovery violations and tortious interference with plaintiff's right to buy a parcel of land, and defendant appealed. Under this rule, a party's dilatory tactics in responding to discovery requests may result in sanctions. The Supreme Court set out the following criteria to be used in reviewing whether a sanction is an abuse of discretion or too severe: (1) whether the consequences imposed by the sanctions relate to the extent and nature of the actual discovery abuse; (2) the extent of the prejudice to the opposing party that resulted from the discovery abuse; and (3) whether the court expressly warned the abusing party of the consequences. In this case, defendant's intransigent approach to resolving the dispute satisfactorily fulfilled all three criteria, and in light of the continuous pattern of noncompliance, which resulted in the issuance of three separate compliance orders prior to the District Court's final order determining liability, there was no abuse of discretion in ordering sanctions. Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), followed in Patterson v. Dept. of Justice, 2002 MT 97, 309 M 381, 46 P3d 642 (2002), and Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Sanction Too Severe in Relation to Abuse: Defendant's agent failed to present photographs at his deposition, in violation of a discovery order. The District Court responded by enjoining defendant from any further discovery until 10 days after compliance with the order. The Supreme Court vacated the order enjoining further discovery after concluding that the order was too severe in relation to the abuse and after noting that there were no other significant discovery abuses or egregious conduct by defendant warranting such extreme sanctions. State ex rel. Burlington N. RR Co. v. District Court, 239 M 207, 779 P2d 885, 46 St. Rep. 1625 (1989).

Notice of Application for Judgment — Not Required: In a dissolution proceeding, appellant continually failed to respond to interrogatories or make an appearance. Plaintiff requested

sanctions under Rule 37(d), M.R.Civ.P. When appellant failed to appear at the sanctions hearing the District Court entered a default judgment for plaintiff. On appeal appellant alleged that the judgment should be set aside as he was not given proper notice of the application for judgment as required by Rule 55(b), M.R.Civ.P. The court held that notice under Rule 55 is not required. The authority provided to courts under Rule 37 is independent of the authority provided under the other Montana Rules of Civil Procedure. If default is entered as a sanction under Rule 37, no other notice is required. In re Marriage of Massey and Reiser, 225 M 394, 732 P2d 1341, 44 St. Rep. 344 (1987).

Hearing Held Fourteen Months After Interrogatories Received — Dilatory Actions Not Cured by Last Minute Presentation: A party could not cure his dilatory actions by the last minute tender of requested answers and documents at a hearing on a motion to dismiss when the hearing was held 14 months after the interrogatories and request for production were received. Dismissal of the action was a permissible sanction. Dassori v. Roy Stanley Chevrolet Co., 224 M 178, 728 P2d 430, 43 St. Rep. 2113 (1986), followed in Landauer v. Kehrwald, 225 M 322, 732 P2d 839, 44 St. Rep. 271 (1987), and distinguished in Smith v. Butte-Silver Bow County, 276 M 329, 916 P2d 91, 53 St. Rep. 421 (1996). See also McKenzie v. Scheeler, 285 M 500, 949 P2d 1168, 54 St. Rep. 1277 (1997).

Discovery Not "Cut Off" Prematurely by Summary Judgment: Plaintiffs contended defendants resisted taking of depositions of witnesses favorable to plaintiffs' cause and thus the court's granting defendants' motion for summary judgment "cut off" discovery prematurely. The court held that plaintiffs failed to present an affidavit as required by Rule 56(f), M.R.Civ.P., stating why depositions could not be taken; nor did plaintiffs exercise their prerogative under Rules 30, 31, or 37, M.R.Civ.P., at any time during the year or more after the complaint was filed. Morales v. Tuomi, 214 M 419, 693 P2d 532, 42 St. Rep. 60 (1985).

Private Interviews of Plaintiff's Physicians Beyond Scope of Discovery — Supervisory Control: In a personal injury case, the defendant obtained a court order stating that the plaintiff had waived her physician-patient privilege and that the plaintiff's doctors were to be treated as any other witnesses in the case. On appeal, the Supreme Court agreed with the order on its face but held that the District Court did not have the power under the rules of discovery to order private interviews between counsel for one party and possibly adverse witnesses, expert or not. The Supreme Court noted that other rules of discovery serve to supplement Rule 26(a), M.R.Civ.P. The District Court must relate discovery it allows and enforces to one of the methods provided for in that rule. A Writ of Supervisory Control was issued in this case. Jaap v. District Court, 191 M 319, 623 P2d 1389, 38 St. Rep. 280 (1981).

Law Review Articles

Rule 37 Sanctions: Deterrents to Discovery Abuses, Irigoin, 46 Mont. L. Rev. 95 (1985).

Collateral References

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions. 30 ALR 4th 9.

Attorney's conduct in delaying or obstructing discovery as basis for contempt proceeding. 8 ALR 4th 1181.

Sanctions available under Rule 37, Federal Rules of Civil Procedure, other than exclusion of expert testimony, for failure to obey discovery order not related to expert witness. 156 ALR Fed. 601.

Rule 37(a). Motion for order compelling discovery.

Commission and Advisory Committee Notes

COMMISSION NOTE

The rule is identical with the Federal Rule, except for changes in subdivisions (a) and (b)(1). Subdivision (a) substitutes in the first sentence "in which the action is pending, or if the deposition is being taken for use in an action pending in another state or country to the district court in Montana where the deposition is being taken," for the clause of the Federal Rule "in the district where the deposition is taken." And in the last sentence of subdivision (a) the first clause, "In an action pending in the State of Montana" is added. In accord with Rule 30(d) it seems desirable to vest the power to compel answers in the court in which the action is pending in all cases involving actions pending in the State of Montana. As for depositions taken in Montana for use in other states or countries, the district court in the district where the deposition is being taken should have such power.

ADVISORY COMMITTEE'S COMMENT
ON DECEMBER 31, 1975, AMENDMENT

This amendment brings the rule into line with the Federal practice. Paragraphs (e) and (f) of the Federal rules have no application to the Montana practice.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote the rule to coincide with Rule 37, Fed.R.Civ.P. The commission note included above applied to the rule as it stood prior to amendment in 1975. As of May 1, 1990, the rule was identical to the Federal Rule.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Attorney Fees Properly Awarded for Pretrial Discovery Litigation: Plaintiff sought a protective order during discovery to avoid the costs associated with searching for and producing a voluminous drafting history related to a policy pollution exclusion in defendant's policy. The protective order was denied, but plaintiff nevertheless refused to produce the drafting history. The court ordered plaintiff to pay defendant's fees in litigating the motion. Plaintiff moved for reconsideration of the award after the District Court found that the policy language was unambiguous, rendering extrinsic evidence inadmissible. The District Court concluded that plaintiff's concern for costs was not an appropriate matter for a protective order during discovery and denied the motion. On appeal, the Supreme Court concluded that defendant should have been allowed to discover the drafting history and that plaintiff, in seeking protection from the discovery order, failed to show good cause for the omission. Although the issues were ultimately adjudged in its favor, plaintiff was not substantially justified in seeking the protective order during discovery. The District Court fairly administered the discovery process and exercised appropriate discretion in controlling discovery and awarding fees, and the award was affirmed. Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc., 2005 MT 50, 326 M 174, 108 P3d 469 (2005).

Failure to Comply With Discovery Order and Sign Discovery Documents — Sanctions for Discovery Abuse Proper: Defendants failed to comply with discovery requests, so the District Court ordered compliance under this rule. Defendants then served their answers in a timely manner, but neglected to sign the documents in violation of Rule 33, M.R.Civ.P. The District Court then determined that discovery sanctions were available under Rule 37(b), M.R.Civ.P., and denied defendants' attempts to introduce additional affidavits not previously submitted through the discovery process. Defendants contended that the District Court erred by imposing sanctions without allowing defendants a second chance to provide signed answers. The Supreme Court disagreed. Defendants' failure to comply with discovery was by no means unintentional, but rather a concerted effort to avoid cooperating with plaintiff and the District Court. Nevertheless, despite defendants' intransigence, the District Court considered defendants' case on the basis of the record, and the sanctions did not prejudice defendants' case. Therefore, the imposition of sanctions was not an abuse of discretion, and the award was affirmed. Lewistown Propane Co. v. Moncur, 2002 MT 349, 313 M 368, 61 P3d 780 (2002), followed in Winslow v. Mont. Rail Link, Inc., 2005 MT 217, 328 M 260, __P3d__ (2005).

Failure to Move to Compel Answer to Interrogatories or for Discovery Sanctions — Failure to Respond to Discovery Not Precluding Introduction of Evidence: After being turned down by the County Sheriff, Smith requested that the District Court grant him a permit to carry a concealed weapon. During discovery, Smith requested information from the county regarding his criminal file, but the county failed to answer the interrogatories. Nevertheless, the District Court admitted Smith's criminal file as evidence, which Smith alleged was an abuse of court discretion, contending that because the county failed to answer the interrogatories, it was precluded from using the information sought by the interrogatories at trial. The Supreme Court pointed out that there are remedies other than exclusion of the evidence for the county's omissions. Rule 33(a), M.R.Civ.P., requires a party to respond to an interrogatory by either answer or objection, but if the party fails to respond, the opposing party may move for an order to compel discovery pursuant to Rule 37(d), M.R.Civ.P. A party may also move for discovery sanctions under this rule. In this case, Smith did not move to compel an answer or move for discovery sanctions, nor

was the evidence inconsistent with the information in the Sheriff's correspondence. Thus, the District Court did not abuse its discretion in admitting the criminal file, despite the county's failure to respond to Smith's discovery request. Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834, 56 St. Rep. 1318 (1999).

Conversion of Motion In Limine Into Motion to Compel Discovery — No Error: During an initial deposition, a witness in a contested will case asserted the attorney-client privilege and refused to answer questions or to produce requested files. The will contestants then filed a motion in limine to prohibit the witness from testifying at trial, based on their inability to explore the files or the witness's knowledge of the files. The District Court treated the motion in limine as a motion to compel discovery and ordered the witness to produce the files. Eight files were produced, and six were found to be relevant. Thereafter, the deposition was reconvened and completed. The contestants alleged District Court error in implicitly denying their motion in limine. The usual procedure following a party's objection or refusal to respond to discovery is a motion to compel, and failure to comply may result in sanctions. Here, the court did not abuse its discretion by converting the motion in limine into a motion to compel, followed by an in camera inspection, and then compelling production of most of the documents. In re Estate of Lande, 1999 MT 162, 295 M 160, 983 P2d 308, 56 St. Rep. 642 (1999).

Discretion of Court to Determine Discovery Compliance: It is within the discretionary power of the trial court to control discovery and determine from the circumstances of the case whether a discovery request has or has not been complied with. That determination will be reversed only if substantial rights of the appellant have been so materially affected as to allow a possible miscarriage of justice. In re H.D., 256 M 70, 844 P2d 114, 49 St. Rep. 1141 (1992).

Denial of Sanctions Without Stating Grounds: The defendant appealed the lower court's refusal to impose sanctions on the plaintiff for failing to comply in a timely manner with discovery requests. The Supreme Court stated that although the lower court did not state the grounds for the denial, the record revealed evidence to justify the decision. Granite County v. Komberec, 245 M 252, 800 P2d 166, 47 St. Rep. 2061 (1990).

Appropriateness of Writ of Supervisory Control Regarding Motion to Compel Discovery — Discovery of Potentially Privileged Material: Although a discovery order is interlocutory and normally not appealable, the Supreme Court accepted supervisory control in a case involving the discovery of potentially privileged material when it was apparent that the discovery order would place the defendant at a significant disadvantage in litigating the merits of the case. State ex rel. Burlington N. RR Co. v. District Court, 239 M 207, 779 P2d 885, 46 St. Rep. 1625 (1989), followed in Preston v. District Court, 282 M 200, 936 P2d 814, 54 St. Rep. 312 (1997).

Award of Expenses After Opportunity for Hearing: Defendant contended that an award of expenses under subsection (4) of this rule can only be made after a hearing on the issue. However, the subsection does not require a hearing but merely an opportunity for a hearing. Because defendant made no request for a hearing, the award of attorney fees and costs was affirmed. State ex rel. Burlington N. RR Co. v. District Court, 239 M 207, 779 P2d 885, 46 St. Rep. 1625 (1989).

Motion to Compel Made in Response to Failure of Timely Discovery — Fees and Costs Appropriate: When a motion to compel and the District Court's subsequent order were largely in response to defendant's failure to produce photographs in a timely manner, the award of attorney fees and costs to plaintiff was appropriate. State ex rel. Burlington N. RR Co. v. District Court, 239 M 207, 779 P2d 885, 46 St. Rep. 1625 (1989).

Motion for Protective Order Not Granted — Motion In Limine Granted — Attorney Fees Appropriate: A motion for a protective order filed under Rule 26(c), M.R.Civ.P. (see Title 25, ch. 20), seeking court guidance as to requested discovery, was never actually granted; however, attorney fees were appropriate under Rule 37(a)(4), M.R.Civ.P. (see Title 25, ch. 20), when the line of discovery was disposed of as irrelevant by the granting of a motion in limine, which in effect granted the motion for the protective order. In re Marriage of Cole, 224 M 207, 729 P2d 1276, 43 St. Rep. 2136 (1986).

Motion to Retake Deposition Denied — No Relevancy — Improper Motion: Denial of motion to retake a deposition was not an abuse of discretion when the subject of the deposition was totally irrelevant to the issues and when movant claimed the other side improperly withheld, during discovery, information that would have made movant's deposition more valuable. Movant, however, failed to use the exclusive remedy of moving for an order compelling discovery. Tocco v. Great Falls, 220 M 221, 714 P2d 160, 43 St. Rep. 310 (1986).

Interlocutory Review of Interrogatories Rulings — Exhaustion of Remedies Required: Applicant for a Writ of Supervisory Control seeking reversal of lower court's order denying applicant's objections to interrogatories failed to exhaust its remedies in lower court where it did

not apply there for a protective order under Rule 26(c), M.R.Civ.P., or for an order under this rule assessing costs and attorney fees against its opponent should the lower court order be reversed on appeal. State ex rel. Guarantee Ins. Co. v. District Court, 194 M 64, 634 P2d 648, 38 St. Rep. 1682 (1981).

Evasive Answer Treated as Failure to Answer: Rule 36(a), M.R.Civ.P., requires a denial of a request for admission to fairly meet the substance of the requested admission. The responder must admit or deny with particularity if the truth can be ascertained by reasonable inquiry. Under Rule 37(a), M.R.Civ.P., an evasive answer is to be treated as a failure to answer and, thus, an admission. Massaro v. Dunham, 184 M 400, 603 P2d 249 (1979).

Failure to Regulate Discovery as Grounds for Reversal: Massaro failed to respond to written interrogatories, a request to produce documents, and requests for admissions, although he asked for additional time and his counsel gave assurance that a response would be forthcoming. Dunham did not move for an order compelling discovery but at trial objected to and sought restriction of certain expected proof that he had not had an opportunity to inspect. The Supreme Court reversed the judgment of the District Court because it failed to regulate the discovery process and accorded an unfair advantage to Massaro. Massaro v. Dunham, 184 M 400, 603 P2d 249 (1979). See also In re Marriage of Deichl, 239 M 425, 781 P2d 254, 46 St. Rep. 1801 (1989), and Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985).

Failure to Disclose Witness — Testimony Admitted: It was not an abuse of discretion for trial judge to allow witness for oil refinery to testify as to condition of ground about railroad tracks where plaintiff-switchman crushed his hand beneath wheel of oil tank car when he allegedly slipped in oil or grease on concrete walkway of refinery in trying to mount the train, even though railroad had not included witness' name in its answer to plaintiff's interrogatories, since witness was the oil refinery's and plaintiff, knowing oil refinery had been joined as a third-party defendant, had failed to seek disclosure from it, or a pretrial conference, and had allowed other witnesses to testify to the same matter at trial. Wolfe v. N. Pac. Ry., 147 M 29, 409 P2d 528 (1966).

Failure to Order Sanctions — Standard of Appellate Review: An appellate court will reverse a trial court judge, who has refused to invoke the sanctions of this section, only when his judgment may materially affect the substantial rights of the parties and allow a possible miscarriage of justice. Wolfe v. N. Pac. Ry., 147 M 29, 409 P2d 528 (1966), followed in In re Marriage of Rada, 263 M 402, 869 P2d 254, 51 St. Rep. 110 (1994).

Use of Sanctions: The use of sanctions lies within the authority of the judge and he will be reversed only when his judgment may materially affect the substantial rights and allow a possible miscarriage of justice. Wolfe v. N. Pac. Ry., 147 M 29, 409 P2d 528 (1966), followed in Barrett v. ASARCO Inc., 234 M 229, 763 P2d 27, 45 St. Rep. 1865 (1988). See also Melotz v. Scheckla, 245 M 327, 801 P2d 593, 47 St. Rep. 2165 (1990).

Law Review Articles

Rule 37 Sanctions: Deterrents to Discovery Abuses, Irigoin, 46 Mont. L. Rev. 95 (1985).

Collateral References

Discovery *key* 70, 77, 107, 129.
27 C.J.S. Discovery §§53, 54, 68, 86.
23 Am. Jur. 2d Depositions and Discovery §§357 through 372.

Rule 37(b). Failure to comply with order.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO DECEMBER 31, 1975, AMENDMENT

This amendment brings the rule into line with the Federal practice. Paragraphs (e) and (f) of the Federal rules have no application to the Montana practice.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 37(b)(2). The amendment conforms the rule to the 1980 Amendment of the Federal Rule. The Commission has recommended the adoption of a new subparagraph 26(f) and the reference in subdivision (b)(2) above to Rule 26(f) is to the proposed amendment of Rule 26(f). For a discussion of the amendment see the advisory committee note to the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote the rule to coincide with Rule 37, Fed.R.Civ.P. The Montana Rule was identical with corresponding portions of the Federal Rule through July 31, 1980. On August 1, 1980, an amendment to subdivision (b)(2) of the Federal Rule became effective allowing sanctions for failure of a party to obey an order entered under Rule 26(f), Fed.R.Civ.P. The 1984 amendment conformed the rule to the Federal Rule. As of May 1, 1990, the rule was identical to the Federal Rule.

The amendment of October 9, 1984, in (2) inserted "or if a party fails to obey an order entered under Rule 26(f)".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Dismissal of Complaint With Prejudice Unwarranted When Delay Reasonable and No Prejudice Shown: The District Court set a scheduling conference, but plaintiff's counsel did not attend because of a computer problem. The District Court then dismissed the complaint with prejudice and denied a motion to reopen the case. On appeal, the Supreme Court reversed, applying the factors in Becky v. Norwest Bank Dillon, N.A., 245 M 1, 798 P2d 1011 (1990), and Hobble-Diamond Cattle Co. v. Triangle Irrigation Co., 272 M 37, 899 P2d 531 (1995), to determine whether the District Court abused its discretion in dismissing the action for failure to prosecute. In this case, plaintiff's delay in prosecuting the case was reasonable, and defendant suffered no actual prejudice, so the District Court abused its discretion in dismissing the complaint with prejudice. Vermeer of Wash., Inc. v. Jones, 2004 MT 77, 320 M 435, 87 P3d 516 (2004), distinguishing E. Livestock Co., Inc. v. O'Neal, 285 M 90, 945 P2d 931 (1997).

Failure to Comply With Discovery Order and Sign Discovery Documents — Sanctions for Discovery Abuse Proper: Defendants failed to comply with discovery requests, so the District Court ordered compliance under Rule 37(a), M.R.Civ.P. Defendants then served their answers in a timely manner, but neglected to sign the documents in violation of Rule 33, M.R.Civ.P. The District Court then determined that discovery sanctions were available under this rule and denied defendants' attempts to introduce additional affidavits not previously submitted through the discovery process. Defendants contended that the District Court erred by imposing sanctions without allowing defendants a second chance to provide signed answers. The Supreme Court disagreed. Defendants' failure to comply with discovery was by no means unintentional, but rather a concerted effort to avoid cooperating with plaintiff and the District Court. Nevertheless, despite defendants' intransigence, the District Court considered defendants' case on the basis of the record, and the sanctions did not prejudice defendants' case. Therefore, the imposition of sanctions was not an abuse of discretion, and the award was affirmed. Lewistown Propane Co. v. Moncur, 2002 MT 349, 313 M 368, 61 P3d 780 (2002), followed in Winslow v. Mont. Rail Link, Inc., 2005 MT 217, 328 M 260, __P3d__ (2005).

Default Proper as Sanction for Discovery Abuses: Alleging that she was defrauded out of nearly $1 million, Cass properly served defendants with a complaint, summons, and discovery requests. Defendants failed to respond to the discovery requests, and the District Court held defendants in default, awarding Cass $1,736,547.20. Defendants moved to set the judgment aside, but the request was denied, and defendants appealed, arguing that the default judgment should have been set aside pursuant to Rule 55, M.R.Civ.P., when Cass filed an amended pleading. However, the record clearly showed that the District Court dismissed the case pursuant to Rule 37, M.R.Civ.P., based on defendants' failure to comply with discovery requests and a court order to answer discovery, rather than on Rule 55, M.R.Civ.P., for defendants' failure to defend. Although default could have been applied under either rule, the District Court obviously faced a litigant who simply was not going to respond to properly served discovery, so entry of default under Rule 37, M.R.Civ.P., was not an abuse of discretion, and the judgment was affirmed. Cass v. Composite Indus. of Am., Inc., 2002 MT 226, 311 M 406, 56 P3d 322 (2002).

Failure of State to Respond to Discovery Requests During Driver's License Reinstatement Proceedings — Sanctions Proper: Responding to a 9-1-1 emergency dispatch, an officer found Patterson slumped over the steering wheel of a running vehicle, fast asleep. Patterson refused to take a Breathalyzer test, so he was arrested for DUI, and his license was seized. Patterson challenged the suspension of his driver's license pursuant to 61-8-403 and through discovery

requests sought a copy of the 9-1-1 report, but no copy was provided. The hearing was continued twice because of the absence of the report, and the District Court warned the state that if it failed to produce the report, Patterson's license would be reinstated and the suspension would be dismissed. On the day of the hearing, the state informed the court that it was unable to obtain the 9-1-1 report, so Patterson's motion for reinstatement of his driver's license was granted. The state appealed on grounds that the District Court erred by reinstating the license based on the state's failure to comply with an order compelling production of the report. The Supreme Court affirmed. To determine whether the sanction for the discovery abuse constituted an abuse of the District Court's discretion, the Supreme Court applied the factors in Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124 (2000). The 9-1-1 report was treated as relevant information absent a timely objection by the state to Patterson's request for production, and the state's failure to produce the report compromised Patterson's ability to prepare and present a defense, suspended the progress of the case, and prejudiced Patterson. The state was warned that reinstatement would result from failure to produce the report, and reinstatement was an appropriate sanction for the state's repeated failure to comply with discovery. Patterson v. Dept. of Justice, 2002 MT 97, 309 M 381, 46 P3d 642 (2002).

Failure to Show Excessiveness of Sanctions — Reasonableness of Fees and Costs: Defendant was awarded fees and costs from plaintiff's attorney Palmer, who complained that the sanctions were excessive, citing Rule 1.5 of the Rules of Professional Conduct for the proposition that fees customarily charged in a locality be considered in determining the reasonableness of fees. However, under Rule 1.5, fees customarily charged in a locale are not the sole factor that may be considered. Palmer did not assert specific objections to either the necessity of or the time spent on the work billed by defendant's counsel and thus failed to show that the sanctions were excessive. Dambrowski v. Champion Int'l Corp., 2000 MT 149, 300 M 76, 3 P3d 617, 57 St. Rep. 581 (2000).

Unilateral Cancellation of Deposition by Plaintiff's Attorney — Sanctions Appropriate for Discovery Abuse: Plaintiff's attorney Palmer was directed to appear at a deposition requested by defendant. Palmer objected to the subpoena under Rules 30(d) and 45(b)(1), M.R.Civ.P., and failed to appear for the deposition. The District Court sanctioned Palmer for discovery abuses pursuant to Rule 37, M.R.Civ.P., and ordered him to pay defendant's attorney fees and costs. On appeal, Palmer argued that the effect of his objection was to quash the subpoena and suspend the deposition and disclosure of documents until further order of the court. Palmer was mistaken on both issues. Rule 30(d) only contemplates a motion to terminate or limit a deposition during the taking of the deposition. Rule 45(b)(1) provides that a District Court may quash a subpoena, not an attorney. By unilaterally canceling the deposition, Palmer violated the deposition order. When Palmer finally was deposed, he refused to answer any questions unless defendant agreed to his stipulations. The Supreme Court considered the relationship between the sanctions and the extent and nature of the discovery abuse and extent of the prejudice to defendant caused by Palmer's failure to appear at the deposition, in light of Smith v. Butte-Silver Bow County, 276 M 329, 916 P2d 91 (1996). Although the District Court could have taken other actions, such as dismissing the underlying action, the sanctions, though severe, related appropriately to the extent of the discovery abuse and prejudice to defendant and were affirmed absent any showing by Palmer that his failure to comply with the discovery orders was substantially justified. Dambrowski v. Champion Int'l Corp., 2000 MT 149, 300 M 76, 3 P3d 617, 57 St. Rep. 581 (2000). See also Pioche Mines Consol., Inc. v. Dolman, 333 F2d 257 (9th Cir. 1964).

Wait of Thirteen Months to Question Whether Sanctions Should Be Imposed — Adequate Notice and Opportunity to Be Heard: Defendant sought sanctions against Palmer, plaintiff's attorney, under Rules 11 and 37, M.R.Civ.P., for Palmer's defiance of scheduling and pretrial orders, and the District Court awarded sanctions under Rule 37. Palmer alleged that his due process rights were violated because he did not receive notice and an opportunity to be heard, but the due process arguments were not supported in the record. The Supreme Court agreed that when a person is sanctioned with attorney fees and costs under Rule 37, that person is entitled to notice and an opportunity to be heard before sanctions are imposed. However, in this case, Palmer waited more than 13 months after defendants moved for sanctions to question whether they should be imposed. Notice was adequate, and Palmer also was allowed to argue the appropriateness of sanctions at a hearing. Palmer's argument on appeal, that Rule 37 did not apply to him because he was a nonparty deponent, was not addressed because the issue was raised for the first time on appeal. The Supreme Court noted that Rule 16(f), M.R.Civ.P., clearly allows sanctions in cases like this one, in which an attorney defies a District Court's scheduling and pretrial orders. Dambrowski v. Champion Int'l Corp., 2000 MT 149, 300 M 76, 3 P3d 617, 57 St. Rep. 581 (2000).

Attorney's Busy Schedule No Excuse for Failure to Answer Interrogatories — Sanctions Warranted: Defendant contended that it should have not been sanctioned when its response to plaintiff's interrogatories was late because of the rush of the Christmas season and the crunch of counsel's schedule. The Supreme Court has consistently stated that a party's abuse of discovery procedures resulting in unnecessary delay of a case should not be dealt with leniently and that those who abuse the discovery rules should be punished rather than encouraged repeatedly to cooperate in the discovery process. An attorney's busy schedule is not substantial justification for failing to comply with a District Court order, nor is it a circumstance that makes an imposition of sanctions unjust under this rule. As set out in McKenzie v. Scheeler, 285 M 500, 949 P2d 1168 (1997), a party should be sanctioned for an attitude of unresponsiveness to the discovery process regardless of the intent behind that attitude. Refusing to provide discovery is the precise reason behind the availability of sanctions under this rule, and in this case, they were properly imposed. Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

Testimony Regarding Presence of Defect Even Though Failed Part Missing — Request to Dismiss Properly Denied: In their brief in support of summary judgment, defendants requested dismissal because the failed section of an allegedly defective product was missing as a result of plaintiffs' failure to preserve the evidence, rendering defendants unable to examine and evaluate the failed section and prejudicing their ability to present a defense. However, both sides offered testimony through experts' affidavits on the presence of a defect and when it occurred, even though the failed part was missing. Thus, the District Court did not abuse its discretion in denying the motion to dismiss because of the missing evidence. Wood v. Old Trapper Taxi, 286 M 18, 952 P2d 1375, 54 St. Rep. 1263 (1997), following Brandenburger v. Toyota Motor Sales, U.S.A., Inc., 162 M 506, 513 P2d 268 (1973).

Dismissal With Prejudice Proper Sanction For Actively Withholding Relevant Information: In a personal injury suit, the plaintiff and her attorney purposely withheld information concerning the plaintiff's prior medical history. The lower court, relying on Rule 37, M.R.Civ.P., dismissed the plaintiff's case with prejudice. The Supreme Court held that the dismissal was not proper under Rule 37(b) or (d), M.R.Civ.P., but was justified under Rule 26(g), M.R.Civ.P., and therefore upheld the dismissal. Jerome v. Pardis, 240 M 187, 783 P2d 919, 46 St. Rep. 2042 (1989).

Failure to Appear Following Notice — Dismissal Proper: Because plaintiff was properly served with notice of his deposition but deliberately and intentionally failed to appear at the time and place set for taking the deposition, the District Court properly sanctioned him by dismissing his cause of action under subsection (2)(C) of this rule. Huffine v. Boylan, 239 M 515, 782 P2d 77, 46 St. Rep. 1877 (1989), followed in McKenzie v. Scheeler, 285 M 500, 949 P2d 1168, 54 St. Rep. 1277 (1997).

Default Judgment on Issue of Liability Not Appealable: The District Court, as a discovery sanction, granted a default judgment for plaintiffs on the issue of liability but reserved determination of the amount of damages, and defendants appealed. The Supreme Court held that an order which grants a default judgment on the issue of liability, reserving determination of the amount of damages for a later hearing, is not a final, appealable order under Rule 1, M.R.App.Civ.P. (now M.R.App.P.). The appeal was dismissed. Stevens v. Abbott, 220 M 61, 712 P2d 1347, 43 St. Rep. 173 (1986).

Sanctions Not Applicable to Interrogatories Propounded by Other Party Absent Order: When a party failed to correctly provide answers to a continuing interrogatory propounded by the other party, the sanctions of Rule 37(b) do not apply because that rule relates to the failure to comply with a court order compelling discovery. Thibaudeau v. Uglum, 201 M 260, 653 P2d 855, 39 St. Rep. 2096 (1982).

Interview of Unnamed Witness — Consent to Alleged Noncompliance With Duty to Supplement: On appeal, a father suing for injury to his son found submerged in defendant's swimming pool alleged pretrial discovery abuse by defendant in that defendant was allowed to add a witness the day before trial and had known the location of the witness but failed to inform the father of the address, in violation of defendant's duty to supplement its interrogatory answers. It was not reversible error to allow the witness to testify. The testimony was probative on important fact issues, and the father interviewed the witness before trial and rejected an offered continuance. The father was not entitled to have his cake and eat it too. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982).

Discovery of Documents — Time Allowance on Remand: Husband failed to comply with court's order allowing shorter time for him to respond to interrogatories, and wife had complained of insufficient time to examine one of his tax returns, which contained information

regarding a piece of property over which there was a dispute as to whether it should be included in the marital estate for property disposition purposes. Since the Supreme Court was returning the case to the District Court for reconsideration of the marital estate assets, the Supreme Court directed that wife be allowed to pursue examination of the disputed piece of property. Hill v. Hill, 197 M 451, 643 P2d 582, 39 St. Rep. 723 (1982).

Impeding Discovery — Sanctions: Plaintiff sued defendant as the distributor of Revson cosmetics in Montana, alleging severe allergic reaction to the application of certain cosmetics. The District Court found that Revson had repeatedly failed to sufficiently comply with plaintiff's discovery requests. The District Court issued a series of orders to compel discovery and impose sanctions. The District Court eventually precluded Revson from introducing evidence contrary to the admitted facts. The District Court found that Revson's failure to comply with discovery and court orders was willful disobedience. On appeal, Revson contended that the District Court abused its discretion. The Supreme Court held that when litigants use willful delay, evasive response, and disregard of court direction as part and parcel of their trial strategy, they must suffer the consequences. Deterrence of such actions is no longer envisioned as a merely incidental effect of remedial sanctions but as an affirmative instrument in the judicial arsenal to be used in providing the "just, speedy, and inexpensive determination of every action". Owen v. F.A. Buttrey Co., 192 M 274, 627 P2d 1233, 38 St. Rep. 714 (1981), followed in First Bank v. Heidema, 219 M 373, 711 P2d 1384, 43 St. Rep. 22 (1986), McKenzie v. Scheeler, 285 M 500, 949 P2d 1168, 54 St. Rep. 1277 (1997), and Bulen v. Navajo Refining Co., Inc., 2000 MT 222, 301 M 195, 9 P3d 607, 57 St. Rep. 912 (2000).

Default Judgment Against Disobedient Party: The District Court did not err in failing to set aside a default judgment entered under Rule 37(b), M.R.Civ.P., against appellants for failure to answer interrogatories. Although appellants allege that the District Court issued an unduly harsh sanction and that default judgments should be set aside under a generally liberal standard, the District Court properly found that appellants' behavior was so abusive of procedural requirements that imposition of a default judgment was warranted. Here, appellants delayed in answering interrogatories for over 8 months; appellants failed to appear and defend at a hearing to compel discovery; after appellants were given notice of withdrawal of their attorney, they failed to obtain another one, thus delaying the proceedings even more; after the District Court issued an order giving appellants 20 days to answer or else a default would be entered, appellants failed to answer the interrogatories; and finally, after appellants were given notice of a hearing on respondent's application for a default judgment, appellants again did not appear. Quoting Gallegos v. Franklin, 59 NM 118, 547 P2d 1160, certiorari denied 549 P2d 284 (1976), appellants halted "the adversary process and endlessly delay[ed] the rights of plaintiff". Audit Serv., Inc. v. Kraus Constr., Inc., 189 M 94, 615 P2d 183 (1980), followed in Eisenmenger v. Ethicon, Inc., 264 M 393, 871 P2d 1313, 51 St. Rep. 296 (1994). However, see Smith v. Butte-Silver Bow County, 276 M 329, 916 P2d 91, 53 St. Rep. 421 (1996).

Sanctions Ordered Under Federal Rules: Under authority of Rule 37(b), Federal Rules of Civil Procedure, the federal District Court entered an order designating that certain facts supporting plaintiff's claim for liability are considered established for purposes of this action. Stanton v. Iver Johnson's Arms, Inc., 88 FRD 290, 37 St. Rep. 1823 (D.C. Mont. 1980).

Law Review Articles

Rule 37 Sanctions: Deterrents to Discovery Abuses, Irigoin, 46 Mont. L. Rev. 95 (1985).

Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 350 (1981).

Collateral References

Depositions *key* 71.

26A C.J.S. Depositions §65.

23 Am. Jur. 2d Depositions and Discovery §§373 through 395.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order for production of documents or other objects. 26 ALR 4th 849.

Attorney's conduct in delaying or obstructing discovery as basis for contempt proceeding. 8 ALR 4th 1181.

Dismissal of action for noncompliance with order in aid of discovery or inspection. 4 ALR 2d 370, §12 superseded by 56 ALR 3d 1109.

Construction and application of rules of court which permit setting aside a plea and giving judgment by default because of disobedience of order requiring production of documents. 144 ALR 372.

Rule 37(c). Expenses on failure to admit.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO DECEMBER 31, 1975, AMENDMENT

This amendment brings the rule into line with the Federal practice. Paragraphs (e) and (f) of the Federal rules have no application to the Montana practice.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

1998 Amendment: In first sentence after "other party" inserted "the other party's attorney or both". Amendment effective December 1, 1998.

Amendments — Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote the rule to coincide with Rule 37, Fed.R.Civ.P. As of May 1, 1990, the rule was identical to the Federal Rule.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Improper Award of Joint and Several Sanctions Under Rule 37(c) — Award of Fees and Costs Proper as Sanction Under Rule 11: Pursuant to this rule, the trial court held both plaintiff and plaintiff's counsel jointly and severally liable for attorney costs and fees associated with a dilatory discovery action. Plaintiff's attorney correctly argued that the language of this rule only allows a court to order that sanctions be paid by a party, so it was error to order that sanctions be paid by the party and the party's attorney under that rule. However, although this rule was unavailable as a source of authority for imposing sanctions under this scenario, Rule 11, M.R.Civ.P., did provide a basis for discipline for dilatory discovery. The District Court reached the right result but for the wrong reason. The error was harmless, and the Supreme Court affirmed the award of sanctions pursuant to Rule 11. Morris v. Big Sky Thoroughbred Farms, Inc., 1998 MT 229, 291 M 32, 965 P2d 890, 55 St. Rep. 957 (1998). Note: The Supreme Court amended this rule to reflect the Morris holding by order dated September 15, 1998, published at 55 St. Rep. 979 (1998).

Improper Denial of Attorney Fees Necessary to Prove Truth of Denied Requests for Admission: The District Court abused its discretion when it failed to award plaintiff attorney fees necessitated to prove the truth of requests for admission that defendant denied. The case was remanded for calculation of the amount of attorney fees to which plaintiff was entitled pursuant to this rule. Springer v. Becker, 284 M 267, 949 P2d 641, 54 St. Rep. 876 (1997).

Failure to Admit Genuineness of Documents: A judge properly awarded attorney fees and witness expenses to plaintiff for defendant's failure to admit the genuineness of documents submitted by plaintiff that supported plaintiff's claim and that later proved to be genuine. Credit Associates, Inc. v. Mogan, 255 M 307, 843 P2d 321, 49 St. Rep. 1021 (1992).

Dilatory Discovery Tactics: In an action by plaintiff bank to recover certain sums of principal and interest owing on a note, the defendant debtors refused to attend their own deposition, refused to produce documents, and ignored court orders directing them to comply with requests for information. In view of the defendants' bad faith in failing to comply with rules of discovery and court orders enforcing the rules, the trial court's judgment in favor of the bank was well within the boundaries of its discretion. First Bank v. Heidema, 219 M 373, 711 P2d 1384, 43 St. Rep. 22 (1986).

Notice of Order Requesting Attorney Fees: When a party requested attorney fees pursuant to Rule 37(c), M.R.Civ.P., and failed to apply by motion with notice to opposing party, but incorporated it within proposed findings of fact and conclusions of law, there was insufficient notice. Luppold v. Lewis, 172 M 280, 563 P2d 538 (1977).

Law Review Articles

Rule 37 Sanctions: Deterrents to Discovery Abuses, Irigoin, 46 Mont. L. Rev. 95 (1985).

Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 350 (1981).

Rule 37(d). Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO DECEMBER 31, 1975, AMENDMENT

This amendment brings the rule into line with the Federal practice. Paragraphs (e) and (f) of the Federal rules have no application to the Montana practice.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule to coincide with Rule 37, Fed.R.Civ.P. As of May 1, 1990, the rule was identical to the Federal Rule.

The May 1, 1990, amendment made language in the rule gender neutral.

Rules Omitted: Federal Rule 37(e), providing for the subpoena of a person in a foreign country (abrogated August 1, 1980), and Federal Rule 37(f), prohibiting the imposition of expenses and attorney fees against the United States, except as provided by statute, are omitted from the Montana Rules.

Case Notes

Dismissal of Complaint as Sanction for Discovery Abuses: Although Xu received timely notice of the need to respond in writing to defendants' discovery requests within 30 days, Xu filed incomplete, inappropriate, and unacceptable responses, and ultimately defendants sought an order compelling Xu's responses. Then, after defendants' unsuccessful attempts to schedule a deposition, defendants timely notified Xu of their intent to take Xu's deposition on May 11, 2004. Without response or explanation, Xu did not attend the deposition, so defendants sought an order compelling Xu's deposition and requesting sanctions, including dismissal of Xu's claims for failure to attend the May deposition. At a hearing, the District Court carefully explained to Xu the obligation to answer discovery and attend depositions. The court gave Xu an additional 3 weeks to provide discovery answers and be deposed. In response, Xu filed a pleading to reschedule the deposition, but failed to complete discovery or to attend the court-ordered deposition. On defendants' motion, the court then dismissed Xu's action with prejudice for failing to attend the depositions. Xu appealed, but the Supreme Court affirmed, concluding from the record that Xu knowingly and repeatedly refused to cooperate with discovery request, and that the District Court did not abuse its discretion in dismissing Xu's claim as a sanction. Xu v. McLaughlin Research Institute for Biomedical Science, Inc., 2005 MT 209, 328 M 232, 119 P3d 100 (2005).

Second Suit Based on Same Facts as Case Dismissed With Prejudice Properly Dismissed as Res Judicata: While a first employment termination claim was pending, Xu filed another claim based on the same facts. The first claim was ultimately dismissed with prejudice for Xu's failure to comply with discovery, and the District Court then summarily dismissed the second case based on res judicata and collateral estoppel. Xu appealed on grounds that it was an abuse of discretion for the District Court to dismiss the second case because the second case contained a new claim of defamation and because there was no final adjudication on the merits of the first claim. The Supreme Court disagreed. Res judicata applied not only to the issues that were raised in the first claim, but also to issues that could or should have been raised in the first litigation. Collateral estoppel applied because a dismissal with prejudice constituted an adjudication on the merits. Summary dismissal of the second case was therefore affirmed. Xu v. McLaughlin Research Institute for Biomedical Science, Inc., 2005 MT 209, 328 M 232, 119 P3d 100 (2005).

Sanction for Discovery Abuse Proper for Dilatory Tactics and Withholding Information Crucial to Damage Case: Only 5 days before trial, defendant discovered during a deposition with plaintiff's physician that a large portion of plaintiff's medical file consisting of 75 to 80 pages of documents had not been identified or produced in response to discovery requests. Defendant then moved to dismiss the complaint with prejudice as a sanction for discovery violations. Plaintiff's response was to fire his attorney and avoid going to trial. The District Court subsequently dismissed plaintiff's complaint with prejudice, and plaintiff appealed, but the Supreme Court affirmed. The sanction was appropriate given plaintiff's dilatory tactics

calculated to hide his weak case and his demonstration of little interest or ability in adjudicating the case on the merits. Smart v. Molinario, 2004 MT 21, 319 M 335, 83 P3d 1284 (2004).

Award of Attorney Fees Associated With Motion to Compel Discovery: When the Mularonis did not respond to requests for depositions, the Bings moved to compel discovery pursuant to this rule and requested attorney fees associated with the motion. The District Court granted the motion, but declined to award attorney fees. The Bings appealed. The Supreme Court noted that in Del. v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818 (1999), a strict rule was applied to sanction the abuse of discovery rules, which included the award of attorney fees. Although the question of whether attorney fees were to be awarded pursuant to a successful motion to compel was not specifically discussed in Delaware, the Supreme Court applied the same rationale with equal force. The Court held that upon motion, a District Court is required to assess reasonable expenses, including attorney fees, against a party that fails to appear for a duly noticed deposition unless the court finds substantial justification or circumstances that make the award of those expenses unjust. In this case, the District Court erroneously neglected to state any findings as to why attorney fees were unjustified, so the Supreme Court remanded with directions to assess the proper award of attorney fees or to recite why the award was not justified. Mularoni v. Bing, 2001 MT 215, 306 M 405, 34 P3d 497 (2001).

When Recovery of Deposition Expenses Allowed — Use of Deposition at Trial Required: The Bings argued that their costs associated with deposing Mularoni were associated with expenses related to a motion to compel discovery and were thus recoverable under this rule. The District Court declined to award deposition costs, and the Bings appealed. Pursuant to 25-10-201, a party to whom costs are awarded is entitled to include the costs of taking depositions. However, the Supreme Court has allowed deposition costs only in limited circumstances—when the deposition was relied on by the District Court or used in a trial setting as evidence or for impeachment or when the deposition is filed with the District Court and used by the court in a dispositive summary judgment motion. Deposition costs are not allowed when the purpose of the deposition is merely to assist the requesting party in compiling its case and is taken only for the convenience of counsel. A deposition that is not used at trial is considered to be for the convenience of counsel. In the present case, the deposition was not used at trial, nor was it used by the District Court in its ruling on the motion to compel, which was not a dispositive motion. Thus, the District Court did not err in declining to award deposition costs to the Bings. Mularoni v. Bing, 2001 MT 215, 306 M 405, 34 P3d 497 (2001). See also Fisher v. St. Farm Ins. Co., 281 M 236, 934 P2d 163 (1997).

Concealing Information Showing Liability — Misleading Opponent About What Information Contained: Default judgment was proper against defendant who failed to answer interrogatories concerning the scope of defendant's electrical work at the site of an explosion occurring when gasoline fumes in a manhole on top of an underground tank were ignited by a spark created when a relay switch was thrown. The concealment of information for over 3 1/2 years after the first service of interrogatories was willful and in bad faith. Defendant claimed that it did no work on the wiring in question, but documents finally discovered revealed that it had. Plaintiff discovered the concealed information just days before trial and was prejudiced by defendant's tactics. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Test for Review of Sanction Imposing Default Judgment: A trial court's imposition of a default judgment sanction under this rule is reviewed under the abuse of discretion test. The question is not whether the reviewing court agrees with the trial court, but rather whether, in view of all the circumstances, the trial court, in the exercise of its discretion, acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason, ignoring recognized principles, resulting in substantial injustice. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Test for Review of Sanctions: The imposition of sanctions for failure to comply with discovery is regarded with favor, and the price for dishonesty must be made unbearable to thwart the inevitable temptation that zealous advocacy inspires. The trial judge is in the best position to know whether a party callously disregarded another party's rights and to determine which sanction is the most appropriate. In reviewing a trial judge's action for abuse of discretion, the Supreme Court may consider: (1) whether a sanction relates to the extent and nature of the discovery abuse; (2) the extent of the prejudice to the other party resulting from discovery abuse; and (3) whether the trial court expressly warned the offending party of the consequences of discovery abuse. Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002, 57 St. Rep. 1499 (2000).

Criteria Used in Review of Sanction — Sanction Proper for Dilatory Tactics: The District Court accepted a judgment for damages and sanctions determined by a special master for defendant's discovery violations and tortious interference with plaintiff's right to buy a parcel of land, and defendant appealed. Under Rule 37, M.R.Civ.P., a party's dilatory tactics in responding to discovery requests may result in sanctions. The Supreme Court set out the following criteria to be used in reviewing whether a sanction is an abuse of discretion or too severe: (1) whether the consequences imposed by the sanctions relate to the extent and nature of the actual discovery abuse; (2) the extent of the prejudice to the opposing party that resulted from the discovery abuse; and (3) whether the court expressly warned the abusing party of the consequences. In this case, defendant's intransigent approach to resolving the dispute satisfactorily fulfilled all three criteria, and in light of the continuous pattern of noncompliance, which resulted in the issuance of three separate compliance orders prior to the District Court's final order determining liability, there was no abuse of discretion in ordering sanctions. Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), followed in Patterson v. Dept. of Justice, 2002 MT 97, 309 M 381, 46 P3d 642 (2002), and Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Failure to Move to Compel Answer to Interrogatories or for Discovery Sanctions — Failure to Respond to Discovery Not Precluding Introduction of Evidence: After being turned down by the County Sheriff, Smith requested that the District Court grant him a permit to carry a concealed weapon. During discovery, Smith requested information from the county regarding his criminal file, but the county failed to answer the interrogatories. Nevertheless, the District Court admitted Smith's criminal file as evidence, which Smith alleged was an abuse of court discretion, contending that because the county failed to answer the interrogatories, it was precluded from using the information sought by the interrogatories at trial. The Supreme Court pointed out that there are remedies other than exclusion of the evidence for the county's omissions. Rule 33(a), M.R.Civ.P., requires a party to respond to an interrogatory by either answer or objection, but if the party fails to respond, the opposing party may move for an order to compel discovery pursuant to this rule. A party may also move for discovery sanctions under Rule 37(a), M.R.Civ.P. In this case, Smith did not move to compel an answer or move for discovery sanctions, nor was the evidence inconsistent with the information in the Sheriff's correspondence. Thus, the District Court did not abuse its discretion in admitting the criminal file, despite the county's failure to respond to Smith's discovery request. Smith v. Missoula County, 1999 MT 330, 297 M 368, 992 P2d 834, 56 St. Rep. 1318 (1999).

Interrogatories Served After Close of Discovery — Sanctions for Late Response Inappropriate: The District Court's scheduling order provided that the parties' discovery deadline was December 18, 1995, and that the deadline could not be modified without leave of court. Some 6 weeks after the deadline, plaintiff served interrogatories without leave of court. Defendant did not answer the interrogatories within 30 days, as required by Rule 33(a), M.R.Civ.P. On the first day of trial, plaintiff sought sanctions against defendant pursuant to subsection (2) of this rule and requested the court to prohibit defendant from introducing designated matters into evidence. Plaintiff admitted that the interrogatories were late, but asserted that this fact did not excuse defendant from the duty to answer or file objections. However, subsection (2) of this rule authorizes sanctions to be applied against a party that fails to serve answers or objections to interrogatories after proper service, which in this case did not occur. Defendant did not abuse discovery procedures or cause unnecessary delay, so, lacking proper service, sanctions were unwarranted. Baldauf v. Arrow Tank & Eng'r Co., Inc., 1999 MT 81, 294 M 107, 979 P2d 166, 56 St. Rep. 337 (1999).

New Trial on Damages for Employer's Failure to Disclose Files Helping Employee's Wrongful Discharge Case: In a wrongful discharge action, an employee was properly granted a new trial on the issue of damages (he had been awarded $70,000 by a jury) as a sanction against the hospital-employer, which failed to give him discovery documents relevant to and favoring the employee on issues of the hospital's liability and employee's damages. The employee was anonymously sent the documents after the trial. Sullivan v. Sisters of Charity of Providence of Mont., 268 M 71, 885 P2d 488, 51 St. Rep. 1193 (1994).

Sanction of $5,500 Against Employer for Failure to Disclose Files Showing Wrongful Discharge: The trial court, in which a wrongful discharge plaintiff was granted a $70,000 jury verdict for damages, properly sanctioned the employer by granting the plaintiff $5,500 for amounts expended for work on summary judgment and, after the verdict, on the basis that documents in the employer's files were requested by the plaintiff and not produced by the employer. The documents, which were anonymously mailed to the plaintiff after the trial, showed that the employer had planned for some time to terminate the plaintiff. The documents

would have affected the damages award had they been available for the trial. Sullivan v. Sisters of Charity of Providence of Mont., 268 M 71, 885 P2d 488, 51 St. Rep. 1193 (1994).

Dismissal With Prejudice Proper Sanction For Actively Withholding Relevant Information: In a personal injury suit, the plaintiff and her attorney purposely withheld information concerning the plaintiff's prior medical history. The lower court, relying on Rule 37, M.R.Civ.P., dismissed the plaintiff's case with prejudice. The Supreme Court held that the dismissal was not proper under Rule 37(b) or (d), M.R.Civ.P., but was justified under Rule 26(g), M.R.Civ.P., and therefore upheld the dismissal. Jerome v. Pardis, 240 M 187, 783 P2d 919, 46 St. Rep. 2042 (1989).

Motion to Compel Not Necessary: A motion to compel is not necessary in an action under Rule 37(d). Dassori v. Roy Stanley Chevrolet Co., 224 M 178, 728 P2d 430, 43 St. Rep. 2113 (1986).

Failure to Impose Sanctions Proper — Information Requested in Interrogatories Available in Other Court Documents: Plaintiff union failed to answer some of defendants' interrogatories because the union objected to the defendants seeking discovery of the legal theories of the complaint. Defendants' motion to dismiss the action on this basis was denied by the District Court. The District Court did not err since the legal theories were readily available to the defendants in earlier documents and briefs. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986).

Dilatory Discovery Tactics: In an action by plaintiff bank to recover certain sums of principal and interest owing on a note, the defendant debtors refused to attend their own deposition, refused to produce documents, and ignored court orders directing them to comply with requests for information. In view of the defendants' bad faith in failing to comply with rules of discovery and court orders enforcing the rules, the trial court's judgment in favor of the bank was well within the boundaries of its discretion. First Bank v. Heidema, 219 M 373, 711 P2d 1384, 43 St. Rep. 22 (1986).

Unresponsive Interrogatory Answers — Remedy — Proof Limited to Discovery and Readily Accessible Documents: Plaintiff abused the discovery process by his late filing of interrogatories and unverified, incomplete, and nonresponsive answers, among other things. As a result, the judge limited the plaintiff's proof to evidence contained in discovery documents and documents readily accessible to both parties. The judge acted properly. The trial was limited to facts disclosed as opposed to facts withheld, which is equitable since the limitation was caused by the actions of plaintiff and his attorney in responding to discovery. Vehrs v. Piquette, 210 M 386, 684 P2d 476, 41 St. Rep. 1110 (1984).

Law Review Articles

Rule 37 Sanctions: Deterrents to Discovery Abuses, Irigoin, 46 Mont. L. Rev. 95 (1985).

Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 320 (1983).

Rule 37(g). Failure to participate in the framing of a discovery plan.

Advisory Committee Note

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 37(g). The amendment conforms the rule to the 1980 Amendment of the Federal Rule. For a discussion of the amendment see the advisory committee note to the Federal Rule. Subparagraphs (e) and (f) of the Federal Rule were never adopted by Montana and both have now been abrogated in the Federal Rule. The new subparagraph has been designated (g) in order to conform to the numbering of the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the rule was identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

VI. Trials

Part Case Notes

Interview of Unnamed Witness — Consent to Alleged Noncompliance With Duty to Supplement: On appeal, a father suing for injury to his son found submerged in defendant's swimming pool alleged pretrial discovery abuse by defendant in that defendant was allowed to

add a witness the day before trial and had known the location of the witness but failed to inform the father of the address, in violation of defendant's duty to supplement its interrogatory answers. It was not reversible error to allow the witness to testify. The testimony was probative on important fact issues, and the father interviewed the witness before trial and rejected an offered continuance. The father was not entitled to have his cake and eat it too. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982).

Part Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 3 (1961).
The Trial of a Lawsuit, Loble, 19 Mont. L. Rev. 117 (1957).

Rule 38. Jury trial of right

Case Notes

Trial De Novo Allowed in District Court Despite Failure to Request Jury Trial in Justice's Court — No Waiver of Right to Jury Trial: The District Court erred in determining that under 25-33-301, a waiver of the right to a jury trial in Justice's Court waives the right to a jury trial de novo on appeal in District Court. The court disregarded the interplay of Rule 3, M.R.Civ.P., with 25-33-301 and this rule in attempting to harmonize the statute and the rules. The language in 25-33-301, limiting appeals from Justice's Court to the pleadings filed in Justice's Court, does not limit jury trial demands in appeals from Justice's Court because jury trial demands are not pleadings. The plain meaning of Rule 81(b), M.R.Civ.P., requires that Rule 3 and this rule be given meanings that are consistent with 25-33-301 and the right to trial by jury. Thus, when a party makes a jury trial demand under this rule for a trial de novo on appeal in District Court, the action commences when the party serves and files notice of appeal pursuant to 25-33-102 and 25-33-103. In appeals from Justice's Court, jury trial demands must be made within 10 days of the filing of notice of appeal. Further, participation in a bench trial in District Court without objection does not constitute waiver of the right to a jury trial so long as a timely jury trial demand is made in District Court. Balyeat Law, P.C. v. Harrison, 1999 MT 144, 295 M 13, 983 P2d 902, 56 St. Rep. 566 (1999), following U.S. v. Calif. Mobile Home Park Management Co., 107 F3d 1374 (9th Cir. 1997), and Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998).

Denial of Demand for Jury Trial — Interlocutory Order Not Appealable: Defendants, sued to recover money due on promissory notes, did not demand a jury trial in their original answer, but after several delays and withdrawal of counsel, defendants acting pro se filed an amended answer with a request for jury trial. Upon objection by plaintiffs and examination of the pleadings, the District Court denied the demand for jury trial. The Supreme Court dismissed the defendants' appeal of the denial as premature, holding that the denial of a request for a jury trial, whether the request was timely or belated, was not a final judgment appealable under Rule 1, M.R.App.P. Such an interlocutory order may be appealable only if specifically provided for in a rule or statute. Heidema v. First Bank, 211 M 178, 682 P2d 1374, 41 St. Rep. 1291 (1984).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).
Jury Trial in Civil Cases, Clark, 10 Mont. L. Rev. 38 (1949).

Collateral References

Right to jury trial in state court divorce proceedings. 56 ALR 4th 955.
Right to jury trial in action for retaliatory discharge from employment. 52 ALR 4th 1141.
Right to jury trial in action for declaratory relief in state court. 33 ALR 4th 146.
Right to jury trial in stockholder's derivative action. 32 ALR 4th 1111.
Right to a jury trial on motion to vacate judgment. 75 ALR 3d 894.

Rule 38(a). Right reserved.

Commission Notes

The rule is identical with the Federal Rule, except for subdivisions (a) and (d). The change in subdivision (a) merely conforms it to the Montana Constitution and statutes.

Compiler's Comments

Identity With Federal Rule: The above commission note was written prior to the amendment of the Federal Rule in 1966, which added subdivision (e), concerning maritime claims.

Case Notes

Right to Jury Trial — Equity Claim and Claim for Damages Tried in Single Proceeding: The District Court granted plaintiffs' motion for a new nonjury trial, ruling that an action under Title 49, ch. 2, is equitable in nature and implies no right to a trial by jury in a federal suit under Title

VII of the federal Civil Rights Act of 1964 (Act). Plaintiffs contended that the only damages sought were backpay and reinstatement. The Supreme Court found that the record disclosed that plaintiffs submitted evidence of damages other than backpay and reinstatement and concluded that a claim for relief under the Act and a legal claim for damages as a result of unlawful discharge were tried in a single proceeding, each claim arising out of common fact issues. The court held that the right to a jury trial encompassed both the claims under the Act and the legal claims for damages, and that the trial judge was bound by the jury's determination of facts on all issues. The Supreme Court further held that the District Court erred in granting a new nonjury trial, and the case was remanded with instructions to reinstate the jury verdict and enter judgment accordingly. Breese v. Steele Mtn. Enterprises, Inc., 220 M 454, 716 P2d 214, 43 St. Rep. 522 (1986).

Jury Passed for Cause — Partiality Issues Waived: Defendant could not successfully argue that the jury was not fair and impartial when defendant passed the jury for cause. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

All Parties in Equity Court Entitled to Have Their Legal Claims and Counterclaims Tried by Jury: Although, in the past, the court has purported to permit a court of equity to rule on all questions in a case, the court has never held that a court sitting in equity may try those issues of fact raised by plaintiff in a legal cause of action. The modern merger of law and equity courts and the liberal joinder provisions of the Rules of Civil Procedure force reevaluation of the traditional justification for permitting an equity court to decide legal issues. Upon timely demand, all parties are entitled to have their legal claims and counterclaims tried by jury. Gray v. Billings, 213 M 6, 689 P2d 268, 41 St. Rep. 1910 (1984), followed in State ex rel. Farm Credit Bank of Spokane v. District Court, 267 M 1, 881 P2d 594, 51 St. Rep. 709 (1994). To the extent that Butler Bros. Dev. Co. v. Butler, 111 M 329, 108 P2d 1041 (1941), and its progeny have been interpreted to deny plaintiff a right to jury trial of his legal claims, the cases are overruled.

Right to Jury Trial — Not Applicable to Equity Cases: A June 1976 agreement between the parties provided that plaintiff would advance money for the downpayment in the purchase of real property in Billings and would receive certain benefits, including a 50% interest in the property, in return. Plaintiff was to control any contractual arrangements until defendant had contributed, by payment of the monthly installments, a sum equal to the downpayment. In 1977, prior to the equalization of contributions, plaintiff entered negotiations to sell the property. No agreement between plaintiff and defendant was reached regarding the sale, and plaintiff filed suit seeking specific performance of the agreement. Defendant's demand for a jury trial was denied and plaintiff was granted summary judgment allowing him exclusive control of contractual negotiations concerning the land for 1 year. Defendant contended he was denied his constitutional right to a jury trial. The Supreme Court, relying on decisions under the 1889 Montana Constitution and the transcripts of the 1972 Constitutional Convention, held that the power to enforce specific performance is vested solely in courts having equitable jurisdiction. The right of trial by jury does not extend to equitable actions, and the judge is not bound by any jury's findings. The District Court's denial of a jury trial was upheld. Downs v. Smyk, 200 M 334, 651 P2d 1238, 39 St. Rep. 1786 (1982).

Failure to Object Where Court Sets Trial Without Jury: The plaintiff brought an action to quiet title, or in the alternative, to obtain a decree of specific performance of an oral contract. The defendant's motion for summary judgment on the quiet title action was granted, with the court setting the remaining count for trial without jury. Because no objection was made to trial without jury and because equitable relief was being sought, the plaintiff could not claim that his right to trial by jury was denied. Craddock v. Berryman, 198 M 155, 645 P2d 399, 39 St. Rep. 835 (1982).

Cases Prior to Rules — Effect: This rule makes it clear that the rules have not altered the substantive right to trial by jury. Therefore, cases antedating the rules have relevance in determining the existence of one's right to trial by jury. Citizens St. Bank v. Duus, 154 M 18, 459 P2d 696 (1969).

Counterclaim Not Compulsory — No Right to Jury Trial: Counterclaim was not compulsory and accordingly court did not err in denying defendant's request for a jury trial. Also, interposition of a legal issue in an equitable action gives the defendant no right to a jury trial of the case generally or of the issue raised by the counterclaim. Citizens St. Bank v. Duus, 154 M 18, 459 P2d 696 (1969). To the extent that this case has been interpreted to deny plaintiff a right to jury trial of his legal issues, it is overruled. Gray v. Billings, 213 M 6, 689 P2d 268, 41 St. Rep. 1910 (1984).

Declaratory Judgment — Right to Jury Trial: A party has a right to a jury trial on demand where the suit is for a declaratory judgment and there are triable issues of fact. Mahan v. Hardland, 147 M 78, 410 P2d 156 (1966).

Requirements of "Trial by Jury": Even though a "trial by jury" requires that all material issues of fact be submitted to and determined by the jury, this does not require that a statement of the issues as defined in the pleadings must be given. Dasinger v. Andersen, 136 M 277, 347 P2d 747 (1959).

Collateral References

Jury *key* 9 through 37.

50 C.J.S. Juries §§9 through 133.

47 Am. Jur. 2d Jury §§61 through 68.

Right to jury trial as to fact essential to action or defense but not involving merits thereof. 170 ALR 383.

Rule 38(b). Demand.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical to the Federal Rule.

Case Notes

Failure to Request Jury Trial in Answer to Second Amended Complaint — Waiver: Goodover initially filed an action for quiet title and declaratory judgment. In his second amended complaint, Goodover added a prayer for damages of $500 and for "such other and further relief as the court may seem [sic] appropriate". Lindey's failure to demand a jury trial in its answer to the second amended complaint constituted a waiver of the right to jury trial. Lindey's claim of lack of notice of a potentially greater damage award and argument that Goodover should have been required to amend his complaint to request larger damages, thereby giving Lindey's the opportunity to request a jury trial, were without merit. Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Denial of Demand for Jury Trial — Interlocutory Order Not Appealable: Defendants, sued to recover money due on promissory notes, did not demand a jury trial in their original answer, but after several delays and withdrawal of counsel, defendants acting pro se filed an amended answer with a request for jury trial. Upon objection by plaintiffs and examination of the pleadings, the District Court denied the demand for jury trial. The Supreme Court dismissed the defendants' appeal of the denial as premature, holding that the denial of a request for a jury trial, whether the request was timely or belated, was not a final judgment appealable under Rule 1, M.R.App.P. Such an interlocutory order may be appealable only if specifically provided for in a rule or statute. Heidema v. First Bank, 211 M 178, 682 P2d 1374, 41 St. Rep. 1291 (1984).

Juvenile Delinquency Proceedings — No Waiver: Where a minor charged with being a delinquent made a demand for a jury trial on the day preceding the trial and at the opening of the trial, the demand was made in time and there was no waiver. Application of Banschbach, 133 M 312, 323 P2d 1112 (1958).

Collateral References

Jury *key* 25(6).

50 C.J.S. Juries §99, et seq.

Rule 38(c). [Demand] — specification of issues.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Collateral References

Jury *key* 25(8).

50 C.J.S. Juries §103.

Rule 38(d). Waiver.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule, except for subdivisions (a) and (d). In subdivision (d) the second sentence, which was proposed by the Federal Advisory Committee in its preliminary draft of May, 1954, has been added. It is intended to end the confusion and diversity of decisions as to the effect of an amendment to a pleading which merely changes the legal theory, as reviving a right to trial by jury once waived.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Failure to Request Jury Trial in Answer to Second Amended Complaint — Waiver: Goodover initially filed an action for quiet title and declaratory judgment. In his second amended complaint, Goodover added a prayer for damages of $500 and for "such other and further relief as the court may seem [sic] appropriate". Lindey's failure to demand a jury trial in its answer to the second amended complaint constituted a waiver of the right to jury trial. Lindey's claim of lack of notice of a potentially greater damage award and argument that Goodover should have been required to amend his complaint to request larger damages, thereby giving Lindey's the opportunity to request a jury trial, were without merit. Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Consent of Both Parties Required to Withdraw Demand for Jury Trial: The insurance agent made several misrepresentations concerning the insured when filling out an application for Safeco insurance. Safeco paid a $300,000 claim and then brought suit against the insurance agency and its agent. The insurance agency initially demanded a jury trial but then over the objection of Safeco was allowed to withdraw its demand for a jury trial. On appeal, the Supreme Court held that the District Court erred in ordering a trial by judge. When one party has made a demand for a jury trial, the other party may rely on it. If at a later date the demanding party waives the demand, the opposing party has the right to determine whether to consent to a trial before a judge or to insist upon a jury trial. On appeal, the Supreme Court directed that judgment be entered in favor of Safeco on the issue of liability but held that the insurance agency was not entitled to a new trial because it had already had its trial. Safeco Ins. Co. v. Lovely Agency, 200 M 447, 652 P2d 1160, 39 St. Rep. 1861 (1982). See also Holm-Sutherland Co., Inc. v. Shelby, 1999 MT 150, 295 M 65, 982 P2d 1053, 56 St. Rep. 595 (1999).

Law Review Articles

Waiver of Trial by Jury in Montana Civil Cases Under the Montana Rules of Civil Procedure, Thompson, 24 Mont. L. Rev. 47 (1962).

Collateral References

Jury *key* 27 through 28.

50 C.J.S. Juries §84, et seq.

47 Am. Jur. 2d Jury §69, et seq.

Jury trial waiver as binding on later state civil trial. 48 ALR 4th 747.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties. 9 ALR 4th 1041.

Rule or statute requiring opposing party's consent to withdrawal of demand for jury trial. 90 ALR 2d 1162.

Disregard of waiver of jury trial in civil action. 64 ALR 2d 506, superseded in part by 9 ALR 4th 1033, 48 ALR 4th 747.

Waiver of jury trial in action for declaratory relief. 13 ALR 2d 782, §§9 through 12 superseded by 33 ALR 4th 146.

Waiver of right to jury trial as operative after expiration of term during which it was made, or as regards subsequent trial. 106 ALR 203.

Rule 38 of Federal Rules of Civil Procedure: waived right to jury trial as revived by amended or supplemental pleadings. 18 ALR Fed. 754.

Rule 39. Trial by jury or by the court

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 39(a). By jury.

Commission Notes

Subdivision (a) of the rule is identical with the Federal Rule, except for the substitution of the words "register of actions" for "docket" in the first sentence, and the omission of the last clause of the Federal Rule, "under the Constitution or statutes of the United States."

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Whether Question of Fact Exists Not Question of Fact — No Right to Jury Trial Absent Evidence of Fact Question: Defendants asserted error in the District Court's denial of their request for a trial by jury, claiming that their affirmative defense constituted a breach of contract claim. However, before there was an entitlement to a jury trial, there had to be issues of fact for a jury to decide. Whether or not there is sufficient evidence to raise an issue of fact is a question of law for the court and not an issue of fact. The right of jury trial on any issue of fact presented by the pleadings is provisional, and if the evidence fails to form an issue of fact, the right of jury trial disappears. The Supreme Court cited numerous cases in holding that when, as in this case, insufficient evidence is presented to have the issue raised by an affirmative defense submitted to a jury, denial of a request for a jury trial is not prejudicial. Fed. Land Bank of Spokane v. Snider, 247 M 508, 808 P2d 475, 48 St. Rep. 285 (1991).

Right to Jury Trial — Equity Claim and Claim for Damages Tried in Single Proceeding: The District Court granted plaintiffs' motion for a new nonjury trial, ruling that an action under Title 49, ch. 2, is equitable in nature and implies no right to a trial by jury in a federal suit under Title VII of the federal Civil Rights Act of 1964 (Act). Plaintiffs contended that the only damages sought were backpay and reinstatement. The Supreme Court found that the record disclosed that plaintiffs submitted evidence of damages other than backpay and reinstatement and concluded that a claim for relief under the Act and a legal claim for damages as a result of unlawful discharge were tried in a single proceeding, each claim arising out of common fact issues. The court held that the right to a jury trial encompassed both the claims under the Act and the legal claims for damages, and that the trial judge was bound by the jury's determination of facts on all issues. The Supreme Court further held that the District Court erred in granting a new nonjury trial, and the case was remanded with instructions to reinstate the jury verdict and enter judgment accordingly. Breese v. Steele Mtn. Enterprises, Inc., 220 M 454, 716 P2d 214, 43 St. Rep. 522 (1986).

Right to Jury Trial — Not Applicable to Equity Cases: A June 1976 agreement between the parties provided that plaintiff would advance money for the downpayment in the purchase of real property in Billings and would receive certain benefits, including a 50% interest in the property, in return. Plaintiff was to control any contractual arrangements until defendant had contributed, by payment of the monthly installments, a sum equal to the downpayment. In 1977, prior to the equalization of contributions, plaintiff entered negotiations to sell the property. No agreement between plaintiff and defendant was reached regarding the sale, and plaintiff filed suit seeking specific performance of the agreement. Defendant's demand for a jury trial was denied and plaintiff was granted summary judgment allowing him exclusive control of contractual negotiations concerning the land for 1 year. Defendant contended he was denied his constitutional right to a jury trial. The Supreme Court, relying on decisions under the 1889 Montana Constitution and the transcripts of the 1972 Constitutional Convention, held that the power to enforce specific performance is vested solely in courts having equitable jurisdiction. The right of trial by jury does not extend to equitable actions, and the judge is not bound by any jury's findings. The District Court's denial of a jury trial was upheld. Downs v. Smyk, 200 M 334, 651 P2d 1238, 39 St. Rep. 1786 (1982).

Failure to Object Where Court Sets Trial Without Jury: The plaintiff brought an action to quiet title, or in the alternative, to obtain a decree of specific performance of an oral contract. The defendant's motion for summary judgment on the quiet title action was granted, with the court setting the remaining count for trial without jury. Because no objection was made to trial without jury and because equitable relief was being sought, the plaintiff could not claim that his

right to trial by jury was denied. Craddock v. Berryman, 198 M 155, 645 P2d 399, 39 St. Rep. 835 (1982).

Criminal Defendant's Right to Have Note Read to Jury: Because defendant had no right to address the jury personally, he had no right to have a note read to the jury. St. v. Armstrong, 172 M 296, 562 P2d 1129 (1977).

Legal or Equitable Case — Time of Determination of Right to Jury Trial: Where in an action to foreclose a trust deed securing a promissory note the equitable issues were not all admitted by defendant, and his answer and cross-complaint, besides setting up failure of consideration, alleged fraud and breach of contract, also asked equitable as well as legal relief, the trial court did not err in refusing a jury trial. Article III, sec. 23, 1889 Mont. Const. (now Art. II, sec. 26, 1972 Mont. Const.) applies only to those cases where right to jury trial existed at the time of the adoption of the Constitution. Being equitable in nature, the case at bar cannot be made an action at law by raising an issue of law in the answer. The court must look to the primary right to determine jury question. Butler Bros. Dev. Co. v. Butler, 111 M 329, 108 P2d 1041 (1941).

Forfeiture of Lease — Right to Jury Trial: An action to compel the release of an oil and gas lease of record on the ground that the lessee had failed to commence drilling operations within the time fixed in the lease, by reason of which it became forfeited, and for the recovery of the statutory penalty, damages, and attorney's fees, is one of law entitling plaintiff to a jury trial. Solberg v. Sunburst Oil & Gas Co., 70 M 177, 225 P 612 (1924), distinguished in McNamer Realty Co. v. Sunburst Oil & Gas Co., 76 M 332, 247 P 166 (1926).

Mixed Law and Equity — Right to Jury Trial: Where the primary purpose of an action against a corporation was to recover on promissory notes aggregating the sum of $27,000 and to enforce liability of its directors as comakers and guarantors and for failure to file the annual statements required by statute, and the only equitable relief prayed for was the foreclosure of a mortgage given by one of the directors on two town lots as security for the notes, the answers of defendants consisting of denials and counterclaims which were put in issue by reply, the defendants were entitled to a trial by jury of the strictly legal issues presented by the pleadings, and denial of such jury trial was error. Benson Stabeck Co. v. Farmers' Elevator Co. of Barber, 66 M 395, 214 P 600 (1923), distinguished in Butler Bros. Dev. Co. v. Butler, 111 M 329, 207 P2d 1041 (1941).

Issues Triable by Jury: Where the pleadings present issues of fact, prima facie each party is entitled to have a jury determine them. But, if during the trial it becomes apparent that there are no such issues in the evidence, the decision falls within the province of the court. Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910).

Statutory Jury in Equity: The long-established principles relating to the equity functions of the District Courts of this state, respecting the findings of a jury on an issue presented to it in an equitable action, are not changed by the provision of a statute to the effect that "in all cases issues of fact must be tried to a jury", so as to render the verdict of a jury in such cases binding upon the court until formally vacated. Arnold v. Sinclair, 12 M 248, 29 P 1124 (1892).

Collateral References

Equity *key* 369 through 392; Jury *key* 25(1) through (11); Trial *key* 9.1, 10, 148, 370(2).

50 C.J.S. Juries §§98 through 105; 88 C.J.S. Trial §§335 through 483.

27A Am. Jur. 2d Equity §§236, 243; 47 Am. Jur. 2d Jury §§3, 8.

Right to jury trial in action for declaratory relief in state court. 33 ALR 4th 146.

Rule 39(b). By the court.

Commission Notes

In subdivision (b) of the rule the last clause, "upon motion or of its own initiative may on ten days' notice to the parties order a trial by a jury of any or all issues" has been substituted for the clause of the Federal Rule, "in its discretion upon motion may order a trial by jury of any or all issues." This change is made to remove any doubt as to the court's power to call a jury in its own discretion, whether or not a motion has been made, and at the same time provide the parties with advance notice that there will be a jury trial despite waiver.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Rule 39(c). Advisory jury and trial by consent.

Commission Notes

Subdivision (c) of the rule is identical with the Federal Rule, except for the omission of the clause, "except in actions against the United States when a statute of the United States provides for trial without a jury."

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

New Trial — Advisory Jury Not Required: In an equity action for specific performance tried before an advisory jury, where the court granted defendant's motion for a new trial, the court was not required to order that the new trial be by jury as had the original proceedings. Waite v. Waite, 143 M 248, 389 P2d 181 (1964).

Advisory Verdict — Court Not Bound: In an equity case brought to determine the priority of water right appropriations, the court is not bound to make its decree in conformity with the verdict of the jury. Kleinschmidt v. Greiser, 14 M 484, 37 P 5 (1894).

Collateral References

Advisory jury questions in action for declaratory relief. 13 ALR 2d 783, §§9 through 12 superseded by 33 ALR 4th 146.

Nature and effect of jury's verdict in equity. 156 ALR 1147.

Rule 40. Assignment of cases for trial.

Commission Notes

The rule is identical with the Federal Rule, except for the substitution of the words "state of Montana" for the words "United States."

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Advancing on Calendar: While the trial court may for good cause shown take up and hear a case out of its regular order, it must not be done to the prejudice of the parties. Counsel has a right to rely on a case not being called for trial until the preceding case on the calendar then in process of trial has been disposed of. Stenner v. Colorado-Montana Mines Ass'n, 116 M 261, 149 P2d 546 (1944).

Pleadings Incomplete — Case Not at Issue: When the parties have filed all their pleadings and pleading has ended, the case is at issue, but where an answer has been filed containing an affirmative defense or new matter, to which a reply has not been filed, the case is not at issue. Roush v. District Court, 101 M 166, 53 P2d 96 (1935).

Collateral References

Trial *key* 7, 9(1).

88 C.J.S. Trial §§60 through 90.

75 Am. Jur. 2d Trial §§76, 80, 83 through 85, 182, 183.

Rule 41. Dismissal of actions

Case Notes

Defendants Immune From Suit — Dismissal for Failure to State Claim Upon Which Relief Could Be Granted: Steele was a certified public accountant who was reported by a state attorney for the unauthorized practice of law for representing a client in a contested case before a Department of Labor and Industry hearings examiner. Another accountant who also was not authorized to practice law subsequently represented the client. Steele then filed a complaint under 42 U.S.C. 1983 against the hearings examiner and the state attorney for violation of his due process and civil rights. However, the hearings examiner and attorney were entitled to judicial immunity and quasi-judicial immunity, respectively. Therefore, the District Court did not err in dismissing Steele's complaint for failure to state a claim upon which relief could be granted. Steele v. McGregor, 1998 MT 85, 288 M 238, 956 P2d 1364, 55 St. Rep. 349 (1998).

Involuntary Dismissal of Action in Bankruptcy Estate — Substitution of Parties and Notice of Dismissal of Action Not Required: Plaintiffs filed a lender liability action against several banks after plaintiffs had filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code. On motion of the plaintiffs' creditors, the Bankruptcy Court involuntarily converted that a proceeding from Chapter 11 to a Chapter 7 liquidation. Pursuant to federal case law, upon the conversion to a Chapter 7 proceeding, the lender liability action in District Court became an asset of the trustee in bankruptcy. The trustee and defendants in the lender liability action reached a stipulated settlement for a dismissal of that action, and plaintiffs appealed the dismissal. Citing Fed. Land Bank of Spokane v. Reilly, 240 M 147, 783 P2d 917 (1989), the Supreme Court held that it has no authority to substantively review issues that are

appropriately before the Bankruptcy Court and that the only issue the Supreme Court could review was the propriety of a lack of notice of the dismissal to the plaintiffs. On this issue, the Supreme Court held that the trustee was not required to give notice because all of plaintiffs' interest in the state court action was transferred to the trustee and held that plaintiffs therefore lacked standing to object to the dismissal. The Supreme Court also held that the trustee was not required to substitute the bankruptcy estate as the real party in interest in the state court proceeding because Rule 25(c), M.R.Civ.P., rather than Rule 17(a), M.R.Civ.P., governed substitution and because under Rule 17(a), substitution was not mandatory. Reilly v. Citizens St. Bank, 251 M 155, 822 P2d 1088, 48 St. Rep. 1140 (1991).

How Consent Judgment Construed: A judgment by consent is contractual in nature, and therefore it should be construed as a written contract. The meaning of the consent judgment is to be gathered from the terms of the contract, and the judgment should not be extended beyond the clear import of the terms. First Bank v. District Court, 226 M 515, 737 P2d 1132, 44 St. Rep. 861 (1987).

Attempt by Prosecutor to Provoke Defense Motion for Mistrial — Double Jeopardy: When a defendant moves for a mistrial and the motion is granted, the "manifest necessity" standard allowing a court to lift the double jeopardy bar to a second trial does not apply (U.S. v. Tateo, 377 US 463, 12 L Ed 2d 448, 84 S Ct 1587 (1964)). The Montana Supreme Court recognized a narrow exception to this rule, as outlined in Oreg. v. Kennedy, 456 US 667, 72 L Ed 2d 416, 102 S Ct 2083 (1982), holding that the circumstances under which a defendant may invoke the bar of double jeopardy are limited to cases "in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial". In the case at bar, the District Court held and the Supreme Court affirmed that the prosecutor attempted, through a series of overreaching questions, to shift the focus of the trial from a charge of criminal sale of drugs for which there was only weak evidence to sexual crimes initially reported but later denied on cross-examination. The court found that the questions were so prejudicial that the defendant had little choice but to move for a mistrial to avoid a conviction for crimes with which he had not been charged. St. v. Laster, 223 M 152, 724 P2d 721, 43 St. Rep. 1614 (1986).

Substitution of Corporation Rather Than Dismissal of Employee: A suit was brought against several defendants, including "Robert Payne and James Payne, d/b/a Ponderosa Realty". At the time of trial it was disclosed that Ponderosa Realty was a corporation. The parties stipulated that Ponderosa Realty was a proper party and dismissed the suit against the two Paynes. At the end of the plaintiffs' case, Ponderosa Realty moved to dismiss, arguing that the dismissal of the two Paynes, in effect, was a dismissal of Ponderosa Realty, since the corporation could only be liable through the actions of its employees or agents. The court rejected the argument, saying that what occurred was not a substantive dismissal with prejudice of an agent or employee but rather the substitution of a proper party before the court. White v. Fidelity Real Estate, 196 M 156, 638 P2d 1053, 39 St. Rep. 1 (1982).

Rule 41(a). Voluntary dismissal — effect thereof.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

The amendment corrects the reference to the wrong rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule, except that "state of Montana" has been substituted for "United States" in the first sentence of paragraph (1) and except that there has been deleted from the end of paragraph (1) a clause reading, "except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim".

Amendments: The amendment of October 9, 1984, in (1) changed internal reference from Rule 23(c) to Rule 23(e).

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Second Suit Based on Same Facts as Case Dismissed With Prejudice Properly Dismissed as Res Judicata: While a first employment termination claim was pending, Xu filed another claim based on the same facts. The first claim was ultimately dismissed with prejudice for Xu's failure to comply with discovery, and the District Court then summarily dismissed the second case based on res judicata and collateral estoppel. Xu appealed on grounds that it was an abuse of discretion for the District Court to dismiss the second case because the second case contained a new claim of defamation and because there was no final adjudication on the merits of the first claim. The Supreme Court disagreed. Res judicata applied not only to the issues that were raised in the first claim, but also to issues that could or should have been raised in the first litigation. Collateral estoppel applied because a dismissal with prejudice constituted an adjudication on the merits. Summary dismissal of the second case was therefore affirmed. Xu v. McLaughlin Research Institute for Biomedical Science, Inc., 2005 MT 209, 328 M 232, 119 P3d 100 (2005).

Modification of Child Support Not Properly Before Trial Court Following Withdrawal of Motion — No Error in Not Considering Modification: As part of an action for contempt of court, the wife moved for a modification of child support but subsequently withdrew the motion before the husband filed a response. The husband did not object to the withdrawal and did not file an independent motion to modify support. When the contempt action came up for hearing, the husband argued that he had experienced a substantial change of circumstances and requested permission to present evidence regarding child support, despite the fact that the wife's motion to consider the issue had been withdrawn. The husband later asserted that the District Court erred in not considering modification of support. The Supreme Court disagreed. A plaintiff may, with proper notice, withdraw a child support modification motion, and absent another specific independent motion for modification, no error is ascribed to the trial court for failing to consider an issue not properly before it. In re Marriage of Crone, 2003 MT 238, 317 M 256, 77 P3d 167 (2003).

Failure to Serve Summons Within Three Years Requiring Dismissal With Prejudice of Same Federal Court Action if Plaintiff Voluntarily Dismisses State Court Action After Three Years: The U.S. District Court certified to the Montana Supreme Court the question of whether a plaintiff's failure to serve summons within 3 years as required under former Rule 41(e), M.R.Civ.P. (repealed and replaced with Rule 4E, M.R.Civ.P.), required dismissal with prejudice of the same claim in federal court upon motion of the defendant if the plaintiff voluntarily dismissed the state court action after 3 years pursuant to this rule. In determining which rule prevailed under the facts of the present case, the Supreme Court noted that the plain language of subsection (1) of this rule allows a plaintiff to dismiss without prejudice prior to an appearance by a defendant. However, if a plaintiff was allowed to dismiss a case without prejudice after the 3-year time period for service of summons in former Rule 41(e) had run, then Rule 41(e) would be meaningless and in conflict with the purpose of that rule to require diligent prosecution, because an inactive plaintiff would be thus rewarded by doing nothing for over 3 years even though that plaintiff was evidently pursuing a complaint. Former Rule 41(e) allowed a defendant to know that when a complaint was brought but service of summons was not accomplished within 3 years, the complaint would be dismissed with prejudice. Therefore, if a plaintiff moves to dismiss a complaint without prejudice under subsection (1) of this rule, but does so after the 3-year time period in former Rule 41(e) has passed, the plaintiff's dismissal is with prejudice and must be given res judicata effect. Rich v. St. Farm Mut. Auto. Ins. Co., 2003 MT 51, 314 M 338, 66 P3d 274 (2003). See also First Call, Inc. v. Capitol Answering Serv., Inc., 271 M 425, 898 P2d 96 (1995).

Absence of Counterclaims — Voluntary Dismissal Proper: Plaintiff filed an action to collect a bill for repair of defendant's pickup truck. The action was dismissed on plaintiff's motion after the repair bill was paid. Defendant appealed on 15 different issues, including a request for sanctions. A review of the District Court file did not reveal any document that could be considered as a counterclaim for purposes of preventing dismissal under this rule. the documents seemed to indicate an intent on the part of defendant to file counterclaims in the future, but did not establish a pleaded counterclaim for purposes of notice to plaintiff that a counterclaim had been filed. Absent the filing of counterclaims, the District Court did not err in dismissing the complaint on grounds that the amount due had been paid. Jim & Tracy's Alignment, Inc. v. Smith, 1998 MT 20, 290 M 368, 966 P2d 731, 55 St. Rep. 865 (1998).

Concurrent State-Tribal Court Jurisdiction — Absence of Special Tribal Issues — No Abuse of Discretion in Denial of Motion to Remand to Tribal Court: Plaintiffs were enrolled Blackfeet Tribe members, and the alleged negligence took place on tribal land. The action was initiated in state court. Plaintiffs maintained significant control of the action from the time that they initiated it and chose not to seek tribal jurisdiction until nearly 4 years after its commencement

and after considerable discovery and multiple proceedings occurred, at which time their motion to dismiss and remand to tribal court was denied. Because the action did not involve any special issues of Blackfeet sovereignty or issues that required the unique expertise of the tribal court, the state court did not abuse its discretion in denying the motion to dismiss and remand. Harwood v. Glacier Elec. Co-op, Inc., 285 M 481, 949 P2d 651, 54 St. Rep. 1257 (1997), following Petritz v. Albertson's, Inc., 187 M 102, 608 P2d 1089 (1980).

Costs and Fees for Voluntary Dismissal — Award Not Proper Under Subsection (1): Plaintiff voluntarily dismissed the case under subsection (1) of this rule before an answer or a summary judgment motion was filed by defendant. It was error for the District Court to award defendant costs for substantial discovery made before dismissal. The District Court erroneously relied on discretionary authority under subsection (2) of this rule to award costs when dismissal was made under that subsection. USF&G Co. v. Rodgers, 267 M 178, 882 P2d 1037, 51 St. Rep. 1023 (1994).

Attorney Fees Not Chargeable After Agreement to Stipulation When No Further Work Necessary: An attorney was paid to accompany clients to a meeting to determine clients' custodial rights in their grandson. At the meeting, an agreement was reached to allow transfer of custody by stipulation, with the documentation to be drawn up by the father's attorney. The clients assumed the agreement resolved the differences between the parties and that no further work needed to be done. However, the clients' attorney refused to enter into any stipulation, continued to prepare documents and do research on behalf of the clients, and initiated a suit for fees and costs for his work after the meeting. The District Court properly dismissed the suit after finding substantial evidence to support the contention that continuing actions by the attorney were unnecessary after the meeting and were therefore unchargeable. Smith v. Fladstol, 248 M 18, 807 P2d 1361, 48 St. Rep. 301 (1991).

Effect of Dismissal With Prejudice of Defendant Employee on Liability of Defendant Employer: The rule that dismissal of a defendant "with prejudice" does not release other defendants who may be liable under respondeat superior, unless the document intends to do so, or the payment is full compensation, or the release expressly so provides, is the better rule. To the extent it is consistent, the Supreme Court overruled State ex rel. Havre v. District Court, 187 M 181, 609 P2d 275, 37 St. Rep. 552 (1980). The force of this ruling applies to this case and to judgments of dismissal entered after the date of this decision. Cantrell v. Henderson, 221 M 201, 718 P2d 318, 43 St. Rep. 745 (1986).

Motion by Plaintiff Did Not Specify Nature of Dismissal — Dismissal With Prejudice Not Erroneous: The District Court did not err in dismissing driver of drilling truck with prejudice. Plaintiffs, in a claim for injuries allegedly caused by driver's negligence, moved for dismissal of driver without specifying whether dismissal should be with or without prejudice. Since that issue was left to the discretion of the trial court in accordance with the provisions of Rule 41(a)(2), M.R.Civ.P., the District Court did not abuse its discretion. Plaintiffs did not prove facts requiring a limitation upon the court's discretion. Cantrell v. Henderson, 221 M 201, 718 P2d 318, 43 St. Rep. 745 (1986).

Effect of Dismissal on Nonlitigated Pending Claim:

Generally, a compromise agreement, when the basis for a final judgment, operates as a merger and bar of all preexisting claims and causes of action. Webb v. First Nat'l Bank of Hinsdale, 219 M 160, 711 P2d 1352, 42 St. Rep. 1919 (1985), followed in Robinson v. First Sec. Bank of Big Timber, 224 M 138, 728 P2d 428, 43 St. Rep. 2080 (1986).

At a time when appellant owed First National Bank money, First National refused to lend appellant any more money, so appellant borrowed money from First State Bank of Malta. With the loan from First State Bank of Malta, appellant bought cattle, some of which he later sold to Glasgow Livestock. First National Bank then asked Glasgow Livestock to place First National's name on the check along with those of appellant, First State Bank of Malta, and another bank. First National Bank eventually brought a collection action against appellant. Appellant consulted a lawyer about the possibility of suing First National for wrongfully inducing Glasgow Livestock to place the bank's name on the check. After being informed by the lawyer that a suit of this type in appellant's case would have no merit, appellant settled the collection action and it was dismissed with prejudice. Two years later, after hiring a new lawyer, appellant filed an action against First National Bank alleging tortious interference with the contract. The District Court granted the bank's motion for summary judgment. The Supreme Court affirmed, ruling that appellant had benefited from the settlement and therefore dismissal with prejudice concluded the preexisting claims between the parties. Webb v. First Nat'l Bank of Hinsdale, 219 M 160, 711 P2d 1352, 42 St. Rep. 1919 (1985).

Notice of Dismissal by Former Guardian Ad Litem Ineffective: A notice of dismissal of an action by the person who originally filed the action as guardian ad litem but who was

subsequently removed as guardian ad litem is completely ineffective. That person is not an individual party to the action, nor is he acting in a representative capacity; thus, the action was not "dismissed by the plaintiff" or at "the plaintiff's instance" as required by this rule. State ex rel. Perman v. District Court, 213 M 130, 690 P2d 419, 41 St. Rep. 2002 (1984).

Stipulation of Dismissal of Action Against Police Officer — Application to City and County Under "Respondeat Superior" Doctrine: A man fleeing from police officers was shot by one of them. The man later entered into a stipulation for dismissal with prejudice of the claim against the officer, but later the city and county, also defendants in the suit, were denied their motions for dismissal with prejudice. The Montana Supreme Court held that a stipulation of dismissal with prejudice of a defendant is tantamount to a judgment on the merits, and accordingly such a dismissal with prejudice is res judicata as to every issue reasonably raised by the pleadings. Under the doctrine of respondeat superior, an employer defendant's liability is vicarious or derivative and does not arise until an employee acts negligently within the scope of his employment. A dismissal with prejudice of a claim against an employee is equivalent to a finding that the employee was not negligent. Under the doctrine of respondeat superior, such a dismissal of an employee operates to exonerate the employer. The Supreme Court will look at the dismissal with prejudice on its face, and will not look behind the words "with prejudice". State ex rel. Havre v. District Court, 187 M 181, 609 P2d 275 (1980), overruled to the extent inconsistent with Cantrell v. Henderson, 221 M 201, 718 P2d 318, 43 St. Rep. 745 (1986), and followed in First Bank v. District Court, 226 M 515, 737 P2d 1132, 44 St. Rep. 861 (1987).

Dismissal by Court Order — Attorney Fees as Curative of Prejudice: Due to the lateness of plaintiff's motion and the extensive preparation on the part of the defense, the award of $85 in attorney fees and costs imposed by the trial court in order to cure prejudice incurred by the defense was unreasonable. In view of the documents and exhibits submitted in the record, a more reasonable award must be determined. Petritz v. Albertsons, Inc., 187 M 102, 608 P2d 1089 (1980), distinguished in Teal, Inc. v. Wiedrich, 259 M 323, 856 P2d 543, 50 St. Rep. 816 (1993), and USF&G Co. v. Rodgers, 267 M 178, 882 P2d 1037, 51 St. Rep. 1023 (1994).

Dismissal by Court Order — Prejudice to Defendant — Curative Conditions: In determining whether a trial court abused its discretion in granting plaintiff's motion for dismissal, the extent to which the defendant was prejudiced and whether, if substantial prejudice did occur, the defendant could have been made reasonably whole by the imposition of curative conditions attached to the dismissal, weigh heavily. Petritz v. Albertsons, Inc., 187 M 102, 608 P2d 1089 (1980), distinguished in USF&G Co. v. Rodgers, 267 M 178, 882 P2d 1037, 51 St. Rep. 1023 (1994).

Federal Interpretations Persuasive: The interpretations under Rule 41(a)(2), Fed.R.Civ.P., have persuasive application to an interpretation of the state rule because of the identical language. Petritz v. Albertsons, Inc., 187 M 102, 608 P2d 1089 (1980), distinguished in USF&G Co. v. Rodgers, 267 M 178, 882 P2d 1037, 51 St. Rep. 1023 (1994).

Appeal From Dismissal: Order granting motion to dismiss is an appealable order, but the right to appeal is lost after the deadline passes, and cannot be revived 17 months later by a motion for appeal and reinstatement of the case. Beach v. Destination Enterprises, Inc., 165 M 152, 526 P2d 1382 (1974).

Dismissal as Affecting Counterclaim — Dismissal Properly Granted: Motion to dismiss complaint was properly granted where counterclaiming defendant did not object to dismissal, where trial was in fact had on defendant's counterclaim, and where defendant in fact obtained judgment against plaintiff on counterclaim. Ratcliff v. Murphy, 150 M 31, 430 P2d 627 (1967).

Nonprejudicial Dismissal: All that is necessary to effectuate a dismissal of complaint by plaintiff before trial is to file a praecipe for dismissal and a formal entry of his dismissal by the clerk in his register. However, an order of court entered in the minutes on motion of plaintiff may accomplish the same result. The dismissal is without prejudice unless, wishing to finally end the matter, he declares that dismissal is with prejudice. Union Bank & Trust Co. v. St. Bank of Townsend, 103 M 260, 62 P2d 677 (1936).

Judgment on Appeal Preventing Dismissal: After Supreme Court had reviewed the cause on supervisory control and directed the trial court to annul its judgment, permit the parties to file further pleadings, hear additional testimony, and revise its findings, which directions the court proceeded to obey when the motion to dismiss was made, the plaintiff was not entitled to a dismissal. State ex rel. Butte-Los Angeles Min. Co. v. District Court, 103 M 140, 61 P2d 828 (1936).

Attorney Fees Payable on Dismissal: Defendant in a suit to foreclose chattel mortgage was entitled to a reasonable attorney's fee upon dismissal of cause by plaintiff before trial, 30-9-511 (now repealed), which provides for attorney fees, being reciprocal and therefore applicable to

plaintiff and defendant. Graham v. Superior Mines, 100 M 427, 49 P2d 443 (1935), distinguished in Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

Motion for Dismissal: While the usual procedure for plaintiff to obtain a dismissal is the filing of a praecipe for dismissal and direction to the clerk to enter it on the register of actions, the same result may be reached by a motion for dismissal and having the order entered on the register. Graham v. Superior Mines, 100 M 427, 49 P2d 443 (1935).

Counsel Dismissing: The provision authorizing dismissal of an action at any time before trial "by the plaintiff himself", meant the plaintiff through his counsel, unless he appears in person and has no counsel. Barbarich v. Chicago, Milwaukee, St. Paul & Pac. Ry., 92 M 1, 9 P2d 797 (1932).

Motion Preventing Dismissal: Where a motion for a judgment on the pleadings has been made by defendant on plaintiff's failure to reply to an answer setting up new matter, which motion has been argued and submitted to the court for decision, the application of plaintiff for dismissal of his action without prejudice comes too late. State ex rel. Mont. Cent. Ry. v. District Court, 32 M 37, 79 P 546 (1905), distinguished in St. v. District Court, 102 M 503, 59 P2d 45 (1936) and Union Bank & Trust Co. v. St. Bank of Townsend, 103 M 260, 62 P2d 677 (1936).

Order Not Judgment of Dismissal: The mere entry in the minutes of the court of an order that an action "is dismissed without prejudice, as per praecipe filed" by plaintiff, is not a final judgment from which an appeal lies, but is simply an order upon which a judgment of dismissal and for costs could have been entered. State ex rel. Mont. Cent. Ry. v. District Court, 32 M 37, 79 P 546 (1905).

No Jurisdiction After Dismissal: A plaintiff may at any time before trial file a praecipe with the clerk for the dismissal of the action and direct the clerk to enter dismissal on the register of actions, and when such acts have been performed the case is dismissed and has passed entirely beyond the jurisdiction of the court, except for the purpose of entering a judgment for costs in favor of the defendant if the defendant so demands. Miller v. N. Pac. Ry., 30 M 289, 76 P 691 (1904), followed in Dew v. Dower, 269 M 286, 888 P2d 421, 51 St. Rep. 1388 (1994).

Payment of Costs Not Prerequisite: The payment of defendant's costs is not a prerequisite to the exercise of plaintiff's right to dismiss the action. Miller v. N. Pac. Ry., 30 M 289, 76 P 691 (1904), overruling State ex rel. Cornue v. Lindsay, 24 M 352, 61 P 883 (1900).

Notation of Stipulation Not Appealable: An entry noting the filing of an agreement to dismiss is not a dismissal from which an appeal can be taken. Kinman v. Scheuer, 30 M 73, 75 P 690 (1904).

Affirmative Relief Sought by Defendant — Effect on Dismissal: A plaintiff may dismiss or discontinue an action where no judgment other than for costs can be recovered against him by the defendant, but when under the pleadings and evidence relevant thereto some other judgment may be recovered, the plaintiff will not be permitted, as of course, to dismiss or discontinue. State ex rel. Cornue v. Lindsay, 24 M 352, 61 P 883 (1900).

Partition Action — Dismissal Not Available: Plaintiff in a partition suit could not dismiss his action after answer filed setting up defendant's interests in lands in question, since such answer sought affirmative relief. State ex rel. Cornue v. Lindsay, 24 M 352, 61 P 883 (1900).

Law Review Articles

Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 349 (1981).

Collateral References

Dismissals and Nonsuit *key* 1 through 43(7).

27 C.J.S. Dismissal and Nonsuit §§6 through 44.

24 Am. Jur. 2d Dismissal, Discontinuance, and Nonsuit §§7 through 54.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper. 34 ALR 4th 778.

What amounts to "final submission" within statute permitting plaintiff to take voluntary dismissal or nonsuit without prejudice before final submission. 31 ALR 3d 449.

What dismissals preclude a further suit, under Federal and State Rules regarding two dismissals. 65 ALR 2d 642.

Effect of discontinuance of action on previous orders. 11 ALR 2d 1407.

Relief from stipulations. 161 ALR 1161.

Provision that judgment is "without prejudice" or "with prejudice" as affecting its operation as res judicata. 149 ALR 553.

Stage of trial at which plaintiff may make voluntary nonsuit, dismissal, or discontinuance. 106 ALR 742; 69 ALR 13.

Appealability of order imposing conditions upon grant of plaintiff's motion for dismissal without prejudice, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. 75 ALR Fed. 505.

Rule 41(b). Involuntary dismissal — effect thereof.

Commission and Advisory Committee Notes

COMMISSION NOTE

In the last sentence of subdivision (b) of the rule the phrase "or for lack of an indispensable party" is substituted for the phrase of the Federal Rule "or for improper venue." The inclusion of the reference to an indispensable party is in accord with the proposal of the Federal Advisory Committee to conform to law and other existing rules. The deletion of the improper venue phrase is for the reason that under the rules objections to improper venue should be taken or waived.

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 41(b), as amended 1963 and 1966.

Explanation of change: Under the prior text of the second sentence of this subdivision [Rule 41(b)], the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. This overlap has caused confusion. Accordingly it is amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to nonjury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases would be a motion for a directed verdict. This amendment involves no change of substance.

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as nonjury cases.

This amendment also changes the last sentence of this subdivision to accord with the amendment to Rule 19.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

COMMISSION NOTE TO 1993 AMENDMENT

The amendment conforms the rule to the 1991 amendments of the Federal Rule.

Compiler's Comments

1993 Amendment: Deleted former second through fourth sentences that read: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)."

Identity With Federal Rule: The above commission note was written prior to the amendment of the State Rule noted in the advisory committee's note. As a result of the 1967 amendment the rule is identical to the Federal Rule except that the Montana Rule makes no reference to a dismissal for improper venue. As of May 1, 1990, the Montana and Federal Rules were still identical with the exception as noted.

Amendments: A 1963 amendment of the Federal Rule adopted the proposal of the Federal Advisory Committee referred to in the commission note above, and it also made other changes to restrict the application of the second sentence to nonjury cases.

The amendment of September 29, 1967, inserted "in an action tried by the court without a jury" before "has completed" in the second sentence and deleted the same phrase from the beginning of the third sentence; and, in the last sentence, substituted "failure to join a party under Rule 19" for "for lack of an indispensable party".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 808
Failure to Prosecute. 810
Sufficiency of Evidence 814

GENERAL

Dismissal of Complaint With Prejudice Unwarranted When Delay Reasonable and No Prejudice Shown: The District Court set a scheduling conference, but plaintiff's counsel did not attend because of a computer problem. The District Court then dismissed the complaint with prejudice and denied a motion to reopen the case. On appeal, the Supreme Court reversed, applying the factors in Becky v. Norwest Bank Dillon, N.A., 245 M 1, 798 P2d 1011 (1990), and Hobble-Diamond Cattle Co. v. Triangle Irrigation Co., 272 M 37, 899 P2d 531 (1995), to determine whether the District Court abused its discretion in dismissing the action for failure to prosecute. In this case, plaintiff's delay in prosecuting the case was reasonable, and defendant suffered no actual prejudice, so the District Court abused its discretion in dismissing the complaint with prejudice. Vermeer of Wash., Inc. v. Jones, 2004 MT 77, 320 M 435, 87 P3d 516 (2004), distinguishing E. Livestock Co., Inc. v. O'Neal, 285 M 90, 945 P2d 931 (1997).

Defendants Immune From Suit — Dismissal for Failure to State Claim Upon Which Relief Could Be Granted: Steele was a certified public accountant who was reported by a state attorney for the unauthorized practice of law for representing a client in a contested case before a Department of Labor and Industry hearings examiner. Another accountant who also was not authorized to practice law subsequently represented the client. Steele then filed a complaint under 42 U.S.C. 1983 against the hearings examiner and the state attorney for violation of his due process and civil rights. However, the hearings examiner and attorney were entitled to judicial immunity and quasi-judicial immunity, respectively. Therefore, the District Court did not err in dismissing Steele's complaint for failure to state a claim upon which relief could be granted. Steele v. McGregor, 1998 MT 85, 288 M 238, 956 P2d 1364, 55 St. Rep. 349 (1998).

Failure to Replead in Accordance With Rules — Dismissal With Prejudice Warranted — Exhaustion of All Sanctions Not Required: After a contract action against Nystroms was dismissed, Nystroms brought an action against the plaintiffs and their counsel, consisting of 76 paragraphs in 26 pages, alleging malicious fraudulent prosecution, intentional abuse of process, and unlawful intentional infliction of emotional distress. The District Court determined that the complaint was vindictive, argumentative, and repetitive and directed Nystroms to replead in accordance to Rules 8 and 12, M.R.Civ.P. Nystroms then filed an amended complaint of 130 paragraphs in 43 pages including previous allegations and adding allegations of interference with business relations and conspiracy. The District Court dismissed with prejudice under this rule for failure to comply with the court's order. The Supreme Court affirmed, holding that even though there may have been other less severe remedies available to the District Court, that court did not abuse its discretion in dismissing the complaint with prejudice. The Nystroms' counsel had warning that failure to replead in accordance with the Rules of Civil Procedure could result in dismissal. The District Court could have reasonably concluded that there was no other adequate remedy available to the District Court and the defendant under the circumstances. Nystrom v. Melcher, 262 M 151, 864 P2d 754, 50 St. Rep. 1488 (1993).

Attempt by Prosecutor to Provoke Defense Motion for Mistrial — Double Jeopardy: When a defendant moves for a mistrial and the motion is granted, the "manifest necessity" standard allowing a court to lift the double jeopardy bar to a second trial does not apply (U.S. v. Tateo, 377 US 463, 12 L Ed 2d 448, 84 S Ct 1587 (1964)). The Montana Supreme Court recognized a narrow exception to this rule, as outlined in Oreg. v. Kennedy, 456 US 667, 72 L Ed 2d 416, 102 S Ct 2083 (1982), holding that the circumstances under which a defendant may invoke the bar of double jeopardy are limited to cases "in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial". In the case at bar, the District Court held and the Supreme Court affirmed that the prosecutor attempted, through a series of overreaching questions, to shift the focus of the trial from a charge of criminal sale of drugs for which there was only weak evidence to sexual crimes initially reported but later denied on cross-examination. The court found that the questions were so prejudicial that the defendant had little choice but to move for a mistrial to avoid a conviction for crimes with which he had not been charged. St. v. Laster, 223 M 152, 724 P2d 721, 43 St. Rep. 1614 (1986).

Findings and Conclusions Sufficient:

A Workers' Compensation Court order that included a provision stating, "The evidence does not establish that claimant is entitled to further benefits now [sic] [nor?] that the claimant's benefits were wrongfully terminated" is in compliance with this rule since it meets the test set

forth in Mondakota Gas Co. v. Becker, 151 M 513, 445 P2d 745 (1968), and Holloway v. Univ. of Mont., 178 M 198, 582 P2d 1265 (1978). Wheeler v. Ins. Co. of N. Amer., 217 M 254, 704 P2d 49, 42 St. Rep. 1177 (1985).

Lower court ruling that "no cause of action or claim exists or has been proven" and "the same is hereby dismissed" was sufficient compliance with the rules despite plaintiff's contention that findings of fact and conclusions of law did not meet requirements of rules. Mondakota Gas Co. v. Becker, 151 M 513, 445 P2d 745 (1968).

Procedural Requirements of Workers' Compensation Court Order: The Supreme Court upheld a Workers' Compensation Court order that complied with the substance of Rule 41(b), M.R.Civ.P. (Title 25, ch. 20), but not with the Rule's formal technical requirements. The Supreme Court reasoned that the primary purpose of the Rule's requirement is that of notice for res judicata, estoppel, and appeal and that it is not proper to require an administrative tribunal to conform strictly to technical requirements of the rules of practice. Wheeler v. Ins. Co. of N. Amer., 217 M 254, 704 P2d 49, 42 St. Rep. 1177 (1985).

Suit for Wrongfully Honoring Checks — Relevance of Evidence and Claims: Plaintiff depositor's partner induced bank to disregard account signature card requiring signature of each partner on a check and to issue a card allowing the partner to make withdrawals on his signature alone. The partner did so, and the depositor sued the bank. The court should not have excluded bank's offered evidence that the partner told bank he had authority to change the card, testimony of the partner, a letter from partner to the bank on this point, and that portion of the partnership agreement authorizing the partner to write checks. However, the court properly refused to dismiss the complaint on the asserted ground that the partnership agreement authorized the bank's action, because a jury could find the bank unauthorized to act as it did. The court also properly refused to dismiss on the asserted ground that the cause of action was a partnership asset, because depositor could show it was not, particularly when the account was opened and the original signature card issued prior to the formation of the partnership. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Motion to Dismiss — Appeal of Denial of Motion Waived: After the plaintiff had rested her case in an action to increase the amount of child support, the defendant made a motion under Rule 41(b), M.R.Civ.P., for dismissal upon the ground that the plaintiff failed to make a showing of changed circumstances so substantial and continuing as to make the terms of the child support previously granted unconscionable. The motion was denied, and the defendant then presented his case. By proceeding to offer evidence, the defendant waived any right of appeal as to the denial of his motion to dismiss. If the defendant wished to challenge the decision, his avenue for doing so was to refuse to offer evidence, accept a judgment for plaintiff, and appeal it on the ground that plaintiff's evidence was insufficient. Nicolai v. Nicolai, 193 M 203, 631 P2d 300, 38 St. Rep. 1100 (1981).

Insufficient Complaint: A complaint should not be dismissed for insufficiency unless it appears for certain that the plaintiff is entitled to no relief under any set of facts that could be proven to support the claim. Varco-Pruden v. Nelson, 181 M 252, 593 P2d 48 (1979).

Ruling on Motion — When: A District Court must rule on a motion to dismiss when made at the close of plaintiff's evidence or reserve its ruling until the close of all evidence, but a specific ruling must be made prior to final decision of the case; however, in this case failure to do so was harmless error. Brown v. Webb, 173 M 275, 567 P2d 450 (1977).

Motion to Dismiss in Jury Trial — Directed Verdict Improperly Given: When a motion to dismiss was inadvertently granted in a jury trial, but both parties recognized the error and treated it as a motion for directed verdict, then the Supreme Court utilized rules for granting a motion for directed verdict in its review. In this case the District Court erred since the evidence clearly presents questions of fact and precludes judgment as a matter of law. Sant v. Baril, 173 M 14, 566 P2d 48 (1977).

Appeal From Dismissal — Burden of Proof: On appeal from dismissal for failure of proof, reviewing court must view evidence in light most favorable to plaintiff, but this does not relieve plaintiff of burden of producing evidence in support of each element essential to recovery. Nixon v. Huttinga, 163 M 499, 518 P2d 263 (1974).

Real Party in Interest — Effect of Assignment of Chose in Action: Court's order denying motion to dismiss when plaintiff had irrevocably assigned his chose in action was without foundation in law and an abuse of discretion. Plaintiff was not real party in interest. State ex rel. Cominco Am., Inc. v. District Court, 147 M 412, 412 P2d 577 (1966).

Amendment After Appeal Dismissing Pleadings: A party may not amend pleadings when appellate court affirmed their dismissal unless the appellate court permits amendment. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

Relationship Between Rules 12(b) and 41(b): Rule 41(b), M.R.Civ.P., has no application to a motion to dismiss for failure to state a claim under Rule 12(b), M.R.Civ.P. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

Adverse Possession — Motion Improperly Denied: Defendants' motion to dismiss should have been granted. Court erred in its denial of motion to dismiss claim of adverse possession. Vennes v. Nollmeyer, 144 M 43, 394 P2d 178 (1964).

Previous Judgment for Codefendant as Bar to Present Action: Where in a prior action motion of dismissal was granted as to defendant and judgment was entered on jury's verdict for codefendant, the judgment on the merits in favor of codefendant was a bar to present action against defendant in whose favor the dismissal was granted. Willoughby v. Flem, 158 F. Supp. 258 (D.C. Mont. 1958).

Federal Determination of State Dismissal: In civil action in federal District Court the federal court would not go behind a judgment of dismissal entered in state court and declare that judgment to be without prejudice where both the state court minutes and judgment expressly stated that the judgment was on the merits. Kelly v. Harris, 158 F. Supp. 243 (D.C. Mont. 1958).

Judgment on Merits as Res Judicata: A judgment of dismissal, which expressly declares on its face that it was rendered on the merits, must be given that effect in a plea of res judicata. Kelly v. Harris, 158 F. Supp. 243 (D.C. Mont. 1958).

Order of Dismissal as Judgment: In proceedings in Montana state court where in open court the court granted defendant's "motion to have the case dismissed with prejudice, on its merits", and the clerk recorded this action in the court minutes, the order so entered was a judgment. Kelly v. Harris, 158 F. Supp. 243 (D.C. Mont. 1958).

Reconsideration of Motion for Nonsuit: The District Court may, after erroneously overruling defendant's motion for nonsuit (superseded by Rule 41(b), M.R.Civ.P.) and hearing the testimony of defendant, reverse its former ruling and sustain the motion before submission of the case to the jury. School District v. Pribyl, 82 M 295, 267 P 289 (1928).

Directed Verdict of Nonsuit Appropriate: When the evidence on the part of the plaintiff does not tend to establish the cause of action stated in the complaint, the court may direct a verdict or take the case from the jury and enter a judgment of nonsuit (superseded by Rule 41(b), M.R.Civ.P.). Whether the court pursues one course or the other the result is the same, for though the court directs the return of a formal verdict the result is nothing more than a determination of the case by the court, the jury performing no other office than that of giving form to the court's conclusion. Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910); McKay v. Mont. Union Ry., 13 M 15, 31 P 999 (1892).

FAILURE TO PROSECUTE

Reasonable Accommodation of Incarcerated Plaintiff's Opportunity to Prosecute Claim — Dismissal for Failure to Prosecute Affirmed: Following remand of Hauschulz v. Michael Law Firm, 2001 MT 160, 306 M 102, 30 P3d 357 (2001), the District Court gave Hauschulz, who was incarcerated out of state, about 1 1/2 years to obtain counsel and participate in the proceedings, but Hauschulz was unable to specify when he would be able to prosecute the claim. The District Court subsequently dismissed Hauschulz's claim for failure to prosecute, and Hauschulz appealed. The Supreme Court affirmed, holding that although incarceration undoubtedly restricts one's ability to exercise civil liberties, it does not give rise to a right to an indefinite postponement of civil proceedings, particularly over the objection of the other party. Applying the factors in Westland v. Weinmeister, 259 M 412, 856 P2d 1374 (1993), the Supreme Court found no abuse of the District Court's discretion in balancing the competing public policy interests when dismissing Hauschulz's claim with prejudice. Hauschulz v. Michael Law Firm, 2005 MT 189, 328 M 95, 117 P3d 908 (2005).

Party Misled by Attorney's Actions — Extraordinary Circumstances Warranting Relief Under Rule: The trial court granted defendant's motion to dismiss for failure to prosecute under this rule. Nearly 13 months later, plaintiffs moved to set aside the dismissal order pursuant to Rule 60(b), M.R.Civ.P., because their attorney had failed to make them aware that the case had been dismissed. Rule 60(b) is an exception to the doctrine of finality of judgments. In the case of an attorney's mistake, inadvertence, misconduct, or neglect, either Rule 60(b)(1) or 60(b)(6) may be applicable, depending on the facts and the nature and seriousness of the mistake, inadvertence, misconduct, or neglect involved. Under ordinary circumstances, subsection (1) will apply. However, when the moving party can meet the higher burden of demonstrating extraordinary circumstances, gross neglect, or actual misconduct and of demonstrating that the client was blameless and acted to set aside the default within a reasonable time, then subsection (6) is available. In this case, plaintiffs' former attorney intentionally misled them into believing that

their case was proceeding and concealed the fact that the case had been dismissed. Conduct of such an egregious nature falls within the "any other reason" clause of subsection (6). The District Court properly granted plaintiffs' motion to set aside the default judgment, and because subsection (6) applied, the motion was considered reasonably timely even though filed 13 months after judgment. Karlen v. Evans, 276 M 181, 915 P2d 232, 53 St. Rep. 337 (1996), following In re Marriage of Waters, 223 M 183, 724 P2d 726 (1986), and followed in Bahm v. Southworth, 2000 MT 244, 301 M 434, 10 P3d 99, 57 St. Rep. 1030 (2000).

Time of Lack of Prosecution — Westland Factors Considered — Alternate Sanctions: Hobble-Diamond Cattle, Co. purchased a pivotal irrigation system from Triangle Irrigation Co. in 1983 and filed an action in 1986, alleging that certain pivots were either defective or improperly installed. After a bench trial in 1989, Hobble-Diamond appealed, and remittitur was issued in 1991. Thereafter, Hobble-Diamond moved to substitute the judge, and Triangle then moved to substitute the substituted judge. Counsel for Hobble-Diamond was allowed to withdraw in 1992, and a status conference was scheduled for 1993, but never occurred. In May of 1994, Triangle moved to dismiss for failure to prosecute and the District Court granted the motion. The Supreme Court analyzed the factors discussed in Westland v. Weinmeister, 259 M 412, 856 P2d 1374 (1993), and noted that the District Court was incorrect in using the total lapse of time since 1983 as a starting point and was incorrect in finding a total lack of activity by Hobble-Diamond since remittitur. Because no actual prejudice to Triangle was established during the proper time period (the 1 year that elapsed between the aborted 1993 conference and the filing of the motion pursuant to this rule), it was important for the District Court to analyze the "availability of alternate sanctions" and "warning" factors discussed in Westland. The Supreme Court held that availability of other sanctions and failure to warn mandated reversal of the dismissal. Hobble-Diamond Cattle, Co. v. Triangle Irrigation Co., 272 M 37, 899 P2d 531, 52 St. Rep. 596 (1995), followed in Pool v. Butte Pre-Release Center, Inc., 283 M 287, 939 P2d 1011, 54 St. Rep. 603 (1997), and distinguished in McKenzie v. Scheeler, 285 M 500, 949 P2d 1168, 54 St. Rep. 1277 (1997).

Case at Issue — Dismissal Improper: The lower court dismissed the plaintiff's case for failure to prosecute. The Supreme Court reversed, pointing out that during the period of inactivity of court proceedings, the parties had been engaged in settlement negotiations. The Supreme Court also noted that the plaintiff filed a motion for summary judgment in response to the motion to dismiss and that therefore another remedy, rather than dismissal, was available to determine the legal issues involved. Doug Johns Real Estate, Inc. v. Banta, 246 M 295, 805 P2d 1301, 47 St. Rep. 2036 (1990), distinguished in Westland v. Weinmeister, 259 M 412, 856 P2d 1374, 50 St. Rep. 857 (1993), which was followed in Hobble-Diamond Cattle, Co. v. Triangle Irrigation Co., 272 M 37, 899 P2d 531, 52 St. Rep. 596 (1995). Hobble-Diamond was followed in Pool v. Butte Pre-Release Center, Inc., 283 M 287, 939 P2d 1011, 54 St. Rep. 603 (1997).

Abuse of Discretion — Dismissal Reversed — Factors to Be Considered: When there had been a delay of only 2 ½ years and there had been no order or other warning from the court to proceed more diligently, it was abuse of the court's discretion to dismiss plaintiff's complaint for failure to prosecute. The elements the Supreme Court will consider when determining whether a District Court has abused its discretion by dismissing an action for failure to prosecute are: (1) plaintiff's diligence in prosecuting his claims; (2) the prejudice to the defense caused by plaintiff's delay; (3) the availability of alternate sanctions; and (4) the existence of a warning to plaintiff that his case is in danger of dismissal. These elements will be considered in light of the competing concerns of plaintiff's right to a hearing on the merits, the trial court's need to manage its docket, and the general policy in favor of prompt disposition of lawsuits. Becky v. Norwest Bank Dillon, N.A., 245 M 1, 798 P2d 1011, 47 St. Rep. 1795 (1990), followed in Westland v. Weinmeister, 259 M 412, 856 P2d 1374, 50 St. Rep. 857 (1993), which as followed in Hobble-Diamond Cattle, Co. v. Triangle Irrigation Co., 272 M 37, 899 P2d 531, 52 St. Rep. 596 (1995). Becky was also followed in DeJana v. Oleson, 264 M 62, 869 P2d 785, 51 St. Rep. 147 (1994). Hobble-Diamond was followed in Pool v. Butte Pre-Release Center, Inc., 283 M 287, 939 P2d 1011, 54 St. Rep. 603 (1997).

Dismissal Reversed — Lack of Prejudice to Defendant: When the only prejudice defendants alleged was that they were forced to list the lawsuit as a contingent liability on their financial statements and when plaintiffs proffered a reasonable excuse for their delay in prosecuting the lawsuit, it was reversible error for the District Court to dismiss plaintiffs' complaint for failure to prosecute. Becky v. Norwest Bank Dillon, N.A., 245 M 1, 798 P2d 1011, 47 St. Rep. 1795 (1990).

No Basis for Discretionary Dismissal After Motion Withdrawn — Mistake or Inadvertence in Involuntary Dismissal: In a wrongful discharge action, petitioner filed a complaint on October 24, 1985, and on December 12, 1986, the state moved to dismiss for failure to prosecute, pursuant to this rule. On December 31, 1986, the state withdrew its motion based on an agreement that

the claim would be held in abeyance until resolution of a companion case. However, on January 6, 1987, the District Court entered an order of dismissal but failed to serve either party with notice of dismissal. On January 13, 1988, the District Court ignored its own order of dismissal and held a hearing regarding disputed discovery. Both parties proceeded with discovery until counsel for respondent discovered the order of dismissal while reviewing the court file. Petitioner then moved for relief under Rule 60, M.R.Civ.P. The Supreme Court reversed and remanded for further proceedings after finding that: (1) this rule provides no basis for a discretionary dismissal after the motion to dismiss is withdrawn; (2) the order of dismissal was either a mistake or inadvertent as contemplated by Rule 60(b) (M.R.Civ.P.); and (3) appellant was not personally notified, so relief was appropriate. Diemert v. St., 242 M 127, 788 P2d 1355, 47 St. Rep. 633 (1990).

Delay Followed by Diligent Prosecution:

The parties separated in 1964, and the petitioner filed for divorce in 1971 with the answer not being filed until 1975. An order of dissolution was entered in 1983, but the question of property settlement was reserved. A second set of interrogatories was served on the respondent in 1987, at which time the respondent successfully moved for dismissal of the action due to lack of prosecution. The Supreme Court reversed, stating that the petitioner's serving the second set of interrogatories constituted diligent prosecution of the case after a delay. In re Marriage of Horton, 237 M 99, 771 P2d 973, 46 St. Rep. 652 (1989).

Plaintiff's case proceeded through 8 years and four substituted attorneys without discovery before it was dismissed for failure to prosecute. Defendants filed motion to dismiss 5 days before date set for deposition of defendants by plaintiff's most recent substituted attorney. On appeal from the District Court's dismissal order, plaintiff argued that Brymerski v. Great Falls, 195 M 428, 636 P2d 846 (1981), held that since plaintiff had resumed prosecution of his action prior to the time motion to dismiss was filed by defendants, motion to dismiss should have been denied. The Supreme Court disagreed with that interpretation, holding that Brymerski required plaintiff to diligently prosecute and that only noticing deposition of defendants after 8 years was insufficient. Diversified Realty, Inc. v. Holenstein, 222 M 263, 721 P2d 752, 43 St. Rep. 1249 (1986).

A motion to dismiss for failure to prosecute will be denied if plaintiff is diligently prosecuting his claim when the motion is filed, even if he may have earlier failed to act diligently. Where plaintiff allowed 3 ½ years to pass without prosecuting his case, then prosecuted it for 4 months, at which time defendants filed a motion to dismiss for failure to prosecute, the motion was untimely. The claim that defendants were prejudiced by delay of plaintiff because a defendant died during the delay was to no avail where nearly everyone involved was still available to testify, the records and files involved were available, and decedent died several months before plaintiff resumed prosecution of the case and no objection was made by defendants until 4 months after prosecution was resumed. Brymerski v. Great Falls, 195 M 428, 636 P2d 846, 38 St. Rep. 2001 (1981).

Lack of Excuse, Discovery, and Attempt to Bring Case to Trial Constituting Failure to Prosecute: While no precise rule or formula sets forth the period of inactivity that is necessary to find a failure to prosecute, the Supreme Court affirmed a dismissal with prejudice for failure to prosecute, noting: (1) the conspicuous absence of any reasonable excuse for a lack of prosecution; (2) the lack of activity following the filing of the complaint; (3) delayed response to nearly all discovery attempts; and (4) the lack of a timely attempt to bring the case to trial. Thomas v. Wilson, 236 M 33, 767 P2d 1343, 46 St. Rep. 160 (1989). See also Cook v. Fergus Elec. Co-op, Inc., 235 M 173, 765 P2d 1138, 45 St. Rep. 2285 (1988).

Failure to Resolve Issue: In upholding a dismissal order for plaintiffs' failure to prosecute their claim, the Supreme Court held that courts should refrain from dismissing an action or claim unless there is no other adequate remedy available and the facts sufficiently call for such a result. In this case, the District Court's dismissal was proper because it was caused by plaintiffs' deliberate failure to comply with the court's order to resolve certain property ownership issues. Chisholm v. First Nat'l Bank of Glasgow, 235 M 219, 766 P2d 868, 45 St. Rep. 2333 (1988).

Abuse of Discretion in Dismissal for Failure to Prosecute — Factors to Be Considered: The Supreme Court cited Hamilton v. Neptune Orient Lines, Ltd., 811 F2d 498 (9th Cir. 1987), in setting out the factors to be weighed when determining whether a District Court abused its discretion in dismissing a case for failure to prosecute, including: (1) the plaintiff's diligence; (2) the trial court's need to manage its docket; (3) the danger of prejudice to the party suffering the delay; (4) the availability of alternate sanctions; and (5) the existence of warning to the party occasioning the delay. Cox v. Myllymaki, 231 M 320, 752 P2d 1093, 45 St. Rep. 649 (1988), distinguished in Westland v. Weinmeister, 259 M 412, 856 P2d 1374, 50 St. Rep. 857 (1993), in

which it was held that neither this rule nor Cox mandate dismissal for lack of warning in the absence of a reasonable excuse for the delay, and which was followed in Hobble-Diamond Cattle, Co. v. Triangle Irrigation Co., 272 M 37, 899 P2d 531, 52 St. Rep. 596 (1995). Hobble-Diamond was followed in Pool v. Butte Pre-Release Center, Inc., 283 M 287, 939 P2d 1011, 54 St. Rep. 603 (1997), and Hauschulz v. Michael Law Firm, 2005 MT 189, 328 M 95, 117 P3d 908 (2005).

Case Dismissed for Lack of Prosecution After Seventy-Four Months — No Reasonable Excuse: Plaintiff could not demonstrate reasonable excuse for failure to prosecute, and the cause had lingered for 74 months, with no action for more than 5 years except to answer defendant's interrogatories and motions. It was not error to find that plaintiff had not been diligent and to consequently dismiss the case. Timber Tracts, Inc. v. Fergus Elec. Co-op, Inc., 231 M 40, 753 P2d 854, 45 St. Rep. 415 (1988), followed in Cook v. Fergus Elec. Co-op., Inc., 235 M 173, 765 P2d 1138, 45 St. Rep. 2285 (1988) (companion case).

Error to Dismiss Appeal: The District Court erred when it dismissed the appeal of a Board of Labor Appeals decision when the case was fully submitted on briefs and all that remained was a decision by the District Court. The District Court dismissed the appeal 4 days after the motion to dismiss was made and 1 day after the petitioner had received notice of the motion. It was as much the responsibility of the hospital and the Department of Labor as it was the petitioner's to bring to the District Court's attention the fact that the pending motions had not been ruled upon. The policy favoring the resolution of a case on its merits is more compelling than the policy of dismissal for failure to prosecute. The District Court abused its discretion by failing to provide the petitioner with meaningful access to the judicial system. Martin v. Board of Labor Appeals, 227 M 145, 737 P2d 488, 44 St. Rep. 951 (1987).

Delay Not Excused by Subsequent Filings: The District Court did not err in granting motion to dismiss for failure to prosecute when 10 years had elapsed between the filing of a complaint and a motion to dismiss; 6 ½ years had passed between the time the court ordered appellants to file a more definite statement of their claim and the filing of the dismissal motion; appellants had been advised 2 years earlier of motion; witnesses had become unavailable; files were lost; one of respondents' attorneys had given up practice of law; one corporate party had changed ownership; and appellants had employed eight different attorneys. The fact that appellants had recently filed a second amended counterclaim and answer to amended complaint and an amended counterclaim along with their third-party complaint was not sufficient in light of unreasonable and unjustified delays to prevent dismissal. Chicago Title Ins. Co. v. Wheat, 216 M 98, 699 P2d 597, 42 St. Rep. 671 (1985).

Discretion of Trial Court — Burden of Showing Excuse — Presumption of Injury From Delay: When a tort action based upon swallowing a dental instrument dragged on 11 years after the incident (7 of those years after filing the complaint) with an almost complete lack of affirmative action in prosecuting the complaint, there was no abuse of discretion by the trial court in dismissing the action for failure to prosecute. The plaintiff has the burden of showing excuse for failure to prosecute with due diligence, but there is no burden on the defendant to show injury by the delay because the law presumes injury, specifically that an unreasonable delay raises a presumption of impairment of defendant's defenses. Shackleton v. Neil, 207 M 96, 672 P2d 1112, 40 St. Rep. 1920 (1983), followed in Westland v. Weinmeister, 259 M 412, 856 P2d 1374, 50 St. Rep. 857 (1993), and Hauschulz v. Michael Law Firm, 2005 MT 189, 328 M 95, 117 P3d 908 (2005).

Diligent Prosecution at Time Motion Filed — Motion Denied: A complaint was filed in 1971 alleging negligence and lease violations by the defendant, resulting in damages to the plaintiff's land. In 1982, the defendant moved for summary judgment for failure to prosecute. The Supreme Court held that the motion should have been denied because the plaintiff was diligently prosecuting an amended complaint at the time the defendant filed the Rule 41(b), M.R.Civ.P., motion. Lien v. Murphy Corp., 201 M 488, 656 P2d 804, 39 St. Rep. 2252 (1982).

No Excuse Shown: Absent a sufficient showing of excuse, an action not prosecuted with due diligence may be dismissed for failure to prosecute, dismissal being within the sound discretion of the trial court. Brymerski v. Great Falls, 195 M 428, 636 P2d 846, 38 St. Rep. 2001 (1981).

Unjustified Delay:

The Supreme Court upheld the dismissal of a complaint of unlawful detainer. Although pleading was completed and the case set for trial nearly 5 years earlier, the case still had not come to trial. The trial setting was vacated twice. The District Court notified counsel by three separate notices in 3 years of its intention to dismiss the case unless good cause was shown to the contrary. The date for such a showing was continued eight times. The plaintiff bore the burden of showing a reason for inaction. Prejudice to the defendant was presumed. A motion for dismissal

for lack of prosecution is within the trial court's sound discretion. No abuse of discretion was found in this case. Peters v. Newkirk, 194 M 223, 633 P2d 1210, 38 St. Rep. 1526 (1981).

The delay occasioned by defendant's (and third-party plaintiff's) inaction was unreasonable. He failed to take any significant action towards a final determination of the case for at least 3 years prior to dismissal, and offered no excuse for the delay. His failure to timely respond to certain interrogatories and failure to appear at a scheduled deposition characterized his inaction regarding furtherance of an ultimate resolution of his claim. Calaway v. Jones, 177 M 516, 582 P2d 756 (1978).

Discretion of Court: It is within the discretion of the court to dismiss an action if it has not been prosecuted with reasonable diligence. It is presumed that the court acted correctly and will not be overturned without a showing of an abuse of discretion. Cremer v. Braaten, 151 M 18, 438 P2d 553 (1968).

Twelve-Year Delay — Dismissal Properly Granted: Case was properly dismissed for failure of plaintiff to prosecute where nothing was done to bring it to trial for over 12 years despite fact that defendant had shown no injury by delay, that attorneys had agreed to get together and try to work out agreement, and that defendant had filed cross-complaint which was defensive in character. Cremer v. Braaten, 151 M 18, 438 P2d 553 (1968).

Failure to Follow Supreme Court Order — No Failure to Prosecute: Trial court abused discretion in dismissing action for failure of plaintiff to prosecute where case was returned by Supreme Court to trial court for new trial but trial court failed to set it for trial at next jury term as per order of Supreme Court. Jangula v. U.S. Rubber Co., 149 M 241, 425 P2d 319 (1967).

Alteration of Time for Prosecution: Where actions were commenced and the summons in each case was issued and served within the period and time limit fixed and allowed by express statutes, the trial court has no "discretion" to disregard the rules of practice and procedure so prescribed and attempt to shorten the time allowed for the performance of the acts. Kujich v. Lillie, 127 M 125, 260 P2d 383 (1953).

Dismissal as Upon Merits: A judgment of dismissal may be said to be on the merits when, after plaintiff has lost the right to a dismissal without prejudice because of the filing of a counterclaim, at the time set for trial he cannot make a case in support of his complaint, and not only fails and refuses to proceed with the presentation of his case but participates in the trial upon defendant's counterclaim. Schuster v. N. Co., 127 M 39, 257 P2d 249 (1953).

Reasonable Diligence Required: Where plaintiff without sufficient cause fails to prosecute his action with reasonable diligence, an application to dismiss for that reason is proper. Smotherman v. Christianson, 59 M 202, 195 P 1106 (1921).

Plaintiff Absent at Trial: Failure of the plaintiff to be present at the trial and offer evidence in support of allegations of the complaint which were traversed by the answer constitutes an abandonment of the cause and authorizes the court to render a judgment of dismissal or nonsuit (superseded by Rule 41(b), M.R.Civ.P.). Sell v. Sell, 58 M 329, 193 P 561 (1920).

Inherent Power to Dismiss: Independently of the statute, a court has power to dismiss an action whenever it appears that the plaintiff has, without sufficient excuse, failed to prosecute it to final judgment. St. Sav. Bank v. Albertson, 39 M 414, 102 P 692 (1909).

SUFFICIENCY OF EVIDENCE

Failure to List Amount of Loss in Pretrial Order — Hearsay Insufficient to Prove Costs — Dismissal for Failure to Prove Damages: Plaintiff alleged that because a title company failed to disclose a sanitary restriction, she was entitled to recover for the cost of a new well. The agreed statement of facts in the pretrial order did not raise any specific contention or agreement as to the cost of the well. Plaintiff did not introduce specific evidence of damages, contending by hearsay as to what the cost would be. She later argued that because the cost of the well was not a factual issue enumerated in the pretrial order, she did not have to present evidence on costs. That the issue was not listed in the pretrial order was immaterial. Damages were listed as a plaintiff's contention, and as part of the pleadings, the question was properly before the court. Because her hearsay statement was insufficient to prove the cost of the well and was inadmissible as proof of costs, the trial court properly concluded that no evidence was presented on the issue and dismissed the case for failure to prove damages. Adlington v. First Mont. Title Ins. Co., 245 M 304, 800 P2d 1051, 47 St. Rep. 2132 (1990).

Hearsay Evidence Presented by Out-of-State Residents Who Failed to Appear — Dismissal Proper: Plaintiffs, who resided in Ohio, sought recovery in a contract dispute but failed to appear in person or by counsel, claiming that the trial court could "fairly judge" the case based on documents submitted to the court. However, an examination of the documents showed they were replete with hearsay and that the unsworn written statements were made out of court and did

not afford defendant with the opportunity to confront the writers or question them as to the veracity of the statements. The District Court properly dismissed the complaint with prejudice and awarded costs to defendant. Fields v. Wells, 239 M 392, 780 P2d 1141, 46 St. Rep. 1775 (1989).

Contract Dispute — Involuntary Dismissal Properly Denied: In a dispute between the buyer and seller of property, involuntary dismissal was properly denied after buyer presented evidence that seller failed to reveal at the time the contract was signed that seller did not have clear title and that seller accepted and used all of buyer's payments without providing a warranty deed to the tract. Many elements of the counts against seller could arise as a matter of law; therefore, the evidence was sufficient to support buyer's claims. Schilke v. Bean, 232 M 125, 755 P2d 565, 45 St. Rep. 930 (1988).

General Assertions of Fraud — Defendant Properly Dismissed: The wife of a defendant convicted of fraudulent misrepresentation of income when selling a business was properly dismissed as a defendant when general assertions of fraud revealed only her involvement as co-owner of the business, her performance of some business bookkeeping functions, and her presence at a few meetings where the sale was discussed. None of the elements of fraud were established by evidence. Selvidge v. McBeen, 230 M 237, 750 P2d 429, 45 St. Rep. 168 (1988).

No False Representations by Real Estate Agent — Dismissal Proper: Real estate agent was properly dismissed from an action involving fraudulent misrepresentations of income by the seller of a business when it was found the agent concealed nothing from buyers and had no knowledge of and made no representations to buyers concerning business profitability. Selvidge v. McBeen, 230 M 237, 750 P2d 429, 45 St. Rep. 168 (1988).

Construction Contract — Evidence Admissible to Establish Damages for Breach: A general contractor on a highway project subcontracted the bridge and concrete work to the plaintiff, who in turn subcontracted the concrete work to a specialist. In an action against the general contractor for breach of contract, the specialist's expert opinion evidence was admissible to establish the reasonable cost of the concrete work under the subcontract without regard to whether he was prequalified to perform the concrete work according to state Department of Highways' (now Department of Transportation's) standards. The trial court's dismissal of the case because there was no valid evidence to establish damages was improper. E. F. Matelich Constr. Co. v. Goodfellow Bros., Inc., 198 M 150, 645 P2d 391, 39 St. Rep. 831 (1982).

Fraud in Real Estate Transaction — No Error in Failure to Dismiss: The law imposes an affirmative duty upon a real estate agent not only to refrain from taking advantage of his client but also to act with the utmost good faith and to fully disclose all material facts concerning a transaction that affects the client's decision. Defendant, when he originally negotiated with sellers to purchase their motel, was their real estate agent. Defendant did not advise them of his relationship with purchasers, nor did he reveal that the maker on the second note could not pay off. On those and other grounds, the trial court did not abuse its discretion by denying defendant's motion to dismiss plaintiffs' claim of fraud at the close of plaintiffs' case in chief. Flemmer v. Ming, 190 M 403, 621 P2d 1038, 37 St. Rep. 1916 (1980).

Dismissal Proper — Negligence Case: Plaintiff failed to establish prima facie case. Therefore dismissal of claim was proper. Knowlton v. Sandaker, 150 M 438, 436 P2d 98 (1968); Hernandez v. Chicago, Burlington & Quincy R.R., 144 M 585, 398 P2d 953 (1965).

Failure to Prove Prima Facie Case: Defendant was entitled to have motion for involuntary dismissal granted where plaintiff wholly failed to establish prima facie case of negligence. Knowlton v. Sandaker, 150 M 438, 436 P2d 98 (1968).

Denial of Motion to Dismiss as Error: District Court erred in not granting defendant's motions for dismissal and directed verdict where evidence, viewed in light most favorable to plaintiff, did not support verdict for him. MacDonald v. Protestant Episcopal Church, 150 M 332, 435 P2d 369 (1967).

Evidence Susceptible of One Construction: No cause should be withdrawn from the jury unless evidence is susceptible of but one construction by reasonable men and that in favor of the defendant, or the evidence is in such condition that if the jury returned a verdict in favor of the plaintiff, it would be the court's duty to set it aside. Jackson v. William Dingwall Co., 145 M 127, 399 P2d 236 (1965); Thompson v. Llewellyn, 136 M 167, 346 P2d 561 (1959).

Failure to Prove Negligence: Where plaintiff's property was damaged by the dropping of fire retardant from airplanes and at the trial he failed to show the lack of proper care under the circumstances, the trial court properly nonsuited (superseded by Rule 41(b), M.R.Civ.P.) plaintiff upon defendant's motion. Stocking v. Johnson Flying Serv., 143 M 61, 387 P2d 312 (1963).

No Error in Granting Nonsuit: Trial court did not err in granting a nonsuit (superseded by Rule 41(b), M.R.Civ.P.) against plaintiff in action by truck driver against automobile owner for injuries arising out of accident when the daughter of the owner of the automobile forced truck off the highway where plaintiff did not prove ownership or the identity of the automobile involved in the accident as belonging to defendant and the record was silent as to any proof upon the question of agency. Castle v. Thisted, 139 M 328, 363 P2d 724 (1961).

Substantial Evidence as Question of Law: Under the provision for a dismissal or nonsuit (superseded by Rule 41(b), M.R.Civ.P.) for failure of proof, whether there is substantial evidence in support of plaintiff's case is always a question of law for the court. Ahlquist v. Mulvaney Realty Co., 116 M 6, 152 P2d 137 (1944); Flynn v. Poindexter & Orr Livestock Co., 63 M 337, 207 P 341 (1922).

Standard of Care Met — Nonsuit to Be Granted: If under the evidence in a personal injury action the jury could arrive at no other conclusion than that the defendant met the standard of reasonable care, the question may be withdrawn from the jury by an order of nonsuit (superseded by Rule 41(b), M.R.Civ.P.). Myles v. Helena Motors, Inc., 113 M 92, 121 P2d 548 (1942).

When Nonsuit Not to Be Granted: A motion for nonsuit (superseded by Rule 41(b), M.R.Civ.P.) should never be granted when reasonable men may draw different conclusions from the evidence introduced by plaintiff or where it shows a substantial support for his complaint, but only where from the undisputed facts the conclusion necessarily follows, as a matter of law, that recovery cannot be had upon any view which may reasonably be taken from the facts established. Claypool v. Malta Standard Garage, 96 M 285, 30 P2d 89 (1934).

Question of Law Only: A judgment of nonsuit (superseded by Rule 41(b), M.R.Civ.P.) is proper where the plaintiff fails to prove a case for the jury, and when no substantial evidence has been introduced by the party upon whom rests the burden of proof, a question of law for the decision by the court is presented. Lee v. Stockmen's Nat'l Bank, 63 M 262, 207 P 623 (1922).

Weakness of Testimony: Dismissal or nonsuit (superseded by Rule 41(b), M.R.Civ.P.) is authorized where the plaintiff has tendered some evidence in support of the complaint, but the evidence is legally insufficient to sustain a verdict, and this insufficiency may arise from the inherent weakness of the testimony itself. McIntyre v. N. Pac. Ry., 56 M 43, 180 P 971 (1919).

Plaintiff Not Entitled to Relief: A motion for a nonsuit (superseded by Rule 41(b), M.R.Civ.P.) will be sustained where, upon the facts proved, the plaintiff is not entitled to any relief. Hoskins v. N. Pac. Ry., 39 M 394, 102 P 988 (1909).

Final Disposition as Judgment: The final disposition of an action on a dismissal thereof is accomplished by a judgment. State ex rel. Mont. Cent. Ry. v. District Court, 32 M 37, 79 P 546 (1905).

Collateral References

Dismissal and Nonsuit *key* 53, et seq.; Judgment *key* 654; Trial *key* 159, et seq.

27 C.J.S. Dismissal and Nonsuit §45, et seq.; 50 C.J.S. Judgments §707; 88 C.J.S. Trial §§405 through 430.

24 Am. Jur. 2d Dismissal, Discontinuance, and Nonsuit §§55 through 83.

Dismissal of state court action for plaintiff's failure or refusal to obey court order relating to pleadings or parties. 3 ALR 5th 237.

What constitutes bringing an action to trial or other activity in case sufficient to avoid dismissal under state statute or court rule requiring such activity within stated time. 32 ALR 4th 840.

Dismissal of state court action for failure or refusal of plaintiff to appear or answer questions at deposition or oral examination. 32 ALR 4th 212.

Dismissal of state court action for failure or refusal of plaintiff to obey request or order for production of documents or other objects. 27 ALR 4th 61.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories. 56 ALR 3d 1109.

Illness or death of party, counsel, or witness as excuse for failure to timely prosecute action so as to preclude dismissal. 80 ALR 2d 1399.

Dismissal of civil action for want of prosecution as res judicata under Rule 41(b). 54 ALR 2d 507.

Dismissal of plaintiff's case for want of prosecution as affecting defendant's counterclaim, setoff, or recoupment, or intervener's claim for affirmative relief. 48 ALR 2d 748.

Delay in issuance or service of summons as requiring or justifying order discontinuing suit. 167 ALR 1058.

Construction and application of rules of court which permit dismissing suit because of disobedience of order, summons, or subpoena duces tecum requiring production of documents. 144 ALR 372.

Rule 41(c). Dismissal of counterclaim, cross-claim, or third-party claim.

Commission Notes

Subdivisions (c) and (d) of the rule are identical with the Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Evidence of Malicious Attachment — Motion to Dismiss Properly Denied: In Spooner Constr. & Tree Serv., Inc. v. Maner, 2000 MT 161, 300 M 268, 3 P3d 641 (2000), it was held that plaintiff admitted no entitlement to any money from a logging agreement or any rental fees associated with defendant's use of a logging skidder. Nevertheless, plaintiff made no attempt to contact defendant to submit a bill, request payment, or discuss the logging contract, but instead, after disabling the skidder, plaintiff filed a lien against and later attached the skidder, with the intent to bid on it at a Sheriff's sale. Defendant presented both direct and circumstantial evidence that, without probable cause, plaintiff wrongfully attached the skidder with an improper motive and with reckless disregard for the facts, constituting a prima facie case of malicious wrongful attachment. Plaintiff's motion to dismiss was properly denied. Spooner Constr. & Tree Serv., Inc. v. Maner, 2003 MT 43, 314 M 268, 66 P3d 263 (2003).

Counterclaim Premised on Malicious Prosecution or Abuse of Process as Suit in Tort — Necessary Elements: A counterclaim alleging damages for breach of fiduciary duty, constructive fraud, creditor overreaching, and wrongful attachment did not meet the conditions of a counterclaim and third-party complaint on an attachment bond as provided in 27-18-204. The counterclaim was then premised upon the common-law notions of malicious prosecution or abuse of process, which is a suit in tort. To recover on such a suit, the elements of malice and want of probable cause must be present and proved. Absent evidence of these elements, the counterclaim was properly dismissed. Montgomery v. Hunt, 227 M 279, 738 P2d 887, 44 St. Rep. 1081 (1987).

Defendants' Obstruction of Easement Unreasonable — Counterclaim for Damages Stricken: After concluding that the defendants' obstruction were an unreasonable interference with a right-of-way easement granted to plaintiffs, the District Court properly withdrew from the jury's consideration the defendants' counterclaim for damages. The standard of review for removal of an issue from jury consideration is the same as that of a directed verdict, as stated in Dahl v. Petroleum Geophysical Co., 38 St. Rep. 1474 (1981); i.e., an issue should not be withdrawn from the jury unless the conclusions from the facts advanced by the moving party follow necessarily, as a matter of law, that recovery cannot be had under any view which can be drawn reasonably from the facts which the evidence tends to establish. Flynn v. Siren, 219 M 359, 711 P2d 1371, 43 St. Rep. 10 (1986).

Dismissal of Battery Counterclaim — Sole Evidence Claimant's Self-Contradicted Testimony: Dismissal of battery counterclaim made in personal injury case arising from motor vehicle collision was not reversible error where defendant's only evidence on the alleged battery was his own testimony, his testimony was contradicted by his statements in a deposition, and he had refused a discovery request to produce his physician's medical report and had not called his physician to the stand. The counterclaim was frivolous, fanciful, gauzy, or merely suspicious, even when construed in the light most favorable to defendant. Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982).

Counterclaim on Contract — Fulfillment of Preexisting Duties Not Consideration — Effect of Lack of Consideration: Plaintiffs contracted with defendant to build their log home. Before and after occupancy of the home, structural problems requiring repair occurred. At trial, defendant counterclaimed against the plaintiffs for his expenses in installing tie rods in the walls of the home. The plaintiffs had authorized the installation of the tie rods after a windstorm had shown the home to be unstable. Although noting the ratification of the agreement after the rods were installed, the Supreme Court also noted that the home remained unstable and that the rods may have been improperly installed. It said that defendant had a common-law duty to construct the home in a manner as to assure stability. The duty was not fulfilled even after the installation of the tie rods. Because a promise to perform a preexisting legal or contractual obligation is insufficient consideration for a promise made in return, consideration was lacking in the supplemental (tie rod installation) agreement. Under Rule 41, M.R.Civ.P., a counterclaim may

be dismissed where, upon the facts and the law, the claimant has shown no right to relief. With consideration lacking, the contract was unenforceable and the defendant had no right to relief on his counterclaim. Estoppel will not support the defendant's claim without a showing of detrimental reliance, and it has no application when the omissions of the party claiming estoppel brought about the problem. Carroccia v. Todd, 189 M 172, 615 P2d 225 (1980), followed in McGregor v. Cushman/Mommer, 220 M 98, 714 P2d 536, 43 St. Rep. 206 (1986).

Rule 41(d). Costs of previously-dismissed action.

Commission Notes

Subdivisions (c) and (d) of the rule are identical with the Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Costs and Fees for Voluntary Dismissal: Plaintiff voluntarily dismissed the case under Rule 41(a)(1), M.R.Civ.P., before an answer or a summary judgment motion was filed by defendant. It was error for the District Court to award defendant costs for substantial discovery made before dismissal. The District Court erroneously relied on discretionary authority under Rule 41(a)(2) and this rule. Relief under this rule, or its federal equivalent, must be sought from the federal District Court in which the plaintiff commenced the subsequent action. USF&G Co. v. Rodgers, 267 M 178, 882 P2d 1037, 51 St. Rep. 1023 (1994).

Collateral References

Dismissal and Nonsuit *key* 43(6).

27 C.J.S. Dismissal and Nonsuit §43.

Financial inability to pay costs of original action as affecting subsequent action. 156 ALR 956.

Rule 42. Consolidation — separate trials

Rule 42(a). Consolidation.

Commission Notes

The rule is identical with the Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Consolidation of Probate and Guardianship Proceedings Not Abuse of Discretion: A District Court consolidated probate and guardianship proceedings, determining that the collective interests would be better served by consolidating the matters. The original guardian objected to consolidation on grounds that the two actions involved different parties and contemplated entirely different legal and factual issues. The Supreme Court disagreed. Although the proceedings did not contemplate similar issues at their inception, as the arguments developed in the probate proceeding, it became apparent that the ownership interest in the estate property formed a common bond conjoining the proceedings as they related to the accounting of the guardianship. The original guardian was given the opportunity to participate in every proceeding regardless of its origin and thus suffered no injustice in the exercise of judicial economy, nor did the District Court act arbitrarily or exceed the bounds of reason in consolidating the actions. In re Estate of McDermott, 2002 MT 164, 310 M 435, 51 P3d 486 (2002).

Peremptory Challenges to Prospective Jurors — Factors Necessary to Show Purposeful Discrimination in Jury Selection — Waiver of Batson Challenge When Not Timely Raised: Ford contended that the state violated his due process rights by improperly exercising all of its peremptory challenges at trial to exclude women from the jury panel, citing J.E.B. v. Ala. ex rel. T.B., 511 US 127 (1994), as a prohibition against gender discrimination during jury selection. In a case of first impression, the Supreme Court applied a de novo review to the trial court's application of the law, deferring to the trial court's findings of fact unless clearly erroneous. The Supreme Court then reviewed the history of the discriminatory use of peremptory challenges as addressed in Batson v. Ky., 476 US 79 (1986), and its progeny, noting that the rules regarding challenges to jury selection no longer apply exclusively to prosecutors striking members of the venire who are the same race as the defendant, but that any racially motivated reason for striking a prospective juror is prohibited whether the juror shares the racial identity of the

defendant or not (see Powers v. Ohio, 499 US 400 (1991)). Further, the challenge is no longer limited to the government in criminal actions but has been extended to prevent a defendant in a criminal action from using peremptory challenges to exclude jurors based on race (see Ga. v. McCollum, 505 US 42 (1992)), has been applied to private litigants in civil cases (see Edmonson v. Leesville Concrete Co., 500 US 614 (1991)), and has been used to prohibit gender discrimination in jury selection, as in J.E.B. In order to establish a prima facie case of purposeful discrimination, a defendant must show that: (1) the defendant is a member of a cognizable racial group; (2) the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire; and (3) these facts and other relevant circumstances raise an inference that the prosecutor used the peremptory jury selection practice to exclude members of the venire from the petit jury on account of their race. In addition, numerous courts have held that the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria must be exercised in a timely manner, and failure to raise a Batson challenge before the jury is sworn and before the venire is dismissed results in waiver of the challenge. In Ford's case, his counsel waited until after the jury was sworn and the venire dismissed before raising the Batson challenge. Because the motion was untimely, and therefore waived, the Supreme Court declined to address the merits of Ford's claim of discriminatory use of peremptory challenges. St. v. Ford, 2001 MT 230, 306 M 517, 39 P3d 108 (2001), followed in Casiano v. Greenway Enterprises, Inc., 2002 MT 93, 309 M 358, 47 P3d 432 (2002), St. v. Parrish, 2005 MT 112, 327 M 88, 111 P3d 671 (2005), and Ford v. St., 2005 MT 151, 327 M 378, 114 P3d 244 (2005).

No Error in Failure to Consolidate Promissory Note Issue With Separate Breach of Contract Issue: Plaintiff brought two actions against defendant — one for payment of outstanding promissory notes and one for breach of contract. Defendant contended that it was error to deny a motion to consolidate the matters because: (1) both actions involved common questions of law and fact; (2) consolidation would have been more cost-efficient; and (3) failure to consolidate created the possibility of conflicting and duplicative judgments. After reviewing the promissory notes at issue and the complaints filed in both actions, the District Court properly determined that: (1) the contract and the promissory notes constituted separate and independent obligations, neither referencing or incorporating the terms of the other; (2) the amounts in controversy in each action were different and independent of one another; and (3) although the breach of contract action involved issues of law regarding contract interpretation, the primary issues in this action were simply questions of fact. Thus, the court did not abuse its discretion in refusing to consolidate the matters. Envtl. Contractors, LLC v. Moon, 1999 MT 178, 295 M 268, 983 P2d 390, 56 St. Rep. 696 (1999).

Consolidation, Rather Than Dismissal, of Lien Actions Proper: Having received no payment for installation of an elevator, Lagerquist filed a lien against Devoe's building. At the same time, DeVoe filed a complaint against Lagerquist, alleging breaches of contract and warranty, negligent or fraudulent misrepresentation, and breach of good faith and fair dealing. The following month, Lagerquist filed for lien foreclosure. DeVoe moved that either the lien foreclosure be dismissed or the actions be consolidated, and the court granted the motion to consolidate. On appeal, DeVoe argued that under the doctrine of election of remedies, Lagerquist was precluded from claiming both that the elevator was installed within the time allowed and that the lien was filed in a timely manner. However, the answer to DeVoe's action in tort did not dispose of the issue of when work was last done on the elevator; therefore, the court did not err in consolidating the actions rather than dismissing the lien foreclosure action. DeVoe v. Gust. Lagerquist & Sons, Inc., 244 M 141, 796 P2d 579, 47 St. Rep. 1527 (1990).

Refusal to Separate Counterclaim Proper: The plaintiff sued on an alleged personal service contract, and the defendant counterclaimed for intentional interference with his business and for libel. The plaintiff claimed that the lower court's failure to order separate trials led to confusion. The Supreme Court affirmed the trial court's decision on the basis that the facts surrounding the contract action and the counterclaim were sufficiently intertwined to be tried together. Tindall v. Konitz Contracting, Inc., 240 M 345, 783 P2d 1376, 46 St. Rep. 2182 (1989).

Consolidation of Suits by Partner Against Bank and Partner Denied: Bank depositor sued his partner for wrongful withdrawal of money from the partnership bank account, conversion of partnership property, and fraud in withdrawing the funds and inducing the bank to issue a signature card allowing him to withdraw funds without plaintiff depositor's cosignature. Depositor also sued the bank for negligently issuing the new card and wrongfully honoring his partner's checks without depositor's signature. There were some similar issues in each case, and consolidation may have been appropriate, but the matter rested in the lower court's discretion, which was not abused when the court refused bank's request to consolidate. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Appointment of Lead Counsel for Consolidated Cases Properly Made: In an action against the defendant for damages caused by a range fire, in which action numerous cases were consolidated for discovery and trial, the District Court did not err in appointing the attorney for one of the parties as lead counsel for all parties in all of the consolidated cases. Had lead counsel not been appointed, 31 different cases would have been prosecuted by 10 separate attorneys, each of whom may have pursued different legal theories. Given this fact, it cannot be said that the District Court abused its discretion, nor would it be proper to allow the appellant to accept the substantial services of lead counsel prior to trial and to avoid the appointment of that counsel on appeal. Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981).

Appointment of Lead Counsel for Consolidated Cases — Findings and Hearing Held Unnecessary: In an action against the defendant for damages caused by a range fire, in which action numerous related cases were consolidated for trial, the District Court did not err in failing to hold an evidentiary hearing prior to the appointment of one attorney as lead counsel for all of the consolidated cases. Because Rule 52(a), M.R.Civ.P., provides that findings are unnecessary on decisions on motions, the court's decision under Rule 42(a), M.R.Civ.P., did not require findings and there was therefore no obligation on the District Court to provide an evidentiary hearing. Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981).

Duty of State Agency to Compensate Lead Counsel in Consolidated Cases Upheld: In an action against the defendant for damages caused by a range fire, in which action numerous cases were consolidated and lead counsel appointed for all consolidated cases, the District Court did not err in requiring the plaintiff state agency to compensate lead counsel. There is no basis, either in Disciplinary Rule 2-107 of the Canons of Professional Ethics or elsewhere, for treating the plaintiff differently from any other beneficiary of the litigation because payment for the litigation is founded upon principles of equity and equity demands that all parties receiving a benefit contribute to payment of the expenses. Disciplinary Rule 2-107, regarding the splitting of fees between two lawyers, has no application to court-appointed lead counsel who is paid under the supervision of the court. Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981).

Payment of Lead Counsel for Consolidated Cases — "Common Fund" Exception for Unequal Contributions: In an action against the defendant for damages caused by a range fire, in which action numerous cases were consolidated and lead counsel appointed for all consolidated cases, the trial court did not err in requiring the plaintiff to compensate lead counsel even in the absence of any contract or statutory authority for the compensation. Where a party through active litigation creates a common fund shared by other parties, those parties must bear a portion of the litigation costs, including reasonable attorney fees, if their contribution to the litigation was unequal to the contribution of the active party. Because the record shows that the plaintiff contributed only half or less of the legal services necessary to the cases, the District Court properly ordered compensation. Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981), followed in Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69, 54 St. Rep. 566 (1997) (Murer III). See also Mtn. W. Farm Bureau Mut. Ins. Co. v. Hall, 2001 MT 314, 308 M 29, 38 P3d 825 (2001).

Reasonableness of Attorney Fees for Lead Counsel in Consolidated Cases Upheld: In an action against the defendant for damages caused by a range fire, in which action numerous cases were consolidated and lead counsel appointed for the consolidated cases, the trial court did not err in awarding lead counsel $47,222.22 in attorney fees to be paid by the plaintiff. In determining the reasonableness of a fee, the Supreme Court, in First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976), established the guidelines to be considered by the trial court. The fee awarded was 11.1% of the plaintiff's recovery and was awarded only after extensive testimony relating to the guidelines to be considered. Under these circumstances, no abuse of discretion was found. Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981), followed in Murer v. St. Comp. Mut. Ins. Fund, 283 M 210, 942 P2d 69, 54 St. Rep. 566 (1997) (Murer III).

Common Questions Absent: Because there were no common questions of law or fact in two actions proposed for consolidation, the refusal of the court to consolidate was not an abuse of discretion. Keller v. Llewellyn, 175 M 164, 573 P2d 166 (1977).

"Pending Before the Court" Defined: Cases as to which time for appeal had passed were not "pending before the court" so as to make them amenable to consolidation with cases not yet reduced to judgment even though amount of insolvent warehouseman's bond might not be sufficient to satisfy all claims in full. Peavey Co. v. Agri-Services, Inc., 163 M 394, 517 P2d 718 (1973).

Actions by Different Parties — Consolidation Improper: Consolidation of two actions for damages flowing from an automobile collision was error where one action was by the guardian of

the infant son of the driver against the bus company and its driver, and the other by the administrator of the passenger's estate against the bus company alone, both plaintiffs being represented by different counsel, both counsel objecting to the consolidation, the two actions not being between the same parties and not involving causes of action which, under section 93-3203, R.C.M. 1947 (since repealed), could have been properly joined, and motions for new trials of both actions were properly granted. Ferron v. Intermountain Transp. Co., 115 M 388, 143 P2d 893 (1943).

Cases Involving Separate Parties: Under section 93-8705, R.C.M. 1947 (superseded by Rule 42(a), M.R.Civ.P.), two actions by different plaintiffs could not be consolidated over the objection of two separate plaintiffs represented by separate counsel. Its purpose was to prevent a multiplicity of actions between the same plaintiff and the same defendant where different causes of action could have been incorporated in a single complaint. Ferron v. Intermountain Transp. Co., 115 M 388, 143 P2d 893 (1943).

Statutory Basis of Consolidation as Exclusive: The statutory power of the District Court to consolidate actions is exclusive, and therefore appeal to its "inherent" power to act in that behalf may not be entertained to supply a different mode of procedure. Ferron v. Intermountain Transp. Co., 115 M 388, 143 P2d 893 (1943).

Discretion of Court: A consolidation may not be demanded as a matter of right, but rests in the discretion of the court, the exercise of which will not be interfered with on appeal unless clear abuse is shown, particularly where the consolidation was denied. However, where consolidation will expedite the court's business and the interests of litigants be furthered as well as the expense to them and the public minimized, it should be ordered. St. George v. Boucher, 84 M 158, 274 P 489 (1929).

Appeal of Consolidation Order — Objection Required: The legality of the consolidation of actions will not be reviewed by the Supreme Court unless excepted to at the time and brought to the Supreme Court by the party excepting. Handley v. Sprinkle, 31 M 57, 77 P 296 (1904).

Pleadings Consolidated: The effect of consolidation is to join all causes of action in one suit, the complaint in which should be the same as if the plaintiff had joined all causes of action alleged in the original suits in one action, and the judgment must settle all the issues involved. Handley v. Sprinkle, 31 M 57, 77 P 296 (1904), explained in Ferron v. Intermountain Transp. Co., 115 M 388, 143 P2d 893 (1943).

Collateral References

Action *key* 54 through 59; Trial *key* 2 through 4.

1A C.J.S. Actions §§259 through 285; 88 C.J.S. Trial §§9 through 16.

75 Am. Jur. 2d Trial §§120 through 122, 128, 138 through 140.

Consolidation of successive stockholders' derivative actions. 70 ALR 2d 1315.

Propriety of consolidation for trial of actions for personal injuries, death, or property damage arising out of same accident. 68 ALR 2d 1372; 104 ALR 62.

Propriety of ordering consolidation under Rule 42(a) of Federal Rules of Civil Procedure in civil rights actions. 81 ALR Fed. 732.

Rule 42(b). Separate trials.

Compiler's Comments

Identity With Federal Rule: This rule was identical with the Federal Rule prior to the amendment of the Federal Rule in 1966. The 1966 amendment added additional reasons for separate trials and added language affirming the right to a jury trial. As of May 1, 1990, the preceding comment was still applicable.

Case Notes

Bifurcation of Liability and Damage Claims Proper: Plaintiff's child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. Plaintiff brought liability and damage claims, and the District Court bifurcated the claims. The Supreme Court found that bifurcation in this case was not erroneous because the evidence proving liability and damages was fundamentally different and the claims were not so interwoven that bifurcation would prevent a fair trial or lead to endless litigation. Bifurcation was also warranted because witnesses for the liability phase could be lost or their memories clouded if they were required to wait until the full extent of the child's injuries was known, because a finding of liability might speed the process of enhancing the possibility of a settlement, for court convenience, and to avoid the danger of prejudice. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Bifurcation of Separate Damage Claims Proper: Plaintiff's child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. Plaintiff brought damage claims related to the child's injuries and claims related to plaintiff's own emotional distress, loss of consortium, and posttraumatic stress disorder. The District Court bifurcated the claims, and the Supreme Court held that bifurcation in this case was not erroneous. Although the same facts surrounded the underlying accident, the claims were fundamentally different. Plaintiff's damages were currently assessable, but the full extent of the child's damages would not be known for several years, so forcing plaintiff to wait until the child's damages were known or forcing trial on both issues now would both be prejudicial. Despite the possibility of a slight overlap of witnesses, the witnesses and evidence on each claim would have been different. Judicial economy did not call for a unified trial in this case, and the District Court did not abuse its discretion in ordering bifurcation of the damage claims. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004).

Dual Insurance Claims — Supervisory Control Proper to Facilitate Convenience and Judicial Economy: Following a vehicle accident, a couple sought recovery for injuries and loss of consortium and also alleged that the damages exceeded the limits of defendants' coverage, entitling them to recover from their own policy. The District Court bifurcated the claims, and the couple sought relief from the order on grounds that they would be prejudiced by having to prosecute two separate trials. The Supreme Court concurred with the couple and, in the interests of the convenience of the parties and judicial economy, agreed to exercise supervisory control. State ex rel. Gadbaw v. District Court, 2003 MT 127, 316 M 25, 75 P3d 1238 (2003), following Malta Pub. School District A & 14 v. District Court, 283 M 46, 938 P2d 1238 (1997).

Refusal to Bifurcate Wrongful Discharge Claim From Employer's Counterclaim Proper: Jarvenpaa argued that his employer's counterclaim against him for recovery of retirement benefits should have been bifurcated from his wrongful discharge claim because the counterclaim unnecessarily invited evidence of his election to retire and the retirement benefits that he received, which prejudicially persuaded the jury to find that the discharge was fair instead of wrongful. However, evidence of the retirement election was helpful to the jury to make a well-informed decision, including whether the employer acted with malice, and was relevant to the wrongful discharge action. Therefore, the District Court did not err in refusing to bifurcate the issues for separate trial. Jarvenpaa v. Glacier Elec. Co-op, Inc., 1998 MT 306, 292 M 118, 970 P2d 84, 55 St. Rep. 1261 (1998).

Bifurcation Necessary to Prevent Further Delay: O'Neal contended that it was error for the trial court to order separate trials because his third-party claims were inextricably interwoven with Eastern Livestock Company's (Eastern) claims against him. On review, the Supreme Court noted that O'Neal had engaged in dilatory tactics to prevent litigation but that Eastern had diligently pursued its claim. The primary consideration in determining the propriety of separate trials is which procedure is most likely to result in a just and final disposition of the litigation. Although certain issues may have arisen in both actions, it was not error to determine that separate trials would permit O'Neal to litigate his third-party claims without causing Eastern further inconvenience or prejudice. E. Livestock Co., Inc. v. O'Neal, 285 M 90, 945 P2d 931, 54 St. Rep. 1058 (1997).

Bifurcation of Breach of Insurance Contract and Bad Faith Claims — Use of Supervisory Control to Require That Both Claims Be Tried to Same Jury: After the District Court bifurcated the Malta school district's insurance contract and bad faith claims, the school district requested by motion that both claims be tried to the same jury, one claim immediately following the other. The District Court denied the motion, and the school district sought a writ of supervisory control. The Supreme Court granted the writ and directed the District Court to try the contract claim and the bad faith claim to the same jury. Because 33-18-242 contains no standards governing whether a bifurcated case should be tried to the same jury, the Supreme Court looked to cases decided under this rule for guidance and, after finding the state and federal versions of this rule sufficiently similar, relied upon Martin v. Bell Helicopter Co., 85 FRD 654 (1980). The Supreme Court held that a two-step process should be used; it should first be determined whether bifurcation is appropriate and then whether the interests of judicial economy, fairness to the parties, clarity of the issues, and convenience require trial of the issues to the same or a different jury. In determining whether to grant the writ of supervisory control, the Supreme Court weighed the same or similar considerations also weighed by the Supreme Court pursuant to Martin v. Bell Helicopter Co. to determine whether separate juries should be used. The Supreme Court reviewed the circumstances of the case and found that the writ of supervisory control should be granted and that the District Court abused its discretion in refusing to try the two claims to the same jury. Malta Pub. School District A & 14 v. District Court, 283 M 46, 938 P2d

1335, 54 St. Rep. 486 (1997), followed in State ex rel. Gadbaw v. District Court, 2003 MT 127, 316 M 25, 75 P3d 1238 (2003).

District Court Jurisdiction to Determine Unfair Trade Practices Alleged Before Workers' Compensation Settlement Agreement: Poteat brought a District Court complaint alleging unfair trade practices, breach of contract, and actual malice under 33-18-242. Because the underlying claim contained unresolved future workers' compensation medical benefits and the Workers' Compensation Court has exclusive jurisdiction over workers' compensation claims, the District Court determined that it had no jurisdiction to hear an unfair trade practices case until Poteat obtained a judgment or settlement of the entire underlying claim. The Supreme Court determined that counts one and four alleged actual malice and unfair trade practices before the settlement agreement, which were not based on an underlying claim that had not been settled or adjudicated, and that counts two and three alleged breach of contract and unfair trade practices after the settlement agreement, which concerned the unresolved issue of future medical benefits not yet adjudicated by the Workers' Compensation Court. The District Court erred in dismissing the entire case on grounds of lack of jurisdiction. The counts regarding unfair practices *before* settlement had their basis in a valid existing settlement agreement, and Poteat was therefore entitled to pursue the counts regarding presettlement trade practices. However, Poteat was not entitled to pursue the counts regarding unfair practices *after* settlement until the issue of future medical benefits was adjudicated. The case was thus affirmed regarding counts two and three and reversed regarding counts one and four. Poteat v. St. Paul Mercury Ins. Co., 277 M 117, 918 P2d 677, 53 St. Rep. 568 (1996). See also Liberty NW. Ins. Corp. v. St. Comp. Ins. Fund, 1998 MT 169, 289 M 475, 962 P2d 1167, 55 St. Rep. 684 (1998).

Disposal of Bifurcated Counterclaims Without Hearing — Compromise Agreement Bar to Preexisting Claims and Causes of Action: Parties signed a stipulation that provided for dismissal of an action, which was a compromise agreement that effectively confirmed and satisfied a contract. Defendant also had pending counterclaims, previously bifurcated and reserved for trial by jury, that were dismissed after the stipulation and never addressed by the District Court. By signing the stipulation, defendant waived any further claims of breach of contract occurring prior to judgment, including bad faith claims or breach of the implied covenant of good faith and fair dealing. Settlement of the declaratory action was dispositive of defendant's counterclaims, and a hearing was unnecessary. S. Gallatin Land Corp. v. Yetter, 245 M 320, 801 P2d 575, 47 St. Rep. 2139 (1990).

Bifurcation of Question of Common-Law Marriage From Issues of Child Custody, Property Distribution, and Maintenance: Subsection (1)(d) of 40-4-104 did not prohibit bifurcation of proceedings (to determine if parties had a common-law marriage) before hearing evidence on custody, property distribution, and maintenance. The trial court lacked authority to grant the requested relief until a determination of the marital relationship was completed because it could not dissolve or equitably distribute the fruits of that which may not exist. Bifurcation was well within the wide discretion of the court. In re Marriage of Geertz, 232 M 141, 755 P2d 34, 45 St. Rep. 942 (1988).

Applicability of Affirmative Defenses to Question of Separate Trials: Affirmative defenses which do not go to the merits of defendant's claim, for example, a defense of a Statute of Limitations or a lack of jurisdiction, may lend themselves to bifurcation, but affirmative defenses which dispute the merits of a claim on issues of fact do not. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Remedy in Contract or in Tort — Motion for Separate Trials: An insurer requested a separate trial on the affirmative defenses raised by cross-claim and requested that the trial of the remaining issues raised by the insured be postponed until after the final determination of the affirmative defenses. The Supreme Court noted that the insured, having a choice of two remedies, one in contract and one in tort, elected to pursue his claim in tort. Recovery by him on his claim in tort would have the effect of barring his claim for breach of contract. If the motion for separate trials had been granted, it would have converted insured's claim for tort to one for breach of contract. Insured would then have been precluded from presenting any evidence as to consequential damages for the tort, let alone any evidence relating to punitive damages. His right to trial by jury of his tort claim, guaranteed by the seventh amendment to the U.S. Constitution and Art. II, sec. 26, Mont. Const., would have been prejudiced. Denial of the motion to bifurcate was proper. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Separate Trials as Abuse of Discretion — No Written Order or Minute Entry on Motion to Bifurcate: The District Court declined to bifurcate a trial so as to determine separately whether the insured intentionally caused a fire and whether the insurer committed a breach of good faith,

based on the mistaken impression that a District Court Judge earlier in jurisdiction had denied bifurcation. Although all the parties assumed such an order was made, the record disclosed no order, and the insurer neither procured a written order granting or denying the motion nor caused a minute entry to be made of the disposition of the motion. The Supreme Court found that under the insured's tort claim, the issues of fact regarding the insurer's violations of the Unfair Claims Settlement Act were so inextricably woven with the insurer's claim of arson that their separation would be an abuse of discretion resulting in extended and needless litigation. A trial court cannot be put in error on matters not brought to its attention by notice or otherwise. Section 33-18-241 was held not to apply, both because of the statutory effective date and because this case involved a first-party rather than a third-party claim. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Purpose to Provide Broad Discretion: The purpose of this rule is to provide broad discretion in the District Court in the handling of trial procedures. State ex rel. McGinnis v. District Court, 673 P2d 1207, 40 St. Rep. 1858 (1983) (apparently not reported in Montana Reports).

Timeliness of Motion to Substitute Judge After Severance of Case: On appeal from his conviction for sexual intercourse without consent and sexual assault, the defendant claimed that the District Judge's refusal to grant his motion for substitution of a judge was error. Although he was on notice that a particular judge would preside over the proceedings both before and after the severance of the codefendants' cases, the defense motion was not filed until 52 days after the defense was informed which judge had been assigned to the case. The substitution motion was clearly untimely. The defense urged that the filing of a separate information after severance of a criminal trial revived the right to peremptorily disqualify the judge. The Supreme Court noted no authority for that argument was cited and said it found none to support it. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981).

Limitation of Issues for Trial: It is an abuse of discretion not to order a separate trial on a specific issue where the separate trial would result in convenience and economy of time to the parties and witnesses and to the court and where a determination on the separate trial would end the matter without further proceedings. In re Estate of Monaco, Monaco v. Cecconi, 180 M 111, 589 P2d 156, 36 St. Rep. 113 (1979), followed in E. Livestock Co., Inc. v. O'Neal, 285 M 90, 945 P2d 931, 54 St. Rep. 1058 (1997).

Abuse of Rule: Where there is no danger of prejudice and the issues are not complex, the necessity of separate trials should be carefully weighed to avoid abuse of the rule. Standard Ins. Co. v. Sturdevant, 173 M 23, 566 P2d 52 (1977).

Severance of Action Into Separate Cases: Judge did not abuse his discretion by severing plaintiff's action into three separate cases. State ex rel. Stenberg v. Nelson, 157 M 310, 486 P2d 870 (1971).

Successor Judge — Power to Grant Severance: Disqualification of District Judge did not render his previous ruling denying severance of claims against different defendants res judicata or the law of the case; successor judge could reconsider and grant severance. State ex rel. Stenberg v. Nelson, 157 M 310, 486 P2d 870 (1971).

Separation Denied — Abuse of Discretion: In wrongful death and survival action trial court abused its discretion by denying motion for separate trial on issue of validity of release where separate trials would result in convenience and economy of time to parties, witnesses, and court and since possible finding that release was valid would end matter, trial of complicated issue of wrongful death and survival would be avoided. State ex rel. N. Pac. Ry. v. District Court, 155 M 91, 467 P2d 145 (1970).

Separate Trials — Insurance Matters: There was a manifest abuse of discretion by court in denying a separate trial for insurance company because otherwise prejudice would result by trying all issues in the same trial. State ex rel. Hereim v. District Court, 154 M 112, 460 P2d 755 (1969).

Separate Trial on Counterclaims — Discretion of Court: Grant of separate trial under this section on counterclaims on matters unrelated to plaintiff's complaint was within discretion of District Judge and was not disturbed since no clear abuse of discretion was apparent. State ex rel. Rooks v. District Court, 153 M 189, 456 P2d 308 (1969).

Insurance Coverage — Issue Severed From Federal Case: Federal court dismissed action for declaratory judgment declaring obligations of casualty insurance company under an automobile insurance policy, which allegedly had been canceled prior to the time of the accident involving the automobile of the insured who was being sued for injuries resulting from the accident in the state court, since the issues, which did not involve federal law, could be solved in the state court wherein third-party complaint under Rule 14(a), M.R.Civ.P., had been filed by the insured against the insurer in which insured sought to hold the insurer to the terms of the policy, where

state court could dispose of the coverage problem first under this rule. W. Cas. & Sur. Co. v. Pinson, 255 F. Supp. 624 (D.C. Mont. 1966).

Liberal Joinder — Effect Upon: The provisions of this rule adequately protect defendants. Liberal use of joinder, guided by the discretion of trial courts, should therefore be allowed. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965).

Permissive Joinder: Since this rule allows for separate trials, practically, it seems desirable to give the broadest possible reading to the permissive language of Rule 20. Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965).

Collateral References

Trial *key* 3.

88 C.J.S. Trial §§17 through 30.

75 Am. Jur. 2d Trial §§115, 117, 119 through 122, 128, 134, 135, 138 through 140, 146, 147, 152, 153, 177 through 179.

Separate trial of issues of liability and damages in tort. 85 ALR 2d 9.

Rule 43. Evidence

Rule 43(d). Affirmation in lieu of oath.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Collateral References

Witnesses *key* 227.

98 C.J.S. Witnesses §320.

Rule 43(e). Evidence on motions.

Commission Notes

Subdivisions (c), (d), and (e) of the rule are identical with the Federal Rule, except that subdivision (e) has been changed to conform to Rule 56.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable, except that subdivision (c) was deleted in 1984.

Case Notes

Venue Properly Based Solely Upon Allegations in Complaint — Affidavits Not Considered — Venue Found Proper for Both Defendants: The Department of Health and Environmental Sciences (now Department of Environmental Quality) brought an action in Lewis and Clark County against Pegasus Gold Corporation (Pegasus) and Zortman Mining, Inc. (ZMI), for numerous violations of the Montana water quality laws at the Zortman and Landusky mines located in Phillips County. The complaint alleged that Pegasus owned or controlled the mines and that both Pegasus and ZMI did business in Lewis and Clark County, making that county a proper place for venue. ZMI moved to change venue to Phillips County, alleging that Pegasus did not own or control ZMI, and attached affidavits of Fletcher and Erickson to support its motion. Citing Petersen v. Tucker, 228 M 393, 742 P2d 483 (1987), the Supreme Court held that the District Court properly relied upon the allegations in the complaint without considering the two affidavits. The Supreme Court held that inasmuch as Pegasus was a named defendant at the time of the complaint and did business in Lewis and Clark County, that county was proper for venue. The Supreme Court noted that because the motion for change of venue did not refer to or rely upon the Fletcher affidavit, it was properly not considered by the District Court. The Supreme Court also noted that because the Erickson affidavit did not contradict the allegations in the complaint that Pegasus owned or controlled ZMI, the District Court was correct in focusing on the allegations in the complaint. The Supreme Court held that venue was properly found in Lewis and Clark County for both defendants because under the provisions of 25-2-117, a county that is proper venue for one defendant is proper for both. State ex rel. Dept. of Health and Environmental Sciences v. Pegasus Gold Corp., 270 M 32, 889 P2d 1197, 52 St. Rep. 64 (1995).

District Court's Use of Affidavits and Discovery Material in Its File to Determine Jurisdiction Upheld: Plaintiffs appealed the use of affidavits and discovery material in the court file in the court's determination of whether an employee was acting within the scope of his employment by a certain defendant. The plaintiffs complained that the court's determination amounted to a decision of the defendant's ultimate tort liability, rather than a factual determination of the court's jurisdiction over some defendants. While agreeing that jurisdiction and ultimate liability in tort are not subject to determination by motion where disputes of fact exist, the Supreme

Court held that common collateral issues related to the defendant's connection with the tortious act are jurisdictional issues which may be resolved before trial and the trial court's use of affidavits for the purpose was correct under Rules 12(d) and 43(e), M.R.Civ.P. In so holding, the court noted that the discovery materials and affidavits were extensive and that the plaintiffs were given a sufficient opportunity to examine the nonresident defendants through depositions and interrogatories and thereby to develop their argument regarding jurisdiction. Knoepke v. SW. Ry., 190 M 238, 620 P2d 1185, 37 St. Rep. 1910 (1980).

Oral Testimony Proper: Oral testimony is properly within the matters which the court may consider on motions for summary judgment. Citizens St. Bank v. Duus, 154 M 18, 459 P2d 696 (1969); Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Collateral References

Motions *key* 37.

60 C.J.S. Motions and Orders §§36, 37.

Rule 43(f). Interpreters.

Advisory Committee Notes

Source: Fed. R. Civ. P. 43(f), as amended 1966.

Explanation of change: This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Rule 44. Proof of official record

Rule 44(a). Authentication.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 44, as amended 1966.

Explanation of change: The new provisions of subdivision (a)(1) on proof of official records kept within the United States are similar in substance to those heretofore appearing in Rule 44. There is a more exact description of the geographical areas covered.

Under subdivision (a)(2) foreign official records may be proved as heretofore, by means of official publications thereof. The rest of subdivision (a)(2) aims to provide greater clarity, efficiency, and flexibility in the procedure for authenticating copies of foreign official records. It is provided that an attested copy may be obtained from any person authorized by the law of the foreign country to make the attestation without regard to whether he is charged with responsibility for maintaining the record or keep it in his custody. The amendment specifically permits use of the chain-certificate method of authentication.

Although the amended rule will generally facilitate proof of foreign official records, it is recognized that in some situations it may be difficult or even impossible to satisfy the basic requirements of the rule. Therefore the final sentence of subdivision (a)(2) provides the court with discretion to admit an attested copy of a record without a final certification, or an attested summary of a record with or without a final certification. Reasonable effort must be made to satisfy the basic requirements.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform the rule to the 1991 amendments of the Federal Rule.

Compiler's Comments

1993 Amendment: In (1) substituted "or within a territory subject to the administrative or judicial jurisdiction of the United States" for "territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands"; in (2), near middle after "consul general", deleted "consul" and inserted last sentence concerning certification as provided by treaty or convention; and made minor changes in style.

Amendments — Identity With Federal Rule: The amendment of September 29, 1967, rewrote all but the first sentence of this rule and divided it into two clauses; in the first sentence, the amendment inserted "kept within the United States ... Ryukyu Islands" and substituted "by" for "with" before "a certificate that". As a result of this amendment, the rule is identical with the Federal Rule, and as of May 1, 1990, was still identical with the Federal Rule.

The May 1, 1990, amendment made language in the rule gender neutral.

Attorney General's Opinions

Authentication of Foreign Judgment: A foreign judgment filed under the Uniform Enforcement of Foreign Judgments Act must be authenticated in accordance with the provisions of subsection (1) of this rule. 44 A.G. Op. 38 (1992).

Collateral References

Evidence *key* 333, 366.

32 C.J.S. Evidence §§626, 629 through 647.

29 Am. Jur. 2d Evidence §§104 through 151; 29A Am. Jur. 2d Evidence §§1321 through 1411.

Admissibility of visual recording of event or matter other than that giving rise to litigation or prosecution. 41 ALR 4th 877.

Admissibility of visual recording of event or matter giving rise to litigation or prosecution. 41 ALR 4th 812.

Admissibility of report of public officer or employee on cause of or responsibility for injury to person or damage to property. 69 ALR 2d 1148; 153 ALR 163.

Mutilations, alterations, and deletions, as affecting admissibility in evidence of public records. 28 ALR 2d 1443.

Compelling production or authentication, for use as evidence, of court records or writings, or objects in custody of court or officer thereof. 170 ALR 334.

Authentication of copy required by Federal Civil Procedure Rule 44 relating to proof of official records. 41 ALR Fed. 784.

Rule 44(b). Lack of record.

Advisory Committee's Note to September 29, 1967, Amendments

Source: Fed. R. Civ. P. 44, as amended 1966.

Explanation of change: Subdivision (b) [Rule 44(b)] is accommodated to the changes made in subdivision (a) [Rule 44(a)].

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of September 29, 1967, rewrote this rule and made it identical with the Federal Rule. As of May 1, 1990, the rule was still identical with the Federal Rule.

Rule 44(c). Other proof.

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of September 29, 1967, substituted "authorized by law" for "any applicable statute or by the rules of evidence at common law". This amendment made the rule identical with the Federal Rule, as amended in 1966. As of May 1, 1990, this rule was still identical with the Federal Rule.

Rule 44.1. Determination of foreign law.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO 1966 AMENDMENT

Source: Fed. R. Civ. P. 44.1, as adopted 1966.

Explanation of change: This is new and clears up uncertainty as to whether foreign law must be pleaded. Under this rule the notice need not be given in the pleadings.

The rule affords a procedure for raising and determining an issue of foreign law. It does not require the court to take judicial notice of the foreign law.

The rule appears to be consistent with and complementary to Rule 9(d) and R. C. M. 1947, section 93-501-6 [since repealed].

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

The existing reference in the rule to Rule 43 appears to be meaningless since Montana never adopted a counterpart to prior Rule 43(a) of the Federal Rules dealing with form and admissibility of evidence. The change also complements the terms of Rule 202, Montana Rules of Evidence, dealing with judicial notice of law. The amendment conforms the rule to the 1972 Amendment of the Federal Rule. For a discussion of the amendment see the advisory committee note to the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the rule was identical with the Federal Rule, except for substitution of "Montana" for "Federal".

Amendments: The amendment of October 9, 1984, in second sentence substituted "the Montana Rules of Evidence" for "Rule 43".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Burden of Proof — Responsibility of Trial Court: Foreign heirs had the burden of proof in proving reciprocity of heirship between state and foreign countries. The determination of reciprocity was a responsibility for which a trial court was well suited. In re Giurgiu, 155 M 18, 466 P2d 83 (1970).

Rule 45. Subpoena

Rule 45(a). Form—issuance.

Commission and Advisory Committee Notes

Subdivisions (a), (b) and (f) of the rule are identical with the Federal Rule.

Compiler's Comments

2003 Amendment: Inserted (a)(4) concerning subpoena of health care information. Amendment effective September 1, 2003.

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

No Duty to Appear if No Subpoena Issued: A physician who failed to appear to testify at his patient's trial was not issued a subpoena compelling his attendance. There is no duty for a physician to testify at the trial of a patient, absent compulsory process. Knight v. Johnson, 237 M 230, 773 P2d 293, 46 St. Rep. 760 (1989).

Collateral References

Witnesses *key* 8 through 11.

97 C.J.S. Witnesses §§21 through 23, 25.

81 Am. Jur. 2d Witnesses §§7 through 9, 18 through 22, 28, 31, 32.

Rule 45(b). Service.

Commission and Advisory Committee Notes

Subdivision (c) [now (b)] has been rewritten in a form which is substantially the same as R. C. M. 1947, section 93-1501-5 [since repealed] except for omission of reference to a "ticket." The proposed subdivision (c) [now (b)] is believed to be more economical to litigants and better suited to Montana practice than the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

No Duty to Appear if No Subpoena Issued: A physician who failed to appear to testify at his patient's trial was not issued a subpoena compelling his attendance. There is no duty for a physician to testify at the trial of a patient, absent compulsory process. Knight v. Johnson, 237 M 230, 773 P2d 293, 46 St. Rep. 760 (1989).

Attorney as Witness: This rule does not distinguish between attorney and the layman; if an attorney would not have attended a hearing except for a subpoena, he is entitled to his statutory witness fee and mileage. United Bank of Pueblo v. Iverson, 164 M 473, 525 P2d 21 (1974).

Collateral References

Witnesses *key* 13, 14.

97 C.J.S. Witnesses §23.

81 Am. Jur. 2d Witnesses §§8, 9, 14 through 17.

Rule 45(c). Protection of persons subject to or affected by subpoenas.

Commission and Advisory Committee Notes

Subdivision (c) has been rewritten in a form which is substantially the same as R. C. M. 1947, section 93-1501-5 [since repealed] except for omission of reference to a "ticket." The proposed subdivision (c) is believed to be more economical to litigants and better suited to Montana practice than the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

No Duty to Appear if No Subpoena Issued: A physician who failed to appear to testify at his patient's trial was not issued a subpoena compelling his attendance. There is no duty for a physician to testify at the trial of a patient, absent compulsory process. Knight v. Johnson, 237 M 230, 773 P2d 293, 46 St. Rep. 760 (1989).

Attorney as Witness: This rule does not distinguish between attorney and the layman; if an attorney would not have attended a hearing except for a subpoena, he is entitled to his statutory witness fee and mileage. United Bank of Pueblo v. Iverson, 164 M 473, 525 P2d 21 (1974).

Collateral References

Witnesses *key* 16.

97 C.J.S. Witnesses §25.

81 Am. Jur. 2d Witnesses §§18 through 33.

Subpoena duces tecum for production of items held by a foreign custodian in another country. 82 ALR 2d 1403.

Statements of witnesses as subject, under subpoena duces tecum, to order for production on trial. 73 ALR 2d 146.

Subpoena duces tecum as affected by Rule 30(b), Fed.R.Civ.P., and similar state statutes and rules, relating to preventing, limiting, or terminating the taking of deposition. 70 ALR 2d 783.

Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records, and documents. 23 ALR 2d 862.

Compelling production of papers in hands of attorney asserting lien. 3 ALR 2d 154.

Practice or procedure for testing validity or scope of the command of subpoena duces tecum. 130 ALR 327.

Privilege against self-incrimination as justification for refusal to comply with subpoena requiring production of books or documents of private corporation. 120 ALR 1102.

Rule 45(d). Duties in responding to subpoena.

Case Notes

Unilateral Cancellation of Deposition by Plaintiff's Attorney — Sanctions Appropriate for Discovery Abuse: Plaintiff's attorney Palmer was directed to appear at a deposition requested by defendant. Palmer objected to the subpoena under Rules 30(d) and 45(b)(1), M.R.Civ.P., and failed to appear for the deposition. The District Court sanctioned Palmer for discovery abuses pursuant to Rule 37, M.R.Civ.P., and ordered him to pay defendant's attorney fees and costs. On appeal, Palmer argued that the effect of his objection was to quash the subpoena and suspend the

deposition and disclosure of documents until further order of the court. Palmer was mistaken on both issues. Rule 30(d) only contemplates a motion to terminate or limit a deposition during the taking of the deposition. Rule 45(b)(1) provides that a District Court may quash a subpoena, not an attorney. By unilaterally canceling the deposition, Palmer violated the deposition order. When Palmer finally was deposed, he refused to answer any questions unless defendant agreed to his stipulations. The Supreme Court considered the relationship between the sanctions and the extent and nature of the discovery abuse and extent of the prejudice to defendant caused by Palmer's failure to appear at the deposition, in light of Smith v. Butte-Silver Bow County, 276 M 329, 916 P2d 91 (1996). Although the District Court could have taken other actions, such as dismissing the underlying action, the sanctions, though severe, related appropriately to the extent of the discovery abuse and prejudice to defendant and were affirmed absent any showing by Palmer that his failure to comply with the discovery orders was substantially justified. Dambrowski v. Champion Int'l Corp., 2000 MT 149, 300 M 76, 3 P3d 617, 57 St. Rep. 581 (2000). See also Pioche Mines Consol., Inc. v. Dolman, 333 F2d 257 (9th Cir. 1964).

Collateral References

Depositions *key* 57, 58.

26A C.J.S. Depositions §§61, 62.

Rule 45(e). Contempt.

Commission and Advisory Committee Notes

Subdivisions (a), (b) [now deleted] and (f) [now (e)] of the rule are identical with the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Collateral References

Witnesses *key* 21.

97 C.J.S. Witnesses §27.

81 Am. Jur. 2d Witnesses §§13, 23.

Rule 46. Exceptions unnecessary.

Commission and Advisory Committee Notes

COMMISSION NOTES

The rule is identical with the Federal Rule, except for the omission after the word "purposes" of the clause, "for which an exception has heretofore been necessary." It is believed that this clause is redundant and perhaps ambiguous.

ADVISORY COMMITTEE'S NOTE
TO MAY 21, 1969, AMENDMENT

Explanation of change: The attention of the Committee has been invited to considerable confusion existing under the old wording of this rule, of Rule 52, and of Section 93-5305, R. C. M. 1947 [superseded by Rule 52(a), M.R.Civ.P.], which statute is now being superseded. It is thought by rewriting Rule 46 and Rule 52 the existing confusions can be avoided.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments — Identity With Federal Law: The above commission note was written prior to the 1969 and 1971 amendments. The 1969 amendment inserted "Except as provided in Rule 52, with respect to findings by the court" at the beginning of the section. The 1971 amendment deleted the language inserted by the 1969 amendment and inserted "or findings" in the first clause of the rule.

The 1971 amendment made this rule identical with the Federal Rule, except for the changes made in 1971, which difference is discussed in the commission note above. As of April 1, 1982, this rule and the Federal Rule were still identical. As of May 1, 1990, this rule and the Federal Rule were still identical except as noted.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General Objection to Judicial Notice Insufficient to Preserve Issue on Appeal: Loh was charged with criminal possession of a controlled substance and sought to have her confession suppressed. The District Court denied the motion to suppress, and Loh was tried on the charge. At the trial, the prosecution requested the District Court to take judicial notice of the testimony of several firefighters given at the suppression hearing. The District Court agreed, over Loh's objection, saying that judicial notice of that former testimony was the very purpose contemplated by Rule 201, M.R.Ev. (Title 26, ch. 10). The Supreme Court held that the general objection made by Loh's counsel at the suppression hearing was an insufficient objection. The Supreme Court also noted that if there was error, it was harmless error and that Loh failed to make a further objection as to the sufficiency of any evidence offered at trial. St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Issues First Raised on Appeal — Exemption From Execution: Issue whether certain items judgment debtor claimed were exempt from execution as necessary for support of his family were in fact not necessary would not be considered on appeal where not raised below. White v. White, 195 M 470, 636 P2d 844, 38 St. Rep. 2041 (1981).

One Proceeding With Two Hearings — Failure to Object Again — Waiver of Error: In a child abuse and neglect proceeding to terminate parental rights when the father of the youngest child was to have his rights determined a month after a hearing involving the termination of both parents' rights to the 2 elder children, the father of the youngest child waived his right to complain of error on appeal because he failed to object to questions by the judge at the second hearing involving a prior felony conviction, even though objection was made and overruled in the first hearing. In the Matter of T.J.D., J.L.D., and R.J.W., 189 M 147, 615 P2d 212 (1980).

No Appeal on Issue of Joint Venture Not First Raised in District Court: Appellants cannot assert for a matter of review on appeal that their relationship with respondents was that of joint venturers because this issue was not first presented to the District Court and as such cannot be raised for the first time on appeal. Mont. Williams Double Diamond v. Royal Village, Inc., 186 M 359, 607 P2d 1120 (1980).

Objections to the Record: The time for defendant to have lodged his objections to the Justice Court record being made was before the appeal was taken. St. v. Tiedemann, 178 M 394, 584 P2d 1284 (1978).

Objections First Raised on Appeal: The issue of failure to appoint counsel for a dependent minor child lacked merit because it was not raised at trial. Easton v. Easton, 175 M 416, 574 P2d 989 (1978).

"Plain Error": In adopting the "plain error" doctrine appellate courts have a duty to determine whether the parties before them have been denied substantial justice by the trial court, and when that has occurred they can within sound discretion consider whether the trial court has deprived a litigant of a fair and impartial trial, even though no objection was made to the conduct during the trial. Such was the case when appellant was denied his day in court by the trial judge's recess and failure to reconvene. Halldorson v. Halldorson, 175 M 170, 573 P2d 169 (1977).

Exceptions to Findings of Fact and Conclusions of Law: Counsel must point out exceptions to findings of fact and conclusions of law so that the court will have opportunity to correct them. Otherwise they become final and the Supreme Court will not discuss the issues raised. Turner v. Turner, 157 M 262, 484 P2d 1303 (1971); Sorenson v. Lynch, 157 M 116, 483 P2d 907 (1971); State ex rel. Bennett v. Dowdall, 157 M 11, 482 P2d 572 (1971); Smiley v. Dolezilek, 156 M 224, 478 P2d 278 (1970); Stapp v. Nickels, 150 M 220, 434 P2d 141 (1967); Olsen v. United Benefit Life Ins. Co., 150 M 147, 432 P2d 381 (1967); Rozan v. Rosen, 150 M 121, 431 P2d 870 (1967).

Objections to Evidence — Ruling Reserved: Where a party objects to the introduction of evidence the trial court should rule thereon and the ruling should go into the record. Where the court reserves its ruling or admits it subject to the objection, and thereafter in a cause tried without a jury considers it in arriving at its conclusion, it will be held to have impliedly overruled the objection, which ruling is deemed excepted to, and is subject to review on appeal. Gilcrest v. Bowen, 95 M 44, 24 P2d 141 (1933).

Directed Verdict — Exception Unnecessary: An objection and exception to an order granting a motion for a directed verdict were not necessary to warrant review of the order on appeal. Gen. Fire Extinguisher Co. v. NW. Auto Supply Co., 70 M 1, 223 P 504 (1924).

Criminal Cases — Rule Inapplicable: The rule declared by section 93-5502, R.C.M. 1947 (since repealed), that every ruling or decision of the District Court on the admissibility of evidence shall be deemed excepted to, had reference to civil, not criminal, cases. St. v. Prouty, 60 M 310, 199 P 281 (1921).

Findings of Court: Section 93-5502, R.C.M. 1947 (superseded by Rule 46, M.R.Civ.P.), providing for automatic exceptions, did not affect sections 93-5305, 93-5306, and 93-5307, R.C.M. 1947 (superseded by Rule 52(b), M.R.Civ.P.), relating to exceptions to findings. Babcock v. Gregg, 55 M 317, 178 P 284 (1918).

Identification of Refused Instruction: Section 93-5502, R.C.M. 1947 (superseded by Rule 46, M.R.Civ.P.), providing for automatic exceptions was not designed to do away with the necessity of identifying or authenticating, in the transcript on appeal, an instruction which was refused. Roberts v. Sinnott, 54 M 114, 169 P 49 (1917).

Collateral References

Appeal and Error *key* 272, 273, 277; Trial *key* 31, 99 through 104, 271.

4 C.J.S. Appeal and Error §222, et seq.; 88 C.J.S. Trial §§248 through 250.

75 Am. Jur. 2d Trial §§483, 484, 487 through 489.

Rule 47. Jurors

Law Review Articles

Voir Dire of Jurors Concerning Relationships With Insurance Companies: This note reviews the case of Avery v. Anaconda in which the court held that the questioning of jurors about investments in insurance companies generally was prejudicial. 29 Mont. L. Rev. 96 (1967).

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 47(a). Examination of jurors.

Commission Notes

Subdivision (a) of the rule follows the current Montana practice, and does not follow the Federal Rule which authorizes the court to conduct the examination of the jurors.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Challenge of Juror for Cause — Standard of Review: In clarifying the standard of review applicable to challenge of a juror for cause, the Supreme Court adopted the standard for findings of fact set out in Rule 52(a), M.R.Civ.P. Because factual determinations of juror appropriateness are being made by the trial court, the "clearly erroneous" standard applies to review of a trial court's decision to deny a challenge for cause. The Supreme Court will not substitute its judgment for that of the trial court absent a showing that the lower court's findings are clearly erroneous, even if there is evidence in the record to support contrary findings. Walden v. St., 250 M 132, 818 P2d 1190, 48 St. Rep. 893 (1991). This standard was applied to criminal cases in St. v. Cope, 250 M 387, 819 P2d 1280, 48 St. Rep. 949 (1991).

Brief Questioning of Prospective Juror Regarding Insurance Employment — Not Error: Two brief questions to one prospective juror about his past work of selling insurance and a question as to whether this would bias his decision did not prejudice the defendant because there was no suggestion that the defendant had liability insurance and the questioning was done in good faith to allow counsel to look for bias or prejudice on the part of a prospective juror as set forth in the general rule of Haynes v. County of Missoula, 163 M 270, 517 P2d 370 (1973). Garza v. Peppard, 222 M 244, 722 P2d 610, 43 St. Rep. 1233 (1986).

General Animosity Toward Defendant in Personal Injury Action — Not Sufficient Grounds for Challenge to Juror for Cause: In a personal injury action against Burlington Northern, Inc. (BN), it was not error for the trial court to refuse to dismiss for cause a juror who testified that he ships grain on BN each year and believes that BN grossly overcharges for shipping when the juror also testified that his feelings toward BN would not prevent him from being fair in this case. Anderson v. Burlington N., Inc., 218 M 456, 709 P2d 641, 42 St. Rep. 1738 (1985).

Improper Questioning and Excusing of Prospective Jurors by Court Clerk: In depositor's suit against bank, the court's clerks examined the prospective jurors, using questions given the clerks by depositor's counsel, without notice to bank's counsel. The clerks asked if the

prospective jurors had business or transactions with the bank and released some prospective jurors based on their answers to the questions, thus excusing them for cause without notice to bank's counsel or a ruling by the court. This occurred before an initial jury panel was called. This action violated the procedure set out in 25-7-221, 25-7-224, and Rules 47(a) and 47(b), M.R.Civ.P. (Title 25, ch. 20); was outside the type of action permitted by 3-15-313; and constituted reversible error requiring a new trial. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Jury Passed for Cause — Partiality Issues Waived: Defendant could not successfully argue that the jury was not fair and impartial when defendant passed the jury for cause. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Voir Dire — Jurors' Beliefs as Taxpayers — Harmless Error: Although taxpayer status is not a ground for juror disqualification, voir dire as to prospective jurors' beliefs, as taxpayers, concerning the financial outcome of a case in which the state is a defendant should be permitted if requested. Failure of the trial court to permit such voir dire is error. However, the error is harmless when the jury returns a verdict for the defendant and does not reach the question of damages. Goodnough v. St., 199 M 9, 647 P2d 364, 39 St. Rep. 1170 (1982).

Defendant's Challenge of Jurors — Discretion of Judge in Ruling on Challenges: The defendant in a deliberate homicide case appealed his conviction in part on the basis that the trial court erred in denying his challenge to the jury panel as a whole and to one juror in particular. While noting that the right to a trial by an impartial jury is an unqualified one, the Supreme Court said that the pertinent inquiry was whether or not the jury empaneled was able to render an impartial judgment based solely upon the evidence presented at trial. Considering that each juror gave an assurance of impartiality and that the trial judge made cautionary remarks to the jury that they had a duty to lay aside their opinions and impressions, the Supreme Court held that under the circumstances the trial judge did not abuse his discretion by denying the defendant's challenge to the jury panel. With respect to the individual juror, the court noted that the judge had questioned the juror and that she had made it clear that she could put her emotions aside and judge the defendant fairly and solely upon the evidence presented at trial. St. v. Bashor, 188 M 397, 614 P2d 470 (1980).

Advising Trial Court of Questions to Be Asked: The practice of advising the trial court, in the absence of the jury, of questions to be asked, their purpose, and making a showing of good faith, is definitely preferred. Failure to follow such practice may negate a claim of good faith. Borkowski v. Yost, 182 M 28, 594 P2d 688 (1979).

Limits on Examination: Although the trial judge may set reasonable limits on the examination, he should permit liberal and probing examination calculated to discover possible bias or prejudice, with due regard for the interests of fairness to both parties. Borkowski v. Yost, 182 M 28, 594 P2d 688 (1979).

Purpose of Voir Dire: The purpose of voir dire is to enable counsel to determine the existence of bias and prejudice on the part of prospective jurors and to enable counsel to exercise his peremptory challenges. Borkowski v. Yost, 182 M 28, 594 P2d 688 (1979).

Questions Concerning Insurance in Voir Dire: In appropriate cases an attorney upon voir dire may ask prospective jurors whether they have any business relationship with insurance companies and whether they are policyholders of an insurance company involved in the case. Also, upon a proper showing of possible prejudice, an attorney may ask whether a prospective juror has heard or read anything to indicate that jury verdicts for plaintiffs in personal injury cases result in higher insurance premiums for everyone; if so, whether the belief will interfere with the juror's ability to render a fair and impartial verdict. These rules are subject to a showing that counsel is acting in good faith and is not merely trying to impress on the jury the fact that defendant may be covered by insurance. Borkowski v. Yost, 182 M 28, 594 P2d 688 (1979).

Collateral References

Jury *key* 124 through 133.
50 C.J.S. Juries §§267 through 278.
47 Am. Jur. 2d Jury §163, et seq.

Rule 47(b). Manner of selection and order of examination of jurors.

Commission and Advisory Committee Notes

COMMISSION NOTES

Subdivision (b) is new and clarifies the order of steps taken in the selection of a jury.

ADVISORY COMMITTEE'S NOTE
TO MAY 21, 1969, AMENDMENT

Explanation of change: In some judicial districts the practice is that the replacement juror takes a new number at the bottom of the list, in others the replacement takes the same number as the juror excused. This amendment expressly adopts the latter and makes the practice uniform throughout the state.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the rule had no federal counterpart.

Amendment: The amendment of May 21, 1969, inserted "and the juror called ... who has been excused" in the second sentence.

Case Notes

Voir Dire Discussion of Plaintiff's Disease, Treatment, and Complications and Prior Summary Judgment on Another Issue: During voir dire in a medical malpractice case, it was not improper for the judge to allow plaintiff's attorney to discuss plaintiff's disease, her past successful treatment, defendant doctor's laser surgery for the disease, the fact that defendant had never before used laser surgery for this disease, the complications from the surgery and plaintiff's current life as a result of the complications, and the fact that the judge had granted summary judgment on the issue of consent to remove plaintiff's hemorrhoid tags during the surgery. O'Leyar v. Callender, 255 M 277, 843 P2d 304, 49 St. Rep. 1008 (1992).

Number of Peremptory Challenges: Under 25-7-224, each party may have four peremptory challenges. "Each party" has been interpreted to mean "each side" unless the position of the codefendants is shown to be "hostile". Here the suits were joined involuntarily, and defendants/respondents in this action have indicated they would seek indemnification from other codefendants. Therefore, the codefendants were found to be hostile, and four peremptory challenges each are permitted. Williams v. Rigler, 234 M 161, 761 P2d 833, 45 St. Rep. 1812 (1988).

Improper Questioning and Excusing of Prospective Jurors by Court Clerk: In depositor's suit against bank, the court's clerks examined the prospective jurors, using questions given the clerks by depositor's counsel, without notice to bank's counsel. The clerks asked if the prospective jurors had business or transactions with the bank and released some prospective jurors based on their answers to the questions, thus excusing them for cause without notice to bank's counsel or a ruling by the court. This occurred before an initial jury panel was called. This action violated the procedure set out in 25-7-221, 25-7-224, and Rules 47(a) and 47(b), M.R.Civ.P. (Title 25, ch. 20); was outside the type of action permitted by 3-15-313; and constituted reversible error requiring a new trial. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Advising Trial Court of Questions to Be Asked: The practice of advising the trial court, in the absence of the jury, of questions to be asked, their purpose, and making a showing of good faith, is definitely preferred. Failure to follow such practice may negate a claim of good faith. Borkowski v. Yost, 182 M 28, 594 P2d 688 (1979).

Number of Challenges When Multiple Parties:

Since the record at the time the court entered its ruling is devoid of evidence showing the parties were "hostile", each is entitled to four peremptory challenges. Upon review the court is compelled to take a hindsight approach to the issue and determine from the entire trial record if the appellant was prejudiced. Hunsaker v. Bozeman Deaconess Foundation, 179 M 305, 588 P2d 493 (1978).

The court properly allowed each defendant four peremptory challenges since they had interests and defenses antagonistic in fact. Kudrna v. Comet Corp., 175 M 29, 572 P2d 183 (1977).

Law Review Articles

Montana Supreme Court Survey, McLean & Young, 41 Mont. L. Rev. 292, 300 (1980).

Collateral References

Jury *key* 78 through 81, 124, et seq.

50 C.J.S. Juries §§192 through 196, 267, et seq.

47 Am. Jur. 2d Jury §§121 through 130.

Effect, on challenges, of substitution of juror during trial. 84 ALR 2d 1317, §11(b) superseded by 15 ALR 4th 1127.

Bias, prejudice, or conduct of individual member or members of jury panel as ground for challenge to array or to entire panel. 76 ALR 2d 678.

Right to challenge for cause as prejudiced by appearance of additional counsel in civil cases after impaneling of jury. 56 ALR 2d 971.

Rule 47(c). Alternate jurors.

Commission and Advisory Committee Notes

Subdivision (c) is identical with subdivision (b) of the Federal Rule, except that it provides for replacement of a juror prior to the time the jury arrives at its verdict rather than prior to the time the jury retires to consider its verdict, and except for the addition of the third and fourth sentences.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the commission note above was still applicable. Montana allows the court to direct the call of one or two alternate jurors, while the Federal Rule allows up to six alternate jurors to be called. The federal provisions on peremptory challenges are tied to the number of alternate jurors called.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Alternate Juror — Conversation After Jury Retires: A jury alternate returned to the jury room with the jury after the case had been submitted for decision, which defendant contended was reversible error, since 46-16-503 requires an officer of the court to prevent conversations between the jurors and others after the jury retires. The Supreme Court held that an alternate, although excluded from deliberating and voting, is in every other respect a juror; therefore, an alternate does not fall within the statutory ban against conversations with others. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Reversible Error: Although an alternate juror was present for only a short time during jury deliberations, the court was not at liberty to make exceptions to the rule that the alternate is not to join the jury in deliberation, based on time, actual harm, or the fact that the person was an alternate juror, given the solemnity associated with the jury system and the possibility of a loss of faith in that system. Highway Comm'n v. Dunks, 166 M 239, 531 P2d 1316 (1975), distinguished in St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Collateral References

Jury *key* 72(1).

50 C.J.S. Juries §184.

Propriety, under state statute or court rule, of substituting state trial juror with alternate after case has been submitted to jury. 88 ALR 4th 711.

Presence of alternate juror in jury room as ground for reversal of state criminal conviction. 15 ALR 4th 1127.

Constitutionality of statute providing for substitution of individual juror or jurors during trial. 84 ALR 2d 1288, superseded in part by 15 ALR 4th 1127.

Alternate jurors in federal trials under Rule 24(c) of Federal Rules of Criminal Procedure or Rule 47(b) of Federal Rules of Civil Procedure. 10 ALR Fed. 185.

Rule 48. Juries — verdict.

Commission Notes

The rule is in accordance with the [1889] Montana Constitution, Article III, section 23 [now Art. II, sec. 26, 1972 Mont. Const.].

Compiler's Comments

Identity With Federal Rule: The Federal Rule provides for a verdict or finding by a stated majority of the jury, but only by stipulation. As of May 1, 1990, this comment was still applicable.

Collateral References

Jury *key* 32; Trial *key* 321 ½.

50 C.J.S. Juries §123; 89 C.J.S. Trial §494.

Validity and efficacy of accused's waiver of unanimous verdict. 97 ALR 3d 1253.

Rule 49. Special verdicts and interrogatories

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 49(a). Special verdicts.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 836
Judgment on Special Verdict 838

GENERAL

Jury Question Concerning Amount of Damages in Injury Case — Use of Special Verdict Form Not Abuse of Discretion: Ele alleged that he was injured in a motor vehicle accident for which Ehnes admitted liability. In the pretrial order, Ehnes agreed that the sole issue of fact at trial was the amount of Ele's accident-related injury and damage claims. The first question on the District Court's verdict form stated that Ehnes had admitted responsibility for the accident and asked if Ele was injured as a result. The jury said no and returned the verdict. Ele contended that the verdict form was inconsistent with instructions on negligence because it did not ask if Ehnes' conduct was the cause of damages. Ele also asserted that the verdict form should not have included the question of whether he was injured because the amount of injury was the only question for trial. The Supreme Court considered whether the District Court abused its discretion and decided that it did not. Causation was in fact the first issue posed in the instruction, and inclusion of that issue did not conflict with the pretrial order. The use of the term "accident-related" in the pretrial order confirmed that the issue remaining for trial was not merely the amount of Ele's damages, but the amount of damages caused by and related to the accident. Ele v. Ehnes, 2003 MT 131, 316 M 69, 68 P3d 835 (2003).

Special Verdict Form in Subdivision Case Upheld Against Claim It Was Confusing and Biased Against Defendant: A special verdict form presented the issues fairly and submitted the ultimate questions of fact clearly. It was not confusing and did not present the plaintiff's theories in a biased manner. Therefore, the District Court did not abuse its discretion in the use of the form. The form had asked whether the city acted arbitrarily or capriciously when it did not timely act on an application for preliminary plat approval, when it used the wrong regulations to approve the application subject to conditions that included unlawful conditions, when it approved a subdivision improvements agreement subject to conditions, and when it denied the application and failed to issue written findings explaining the denial. Kiely Constr. v. Red Lodge, 2002 MT 241, 312 M 52, 57 P3d 836 (2002).

Inconsistencies in Answers on Special Verdict Form — Reversal Not Warranted: Defendants contended that internally inconsistent answers on a special verdict form required a reversal of the verdict. Upon review, the Supreme Court found that evidence introduced at trial qualified questions of breach of covenant that had led to the inconsistent answers and that the defendants' counterclaims included several separate theories. Any inconsistencies in the jury's verdict were insufficient to warrant reversal. NW. Truck & Trailer Sales, Inc. v. Dvorak, 269 M 150, 887 P2d 260, 51 St. Rep. 1530 (1994).

Court Discretion in Use of Special Verdict Form: Defendant contended an abuse of discretion by a trial court that opted to use a simple general verdict form rather than the form proposed by defendant, which the court declined as being too argumentative and confusing. The use of a special verdict form is discretionary with the court. In this case, the court did not abuse its discretion because the general verdict form, in combination with the court's instructions, adequately presented all relevant issues to the jury without the danger of confusion that could have been caused by the use of defendant's form. Barthule v. Karman, 268 M 477, 886 P2d 971, 51 St. Rep. 1423 (1994).

Offset for Advanced Wage Benefits Proper Even Though No Apportionment Between General Damages and Wage Loss in Jury Verdict: At the close of trial, Burlington Northern objected to a verdict form that would have itemized the nature of the damages awarded by the jury. The lower court refused to grant the railroad an offset against the judgment for advanced wage benefits paid to the plaintiff. On appeal, plaintiff's attorney argued that the offset should not be granted because the form of the verdict made it impossible to determine what, if any, amounts were awarded by the jury for wage loss. The Supreme Court held that, by logical deduction, some of the award was for wage loss and remanded the case to the lower court for a determination of the amount of offsets to which Burlington Northern was entitled. Cottrell v. Burlington N. RR Co., 261 M 296, 863 P2d 381, 50 St. Rep. 1323 (1993).

Court Amending Special Verdict Not Error: The jury returned a special verdict, finding that the defendant had breached a car purchase contract and that the plaintiff had acted reasonably in repossessing and reselling the vehicle. The verdict awarded the plaintiff only $22 for the notice of sale publication costs. The lower court amended the verdict to include court costs, attorney fees, and the balance due under the contract. The Supreme Court held that amending the verdict was not error because once the jury decided that the plaintiff had acted in a commercially reasonable manner, a judgment for any deficiency followed as a matter of law. Sportco, Inc. v. Thompson, 247 M 379, 806 P2d 1039, 48 St. Rep. 236 (1991).

Error to Allow Jury to Consider Claim Unsupported by Law or Fact: In rejecting plaintiff's argument that requiring a general verdict form is within the discretion of the trial court pursuant to this rule, the Supreme Court held that it is error for a trial court to allow a jury to consider a claim unsupported by either law or facts; it may allow only those claims supported by the evidence to go to the jury. If different theories of the same case are placed before a jury, it is impossible to know upon which the general verdict is made to depend. R.H. Grover, Inc. v. Flynn Ins. Co., 238 M 278, 777 P2d 338, 46 St. Rep. 1266 (1989).

Failure to Assert Rights Under Will for Seven Years — Instructions on Equity Claims Refused: Plaintiffs who waited 7 years to assert their rights under decedent's will were not entitled to proposed instructions relating to laches and equitable estoppel. The rule that a party is entitled to jury instructions adaptable to his theory of the case is not absolute. The instructions must be supported by credible evidence. Plaintiffs were not entitled to the aid of equity. The District Court did not err in refusing to instruct the jury on estoppel and laches or to include those issues in the special verdict form for the jury. Tope v. Taylor, 235 M 124, 768 P2d 845, 45 St. Rep. 2242 (1988).

Conflict Between Special Verdict Form and Jury Instructions — Damage Award Justified: Defendant contended the special verdict form was inherently contradictory with jury instructions in allowing the jury to fix a verdict based on a breach of contract when the court had instructed the jury on the tort measure of damages. The Supreme Court found no merit in the issue because: (1) instructions on breach of contract damages were withdrawn by defendant during settlement of instructions; (2) instructions given were substantially modified to include the essential elements for breach of contract damages; and (3) no harm was done because damages were clearly ascertainable and would have been the same in any event. Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

Special Interrogatories on Tort and Breach of Contract Claims — Award Under Each Theory Unclear — Remand: A District Court judgment on a special verdict based on jury findings of damages, both for breach of contract and for tort, was remanded because the special interrogatories did not state which acts were to be considered under each theory; therefore, the verdict on tort claims was unclear as to which damages were cumulative to contract damages and which were alternative. NW. Nat'l Bank of Great Falls v. Weaver-Maxwell, Inc., 224 M 33, 729 P2d 1258, 43 St. Rep. 1995 (1986).

Special Verdict Form Disregarding Conflict of Evidence — Fatally Deficient: A special verdict form that presented the issue of breach of contract in terms that adopted defendants' view of substantial disputed facts rather than leaving the factual determination of the nature of the agreement to the jury was found fatally inadequate and was subject to remand and a new trial. NW. Nat'l Bank of Great Falls v. Weaver-Maxwell, Inc., 224 M 33, 729 P2d 1258, 43 St. Rep. 1995 (1986).

Conflicting Special Verdicts — New Trial Ordered: After becoming stuck in a snowdrift on the highway, the plaintiff got out of his vehicle to shovel it out, leaving his son in the vehicle. Plaintiff was injured and his son was killed when their vehicle was struck by defendant's truck. The jury found that the defendant's negligence was the proximate cause of plaintiff's injuries but not the son's death. Because two conflicting verdicts were reached from the same evidence, a new

trial was required. Abernathy v. Eline Oil Field Services, Inc., 200 M 205, 650 P2d 772, 39 St. Rep. 1688 (1982).

Refusal to Allow Special Verdict — No Error on Review Where No Prejudice Shown: Error was not found in the lower court's refusal to allow jury to return a general verdict where special findings and verdict could not have prejudiced the complaining party. Shahrokhfar v. St. Farm Mut. Auto. Ins. Co., 194 M 76, 634 P2d 653, 38 St. Rep. 1669 (1981).

Objection Must Be Specific — Motion for Special Verdict Must Be Made: When party never specifically objected to submission of adversary's proposed verdict to jury and did not move for special verdict, Supreme Court would not consider alleged errors on appeal. Kirby v. Kelley, 161 M 66, 504 P2d 683 (1972).

Discretion of Court: The court may in its discretion submit to the jury a particular question of fact, and require them to find upon it; but it is not bound to do so. Hatch v. Nat'l Sur. Corp., 105 M 245, 72 P2d 107 (1937); Poor v. Madison River Power Co., 41 M 236, 108 P 645 (1910); Hollingsworth v. Davis-Daly Estates Copper Co., 38 M 143, 99 P 142 (1909). See also Michalsky v. Centennial Brewing Co., 48 M 1, 134 P 307 (1913).

Separation of Awards: Where in an action by a number of plaintiffs to recover on an injunction bond they in their prayer asked for judgment in a lump sum and but one judgment was recoverable, trial court did not err in refusing to submit the defendant surety company's proposed special verdict requiring the jury to set out the separate amounts awarded to each plaintiff. Hatch v. Nat'l Sur. Corp., 105 M 245, 72 P2d 107 (1937).

Indecisive Verdict: A verdict is bad which is not responsive to and decisive upon every material issue submitted to the jury. Hickey v. Breen, 40 M 368, 106 P 881 (1910); Hamilton v. Murray, 29 M 80, 74 P 75 (1903); McCleary v. Crowley, 22 M 245, 56 P 227 (1899). See also Olcott v. Gebo, 54 M 35, 166 P 300 (1917); Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910).

Special Verdict as Recommended Procedure: The practice of more frequently instructing juries to find upon particular questions of fact is recommended; thereby, the necessity for granting new trials would be greatly diminished, and much unnecessary expense and delay be avoided. O'Meara v. McDermott, 40 M 38, 104 P 1049 (1909).

Divorce Proceedings: Special findings may be properly submitted to and passed upon by the jury in a divorce suit. Morrison v. Morrison, 14 M 8, 35 P 1 (1894).

JUDGMENT ON SPECIAL VERDICT

Proposed Special Verdict Preserves Objection for Appeal: The defendant did not specifically object to the plaintiff's special verdict form that did not require the jury to find that either party had breached the contract. The Supreme Court held that the defendant's proposed special verdict form had contained a reference to a breach of contract and that this was sufficient to preserve the defendant's right to appeal the verdict form submitted to the jury. Story v. Bozeman, 242 M 436, 791 P2d 767, 47 St. Rep. 850 (1990).

Adequacy of Special Verdict — Standard Applied: In determining the adequacy of a special verdict form, the Supreme Court applied a three-part standard as outlined in Kinjerski v. Lamey, 194 M 38, 635 P2d 566, 38 St. Rep. 1703 (1981). The instructions must: (1) when read as a whole and in conjunction with the general charge adequately present the contested issues to the jury; (2) fairly submit the issues to the jury; and (3) clearly submit to the jury the ultimate questions of fact. Gurnsey v. Conklin Co., Inc., 230 M 42, 751 P2d 151, 45 St. Rep. 1 (1988). The Kinjerski standard was applied in Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993), and Baldauf v. Arrow Tank & Eng'r Co., Inc., 1999 MT 81, 294 M 107, 979 P2d 166, 56 St. Rep. 337 (1999). Story was followed in Fox Grain & Cattle Co. v. Maxwell, 267 M 528, 885 P2d 432, 51 St. Rep. 1136 (1994), and Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998).

Amending Special Verdict Form Several Hours After Jury Deliberations Began — Error: After several hours of deliberation, the jury returned with questions. In response to those questions, it was error for the court to amend the special verdict forms to include a determination by the jury as to whether a party acted willfully or wantonly. Although the instruction would not have been error if given at the proper time, the late inclusion denied the party the right to argue his case and properly present it before the jury. White v. Phillips, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986).

Negligence Special Verdict Form — Harmless Error on Strict Liability Instruction: Plaintiff contended that it was error for the trial court to give a particular instruction as he contended it was an incomplete and misleading statement of the law of strict liability. The Supreme Court held that any alleged error was harmless because the plaintiff did not object to a special verdict

form that required the jury to decide the case on negligence alone. Kleinsasser v. Superior Derrick Serv., Inc., 218 M 371, 708 P2d 586, 42 St. Rep. 1662 (1985). See also Drilcon, Inc. v. Roil Energy Corp., Inc., 230 M 166, 749 P2d 1058, 45 St. Rep. 114 (1988).

Manner of Determining Judgment: A special verdict should find all the facts which are necessary to enable the court to determine by the consideration of the pleadings and the verdict alone which party is by law entitled to a judgment, without reference to the evidence. Kinjerski v. Lamey, 194 M 38, 635 P2d 566, 38 St. Rep. 1703 (1981), distinguished in Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988); Coburn Cattle Co. v. Small, 35 M 288, 88 P 953 (1907), distinguished in Glick v. Knoll, 136 M 176, 346 P2d 987 (1959).

Judgment Conditioned on Special Verdict: Since the District Court is authorized in all cases to direct the jury to find a special verdict in writing upon all or any of the issues in a case, it may properly predicate its judgment upon such a verdict. Tannhauser v. Shea, 88 M 562, 295 P 268 (1930).

Court's Duty to Render Judgment: When the court has submitted special findings and the jury has rendered a special verdict, it then becomes the duty of the court to render the proper judgment. McDonald v. Klenze, 52 M 142, 157 P 175 (1916).

Verdict Insufficient to Warrant Judgment: A special verdict is insufficient to warrant judgment, where such verdict fails to find all the facts necessary to enable the court to determine by a consideration of the pleadings and the verdict alone which party is by law entitled to a judgment, without reference to the evidence. Coburn Cattle Co. v. Small, 35 M 288, 88 P 953 (1907).

Law Review Articles

Comparative Negligence in Montana, Ellingson, 37 Mont. L. Rev. 152 (1976).

Collateral References

Trial *key* 346 through 349(4).

89 C.J.S. Trial §526, et seq.

75B Am. Jur. 2d Trial §§1835, 1837, 1859, 1860.

Necessity of special verdict in malicious prosecution action as to probable cause or want thereof. 87 ALR 2d 202.

Failure of one or more jurors to join in special verdict as affecting verdict. 155 ALR 586.

Rule 49(b). General verdict accompanied by answer to interrogatories.

Commission Notes

The rule is identical with the Federal Rule.

Compiler's Comments

Amendment — Identity With Federal Rule: The above commission note refers to the Federal Rule as it stood prior to a 1963 amendment thereof. The 1963 amendment made minor changes to conform the Federal Rule to a contemporaneous amendment of Federal Rule 58. As of May 1, 1990, these comments were still applicable.

Case Notes

General 839
Correction of Verdict 840
Inconsistent Verdict and Findings 841

GENERAL

Interrogatories — Discretion of Court: A submission of interrogatories to the jury is within the sound discretion of the District Court and a refusal to submit such interrogatories cannot be predicated as error unless it is a clear abuse of discretion. Teesdale v. Anschutz Drilling Co., 138 M 427, 357 P2d 4 (1960).

Motion for Judgment Notwithstanding the Verdict Improper: It is not permissible in this state to move for a judgment non obstante veredicto in a law case. Fauver v. Wilkoske, 123 M 228, 211 P2d 420 (1949).

Verdict Accepted — New Trial as Remedy: After a case has been submitted to the jury and a verdict returned, accepted, and filed at the direction of the court and the jury discharged from the case, the only way to reach the verdict, if insufficient or against the law, is by a timely and proper motion for a new trial. Fauver v. Wilkoske, 123 M 228, 211 P2d 420 (1949).

Separation of Awards — Joint Tortfeasors: In the absence of statute authorizing a jury to apportion compensatory damages against joint tortfeasors, damages must be assessed in one sum against those found liable. But where the jury in its verdict finds a lump sum and then attempts to divide it among certain of the defendants, the division should be stricken out as

surplusage and judgment entered for the lump sum, or the verdict should be sent back to the jury with instruction to correct it. The jury may apportion exemplary damages between joint tortfeasors if actual damages have been assessed. Bowman v. Lewis, 110 M 435, 102 P2d 1 (1940), overruled in part in Fauver v. Wilkoske, 123 M 228, 211 P2d at 426 (1949).

General Verdict Finding on Issues: A general verdict in favor of a party is a finding on every material fact properly submitted to the jury for its consideration. The universal rule being that where the verdict finds the issues in favor of a particular party, such finding necessarily includes all issues raised by the pleadings. Gilmore v. Mulvihill, 109 M 601, 98 P2d 335 (1940).

Claim and Delivery — General Verdict Sufficient: A general verdict alone is sufficient in an action in claim and delivery if the issues warrant it. Dalke v. Pancoast, 63 M 524, 208 P 589 (1922).

Sufficient Verdict — Power of Court to Strike: After a verdict which was neither informal nor insufficient had been received and recorded, the trial court had no power to order it stricken from the files and direct the jury to return another, its authority over it being limited to setting it aside upon proper motion for a new trial. Lish v. Martin, 55 M 582, 179 P 826 (1919).

Interrogatories as Recommended Procedure: The submission of special interrogatories to the jury is a matter addressed to the sound legal discretion of the trial court. The observance of the practice, rather than constituting error, is to be commended as tending to promote justice. Rairden v. Hedrick, 46 M 510, 129 P 498 (1913).

Incomplete Verdict — Judgment Improper: A verdict is bad if it varies from the issues in a substantial matter, or if it finds only a part of that which is in issue. Whether the jury finds a general or a special verdict, it is their duty to decide the very point in issue; and, although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict. Hickey v. Breen, 40 M 368, 106 P 881 (1910); Hamilton v. Murray, 29 M 80, 74 P 75 (1903).

Chance Verdict — Requirement of Amendment Improper: Where, upon the polling of the jury in a personal injury case, the court inquires whether the verdict for the plaintiff has been reached by chance and several of the jurors answering in the affirmative, the court then directs them to retire and find a verdict by "deliberation and reasoning", and to exclude the element of chance, the action of the court is unauthorized. The verdict returned should have been received, subject to be set aside only upon application under 25-11-102. Harrington v. Butte, Anaconda & Pac. Ry., 36 M 478, 93 P 640 (1908).

Forcible Detainer — Required Findings: In forcible detainer a verdict is defective which fails to find that defendant detained the property. McCleary v. Crowley, 22 M 245, 56 P 227 (1899).

Discharge of Jury: When a verdict is rendered and recorded, and the jury discharged, the jury is functus officio. Prior to that time the verdict is in the control of the jury in some respects, but after those events the province of the jury is exhausted. Morris v. Burke, 15 M 214, 38 P 1065 (1895); In re Thompson, 9 M 381, 23 P 933 (1890).

Debt Admitted — Amount of Award Admitted: A verdict in favor of plaintiff is sufficient without stating the amount awarded, where the answer admitted the indebtedness and amount thereof, and the only denial was that the debt was not yet due. Josephi v. Mady Clothing Co., 13 M 195, 33 P 1 (1893).

CORRECTION OF VERDICT

Verdict for Both Parties: Where the court in its original instruction told the jury it could find but one verdict and the jury returned with a verdict for the plaintiff and also one for the defendant for a lesser amount, the court was correct in sending the jury back for further deliberation and requiring but one verdict. Baranko v. Grenz, 127 M 18, 256 P2d 1074 (1953).

Two Defendants — Unclear Verdict: Where two defendants were charged with larceny, but only one was tried and the verdict found the defendant "in the above entitled cause" guilty without naming him, the court did not err in sending the jury back to the jury room for a correction of their verdict in this regard. St. v. Semmens, 105 M 113, 71 P2d 913 (1937).

Change in Substance Improper: The plain purpose of permitting the correction of verdicts is to prevent the receipt of informal or insufficient verdicts. It does not extend to matters going to the substance that do not appear upon their face. If a verdict covers the issue and is complete on its face, the court must receive it. Harrington v. Butte, Anaconda & Pac. Ry., 36 M 478, 93 P 640 (1908). See also State ex rel. Jones v. District Court, 50 M 1, 144 P 564 (1914).

Existing Principles Declared: The statute permitting correction of verdicts is to some extent rather a declaration of existing principles than the introduction of any wholly new principles or doctrine. Morris v. Burke, 15 M 214, 38 P 1065 (1895).

Insufficient Damages — Remedy: The practice of permitting correction of verdicts is to prevent irregular, informal, and insufficient verdicts from being received and recorded, and is not to be extended so far as to authorize the court to refuse to receive a verdict for the plaintiff for a sum less than that claimed by him on the ground that, under the evidence, if the plaintiff is entitled to a verdict at all it must be for the full amount claimed. The proper remedy in the latter case is to have the verdict set aside on motion for a new trial. Morris v. Burke, 15 M 214, 38 P 1065 (1895). See also State ex rel. Jones v. District Court, 50 M 1, 144 P 564 (1914).

INCONSISTENT VERDICT AND FINDINGS

Findings Authorized and Controlling: The trial court is authorized in any case, in its discretion, to instruct the jury to find upon particular questions of fact, though they are required to render a general verdict. The trial court is required, when a special finding is inconsistent with the general verdict, to recognize the finding as controlling, and to give judgment accordingly. Johnson v. Butte Alex Scott Copper Co., 51 M 126, 149 P 717 (1915).

Special Findings Inconsistent — Defendant Entitled to Judgment: Where, in an action for injuries from a premature explosion of dynamite alleged to be due to using stronger explosives than proper or customary, without warning plaintiff, the jury returned a general verdict for plaintiff and found specially that plaintiff had been warned, that he knew the stronger powder was used, and that the use of such powder was proper, the special findings were inconsistent with the general verdict, and the defendant was entitled to judgment upon such findings. Johnson v. Butte Alex Scott Copper Co., 51 M 126, 149 P 717 (1915).

Personal Injury — Special Finding Controlling: Special findings in a personal injury case control the general verdict. Mitchell v. Boston & Mont. Consol. Copper & Silver Min. Co., 37 M 575, 97 P 1033 (1908).

Special Finding Controlling: The court may not set aside a special finding and enter judgment on the general verdict, but must enter judgment on the special finding, leaving it to the defeated party to pursue his remedy by a motion for a new trial. Martin v. Butte, 34 M 281, 86 P 264 (1906).

Law Review Articles

Comparative Negligence in Montana, Ellingson, 37 Mont. L. Rev. 152 (1976).

Collateral References

Trial *key* 352.

89 C.J.S. Trial §§541 through 548.

75B Am. Jur. 2d Trial §§1843 through 1845, 1874 through 1876.

Validity of verdict in personal injury action which awards damages to plaintiff wife, but either finds against plaintiff husband seeking to recover medical expenses and the like, or awards nothing to him. 66 ALR 3d 472.

Withdrawal of written special interrogatories or special questions submitted to jury. 91 ALR 2d 777.

Prejudicial effect of informing jury of the effect that their answers to special interrogatories or special issues may have upon ultimate liability or judgment. 90 ALR 2d 1040.

Correction, by trial court, of verdict which finds for party on his cause of action or counterclaim for money judgment, but which does not state amount of recovery, or is indefinite in this regard, or which affirmatively states that he is entitled to no amount. 49 ALR 2d 1328; 116 ALR 847.

Failure of one or more jurors to join in answer to special interrogatory as affecting verdict. 155 ALR 586.

Kind of verdict or judgment, or verdicts or judgments, where administrator or executor whose decedent was negligently killed brings an action which combines a cause of action for benefit of estate and another for statutory beneficiaries. 124 ALR 621.

Power of court to add interest to verdict returned by jury. 72 ALR 1150.

Rule 50. Judgment as a matter of law in actions tried by jury; alternative motion for new trial; conditional rulings

Case Notes

No Duty of Volunteer Fire Department to Direct Traffic During "Boot Drive" Fundraiser: The Laurel Volunteer Fire Department sponsored a Fourth of July fireworks display for the benefit of the community, which included a "boot drive" fundraiser to help raise money for the display. The

fundraiser entailed fire department personnel standing near the edge of the road while holding a cowboy boot and inviting people driving by to contribute by throwing money or checks into the boot. Two fire department personnel conducted a boot drive at an interstate highway exit ramp on the night of July 4, 1994. Jacobs and Coates exited the freeway and got in line behind a string of slow-moving vehicles, slowly advancing and then stopping each time that a vehicle went through the stop sign. Bruce exited the freeway behind Jacobs and Coates but did not notice the line of cars until it was too late to avoid a collision. Jacobs and Coates were injured and sued the fire department, claiming that the boot drive caused traffic to build up on the exit ramp and that as the sponsors of the fireworks display, the fire department owed a duty to warn people about and manage the traffic. The District Court granted the fire department's motion in limine and dismissed the action as a matter of law, concluding that no causation existed between the accident and the boot drive. Jacobs and Coates appealed, but the Supreme Court affirmed. Citing Jackson v. St., 1998 MT 46, 287 M 473, 956 P2d 35 (1998), the court noted that a judicial determination of duty involves various policy considerations, including: (1) the moral blame attributable to the defendant's conduct; (2) the prevention of future harm; (3) the extent of the burden placed on the defendant; (4) the consequences to the public of imposing that duty; and (5) the availability of insurance for the risk involved. Although a duty may have been owed by the fire department to ensure safe passage at the event itself, the fire department had no duty to ensure that every spectator arrived safely at the event. The fire department did not spill anything or block traffic on the freeway, nor did it create a hazardous condition for travelers coming to and from fire department property. Thus, after evaluating the factors regarding duty, the Supreme Court found no duty owed by the fire department to regulate traffic on or around the interstate highway. Further, in order to sustain a negligence claim, Jacobs and Coates needed to prove not only negligence on the part of the fire department but also a causal relationship between that negligence and the injury. Here, Jacobs and Coates offered no evidence of a causal connection between the accident and the boot drive. Neither of them saw fire department personnel at the off ramp or soliciting donations prior to the accident, no witness testified to any negligent behavior by the fire department personnel who conducted the boot drive, and Jacobs and Coates did not even produce a witness who saw the boot drive at all during that evening. Dismissal as a matter of law was therefore proper. Jacobs v. Laurel Volunteer Fire Dept., 2001 MT 98, 305 M 225, 26 P3d 730 (2001).

Evidence of Sex Discrimination Warranting Submission to Jury — Directed Verdict Improper: Allison brought a claim against the town of Clyde Park, alleging disability, sex, and age discrimination in employment. At the close of Allison's case in chief, the court granted the town's motion for a directed verdict on the sex discrimination claim, but declined a similar motion on the age discrimination claim. The court allowed submission of both the age discrimination and disability claims to the jury, which returned a verdict against Allison on both claims. On appeal, Allison argued that the jury should also have been allowed to decide the sex discrimination claim. Motions for directed verdict are properly granted only when there is a complete absence of evidence to warrant submission to the jury when the evidence is considered in the light most favorable to the party opposing the motion. Here, Allison produced evidence, although minimal, in support of the sex discrimination claim, so the directed verdict on that issue was incorrectly granted. The case was remanded for trial on the sex discrimination claim. Allison v. Clyde Park, 2000 MT 267, 302 M 55, 11 P3d 544, 57 St. Rep. 1119 (2000).

Appeal of Order Granting or Denying Motion for Judgment as Matter of Law — Standard of Review: The Supreme Court standard of review of appeals from District Court orders granting or denying motions for judgment as a matter of law is identical to that of the District Court. Judgment as a matter of law is properly granted only when there is a complete absence of evidence that would justify submitting an issue to a jury. All evidence and any legitimate inferences that might be drawn from the evidence must be considered in the light most favorable to the party opposing the motion. Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998), following Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160, 55 St. Rep. 198 (1998). Hydro Flame was followed in Schumacher v. Stephens, 1998 MT 58, 288 M 115, 956 P2d 76, 55 St. Rep. 247 (1998).

Time of Discovery of Injury Because of Childhood Sexual Abuse as Jury Question — Motion for Directed Verdict Properly Denied: Substantial conflicts in the evidence existed regarding the time at which plaintiff discovered that her mental disorders were connected to sexual abuse that she experienced as a child. It is within the province of the jury to resolve conflicting evidence; therefore, the District Court properly denied defendant's motion for a directed verdict based on the time bar in 27-2-216. Werre v. David, 275 M 376, 913 P2d 625, 53 St. Rep. 187 (1996).

Good Cause — Sufficient Evidence of Wrongful Discharge to Preclude Directed Verdict: Evidence that employee was performing a job satisfactorily when discharged provided a possible motive for termination for other than good cause, warranting submission of a wrongful discharge claim to the jury and precluding a directed verdict. Guertin v. Moody's Market, Inc., 265 M 61, 874 P2d 710, 51 St. Rep. 407 (1994), following Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303 (1986).

Inducement to Purchase Property Based on Promise of Road Improvements — Directed Verdict Improper:

Following a trial subsequent to Dew, infra., the District Court determined that defendant did fraudulently induce plaintiffs to purchase property by misrepresenting the quality of the road that she intended to build as access to the property and further awarded monetary damages to each plaintiff. On appeal, defendant contended, among other things, that the trial court erred in admitting, without first requiring plaintiffs to prove intent to defraud, parol evidence that defendant orally promised to improve the road and also erred in determining that defendant intended to defraud plaintiffs by inducing them to enter into contracts for deed. However, defendant waived the right to appeal the parol evidence question by failing to object at trial, and substantial evidence that defendant had no intention to perform the promises to improve the road was sufficient to prove defendant's intent to defraud. Dew v. Dower, 258 M 114, 852 P2d 549, 50 St. Rep. 454 (1993).

Plaintiffs claimed they were fraudulently induced to enter contracts to purchase land when seller orally promised to improve access roads to county grade. The District Court granted defendants a directed verdict, relying on Kelly v. Ellis, 39 M 597, 104 P 873 (1909), in holding that when there was no allegation of failure to keep all promises made in the written agreement, the statute of frauds precluded admission of evidence of an oral promise directly related to the contents of the contract. However, plaintiffs relied on a certificate of survey that showed county grade easements, a letter from defendants' attorney agreeing to hold a title insurance company harmless from any claims arising from purchasers' access problems, and the representation by a realtor that roads would be upgraded to county road standards. These representations constituted a conflict in evidence precluding directed verdict, and the District Court erred in taking from the jury the issue of whether plaintiffs were fraudulently induced to enter the contracts. Dew v. Dower, 237 M 476, 774 P2d 989, 46 St. Rep. 981 (1989), following Majers v. Shining Mtn., 230 M 373, 750 P2d 449, 45 St. Rep. 283 (1988), Majers v. Shining Mtn., 219 M 366, 711 P2d 1375, 43 St. Rep. 16 (1986), Dodds v. Gibson Prod. Co., 181 M 373, 593 P2d 1022 (1979), and Goggans v. Winkley, 154 M 451, 465 P2d 326 (1970).

Evidence of Fraud — Support for Jury Verdict: In this action involving the sale of commercial real estate, there was sufficient evidence to support submitting the issue of the seller's fraud to the jury and to support the jury's verdict against the seller. The trial court did not err in denying the seller's motion for a directed verdict and for a judgment notwithstanding the verdict. Zugg v. Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989).

Sale of Real Estate — Motion Improperly Denied: In this action involving the sale of commercial real estate, the plaintiff purchasers relied upon the realtor's representations concerning the property because he held himself out as an experienced investment analyst. The realtor did not try to confirm the seller's representations concerning the property. The purchasers provided sufficient evidence of the realtor's negligence and constructive fraud to require that the issues be presented to the jury. The trial court erred in granting a directed verdict as to the realtor. Zugg v. Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989).

Evidence of Jury Issues — No Directed Verdict: An insurer contended District Court Judge erred in not granting its motion for directed verdict so as to relieve it from extracontractual damages and for liability on its implied duty of good faith and fair dealing. A motion for directed verdict is properly granted only in the complete absence of any evidence to warrant submission to the jury. Had the insurer relied on admissible circumstantial evidence and promptly denied the claim, the Supreme Court would have been constrained to hold that the insured was not entitled to extracontractual or punitive damages. However, the court found at least eight elements in the handling of the claim that made a jury issue of whether the insurer breached its duty of fair dealing. Noting that the jury had been properly instructed on the issue of good faith, no error was found in denying the motion for directed verdict. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986), followed in Head v. Cent. Reserve Life of N. America Ins. Co., 256 M 188, 845 P2d 735, 50 St. Rep. 20 (1993).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Court Control Over Jury Verdicts, Hebert, 15 Mont. L. Rev. 111 (1954).

Rule 50(a). Judgment as a matter of law.

Advisory Committee Note

ADVISORY COMMITTEE'S NOTE TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to members of the jury.

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform the rule to the 1991 amendments of the Federal Rule.

Compiler's Comments

1999 Amendment: In (1) after "court may" inserted "determine the issue against that party and may",substituted "with respect to a claim or defense" for "on any claim, counterclaim, cross-claim, or third party claim", and after "maintained" inserted "or defeated"; and made minor changes in style. Amendment effective June 7, 1999.

1993 Amendment: Substituted present text concerning judgment as a matter of law for former text that read: "A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury."

Amendment — Identity With Federal Rule: The amendment of this rule in 1967 inserting the last sentence made the rule identical to the Federal Rule, as amended in 1963. As of May 1, 1990, this rule was still identical to the Federal Rule.

Case Notes

General 844
Motion Properly Granted 851
Motion Properly Denied 852

GENERAL

Failure to Instruct Jury on Greater Duty of Care in Situation of Greater Danger — Reversible Error: The Schuffs were injured while riding in Jackson's boat when Jackson failed to negotiate a submerged rock formation that he knew was there. Jackson admitted error during operation of the boat but maintained that his conduct nevertheless conformed to that of an ordinary prudent boater under the same or similar circumstances. The jury found that Jackson was not negligent, and the Schuffs appealed. The Supreme Court agreed. The fact that Jackson admitted error did not establish negligence per se. Evidence was sufficient for the jury to find that Jackson was operating the boat in a manner consistent with other ordinarily prudent boaters under the same circumstances. Further, the Schuffs failed to timely object to Jackson's interjection of the defenses of unavoidable accident and assumption of risk, so motion for a new trial was properly denied on those grounds. However, the Supreme Court found that the jury instructions did not include information regarding the possible greater duty of care in situations in which the danger is known to be greater or on Jackson's statutory duty not to operate the boat at a speed greater than would permit stopping the boat within an assured clear distance. Failure to properly instruct the jury was prejudicial error, so the case was remanded for a new trial. Schuff v. Jackson, 2002 MT 215, 311 M 312, 55 P3d 387 (2002), followed in Dale v. Three Rivers Tel. Co-ops, Inc., 2004 MT 74, 320 M 401, 87 P3d 489 (2004).

No Complete Absence of Credible Evidence to Support Jury Award of Damages in Wrongful Discharge Case — Denial of Motion for Judgment as Matter of Law Proper: A jury awarded Casiano damages for wrongful discharge from employment. Defendant employer moved for judgment as a matter of law or a new trial on grounds that the damage award was based on the assumption that Casiano would have remained employed for 4 years had he not been wrongfully discharged, while uncontroverted evidence at trial showed that Casiano would have been laid off with all other hourly employees at the end of a particular construction project. Casiano asserted that contradictory evidence was presented regarding whether employment would have continued after the project was completed. In its order, the District Court agreed with defendant, but nevertheless denied the motion because it could not be said that there was a complete

absence of credible evidence to support the jury's verdict. The Supreme Court agreed and affirmed. Casiano v. Greenway Enterprises, Inc., 2002 MT 93, 309 M 358, 47 P3d 432 (2002).

Erroneous Conclusion That Elements of Malicious Prosecution by State Not Established — Judgment as Matter of Law Improper: Plaintiffs were cited by the state for various water quality violations related to their public swimming pools, drinking water, and discharge from a sewage lagoon. The charges were ultimately dropped, and both plaintiffs filed separate actions that were settled, except for plaintiffs' malicious prosecution claims against the state, which were joined for trial by jury. At the close of plaintiffs' case, the state's motion for judgment as a matter of law was granted, so plaintiffs appealed. As set out in Orser v. St., 178 M 126, 582 P2d 1227 (1978), in a civil action for malicious prosecution, plaintiff must introduce sufficient proof of the following elements: (1) a judicial proceeding has been commenced and prosecuted against the plaintiff; (2) the defendant was responsible for litigating, prosecuting, or continuing the proceeding; (3) there is lack of probable cause for the defendant's acts; (4) the defendant was actuated by malice; (5) the proceeding terminated in favor of the plaintiff; and (6) the plaintiff suffered damages. Here, the District Court found that plaintiffs had not met their burden of proof regarding elements three, four, and five. The Supreme Court examined each of those elements—lack of probable cause, malice, and favorable termination of the underlying suit—and concluded that the elements were met, warranting reversal for trial on the merits. Judgment as a matter of law averts trial by jury and is proper only in rare cases when undisputed evidence admits of only one conclusion. Although the proceedings to date in this case did not demonstrate guilt or innocence, plaintiffs nevertheless made out a prima facie case that warranted jury determination. Plouffe v. Dept. of Public Health and Human Services, 2002 MT 64, 309 M 184, 45 P3d 10 (2002), following McGuire v. Armitage, 184 M 407, 603 P2d 253 (1979), Miller v. Watkins, 200 M 455, 653 P2d 126 (1982), and Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995).

Sufficient Evidence That Damages Not Result of State Negligence to Submit Case to Jury — Judgment as Matter of Law Not Appropriate: Pula sued in federal court, alleging negligence against the city of Chinook, Blaine County, three Chinook police officers, the County Sheriff, and the state, related to an incident of rape of Pula by another inmate while Pula was incarcerated in Blaine County jail. All the claims were settled except the claim against the state, which was dismissed and subsequently refiled in state District Court. At trial, Pula moved for judgment as a matter of law, contending that the state presented no admissible evidence to counter the claims of duty, breach, causation, and damages. The District Court denied the motion and sent the case to the jury. The jury found that the state was negligent, but that its negligence was not the cause of Pula's injuries. Pula appealed the denial of the motion for judgment as a matter of law, but the Supreme Court affirmed. The state presented substantial evidence that the damages suffered by Pula were not the result of the state's negligent acts or omissions, and the evidence was sufficient to submit the case to the jury, so judgment as a matter of law was not appropriate. Pula v. St., 2002 MT 9, 308 M 122, 40 P3d 364 (2002).

Termination of Employment for Legitimate Business Reasons Insufficient Basis for Judgment as Matter of Law: As set out in Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725, 55 St. Rep. 541 (1998), a motion for judgment as a matter of law may be granted only if it appears that a party could not prevail upon any view of the evidence, including legitimate references that can be drawn from the evidence, and there is a complete absence of any evidence to warrant submission to a jury. In this case, an employer maintained that its employee was terminated for legitimate business reasons and evidence existed to support that contention, but that did not constitute a sufficient basis for judgment as a matter of law in light of other evidence submitted by the employee tending to show that the termination was not for legitimate business reasons. Denial of the motion for judgment as a matter of law was proper. Braulick v. Hathaway Meats, Inc., 1999 MT 57, 294 M 1, 980 P2d 1, 56 St. Rep. 241 (1999).

Agricultural Lease — Failure to Pay Lease Price for Grain Produced — No Evidence of Conversion — Judgment as Matter of Law Properly Granted: The Schumachers leased property that they owned to Stephens under an agricultural lease. The lease required Stephens to pay the Schumachers $40,000 plus one-third of the proceeds of the sale of a crop if the value of the crop exceeded $120,000. For 1993, Stephens paid the Schumachers the required $40,000 but contended that no additional money was due to the Schumachers because one-third of the total crop receipts was less than the $43,000 (the lease price plus an additional $3,000 advance for the 1994 crop year) that Stephens had already paid. The Schumachers sued, alleging conversion and breach of contract and contending that Stephens actually grew more grain than he claimed. The District Court granted Stephens' motion for judgment as a matter of law on the conversion claims. The Supreme Court reviewed the record, including Federal Crop Insurance reports, testimony by others who had been on the property, reports on the amount of grain in the grain

bins used by Stephens, testimony by the Schumachers' neighbors, and other testimony, and found that the quantum of evidence showing that the actual amount of grain produced was, as Stephens claimed, overwhelming and would have required the jury to engage in speculation if it were to hold otherwise. The Supreme Court said that even considering the evidence in the light most favorable to the Schumachers, the jury would have had to go beyond reasonable and legitimate inferences to find in the Schumachers' favor and that the Schumachers did not present any evidence that Stephens produced any additional grain, that he exercised any dominion or control over any additional grain, or that the Schumachers were damaged by that unauthorized dominion. For these reasons, the Supreme Court affirmed the judgment as a matter of law granted by the District Court. Schumacher v. Stephens, 1998 MT 58, 288 M 115, 956 P2d 76, 55 St. Rep. 247 (1998).

Absence of Proof of Open Range or Fenced Highway — Directed Verdict Improper: Indendi hit a horse on Highway 84, killing the animal, sustaining personal injuries, and totaling her vehicle. She alleged negligence on the part of the horse owner as well as violations of fencing and livestock herding laws and open-range exceptions. The horse owner counterclaimed for loss of the horse. The District Court directed a verdict in favor of the horse owner. A directed verdict may be granted only when it appears that the nonmoving party cannot recover on any view of the evidence, including the legitimate inferences drawn from that evidence. Absent proof that the land was open range and that Highway 84 was a fenced highway, it was improper for the court to direct a verdict premised on the horse owner's satisfaction of the duty exclusion in 60-7-202(2). Indendi v. Workman, 272 M 64, 899 P2d 1085, 52 St. Rep. 644 (1995), following Ambrogini v. Todd, 197 M 111, 642 P2d 1013 (1982).

Civil Rights Action for Deprivation of Medical Attention — Directed Verdict Properly Given: Joshua Lloyd suffered a seizure and died after being held by the Flathead County Sheriff for emergency detention. Buhr, Joshua's personal representative, sued the county, the Sheriff, and others under 42 U.S.C. 1983 for causing Joshua's death by failing to give medical attention. Buhr claimed that the county had adopted a "hands-off" policy that evidenced indifference to the health and welfare of persons, such as Joshua, in the custody of the county detention center. The District Court directed a verdict against Joshua's estate. Citing Canton v. Harris, 489 US 378 (1989), the Supreme Court held that there was insufficient evidence that the county had adopted a policy of indifference to the constitutional rights of Joshua and persons like him. The evidence at trial showed that the "hands-off" policy did not mean that the county was deliberately indifferent to the medical needs of persons held in a soft cell because the policy did not mean that medical attention would not be summoned when it was needed. The directed verdict was therefore properly granted. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Civil Rights Action for Excessive Use of Force — Directed Verdict Properly Given: Joshua Lloyd suffered a seizure and died after being held by the Flathead County Sheriff for emergency detention. Buhr, Joshua's personal representative, sued the county, the Sheriff, and others under 42 U.S.C. 1983 for excessive use of force in placing Joshua in the county detention facility. Buhr claimed that the county had adopted a policy requiring a report on excessive use of force and that the policy did not define "excessive force". Buhr alleged that it was this policy that led to the violation of Joshua's constitutional rights. The District Court directed a verdict against Joshua's estate. Citing Oklahoma City v. Tuttle, 471 US 808 (1985), the Supreme Court held that there was insufficient evidence that the county had adopted a policy of indifference to the constitutional rights of Joshua and persons like him. The evidence at trial was of only one alleged incident involving excessive force, and under Tuttle, one incident is insufficient to demonstrate a policy of official indifference by the county. The directed verdict was therefore properly granted. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Good Cause — Sufficient Evidence of Wrongful Discharge to Preclude Directed Verdict: Evidence that employee was performing a job satisfactorily when discharged provided a possible motive for termination for other than good cause, warranting submission of a wrongful discharge claim to the jury and precluding a directed verdict. Guertin v. Moody's Market, Inc., 265 M 61, 874 P2d 710, 51 St. Rep. 407 (1994), following Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303 (1986).

Standard of Review of Directed Verdict: In reviewing a directed verdict, the Supreme Court considers only the evidence introduced by the party against whom the directed verdict is granted. If that evidence, when viewed in a light most favorable to the party, tends to establish the case made by the party's pleading, the court will reverse the directed verdict. The test commonly used to determine if the evidence is legally sufficient to withdraw cases and issues from the jury is whether reasonable persons could draw different conclusions from the evidence.

Riley v. Am. Honda Motor Co., Inc., 259 M 128, 855 P2d 196, 50 St. Rep. 714 (1993), followed in Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996). See also Boehm v. Alanon Club, 222 M 373, 722 P2d 1160 (1986), and Hauck v. Seright, 1998 MT 198, 290 M 309, 964 P2d 749, 55 St. Rep. 838 (1998).

Evidence of Negligence in County Jail Sufficient — Motion for Directed Verdict Properly Denied — Jury Verdict Upheld: The Supreme Court held that there was sufficient evidence showing that the county breached its duty owed to Moralli, a prisoner in the Lake County jail, who slipped on a wet floor and injured her back. There was also sufficient evidence of causation and damages. Because there was sufficient evidence in the record from which the jury could make the findings that it did, the jury's verdict is also binding upon the court. Moralli v. Lake County, 255 M 23, 839 P2d 1287, 49 St. Rep. 872 (1992).

Refusal to Give Jury Instructions Not Error in Light of Directed Verdict: The lower court entered a directed verdict finding one of the defendants in a personal injury case not liable. Buskirk's attorney alleged that the trial court erred in not submitting certain jury instructions pertaining to the individual found not liable by the directed verdict. The Supreme Court held that it was not error to refuse to give the instructions in light of the directed verdict. Buskirk v. Nelson, 250 M 92, 818 P2d 375, 48 St. Rep. 864 (1991).

Standard of Review of Denial of Motion for Directed Verdict: When reviewing the denial of a motion for directed verdict, only substantial evidence in the record supporting the jury's finding is required. The conviction cannot be overturned if evidence, when viewed in a light most favorable to the prosecution, would allow a rational trier of fact to find essential elements of the crime beyond a reasonable doubt. The weight of evidence and credibility of witnesses are exclusively within the province of the jury. St. v. Laverdure, 241 M 135, 785 P2d 718, 47 St. Rep. 142 (1990), followed in Nelson v. Flathead Valley Transit, 251 M 269, 824 P2d 263, 49 St. Rep. 58 (1992), and in St. v. Haskins, 255 M 202, 841 P2d 542, 49 St. Rep. 922 (1992). The Nelson standard was applied in Okland v. Wolf, 258 M 35, 850 P2d 302, 50 St. Rep. 412 (1993).

Question of Contributory Negligence in Automobile Accident — Directed Verdict Inappropriate: Relying on the holding in Reed v. Little, 209 M 199, 680 P2d 937 (1984), that the defense of contributory negligence on the plaintiff's part is available to a defendant who has violated a traffic statute, the Supreme Court reversed the grant of a directed verdict in favor of plaintiff because reasonable persons could differ as to conclusions drawn from the evidence relating to the accident. The question should have been submitted to the jury and was inappropriate for a directed verdict. Hart-Anderson v. Hauck, 239 M 444, 781 P2d 1116, 46 St. Rep. 1817 (1989), followed in Ryan v. Bozeman, 279 M 507, 928 P2d 228, 53 St. Rep. 1258 (1996). Ryan was followed in Schumacher v. Stephens, 1998 MT 58, 288 M 115, 956 P2d 76, 55 St. Rep. 247 (1998).

Evidence of Fraud — Support for Jury Verdict: In this action involving the sale of commercial real estate, there was sufficient evidence to support submitting the issue of the seller's fraud to the jury and to support the jury's verdict against the seller. The trial court did not err in denying the seller's motion for a directed verdict and for a judgment notwithstanding the verdict. Zugg v. Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989).

Sale of Real Estate — Motion Improperly Denied: In this action involving the sale of commercial real estate, the plaintiff purchasers relied upon the realtor's representations concerning the property because he held himself out as an experienced investment analyst. The realtor did not try to confirm the seller's representations concerning the property. The purchasers provided sufficient evidence of the realtor's negligence and constructive fraud to require that the issues be presented to the jury. The trial court erred in granting a directed verdict as to the realtor. Zugg v. Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989).

Questions of Fraud Precluding Directed Verdict and Judgment Notwithstanding the Verdict: Because questions of actual or constructive fraud existed requiring submission of facts to the jury, the District Court did not err in denying plaintiff's motion for directed verdict and defendant's motion for judgment notwithstanding the verdict. Mont. Bank of Red Lodge v. Lightfield, 237 M 41, 771 P2d 571, 46 St. Rep. 605 (1989).

Fire Caused by Poorly Maintained Outside Power Line — No Directed Verdict: Plaintiff brought an action against the power company for negligently inspecting and maintaining a power line to a building, resulting in a fire that destroyed the building. A directed verdict after the close of plaintiff's case was properly denied when an expert testified that the power line caused the fire, a person who rented part of the building stated that on the day of the fire she saw a loose wire, and photographs showed that other power lines in the area appeared to be poorly maintained. Stout v. Mont. Power Co., 234 M 303, 762 P2d 875, 45 St. Rep. 1926 (1988).

Evidence of Jury Issues — No Directed Verdict: An insurer contended District Court Judge erred in not granting its motion for directed verdict so as to relieve it from extracontractual damages and for liability on its implied duty of good faith and fair dealing. A motion for directed verdict is properly granted only in the complete absence of any evidence to warrant submission to the jury. Had the insurer relied on admissible circumstantial evidence and promptly denied the claim, the Supreme Court would have been constrained to hold that the insured was not entitled to extracontractual or punative damages. However, the court found at least eight elements in the handling of the claim that made a jury issue of whether the insurer breached its duty of fair dealing. Noting that the jury had been properly instructed on the issue of good faith, no error was found in denying the motion for directed verdict. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

False Representation as Actual Fraud — No Directed Verdict: Defendants contended that plaintiffs' evidence was insufficient to establish a false representation or justifiable reliance on the representation and that therefore defendants' motions for a directed verdict were improperly denied. The Supreme Court noted that a prospectus given to plaintiff, McGregor, contained financial statements which would be misleading to someone not knowledgeable in accounting and that a jury could find that false representations were made on this evidence. The court found that McGregor adequately investigated the business and reasonably relied on defendants' representations. The Supreme Court found no error in the District Court's failure to direct a verdict for defendants on the claim of actual fraud. McGregor v. Cushman/Mommer, 220 M 98, 714 P2d 536, 43 St. Rep. 206 (1986).

Defendants' Obstruction of Easement Unreasonable — Counterclaim for Damages Stricken: After concluding that the defendants' obstruction were an unreasonable interference with a right-of-way easement granted to plaintiffs, the District Court properly withdrew from the jury's consideration the defendants' counterclaim for damages. The standard of review for removal of an issue from jury consideration is the same as that of a directed verdict, as stated in Dahl v. Petroleum Geophysical Co., 38 St. Rep. 1474 (1981); i.e., an issue should not be withdrawn from the jury unless the conclusions from the facts advanced by the moving party follow necessarily, as a matter of law, that recovery cannot be had under any view which can be drawn reasonably from the facts which the evidence tends to establish. Flynn v. Siren, 219 M 359, 711 P2d 1371, 43 St. Rep. 10 (1986).

Evidence — When Sufficient to Support Verdict: Plaintiff appealed from jury verdict in favor of defendant, alleging the evidence did not support the verdict. The Supreme Court held that in order to overturn the verdict on the basis of insufficient evidence, it must find plaintiff entitled to judgment as a matter of law, and that there was insufficient evidence to warrant submitting the case to a jury. Here the court found credible evidence supporting a verdict either way and considered itself without power to set aside the decision of the trier of fact as a matter of law. The District Court properly denied plaintiff's motions for directed verdict and judgment notwithstanding the verdict. Gunlock v. W. Equip. Co., 219 M 112, 710 P2d 714, 42 St. Rep. 1882 (1985), followed in Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

When Properly Granted — General Tests:

In considering a motion for a directed verdict or for a judgment notwithstanding the verdict, the District Court must view the evidence in a light most favorable to the opposing party and deny the motion if a prima facie case is made. A judgment notwithstanding the verdict cannot be granted if there is a substantial conflict in the evidence. Like any form of directed verdict, it rests on a finding that the case of the opposing party is unsupported in some necessary particular. Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985), followed in Barrows v. Barrows, 256 M 78, 844 P2d 119, 49 St. Rep. 1145 (1992), and in Riley v. Am. Honda Motor Co., Inc., 259 M 128, 855 P2d 196, 50 St. Rep. 714 (1993).

A motion for a directed verdict or for judgment notwithstanding the verdict is properly granted only in the complete absence of any evidence to warrant submission to the jury, and all inferences must be considered in the light most favorable to the opposing party. This compels a trial court to exercise the greatest self-restraint in interfering with the constitutionally mandated processes of jury decision. Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319, 39 St. Rep. 1565 (1982). See also Zugg v. Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989), Kestell v. Heritage Health Care Corp., 259 M 518, 858 P2d 3, 50 St. Rep. 919 (1993), and Schumacher v. Stephens, 1998 MT 58, 288 M 115, 956 P2d 76, 55 St. Rep. 247 (1998).

Conflicting Evidence on Cause of Death — Motion Properly Denied: In a medical malpractice action, the plaintiff moved for a directed verdict on the basis that the defendant's negligence was the legal cause of the decedent's death. However, because there was conflicting evidence on the

issue of cause of death, the trial court correctly denied the plaintiff's motion. Rudeck v. Wright, 218 M 41, 709 P2d 621, 42 St. Rep. 1380 (1985).

Possible Differing Conclusions — No Directed Verdict: Plaintiff applied to defendant for health coverage for himself and his family. He met with an agent who filled out the application, which was signed by both parties. Plaintiff was not given a copy of the application or contract and was not advised that the application was part of the contract. The application was accepted. The family contracted medical bills which defendant declined to pay, claiming that the bills stemmed from "preexisting conditions" not covered by the contract. Defendant then unilaterally canceled the contract, claiming plaintiff had misrepresented his family's health in the application, and plaintiff filed suit. Defendant moved for a directed verdict on the issues of actual and constructive fraud and the fact of bad faith, which motion was denied. If the representations that induced the plaintiff to enter the contract were false, he would have a case in fraud. If the contract was breached, a cause of action may sound in the tort, although it arises out of a breach of contract, if the defaulting party by breaching the contract also breaches the duty to act in good faith owed to the other party independently of the contract. The evidence viewed in a light most favorable to plaintiffs indicated reasonable men could differ as to the conclusions drawn from the evidence. Therefore, the directed verdict was properly denied. Weber v. Blue Cross of Mont., 196 M 454, 643 P2d 198, 39 St. Rep. 245 (1982).

Probable Cause in Malicious Prosecution Action: Lack of probable cause, an essential element of a malicious prosecution action, is a fact question for the jury's determination when the evidence is conflicting and is a question of law for the court only when the evidence is undisputed and allows only one conclusion on the issue; and a directed verdict is error when the evidence, including reasonable inferences, is susceptible to different conclusions by reasonable men when viewed in the light most favorable to the party opposing the directed verdict. Reece v. Pierce Flooring, 194 M 91, 634 P2d 640, 38 St. Rep. 1655 (1981).

Grounds for Granting Motion for Directed Verdict — Invasion of Privacy Action: Where respondent telephone company conducted a recording on a party line for a period of 6 days for the alleged purpose of protecting the quality of its services, the District Court erred in granting a motion for a directed verdict filed by respondent at the close of appellant's case. Considering the nature and extent of the recording and comparing it to recordings in other cases in which the recordings are allowed only in limited circumstances, namely, where telephone fraud is at issue, reasonable men could draw different conclusions as to whether the recording could be classified in such a way as to be allowable under the federal statute; thus the directed verdict should not have been granted. Sistok v. NW. Tel. Sys., Inc., 189 M 82, 615 P2d 176 (1980), citing Lawlor v. Flathead County, 177 M 508, 582 P2d 751 (1978).

Actual and Constructive Fraud — Motion Properly Denied: When applying the standard for ruling on a motion for directed verdict, the Supreme Court concluded that the evidence presented was entitled to jury consideration and therefore the directed verdict was properly denied. Harrington v. Holiday Rambler Corp., 176 M 37, 575 P2d 578 (1978).

Motion to Dismiss in Jury Trial — Treated as Motion for Directed Verdict: When a motion to dismiss was inadvertently granted in a jury trial, but both parties recognized the error and treated it as a motion for directed verdict, then the Supreme Court utilized rules for granting a motion for directed verdict in its review. In this case the District Court erred since the evidence clearly presents questions of fact and precludes judgment as a matter of law. Sant v. Baril, 173 M 14, 566 P2d 48 (1977).

Contract Action — Motion Properly Denied: Where the plaintiff construction company completed construction of a sanitary sewer system and sewage lagoon for the defendant city and subsequently brought an action to enforce payments under the contract, the court properly denied the defendant's motion for a directed verdict, as the evidence of the nonmoving party was substantial enough to sustain the jury's verdict. Brothers v. Virginia City, 171 M 352, 558 P2d 464 (1976).

Jury Question — Intersection Collision: The law does not favor directed verdicts. A case presenting facts showing the defendant was speeding, that he had been drinking, and that he did not see the plaintiff's vehicle until immediately before a collision with the plaintiff's car which had turned onto the street in which the defendant was driving, was a proper one for presentation to a jury since there was sufficient evidence to find the defendant's conduct was the proximate cause of the collision. Sweet v. Edmonds, 171 M 106, 555 P2d 504 (1976), followed in Spinler v. Allen, 1999 MT 160, 295 M 139, 983 P2d 348, 56 St. Rep. 632 (1999).

Negligence of Rodeo Company — Motion Properly Denied: Although rodeo company was the owner of dangerous animals, it was not an insurer, and trial court correctly denied directed

verdict against rodeo on issue of liability where show was produced in facilities erected and maintained by county. Ross v. Golden St. Rodeo Co., 165 M 337, 530 P2d 1166 (1974).

Breach of Employment Contract: Statement by office secretary of local union to its executive officer that latter had been removed from office was not the type of information which would lead a prudent person to believe she had been discharged, and local union was entitled to directed verdict in officer's action for breach of employment contract where there was no evidence that officer had in fact been discharged, she was not subject to discharge at will and she had never talked to anyone in authority to confirm her discharge. Hannifin v. Retail Clerks Int'l Ass'n, 162 M 170, 511 P2d 982 (1973).

Motions — Directed Verdict — New Trial — Relationship: Motions for a new trial and for a directed verdict raise the same question. They both question the sufficiency of the evidence to support a verdict. Appeal will be accepted based upon insufficiency of the evidence notwithstanding failure to move for a new trial if motion was made for directed verdict. Davis v. Davis, 159 M 355, 497 P2d 315 (1972).

Directed Verdict Reversed — Undue Influence: Court erred in directing verdict. There were many factual issues regarding alleged undue influence upon testator, and plaintiffs should have had an opportunity to place the issues before the jury. Hall v. Milkovich, 158 M 438, 492 P2d 1388 (1972).

Motion Viewed in Light Most Favorable to Party Directed Against: The court must view motions for directed verdict and for new trials in light most favorable to the party against whom the motion is directed. Dieruf v. Gallaher, 156 M 440, 481 P2d 322 (1971).

Both Parties Moving for Directed Verdict — Effect: The old rule that jury trial was waived when both parties moved for a directed verdict without requesting a particular factual issue be determined by a jury was abolished by this rule. Court erred in directing verdict in view of the fact situation at the time of the motions. Borgmann v. Diehl, 155 M 458, 473 P2d 529 (1970).

Burden of Proof: Denial of a motion for a directed verdict will not be presumed error. The moving party must show that error was committed. Fuchs v. Huether, 154 M 11, 459 P2d 689 (1969); Laughnan v. Sorenson, 139 M 531, 366 P2d 433 (1961); Bouma v. Bynum Irrigation District, 139 M 360, 364 P2d 47 (1961).

Attractive Nuisance — Motion Improperly Denied: Verdict for plaintiff based upon attractive nuisance theory was reversed. Directed verdict for defendant should have been granted. Gagnier v. Curran Constr. Co., 151 M 468, 443 P2d 894 (1968).

Circumstances Under Which Motion Should Be Granted: Denial of motion for directed verdict, made by lessor of destroyed building in suit by lessee claiming that premises were repairable, was cause for reversal where, viewing evidence most favorable to plaintiff lessee and considering as proven everything which evidence tended to prove, reasonable man could come to no other conclusion but that building involved was destroyed. Solich v. Hale, 150 M 358, 435 P2d 883 (1967).

Res Ipsa Case — Motion Improperly Granted at End of Plaintiff's Case: Court erred in granting plaintiff's motion for directed verdict before defendant had opportunity to present his case, where defendant was precluded from offering evidence to rebut presumption of negligence raised by plaintiff's case in chief based on doctrine of res ipsa loquitur, notwithstanding fact that plaintiff had examined all witnesses to accident during his case in chief. Baker v. Rental Serv. Co., 150 M 166, 432 P2d 624 (1967).

Filing Motion for Disqualification Before Motion for New Trial: A judge may be disqualified after return of verdict but before new trial motion was made. State ex rel. Bellon v. District Court, 140 M 447, 373 P2d 314 (1962); Russell v. Sunburst Ref. Co., 83 M 452, 272 P 998 (1928); Hill v. Nelson Coal Co., 40 M 1, 104 P 876 (1909); State ex rel. Carelton v. District Court, 33 M 138, 82 P 789 (1905). But see State ex rel. Cline v. District Court, 142 M 278, 384 P2d 490 (1963); State ex rel. Peery v. District Court, 145 M 287, 400 P2d 648 (1965), where the doctrine was criticized and the statute was considered improperly construed when disqualification is permitted pending a motion for a new trial. See State ex rel. Wilson v. District Court, 143 M 543, 393 P2d 39 (1964), where the Supreme Court refused to follow the interpretation given the civil statute and declined to permit the disqualification of a judge in a criminal case following verdict and before hearing upon a motion for a new trial.

Weighing of Evidence Improper: On motion for directed verdict the court may not pass upon the weight and sufficiency of the evidence where it is in sharp conflict upon a vital issue and there is nothing inherently improbable or unbelievable in plaintiff's testimony. Durocher v. Myers, 84 M 225, 274 P 1062 (1929).

MOTION PROPERLY GRANTED

Dismissal of Counterclaims by Summary Judgment Proper When All Prior Claims Resolved by Memorandum of Understanding: Defendant filed several counterclaims stemming from an agricultural lease. The District Court held that the underlying dispute regarding the parties' obligations applicable to the lease was settled by a valid and enforceable memorandum of understanding (MOU), and dismissed the counterclaims as a matter of law. Defendant appealed, but the Supreme Court affirmed. The MOU was a valid unconditional resolution of the parties' claims that effectively released any claims of the signatories, and the District Court did not err in summarily dismissing the counterclaims. Bar OK Ranch, Co. v. Ehlert, 2002 MT 12, 308 M 140, 40 P3d 378 (2002).

No Duty of Volunteer Fire Department to Direct Traffic During "Boot Drive" Fundraiser: The Laurel Volunteer Fire Department sponsored a Fourth of July fireworks display for the benefit of the community, which included a "boot drive" fundraiser to help raise money for the display. The fundraiser entailed fire department personnel standing near the edge of the road while holding a cowboy boot and inviting people driving by to contribute by throwing money or checks into the boot. Two fire department personnel conducted a boot drive at an interstate highway exit ramp on the night of July 4, 1994. Jacobs and Coates exited the freeway and got in line behind a string of slow-moving vehicles, slowly advancing and then stopping each time that a vehicle went through the stop sign. Bruce exited the freeway behind Jacobs and Coates but did not notice the line of cars until it was too late to avoid a collision. Jacobs and Coates were injured and sued the fire department, claiming that the boot drive caused traffic to build up on the exit ramp and that as the sponsors of the fireworks display, the fire department owed a duty to warn people about and manage the traffic. The District Court granted the fire department's motion in limine and dismissed the action as a matter of law, concluding that no causation existed between the accident and the boot drive. Jacobs and Coates appealed, but the Supreme Court affirmed. Citing Jackson v. St., 1998 MT 46, 287 M 473, 956 P2d 35 (1998), the court noted that a judicial determination of duty involves various policy considerations, including: (1) the moral blame attributable to the defendant's conduct; (2) the prevention of future harm; (3) the extent of the burden placed on the defendant; (4) the consequences to the public of imposing that duty; and (5) the availability of insurance for the risk involved. Although a duty may have been owed by the fire department to ensure safe passage at the event itself, the fire department had no duty to ensure that every spectator arrived safely at the event. The fire department did not spill anything or block traffic on the freeway, nor did it create a hazardous condition for travelers coming to and from fire department property. Thus, after evaluating the factors regarding duty, the Supreme Court found no duty owed by the fire department to regulate traffic on or around the interstate highway. Further, in order to sustain a negligence claim, Jacobs and Coates needed to prove not only negligence on the part of the fire department but also a causal relationship between that negligence and the injury. Here, Jacobs and Coates offered no evidence of a causal connection between the accident and the boot drive. Neither of them saw fire department personnel at the off ramp or soliciting donations prior to the accident, no witness testified to any negligent behavior by the fire department personnel who conducted the boot drive, and Jacobs and Coates did not even produce a witness who saw the boot drive at all during that evening. Dismissal as a matter of law was therefore proper. Jacobs v. Laurel Volunteer Fire Dept., 2001 MT 98, 305 M 225, 26 P3d 730 (2001).

Business Retaliation — Lack of Evidence as to Emotional Distress of Minor Child: David, his wife Susan, their minor child, and the parties' defunct business sued Pierce Flooring and others for damages stemming from criminal acts taken against the plaintiffs' competing business. The District Court granted the defendants' motion for a directed verdict against the plaintiffs' minor child on the issue of emotional distress. The Supreme Court, after reviewing the record, held that the motion was correctly granted because there was no evidence that the child suffered any emotional distress from the actions taken against her parents. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Wrongful Discharge — Directed Verdict Proper as to Alleged Civil Rights Violations: Tyner sued the county for wrongful discharge and alleged violation of Tyner's civil rights. Tyner claimed that he was fired because he had run against one of the County Commissioners in the recent election and because he had criticized the handling of a county contract. The District Court granted a directed verdict on the alleged civil rights violations. The Supreme Court held that the directed verdict was proper because Tyner failed to link these activities to the discharge. Tyner v. Park County, 271 M 355, 897 P2d 202, 52 St. Rep. 507 (1995).

Dismissal of Breach of Good Faith and Fair Dealing Claims and Claims for Emotional Damages: The District Court properly directed verdict on claims of breach of the covenant of

good faith and fair dealing and for damages for emotional distress upon finding no evidence to support the claims of breach and upon failure of plaintiffs to establish a legally protected interest sufficient to warrant damages. Semenza v. Leitzke, 232 M 15, 754 P2d 509, 45 St. Rep. 829 (1988).

Expert Testimony Required in Legal Malpractice Case — Directed Verdict Proper: An attorney's standard of care depends on the skill and care ordinarily exercised by attorneys—a criteria that rarely falls within the common knowledge of lay persons. Therefore, expert testimony is required in a legal malpractice case. Absent such testimony, a directed verdict was proper. Carlson v. Morton, 229 M 234, 745 P2d 1133, 44 St. Rep. 1929 (1987), followed in Brown v. Small, 251 M 414, 825 P2d 1209, 49 St. Rep. 98 (1992), and Moore v. Does 1 to 25, 271 M 162, 895 P2d 209, 52 St. Rep. 399 (1995). See also Lorash v. Epstein, 236 M 21, 767 P2d 1335, 46 St. Rep. 151 (1989).

Plaintiff Not Negligent as a Matter of Law: A directed verdict was proper when no evidence was presented at the trial to prove that the defendant breached any duty which caused the damages complained of by the plaintiff. Robertson v. Hughes, 204 M 515, 668 P2d 1025, 40 St. Rep. 1041 (1983).

Directed Verdict in a Res Ipsa Case: It is proper for a District Court to grant a motion for a directed verdict in a res ipsa case if the inference of negligence is so strong that persons of reasonable minds could not reach differing conclusions as to the negligence of the defendant. Helmke v. Goff, 182 M 494, 597 P2d 1131 (1979).

Proof of Manufacturer Defect: The court did not err in granting defendants' motion for directed verdict when plaintiff failed to prove that the defect that caused an engine fire existed when the vehicle left the hands of the defendants, which existence is a necessary element in breach of implied warranty of merchantability, strict liability, and res ipsa loquitur legal theories. St. Paul Mercury Ins. Co. v. Jeep Corp. & Am. Motors Sales, 175 M 69, 572 P2d 204 (1977).

Improper Signaling: No basis exists for finding defendant negligent when plaintiff gave improper signal for maneuver which was a failure to yield right-of-way. Defendant's motion for a directed verdict was properly granted. Slagsvold v. Johnson, 168 M 490, 544 P2d 442 (1975).

Inaccurate Exhibits — Failure of Proof: In action for breach of contract, an exhibit of 123 pages of inaccurate information about all the deliveries made by the plaintiff was insufficient proof without supporting testimony, and directed verdict for defendant was proper. LaVelle v. Kenneally, 165 M 418, 529 P2d 788 (1974).

Negligence Action — Directed Verdict for Defendant Ordered: Notwithstanding jury verdict for plaintiff, directed verdict for defendant was ordered because plaintiff failed to set forth prima facie case proving negligence. Rogers v. Hilger Chevrolet Co., 155 M 1, 465 P2d 834 (1970); Fuchs v. Huether, 154 M 11, 459 P2d 689 (1969); Mang v. Eliasson, 153 M 431, 458 P2d 777 (1969).

Directed Verdict for Defendant Upheld — Negligence: Plaintiff failed to set forth prima facie case proving negligence. Therefore, court properly directed verdict for defendant. Jackson v. Dingwall Co., 145 M 127, 399 P2d 236 (1965).

Personal Injury — Failure of Prima Facie Case: Trial court properly granted directed verdict for defendant, employer and ranch foreman, where plaintiff, a ranch hand, was injured while riding atop a bobsled loaded with hay, since plaintiff failed to make out a prima facie case that tipping of bobsled was due to negligence. Jackson v. Dingwall Co., 145 M 127, 399 P2d 236 (1965).

MOTION PROPERLY DENIED

Judgment as Matter of Law Denied — Sufficient Evidence Presented to Support Jury Verdict: An insured brought an action against Deonier, an insurance agent, and Paul Revere Life Insurance Company (Revere) to recover benefits and damages after the insured's claim was denied on grounds of a preexisting condition, despite the incontestability clause in the policy. The agent cross-claimed against the company for indemnity and breach of fiduciary duty, contending that there was a significant amount of evidence that Revere planned to assert the Forman defense in Montana (see Mass. Cas. Ins. Co. v. Forman, 516 F2d 425 (5th Cir. 1975), in which an insurer asserted a legal defense to the incontestability clause based on its definition of sickness as excluding disabilities that manifested themselves prior to the date of issue of the policy) and that Revere's failure to inform Deonier of its intention to invoke the defense was a clear breach of Revere's duty to inform its agents of a risk of pecuniary loss from potential lawsuits. Revere asserted that pursuant to Doettl v. Colonial Life & Accident Ins. Co., 505 F. Supp. 127 (D.C. Mont. 1981), in which a Montana federal District Court endorsed the Forman defense, it had no reason to believe that its policy interpretation might be in violation of Montana

law and therefore did not breach its duty to inform its agents of risk of pecuniary loss. In the first Deonier case, Deonier & Associates v. Paul Revere Life Ins. Co., 2000 MT 238, 301 M 347, 9 P3d 622 (2000), the Supreme Court reversed the lower court's summary judgment in favor of Revere that held that there had not been a breach of fiduciary duty and remanded the case back to the lower court for a jury trial on the issue of liability and damages. The jury found for Deonier and awarded her $150,000 in compensatory damages and $1 million in punitive damages, which the trial court reduced to $375,000. The trial court denied Revere's motion for judgment as a matter of law that it had not breached its fiduciary duty. The Supreme Court affirmed on the basis that Deonier had presented evidence that Revere knew it would assert the Forman defense and that such an action might lead to pecuniary damages for its agents, and therefore there existed a legally sufficient evidentiary basis for a reasonable jury to find that a breach of fiduciary duty had occurred. Deonier & Associates v. Paul Revere Life Ins. Co., 2004 MT 297, 323 M 387, 101 P3d 742 (2004).

Sufficient Evidence to Support Jury Verdict Awarding Punitive Damages for Breach of Fiduciary Duty by Insurer in Dealings With Its Agent: An insured brought an action against Deonier, an insurance agent, and Paul Revere Life Insurance Company (Revere) to recover benefits and damages after the insured's claim was denied on grounds of a preexisting condition, despite the incontestability clause in the policy. The agent cross-claimed against the company for indemnity and breach of fiduciary duty, contending that there was a significant amount of evidence that Revere planned to assert the Forman defense in Montana (see Mass. Cas. Ins. Co. v. Forman, 516 F2d 425 (5th Cir. 1975), in which an insurer asserted a legal defense to the incontestability clause based on its definition of sickness as excluding disabilities that manifested themselves prior to the date of issue of the policy) and that Revere's failure to inform Deonier of its intention to invoke the defense was a clear breach of Revere's duty to inform its agents of a risk of pecuniary loss from potential lawsuits. Revere asserted that pursuant to Doettl v. Colonial Life & Accident Ins. Co., 505 F. Supp. 127 (D.C. Mont. 1981), in which a Montana federal District Court endorsed the Forman defense, it had no reason to believe that its policy interpretation might be in violation of Montana law and therefore did not breach its duty to inform its agents of risk of pecuniary loss. Revere argued that punitive damages were inappropriate as a matter of law because it was entitled to assert any defense, including the Forman defense, that had a reasonable basis in the law. Deonier countered by pointing out that she had introduced evidence that by 1994 when Revere first used the Forman defense in Montana, it knew that its selling agents had been sued in at least 20% of the previous lawsuits and the company nevertheless refused to inform its agents of the risk of pecuniary loss if Revere decided to assert that defense. The Supreme Court held that based on the evidence alone, it could conclude that there was a complete absence of any evidence that would justify submitting the issue of punitive damages to the jury and therefore the lower court did not err in denying the motion for judgment as a matter of law on punitive damages. Deonier & Associates v. Paul Revere Life Ins. Co., 2004 MT 297, 323 M 387, 101 P3d 742 (2004).

Collateral References

Trial *key* 167 through 181.

88 C.J.S. Trial §§431 through 483.

75A Am. Jur. 2d Trial §§857, 858, 914.

Consideration by trial court, in passing on motion for direction of verdict, of inadmissible hearsay evidence introduced without objection. 79 ALR 2d 914.

Motion by each party for directed verdict as waiving submission of fact questions to jury. 68 ALR 2d 300.

Rule 50(b). Renewal of motion for judgment after trial; alternative motion for new trial.

Commission and Advisory Committee Notes

COMMISSION NOTES

The rule is identical with the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.

This departs from the federal amendment in providing that the time limit for making a motion for judgment n.o.v. is 10 days after service of notice of entry of judgment, rather than 10 days after entry of judgment as provided in the federal amendment. This is consistent with the provisions of Rules 59(b) (time for motion for a new trial) and 52(b) (time for motion to amend findings by the court).

ADVISORY COMMITTEE'S NOTE
TO MAY 21, 1969, AMENDMENT

Explanation of change: A housekeeping change to conform with superseding section 93-5606, R. C. M. 1947 [superseded by Rule 59(d), M.R.Civ.P.], by the amendment of Rule 59.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform the rule to the 1991 amendments of the Federal Rule.

Compiler's Comments

1993 Amendment: In first sentence substituted "judgment as a matter of law" for "directed verdict"; at beginning of second sentence inserted "Such a motion may be renewed by service and filing" and at end deleted "a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict"; in third sentence, near beginning after "new trial", inserted "under Rule 59", after "joined with" substituted "a renewal of the motion for judgment as a matter of law" for "this motion", and near end substituted "requested" for "prayed for"; in fourth and fifth sentences, after "court may", inserted "in disposing of the renewed motion" and substituted "as a matter of law" for "as if the requested verdict had been directed"; and made minor changes in style.

Amendments — Identity With Federal Rule: The above commission note refers to the Federal Rule as it stood before a 1963 amendment thereof. The 1963 amendment changed the time specified in the second sentence of subdivision (b) for a motion for judgment notwithstanding the verdict from 10 days after reception of verdict to 10 days after entry of judgment. The 1963 amendment of the Federal Rule also added new subdivisions (c) and (d) to clarify and expedite the procedure for new trial or entry of judgment following the disposition of a motion for judgment notwithstanding the verdict and appellate proceedings thereon.

The amendment of September 7, 1965, added the second paragraph.

The amendment of September 29, 1967, substituted the present heading for "Reservation of decision on motion" and, in the second sentence of the first paragraph, substituted "Not later than 10 ... judgment" for "Within 10 days after the reception of a verdict".

The amendment of May 21, 1969, in the second paragraph, substituted "Rule 59 ... for new trial" for "Section 93-5606 of the 1947 Revised Codes of Montana in the case of motions for new trial".

As of May 1, 1990, the rule was identical to the Federal Rule, except that the second sentence of the Montana Rule measures "10 days after service of notice of entry of judgment" while the Federal Rule measures from time of entry of judgment, and the second paragraph of the Montana Rule regarding Rule 59 hearing and determination times does not appear in the Federal Rule.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Preservation of Right to Argue Sufficient Evidence of Negligence on Appeal From Judgment as Matter of Law: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found for the plaintiffs. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that the domestic violence statutes did not trigger mandatory legal duties upon the Sheriff regarding arrest and seizure. On appeal, the Sheriff argued that because plaintiffs did not specifically appeal from the District Court's refusal to instruct the jury that violations of the arrest and weapon seizure provisions of the domestic violence law were negligence per se, plaintiffs could not argue on appeal that

evidence that the statutes were violated supported the verdict. The Supreme Court examined the definitions of common-law negligence and negligence per se, noting that the jury was given the full panoply of instructions on common-law negligence and that despite the fact that negligence per se instructions were not given, plaintiffs nevertheless argued that violation of the statutes was evidence of negligence. Pursuant to Nehring v. LaCounte, 219 M 462, 712 P2d 1329 (1986), even if a violation of a statute does not constitute negligence per se, the violation may nonetheless be considered as evidence of negligence. Because plaintiffs appealed from the judgment as a matter of law, they preserved their right to argue on appeal that the jury had before it sufficient evidence of negligence. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004).

Substantial Evidence of Legal Duty of Sheriff to Protect Domestic Violence Victim to Preclude Judgment as Matter of Law: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found the Sheriff negligent and awarded plaintiffs $358,000. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that no special relationship existed between the victim and the Sheriff under the domestic violence statutes that would trigger a legal duty upon the Sheriff to protect the victim. On appeal, the Supreme Court noted that judgment as a matter of law may be granted only when it appears as a matter of law that a party could not prevail upon any view of the evidence, including legitimate inferences drawn from the evidence. Here, viewed in a light most favorable to plaintiffs, there was sufficient evidence from which the jury could conclude that the Sheriff was negligent in failing to comply with the mandatory notice provisions of the domestic violence law to preclude judgment as a matter of law, and the District Court was reversed. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004).

Judge's Answer to Jury Question Held Not External Influence — Juror Affidavits Not Proper — Motions to Change Verdict Denied: In a civil suit, the special verdict form contained question #5 that read: "Do you find by clear and convincing evidence that Defendants acted either fraudulently and or with malice?" This question was taken nearly verbatim from plaintiff's proposed verdict form except that the proposed form contained a slash ("/") between the "and" and "or" in the question. Plaintiff did not object to this clerical error at or prior to the time that the form was submitted to the jury. During jury deliberations, the jury submitted a question to the judge stating: "Do we have to differencateate [sic] Between [sic] fraud and malice in #5." The judge answered "No" to the jury question, and neither plaintiff nor defendants objected to the answer at the time. After the trial, plaintiff filed alternative posttrial motions requesting the court to order that the answer to question #5 be "Yes", to set aside the jury verdict on question #5, and to either enter judgment against defendant on the issue of punitive damages as a matter of law or grant a new trial on the issue of punitive damages. The motions were based on affidavits of eight jurors alleging mistake or confusion based on the court's "No" answer. The District Court denied the motions. The Supreme Court upheld the denial, determining that plaintiff waived her claims of error by failing to object to the special verdict form submitted to the jury; that based on the "invited error rule", plaintiff participated in the error by submitting the conjunctive-disjunctive question; and that the affidavits were not proper because the jury had not been subject to external influences. Sandman v. Farmers Ins. Exch., 1998 MT 286, 291 M 456, 969 P2d 277, 55 St. Rep. 1165 (1998).

Failure to Follow Uniform Building Code as Negligence Per Se — Denial of Judgment N.O.V. Reversed: Rosauers Supermarket undertook remodeling for which ALSC was the architect. As a change order to the remodeling, Rosauers asked that a walk-in freezer be removed and that the access door to a walkway over the freezer be closed off. Unknown to Rosauers and its employee, Pierce, the door was never closed off even though the freezer was removed. Pierce was injured when he fell through a false ceiling after stepping off the walkway, assuming that the freezer was still in place and that it would support him. After a jury verdict finding no negligence on the part of ALSC, Pierce moved for judgment N.O.V., which was denied by virtue of the fact that the District Court failed to grant the motion within 45 days. The Supreme Court found that ALSC had knowledge of the change order and knew that without the access door being blocked, the door and walkway would leave an unsafe condition after the freezer was removed. Citing Herbst v. Miller, 252 M 503, 830 P2d 1268 (1992), the Supreme Court also found that failure to place a guardrail around the walkway in accordance with the Uniform Building Code caused an unsafe condition in violation of the code, which constituted negligence per se on the part of ALSC. For this reason, the Supreme Court held that the District Court erred when it denied Pierce's motion for judgment N.O.V. by failing to grant the motion with 45 days. Pierce v. ALSC Architects, P.S., 270 M 97, 890 P2d 1254, 52 St. Rep. 93 (1995).

Denial of Motion for Judgment Notwithstanding the Verdict on Issue of Negligence When Dispute in Evidence Exists: The District Court properly denied various summary judgment motions and directed verdict motions because a dispute as to the evidence existed that necessarily forced the court to submit the case to the jury. The evidence was substantial enough for the jury to have resolved the conflict in the manner in which it did. Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158, 49 St. Rep. 473 (1992), followed in Fox Grain & Cattle Co. v. Maxwell, 267 M 528, 885 P2d 432, 51 St. Rep. 1136 (1994).

Ample Evidence to Support Jury Verdict — Judgment N.O.V. Improper:

The District Court did not err in denying motions for a directed verdict and for judgment notwithstanding the verdict when the facts rose to the level of substantial evidence to support the jury's verdict and when the evidence established a reasonable basis for which an honest difference of opinion could arise under the circumstances presented. Hash v. St., 247 M 497, 807 P2d 1363, 48 St. Rep. 277 (1991).

Because there was substantial credible evidence on which the jury could have rendered its verdict, the District Court should have deferred to that verdict. It should not have set aside the verdict solely because it chose to believe testimony different from that believed by the jury. Wilkerson v. School District, 216 M 203, 700 P2d 617, 42 St. Rep. 745 (1985).

Judgment N.O.V. Reversed — Jury Finding of Breach of Fiduciary Duty Possible: The lower court set aside an award against the bank on the basis that the facts did not support the jury's verdict. The Supreme Court ruled that the fact that the bank required the plaintiffs to hire a contractor who owed the bank money could support a finding of breach of the bank's fiduciary duty. First Sec. Bank of Glendive v. Gary, 245 M 394, 798 P2d 523, 47 St. Rep. 1646 (1990).

Criteria for Granting:

A motion for judgment notwithstanding the verdict may be granted only if it appears that the nonmoving party cannot recover upon any view of the evidence, including legitimate inferences to be drawn from it. Larson v. K-Mart Corp., 241 M 428, 787 P2d 361, 47 St. Rep. 415 (1990), followed in Nelson v. Flathead Valley Transit, 251 M 269, 824 P2d 263, 49 St. Rep. 58 (1992), followed in Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158, 49 St. Rep. 473 (1992), and in Kestell v. Heritage Health Care Corp., 259 M 518, 858 P2d 3, 50 St. Rep. 919 (1993). See also Fox Grain & Cattle Co. v. Maxwell, 267 M 528, 885 P2d 432, 51 St. Rep. 1136 (1994), Ryan v. Bozeman, 279 M 507, 928 P2d 228, 53 St. Rep. 1258 (1996), Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160, 55 St. Rep. 198 (1998), Cameron v. Mercer, 1998 MT 134, 289 M 172, 960 P2d 302, 55 St. Rep. 531 (1998), and Schuff v. Jackson, 2002 MT 215, 311 M 312, 55 P3d 387 (2002).

In considering a motion for a directed verdict or for a judgment notwithstanding the verdict, the District Court must view the evidence in a light most favorable to the opposing party and deny the motion if a prima facie case is made. A judgment notwithstanding the verdict cannot be granted if there is a substantial conflict in the evidence. Like any form of directed verdict, it rests on a finding that the case of the opposing party is unsupported in some necessary particular. Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985), followed in Rookhuizen v. Blain's Mobile Home Court, Inc., 236 M 7, 767 P2d 1331, 46 St. Rep. 139 (1989), Wiberg v. 17 Bar, Inc., 241 M 490, 788 P2d 292, 47 St. Rep. 429 (1990), Nelson v. Flathead Valley Transit, 251 M 269, 824 P2d 263, 49 St. Rep. 58 (1992), Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158, 49 St. Rep. 473 (1992), and in Barrows v. Barrows, 256 M 78, 844 P2d 119, 49 St. Rep. 1145 (1992). See also Fox Grain & Cattle Co. v. Maxwell, 267 M 528, 885 P2d 432, 51 St. Rep. 1136 (1994).

A motion for a directed verdict or for judgment notwithstanding the verdict is properly granted only in the complete absence of any evidence to warrant submission to the jury, and all inferences must be considered in the light most favorable to the opposing party. This compels a trial court to exercise the greatest self-restraint in interfering with the constitutionally mandated processes of jury decision. Jacques v. Mont. Nat'l Guard, 199 M 493, 649 P2d 1319, 39 St. Rep. 1565 (1982), followed in Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594, 40 St. Rep. 23 (1983), and Ryan v. Bozeman, 279 M 507, 928 P2d 228, 53 St. Rep. 1258 (1996). See also Walters v. Getter, 232 M 196, 755 P2d 574, 45 St. Rep. 986 (1988), Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160, 55 St. Rep. 198 (1998), Schumacher v. Stephens, 1998 MT 58, 288 M 115, 956 P2d 76, 55 St. Rep. 247 (1998), Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725, 55 St. Rep. 541 (1998), and Schuff v. Jackson, 2002 MT 215, 311 M 312, 55 P3d 387 (2002).

The question involved in whether a judgment notwithstanding the verdict was proper is not whether there was sufficient evidence to support the court's order. A motion for such judgment may be granted only when, without weighing the credibility of the evidence, there can be but one

reasonable conclusion as to the proper judgment. Yetter v. Kennedy, 175 M 1, 571 P2d 1152 (1977).

Evidence of Fraud — Support for Jury Verdict: In this action involving the sale of commercial real estate, there was sufficient evidence to support submitting the issue of the seller's fraud to the jury and to support the jury's verdict against the seller. The trial court did not err in denying the seller's motion for a directed verdict and for a judgment notwithstanding the verdict. Zugg v. Ramage, 239 M 292, 779 P2d 913, 46 St. Rep. 1693 (1989).

Questions of Fraud Precluding Directed Verdict and Judgment Notwithstanding the Verdict: Because questions of actual or constructive fraud existed requiring submission of facts to the jury, the District Court did not err in denying plaintiff's motion for directed verdict and defendant's motion for judgment notwithstanding the verdict. Mont. Bank of Red Lodge v. Lightfield, 237 M 41, 771 P2d 571, 46 St. Rep. 605 (1989).

Motion Denied — Intentional Trespass Due to Flooding: The lower court's refusal to grant a motion on grounds that sufficient evidence existed for the jury's conclusion that defendants' dam was not the cause of flood damage to plaintiffs' property was affirmed on appeal. Guenther v. Finley, 236 M 422, 769 P2d 717, 46 St. Rep. 477 (1989).

Power Company Liable for Poorly Maintained Outside Wire That Caused Fire That Destroyed Building: In an action against the power company for negligently inspecting and maintaining a power line to a building, resulting in a fire that destroyed the building, substantial evidence existed to support the jury verdict and to deny a motion for judgment notwithstanding the verdict. Two tenants testified that just before the fire their lights flickered and their radio was making static, the two tenants and another person witnessed arcing, a tenant and fireman witnessed a loose wire, an expert testified that the fire was caused by the wire, and pictures appeared to show that other power lines in the area were poorly maintained. Stout v. Mont. Power Co., 234 M 303, 762 P2d 875, 45 St. Rep. 1926 (1988).

Evidence — When Sufficient to Support Verdict: Plaintiff appealed from jury verdict in favor of defendant, alleging the evidence did not support the verdict. The Supreme Court held that in order to overturn the verdict on the basis of insufficient evidence, it must find plaintiff entitled to judgment as a matter of law, and that there was insufficient evidence to warrant submitting the case to a jury. Here the court found credible evidence supporting a verdict either way and considered itself without power to set aside the decision of the trier of fact as a matter of law. The District Court properly denied plaintiff's motions for directed verdict and judgment notwithstanding the verdict. Gunlock v. W. Equip. Co., 219 M 112, 710 P2d 714, 42 St. Rep. 1882 (1985), followed in Weinberg v. Farmers St. Bank of Worden, 231 M 10, 752 P2d 719, 45 St. Rep. 391 (1988).

Motor Vehicle Negligence:

The trial court properly granted motion for judgment notwithstanding the verdict, since defendant is guilty of negligence as a matter of law for failure to keep a proper lookout. At the time defendant "rear ended" plaintiff, the road was dry and the weather clear and sunny. No contributory negligence was alleged or proved. The only reasonable conclusion is that defendant negligently failed to keep a proper lookout. Garza v. Peppard, 213 M 25, 689 P2d 279, 41 St. Rep. 1922 (1984).

Court erred in not granting directed verdict in favor of plaintiff on defendant's counterclaim. Smith v. Babcock, 157 M 81, 482 P2d 1014 (1971).

Motion for Summary Judgment Treated as Motion Under This Rule: When a defendant at the close of trial and after submission of all evidence moved under Rule 56(c), M.R.Civ.P., for summary judgment on its counterclaim, the Supreme Court held that the proper procedure would have been to make the motion under this rule but that since the questions to be answered are the same under either motion, the motion made would be considered the equivalent of a motion for a directed verdict. The Supreme Court further ruled that on the basis of the record, the defendant was entitled to judgment on its counterclaim. Doll v. Major Muffler Centers, Inc., 208 M 401, 687 P2d 48, 41 St. Rep. 429 (1984).

Lack of Findings on Marital Home Not Correctable by District Court After Time Limitations Expire: In a divorce settlement, the trial court findings contained no determination of the net worth of the parties, the net worth of the husband's medical practice, or the relative financial contributions of the two parties. The findings of fact also were inconclusive as to the value and disposition of the family home. Five months after the decree was entered, the husband petitioned for amendment, requesting award of the family home to him. Eleven months later the District Court found that it was the original intention of the court to distribute the home to the husband. The Supreme Court concluded that the District Court erred in its attempt to amend the decree. Under Rule 60(a), M.R.Civ.P., clerical errors in judgments may be corrected at any time since

correction does not alter substantive rights of the parties. Here the attempted change adversely affected the wife's substantive rights by depriving her of her interest in the family home, a major asset of the marriage. Such error is judicial in nature and could not be corrected by the District Court except by motion made within the time limitations of Rules 50(b), 52(b), 59, or 60(b)(1), M.R.Civ.P. No such motion having been made, the error would have been correctable by appeal, which was never taken by either of the parties. The District Court therefore lacked jurisdiction to make the change effected by its entry of the amended findings and decree. The case was remanded. Thomas v. Thomas, 189 M 547, 617 P2d 133, 37 St. Rep. 1710 (1980).

Motion Denied — Sufficiency of Evidence: There was sufficient evidence of a violation of the Federal Safety Appliance Act, 45 U.S.C. §2, to submit the issue to the jury. McGee v. Burlington N., Inc., 174 M 466, 571 P2d 784 (1977).

Factual Disputes for Jury: Since the jury decided that plaintiff was covered by the group insurance policy purchased by employer from defendant and the evidence did not show lack of coverage as a matter of law, the motion for judgment notwithstanding the verdict was properly denied. Standish v. Business Men's Assurance Co., 172 M 264, 563 P2d 552 (1977).

District Court's Discretion — Motion Improperly Granted: It was error for the District Court not to set aside the verdict for the defendant upon plaintiff's motion for new trial or judgment notwithstanding the verdict under Rule 50(b), where defendant's conduct consisted of a breach of duty established by statute apparently conclusive as to the issue of negligence and could not be overlooked by a jury where there was insufficient evidence to support the verdict for defendant. Erickson v. Perrett, 169 M 167, 545 P2d 1074 (1976).

Granting of Motion by Appellate Court: Alternatives for disposition of a motion under this section available to a trial court are equally available to a reviewing appellate court. Therefore, where appeal was inter alia from denial of motion under this section, appellate court in reversing trial court could itself order a new trial. Erickson v. Perrett, 169 M 167, 545 P2d 1074 (1976).

Time for Ruling on Motion: Where judgment was granted for the defendant on May 4 and an alternative motion for a judgment notwithstanding the verdict or a new trial was filed by the plaintiff on May 10, the hearing thereon continued until May 30, and the plaintiff's brief was not filed until July 10, the District Court had no authority to grant the motion on July 10 since Rules 50(b) and 59(d), M.R.Civ.P., clearly indicate that the court shall rule on a motion within 15 days after the motion is submitted and that the court may continue the case for only 30 days. Here the case was continued beyond the time provided for in the rules, and the court's decision was rendered more than 15 days beyond the date upon which it was ordered to be submitted. Cain v. Harrington, 161 M 401, 506 P2d 1375 (1973).

Denial of Motion for Judgment Notwithstanding the Verdict — Upheld: Plaintiff motion for judgment notwithstanding the verdict in negligence action was properly denied. French v. Abercrombie, 156 M 356, 480 P2d 187 (1971).

Burden of Proof: Denial of a motion for a directed verdict will not be presumed error. The moving party must show that error was committed. Fuchs v. Huether, 154 M 11, 459 P2d 689 (1969); Laughnan v. Sorenson, 139 M 531, 366 P2d 433 (1961); Bouma v. Bynum Irrigation District, 139 M 360, 364 P2d 47 (1961).

New Trial Alternate to Judgment Notwithstanding the Verdict: This rule contains no language which absolutely requires a court to enter judgment notwithstanding the verdict although persuaded it erred in failing to direct a verdict for the losing party. Thus, a new trial might better serve the ends of justice, and it is within the judge's discretion to so order. Jangula v. U.S. Rubber Co., 147 M 98, 410 P2d 462 (1966).

Disqualification of Trial Judge: This rule does not prevent the disqualification of a trial judge, which is governed by 3-1-801, during the 10-day period after reception of a verdict. State ex rel. Bellon v. District Court, 140 M 447, 373 P2d 314 (1962).

Collateral References

Practice and procedure with respect to motion for judgment notwithstanding verdict under Federal Civil Procedure Rule 50(b) or like state provision. 69 ALR 2d 449.

Rule 50(c). Conditional rulings on grant of motion for judgment as a matter of law.

Advisory Committee Notes

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: The procedure where a party joins a motion for a new trial with his motion for judgment n.o.v., or prays for a new trial in the alternative has often been misunderstood. This amendment summarizes the practice. It does not alter the effects of a jury verdict or the scope of appellate review.

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform the rule to the 1991 amendments of the Federal Rule.

Compiler's Comments

1993 Amendment: In (1), near beginning of first sentence before "motion", inserted "renewed" and after "judgment" substituted "as a matter of law" for "notwithstanding the verdict, provided for in subdivision (b) of this rule"; and in (2), after "party", substituted "against whom judgment as a matter of law has been rendered" for "whose verdict has been set aside on motion for judgment notwithstanding the verdict" and at end deleted "notwithstanding the verdict".

Identity With Federal Rule: As of May 1, 1990, the rule was identical to the Federal Rule except for references to "supreme court" instead of "appellate court" and to "respondent" instead of "appellee", and except that in (2) the Montana Rule measures from service of notice of entry of judgment N.O.V. instead of from entry of judgment N.O.V.

Rule 50(d). Denial of motion for judgment as a matter of law.

Advisory Committee Notes

Source: Fed. R. Civ. P. 50, as amended 1963.

Explanation of change: This subdivision does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform the rule to the 1991 amendments of the Federal Rule.

Compiler's Comments

1993 Amendment: In first sentence, after "judgment", substituted "as a matter of law" for "notwithstanding the verdict" and at end deleted "notwithstanding the verdict".

Identity With Federal Rule: As of May 1, 1990, the rule was identical to the Federal Rule except for appropriate references to "supreme court" instead of "appellate court" and to "respondent" instead of "appellee".

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Denial of Motion for Judgment N.O.V. Proper When Evidence Sufficient to Support Question of Liability: Defendant appealed the District Court's denial of a posttrial motion for judgment notwithstanding the verdict, claiming that the motion was warranted based on the statutory liability of an indemnitor on claims for which its indemnitees had no liability. The Supreme Court, noting that the issue of indemnity was not raised at trial and was thus not arguable on appeal, restated the question as whether the motion for judgment notwithstanding the verdict was properly denied. After reviewing the record, the court concluded that plaintiff presented sufficient evidence to support submission to the jury of the question of defendant's contract liability. Kapner, Wolfberg & Associates, Inc. v. Blue Cross & Blue Shield of Mont., 270 M 283, 891 P2d 530, 52 St. Rep. 184 (1995).

Rule 51. Instructions to jury — objection.

Commission and Advisory Committee Notes

The rule has been written so as to substantially comply with those provisions of R. C. M. 1947, sections 93-5101 [now codified as 25-7-301, MCA] and 93-5502 [superseded by Rule 46, M.R.Civ.P.] dealing with instructions and with Montana case law and practice on this subject.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 860
Specification of Objection Required 877
Sufficiency of Objection 877

GENERAL

Failure to Request Jury Instruction on Sudden Emergency Doctrine — Appeal Precluded: Payne's son was killed while transporting an antique tractor purchased from defendants. The jury found that more than 51% of the negligence was attributable to Payne's son. Payne appealed on grounds that under the sudden emergency doctrine set out in Simonson v. White, 220 M 14, 713 P2d 983 (1986), the son was not negligent as a matter of law. Defendants argued that the sudden emergency doctrine is no longer a recognized doctrine in Montana negligence law. Without ruling on whether the doctrine is still viable, the Supreme Court dismissed the issue because Payne failed to request a jury instruction on sudden emergency, thereby failing to preserve the issue for appeal. Payne v. Knutson, 2004 MT 271, 323 M 165, 99 P3d 200 (2004).

No Prejudice in Jury Instructions Explaining General Elements of Legal Malpractice: Plaintiffs contended that general instructions regarding the elements of legal malpractice given to the jury in a legal malpractice case were internally inconsistent, incomplete, and essentially confusing. Defendant attorney asserted that the jury was advised that the attorney had a duty to use the care and skill ordinarily used by lawyers practicing in Montana and that the jury was not confused by an instruction that did not recite every duty discussed by an expert. The Supreme Court agreed with defendant. Although the trial court might have crafted other instructions that may have better assisted the jury in considering the law applicable to the case, when taken as a whole, the instructions, when coupled with extensive expert testimony for both parties, adequately described the attorney's standard of care and did not potentially mislead or confuse the jury, resulting in prejudice to plaintiffs. Byers v. Cummings, 2004 MT 69, 320 M 339, 87 P3d 465 (2004).

Lack of Evidence on Impact of Taking on Value of Remaining Property — Jury Instructions on Compensation for Taking of Access Proper: The District Court instructed the jury that defendants were not entitled to compensation merely because traffic access was diverted because of road construction or for defendants' loss of business resulting from the taking of a part of defendants' property. Defendants contended that the instructions were an abuse of discretion because they were not seeking compensation for access impairment, traffic diversion, or loss of business, but rather that those factors had caused severance damages when the remaining property's commercial value sustained a permanent market value loss, entitling defendants to a new trial. The Supreme Court disagreed. Defendants failed to offer any evidence of a loss of revenue from their business and the impact of the loss on the fair market value of the remainder of the property. Thus, the jury instructions did not materially affect defendants' substantial rights, and the motion for a new trial was properly denied. Dept. of Transportation v. Simonson, 2004 MT 60, 320 M 249, 87 P3d 416 (2004).

No Prejudicial Error in Failure to Give Negligent Homicide Mental State Instruction in Wrongful Death Action When Other Instructions Adequately Reflect Negligence: Samson's son was killed by Bercier, a youth who walked away from a nonsecure, supervised licensed youth group home. Samson sued the state for foreseeable negligence. To boost the theory of foreseeability, Samson offered a jury instruction that defined Bercier's conduct as reckless and postulated therefrom that the conduct was foreseeable because of Bercier's background, seeking to undermine the state's theory that the shooting was an unforeseeable accident. The District Court refused to offer the instruction, instead instructing the jury on elements of wrongful death, and Samson appealed. The state argued that the mental state of Bercier was not a controlling issue and contended that it was not necessary to instruct the jury on the mental state of negligent homicide because the instructions as a whole properly included the key concepts of a wrongful death action. The Supreme Court agreed with the state. The fundamental issue concerned the state's negligence, not Bercier's mental state. Nevertheless, Samson was still able to present the foreseeability theory under the instructions that were given, so failure to give Samson's offered instruction did not result in prejudice to Samson's case. It is within a District Court's discretion to decide how to instruct the jury, taking into account the theories of the contending parties, and absent an abuse of discretion, the District Court was affirmed. Samson v. St., 2003 MT 133, 316 M 90, 69 P3d 1154 (2003). See also Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996).

Rule of Law Regarding Admissibility of Evidence of Subsequent Accident With Nonparty — Defendant's Burden to Show That Damages Divisible and Apportionment Proper: Following

Truman's injury in an automobile accident, she was involved in a second automobile accident and in an accident involving an ultralight aircraft. The District Court held that evidence of Truman's injuries in the second automobile accident and the aircraft accident would be admissible in a trial related to the first automobile accident to disprove causation. After accepting supervisory control, the Supreme Court relied on an analogous situation in Azure v. Billings, 182 M 234, 596 P2d 460 (1979), holding that once a plaintiff presents a prima facie case that the defendant's conduct contributed as a cause of injury, the burden shifts to the defendant to prove that the injury is divisible. A defendant is permitted to submit relevant evidence of subsequent accidents to negate allegations that the defendant is the cause or sole cause of the injury, but the defendant may not attempt to apportion fault to the conduct of a nonparty because assignment of liability to a nonparty without affording that party the opportunity to defend against liability risks an unreliable and disproportionate assignment of liability and places the burden of defending the nonparty on the plaintiff. In this case, plaintiff must prove that defendant's conduct contributed as a substantial factor to the damages, but need not prove the extent to which defendant is responsible. If defendant proves by a reasonable medical probability that the injury is divisible and that defendant is responsible for only a portion of the damages, the jury may reduce defendant's obligation by the portion of damages for which it is proved that defendant is not responsible. However, if the injury is indivisible and evidence does not permit an apportionment, then defendant is liable for the entire damage. Truman v. District Court, 2003 MT 91, 315 M 165, 68 P3d 654 (2003).

Plaintiffs Residing in House for Several Years Not Entitled to Instruction on Warranty of Habitability: The Satterfields appealed the District Court's refusal to submit a jury instruction regarding the implied warranty of habitability. The Supreme Court held that the instruction was properly excluded because the plaintiffs did not introduce enough evidence to support their argument especially in light of the fact that they inhabited the home for a period of several years after construction was finished. Satterfield v. Medlin, 2002 MT 260, 312 M 234, 59 P3d 33 (2002).

Oil and Gas Habendum Clause Obligating Maintenance of Production — Jury Instructions Allowing Consideration of Causes of Cessation of Production Improper When Evidence Shows Lack of Production of Paying Quantities: Actions to terminate oil and gas leases invoke two distinct inquiries: (1) whether the lease is producing in paying quantities; and (2) if not, whether the cessation in production is permanent or temporary. As an ownership-in-place state, in Montana, the lessee's interest terminates upon the occurrence of a stated event, which, under the habendum clause in effect here, was the cessation of production in paying quantities. Paying quantities is defined as the amount that would pay a small profit over the cost of operation, excluding the initial cost of bringing the well into production. Thus, the finder of fact must necessarily consider income generated from the property and the expenses incurred in its operation. However, in an effort to mitigate the harshness of the automatic termination rule, courts developed the temporary cessation of production rule, which shifts the burden to defendant to prove that cessation is temporary once plaintiff establishes that the lease has halted production. To determine whether a cessation is temporary or permanent, a jurisdiction considers the cause of the cessation, the time reasonably required to restore production, and the diligence exercised by the lessee in restoring production. Ownership-in-place jurisdictions generally limit temporary cessations to mechanical or production breakdowns. If there is a lack of market, if the lease is capable of producing in paying quantities, and if the lessee is using reasonable diligence to market the product, Montana law considers the lease as one that is producing in paying quantities and will not reach the temporary cessation of production question. The District Court in this case allowed jury consideration of oil prices, economic considerations, and defendant's financial condition in determining whether cessation was temporary or permanent. However, plaintiff established that the leases in question failed to produce in paying quantities during the prescribed accounting period. At that point, analysis implicating economic factors concluded. Therefore, the Supreme Court held that allowing jury consideration of defendant's economic factors was an abuse of discretion and was prejudicial to plaintiff, warranting a new trial. Somont Oil Co., Inc. v. A&G Drilling, Inc., 2002 MT 141, 310 M 221, 49 P3d 598 (2002), following Berthelote v. Loy Oil Co., 95 M 434, 28 P2d 187 (1933), and Christian v. A. A. Oil Corp., 161 M 420, 506 P2d 1369 (1973). See also Watson v. Rochmill, 155 SW 2d 783 (Tex. 1941).

No Error in Giving Jury Instructions Regarding Intervening Cause When Jury Did Not Consider Issue: Pula sued the state for negligence related to an incident of rape of Pula by another inmate while Pula was incarcerated in Blaine County jail. The District Court's special verdict form required jurors to answer a series of questions on breach of duty, causation, and damages, and then, depending on the answers, to move on to succeeding questions, one of which

was the issue of whether there was an intervening cause. Pula asserted error in that the instructions on independent intervening causation were incorrect statements of the law. However, the first question for the jury was whether the state was negligent, which was answered affirmatively, so the jury moved on to the second question, which was whether the negligence resulted in Pula's injuries. The answer was negative, so the jury was instructed not to consider the third question, which was whether there was an intervening cause. Because the jury never considered the issue of intervening cause in reaching its verdict, the instructions on intervening cause had no effect on the outcome of the trial. The Supreme Court declined to assign reversible error to instructions addressing an issue that was never reached. Pula v. St., 2002 MT 9, 308 M 122, 40 P3d 364 (2002). See also Stenberg v. Neel, 188 M 333, 613 P2d 1007 (1980).

Jury Instructions Regarding Causation and Superseding, Intervening Cause Not Conflicting: Onstad was assaulted on the job and sued the employer, Payless Shoesource (Payless), for failure to provide a safe workplace. Although conceding that the jury instructions were correct statements of the law, Payless nevertheless asserted that the instructions, when read together, were confusing regarding Payless's liability when the case involved a defense of superseding, intervening cause. The Supreme Court found that the instructions were appropriate and not conflicting and that nothing in the record indicated that the jury was confused. The jury sent out no written questions to the court and deliberated less than 2 hours before unanimously agreeing on its answers to six special verdict questions. Onstad v. Payless Shoesource, 2000 MT 230, 301 M 259, 9 P3d 38, 57 St. Rep. 943 (2000).

Disallowance of Jury Instruction Regarding Heightened Standard of Care of Driver in Vicinity of Children: Fifteen-year-old Hanson was struck by Edwards's car while crossing an intersection near a school. The intersection had no sidewalks, curbs, or painted lines delineating a crosswalk. Hanson sought a jury instruction that a motorist operating in an area in which children are known to likely be present has a heightened standard of care, relying on Okland v. Wolf, 258 M 35, 850 P2d 302 (1993). The instruction was denied. On appeal, the Supreme Court noted that a person's duty of care varies depending on the circumstances at the time and place in question, so in this case, as in Okland, the standard negligence instruction permitted Hanson to argue that the circumstances required a heightened standard and was thus considered adequate. Hanson v. Edwards, 2000 MT 221, 301 M 185, 7 P3d 419, 57 St. Rep. 907 (2000).

Disallowance of Jury Instruction Regarding Motorist's Affirmative Duty to Ascertain Whether Intersection Clear and to Anticipate Presence of Pedestrians: Hanson was struck by Edwards's car while crossing an intersection that had no sidewalks, curbs, or painted lines delineating a crosswalk. Hanson sought a jury instruction that a motorist has an affirmative duty to ascertain whether an intersection is clear before proceeding and a duty to anticipate that pedestrians may be present in the intersection. The instruction was denied. On appeal, the Supreme Court held that the instruction that was given, which clarified a driver's obligation to yield the right-of-way to a pedestrian in a crosswalk and a pedestrian's obligation to avoid moving into the path of a vehicle that is too close for the driver to yield, was a proper statement of law under 61-8-504 and that the trial court did not err in refusing to give Hanson's proposed instruction regarding a driver's affirmative duties. Hanson v. Edwards, 2000 MT 221, 301 M 185, 7 P3d 419, 57 St. Rep. 907 (2000).

Unmarked Crosswalk at Every Intersection: Hanson was struck by Edwards's car while crossing an intersection that had no sidewalks, curbs, or painted lines delineating a crosswalk. Hanson moved for a directed verdict on grounds that because he was in an unmarked crosswalk, which gave him the right-of-way, Edwards was negligent as a matter of law. The motion was denied, and the trial court refused to instruct the jury that an unmarked crosswalk exists at every intersection pursuant to 61-1-209 (now repealed). The Supreme Court examined legislative intent and, reading 61-1-209 (now repealed) in pari materia with 61-8-502, concluded that Montana law provides for a crosswalk on any portion of a roadway at an intersection. The jury should have been so instructed, and failure to do so was reversible error. Hanson v. Edwards, 2000 MT 221, 301 M 185, 7 P3d 419, 57 St. Rep. 907 (2000).

Error in Refusal to Give Law of the Case Instruction: On remand from Federated Mut. Ins. Co. v. Anderson, 277 M 134, 920 P2d 97, 53 St. Rep. 618 (1996) (Federated Mut. I), defendant offered a jury instruction setting forth as facts three paragraphs that had been determined to be true as a matter of law in Federated Mut. I. The District Court rejected the proposed law of the case instruction, which defendant contended was error because it allowed third-party defendant to present testimony contrary to the facts found in Federated Mut. I. The court found for third-party defendant. The difference between the instruction given and the proposed law of the case instruction was that the instruction given stated only the conclusion reached in Federated Mut. I, while the proposed instruction stated the specific facts on which those conclusions were

based. Normally, the instructions as given would have been adequate, but in this case, the District Court had warned the parties prior to trial that pursuant to Federated Mut. I, the reasonableness of third-party defendant's actions was no longer at issue, yet third-party defendant improperly raised the reasonableness issue at least 23 times during trial but was not sanctioned. As a result of the instruction given and this violation of the pretrial order, third-party defendant in effect relitigated several fact issues previously settled in Federated Mut. I. Thus, the jury instructions as a whole failed to adequately present the law of the case, allowing the presentation of improper testimony and argument to the jury, constituting reversible error. Federated Mut. Ins. Co. v. Anderson, 1999 MT 288, 297 M 33, 991 P2d 915, 56 St. Rep. 1152 (1999).

Failure to Give Instruction Regarding Retaliation in Wrongful Discharge Claim — No Abuse of Discretion: Plaintiffs filed action against a hotel employer, alleging wrongful discharge and violation of wage and hour laws. Since plaintiffs did not advance this theory for discharge, the Supreme Court ruled that the District Court did not abuse its discretion in refusing to provide the jury with an instruction using the theory as a ground for a wrongful discharge claim. Moore v. Imperial Hotels Corp., 1998 MT 248, 291 M 164, 967 P2d 382, 55 St. Rep. 1023 (1998).

Agricultural Lease — No Error in Failure to Give Instruction on Implied Contract Covenant to Farm in Workmanlike Manner — Express Lease Terms Stricter Than Requested Instruction on Implied Term: The Schumachers leased property that they owned to Stephens through an agricultural lease. The lease required Stephens to farm with "diligence and care" and to do "all work necessary . . . and to the best interest of lessor, all in such time and manner as shall be to the best advantage and economy". The Schumachers sued Stephens, alleging that Stephens breached the implied contract covenant of good faith and fair dealing. The District Court refused to give the Schumachers' requested instruction on an implied covenant in the lease that would have required Stephens to farm the property in a "competent, skilled, workmanlike and husbandlike fashion". The Supreme Court noted that: (1) the District Court was correct in not giving an instruction on negligence because the Schumachers' complaint and evidence contained no such theory; (2) the District Court did instruct on the implied covenant of good faith and fair dealing; (3) the standard of care required of Stephens was expressly stated in the lease itself; and (4) the Schumachers had not shown that they were prejudiced by the failure to give the requested instruction. For these reasons, the Supreme Court held that it was not error for the District Court to refuse to give an instruction on an implied covenant to farm in a workmanlike manner. Schumacher v. Stephens, 1998 MT 58, 288 M 115, 956 P2d 76, 55 St. Rep. 247 (1998).

Agricultural Lease — No Error in Failure to Give Plaintiffs' Instruction on Effect of Material Participation Provisions — Instruction on Mutual Cooperation Held Sufficient: The Schumachers leased property that they owned to Stephens through an agricultural lease. Later, when the Schumachers sued Stephens over Stephens' failure to comply with the terms of the lease, Stephens claimed in defense that the Schumachers had breached the material participation agreements in the lease and that therefore he was excused from compliance. The Schumachers requested an instruction stating that if the jury found that Stephens failed to cooperate with the plaintiffs, then Stephens was not entitled to claim that he was excused from liability because of his contention that the Schumachers breached the material participation agreements in the lease. The District Court refused to give the instruction and instead gave an instruction stating that "the failure of a party to fully perform a contract is excused if his performance is prevented or delayed by the conduct of the other party". The Supreme Court noted that the Schumachers had not shown that they were prejudiced in any way by the failure of the District Court to give the requested instruction. Citing Fillinger v. NW. Agency, Inc., of Great Falls, 283 M 71, 938 P2d 1347 (1997), the Supreme Court held that: (1) a party assigning error to a refused instruction must show that the party was prejudiced by the refusal; and (2) the refused instruction must be reviewed in the context of the instructions that were given and the evidence produced at trial. Under these standards, the Supreme Court held that the instruction given by the District Court was sufficient. Schumacher v. Stephens, 1998 MT 58, 288 M 115, 956 P2d 76, 55 St. Rep. 247 (1998).

Aggravated Assault — Sufficiency of Circumstantial Evidence — Extraneous Allegation of Use of Weapon Held Not to Affect Conviction — Instruction Properly Refused: Neary was charged with aggravated assault of a female friend. The evidence at trial consisted of statements by witnesses who placed him, in an angry mood, with the injured woman at the top of some stairs and who heard admissions against interest and inconsistent statements from Neary about the circumstances of the woman's injury. The state also introduced expert medical testimony that the woman's injuries were consistent with a blow to the head with an object or a fall down some stairs onto an object. A neurologist testified for Neary that the woman's injuries could have been

caused in the same manner and that the woman's blood showed evidence of alcohol, amphetamines, and a prescription drug, which, in combination, would cause a propensity to fall. Neary contended that the state's case was circumstantial and that the verdict was not supported by the evidence. The Supreme Court held that Neary's inconsistent statements, his other statements, and his actions before, during, and after the incident supported the jury's verdict. The Supreme Court distinguished St. v. Gould, 216 M 455, 704 P2d 20 (1985), and St. v. Gommenginger, 242 M 265, 790 P2d 455 (1990), by pointing out that in Gommenginger, unlike the case before it, testimony came from a drug informant with a motive to lie and that in Gould, the defendant had moved to suppress pretrial admissions, that Neary had not. The Supreme Court also held that the District Court did not err in refusing to amend one of the state's jury instructions to provide that Neary had committed the elements of aggravated assault "with a weapon". The Supreme Court noted that the fact that the text of the state's information alleged that Neary struck the woman "with some type of blunt weapon" did not change the fact that the jury was correctly given the elements of the offense of aggravated assault and that the jury was not required to find that Neary used a weapon to find him guilty of aggravated assault. Distinguishing St. v. Later, 260 M 363, 860 P2d 135 (1993), in which the defendant had been charged under the wrong statute, the Supreme Court held that Neary was not prevented from preparing an adequate defense by the statement in the information that Neary used a weapon. St. v. Neary, 284 M 409, 944 P2d 750, 54 St. Rep. 942 (1997).

Timing of Settlement of Instructions — Inapplication of This Rule for Lack of Notice Rejected: In a case in which an issue on appeal was whether the plaintiff's estate could assert a survival action and the state submitted no jury instruction regarding the survival action, the state argued that it should not be bound by this rule because it did not have timely notice that the District Court was going to give an instruction requested by the plaintiff. The Supreme Court rejected that state's argument concerning damages, noting that the plaintiffs submitted an instruction based upon Montana Pattern Jury Instructions 25.20 through 25.25 and that because of the language of the proposed instruction, the state knew or should have known that the "not instantaneous" (concerning the death of the decedent) language was being proposed with regard to the survival of the action. Thus, although the final revised language of the instruction was not available for the state to review, the Supreme Court held that the state had sufficient knowledge of the content of the final instruction that this rule would be applied to the state for its failure to submit a different or clarifying instruction. Starkenburg v. St., 282 M 1, 934 P2d 1018, 54 St. Rep. 214 (1997).

New Trial Denied — Failure to Object to Instruction — No Plain Error Found: Berg contended on appeal that he was entitled to a new trial concerning workers' compensation fraud because the District Court failed to instruct the jury on the meaning of the term "misrepresentation". Citing St. v. Courchene, 256 M 381, 847 P2d 271 (1992), and Werre v. David, 275 M 376, 913 P2d 625 (1996), the Supreme Court held that Berg was not entitled to a new trial for failure of the District Court to give a certain instruction when Berg had not requested that the instruction be given. Distinguishing the case of St. Bank of Townsend v. Maryann's, Inc., 204 M 21, 664 P2d 295 (1983), relied upon by Berg, the Supreme Court also held that there was no "plain error" sufficient to justify the Supreme Court's review of the failure to give the instruction notwithstanding Berg's failure to request the instruction. State ex rel St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Foreseeability to Be Considered Part of Analysis of Duty: The trial court refused to give Columbus Hospital's proposed jury instruction on proximate cause and also did not instruct the jury on foreseeability even though the hospital contended that the Supreme Court had included foreseeability as an element of proximate cause in Kitchen Krafters, Inc. v. Eastside Bank of Mont., 242 M 155, 789 P2d 567 (1990). The Supreme Court, after a lengthy discussion of duty, proximate cause, and foreseeability and after examining the statutory definitions of duty and proximate cause, held that foreseeability is to be considered as part of the analysis of duty rather than proximate cause. The Supreme Court further held that it was reversing that part of Kitchen Krafters that requires a two-tiered analysis of causation that includes consideration of foreseeability in cases other than those cases in which there has been an allegation that the chain of causation is severed by an independent, intervening cause. Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996), followed in Kolar v. Bergo, 280 M 262, 929 P2d 867, 53 St. Rep. 1395 (1996), Jackson v. St., 1998 MT 46, 287 M 473, 956 P2d 35, 55 St. Rep. 183 (1998), Gentry v. Douglas Hereford Ranch, Inc., 1998 MT 182, 290 M 126, 962 P2d 1205, 55 St. Rep. 737 (1998), Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999), and Poole v. Poole, 2000 MT 117, 299 M 435, 1 P3d 936, 57 St. Rep. 489 (2000).

Instruction on Duty to Examine Available Fraudulent Form — Fraudulent Material Inserted After Availability Ceases: In an action by the insureds against an insurance agent and his company for the agent's fraud, the lower court properly refused defendants' instruction that one who fails to take the opportunity to examine a written form before executing it cannot claim that the form was fraudulent. The instruction was taken out of context. In addition, the agent's insertion of fraudulent material on insurance applications after plaintiffs saw them made the obligation in the instruction inapplicable to plaintiffs. Cartwright v. Equitable Life Assurance Soc'y, 276 M 1, 914 P2d 976, 53 St. Rep. 268 (1996).

Instructions as to Contract Clause Requiring Independent Investigation Properly Denied: A real estate broker appealed a verdict finding that an employee had negligently misrepresented the boundary of property purchased by the Cechovics. The basis for the appeal was that the contract between the parties contained a clause requiring the Cechovics to conduct an independent investigation, which the Cechovics had not conducted, and that therefore the Cechovics' reliance on the employee's representation was not justified. The broker requested a jury instruction stating that a buyer has the duty to make a reasonable investigation of property prior to purchasing it and a second instruction containing the independent investigation clause as set out in the parties' buy-sell agreement. The Supreme Court held that the instructions had been properly denied because the issue had been argued to the jury and the jury had been instructed regarding contributory negligence. In fact, the jury had found the Cechovics partially at fault for the damages. Cechovic v. Hardin & Associates, Inc., 273 M 104, 902 P2d 520, 52 St. Rep. 854 (1995), followed, with regard to jury instructions on causation, in Werre v. David, 275 M 376, 913 P2d 625, 53 St. Rep. 187 (1996).

Failure to Give Duplicitous and Legally Incorrect Instructions — Jury Properly Instructed: Contreras contended that the jury was denied consideration of his case by the District Court's refusal to give his proposed jury instructions, which would have acted to direct a verdict on the element of duty. However, the proposed instructions were duplicitous and not correct statements of the law. The instructions that were given properly instructed the jury on all theories of the case and on the appropriate law. Thus, the court did not abuse its discretion in instructing the jury. Contreras v. Vannoy Heating & Air Conditioning, Inc., 270 M 393, 892 P2d 557, 52 St. Rep. 246 (1995).

Failure to Notify Seller of Nonconformity of Goods — Damages Unwarranted: Defendants claimed that a jury instruction should have been given regarding damages owing under the Uniform Commercial Code for a sale of nonconforming goods. However, defendants did not reject the goods upon delivery or notify the seller within a reasonable time regarding the nonconformity. Because no damages were owing, an instruction on the measure of damages was not appropriate. NW. Truck & Trailer Sales, Inc. v. Dvorak, 269 M 150, 887 P2d 260, 51 St. Rep. 1530 (1994).

Challenge by Party Who Offered Instruction — Failure to Object: Defendant argued that the focal point of his defense was that he had asserted an attorney's retaining lien. Even though the only instruction he offered related to an attorney's charging lien, defendant contended that the District Court had erred by giving the charging lien instruction rather than a retaining lien instruction. When proposing the charging lien instruction, defendant's counsel stated that in his opinion, the language was broad enough to cover the defense. The rule that a party is barred from challenging on appeal a court's refusal to give an instruction if the party fails to object at the time that the instruction is given is particularly applicable when the party challenging the instruction is the party that offered it. A party will not be allowed to benefit from an error that that party created. Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

Incorrect Jury Instruction Requested — Plain Error Not Applied: In a civil rights action against a county and hospital, Buhr argued at trial that the deliberate indifference standard was the correct standard of care to apply to the defendants in the case and requested a jury instruction to that effect. During trial, Buhr discovered his error and, on appeal, argued for the first time that the correct standard to be applied in the case was the professional judgment standard. He further argued that the District Court erred in applying the deliberate indifference standard and that the Supreme Court should apply the plain error doctrine in order to reach the conclusion that the professional judgment standard applies to his civil rights claim. The Supreme Court refused to apply the plain error doctrine, noting that Buhr himself requested the jury instruction on deliberate indifference. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Lengthy Instructions Not Erroneous if Law Properly Stated: Joshua Lloyd suffered a seizure after being transferred to the Kalispell Regional Hospital's security room. His personal representative sued the hospital and others. During trial, the District Court instructed the jury

on negligence per se by giving lengthy instructions that counsel claimed were too complicated for the jury to understand. Citing Walden v. St., 250 M 132, 818 P2d 1190 (1991), the Supreme Court held that if the instructions properly state the law, the fact that the instructions are lengthy serves no basis for reversing the District Court. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994). See also Tanner v. Dream Island, Inc., 275 M 414, 913 P2d 641, 53 St. Rep. 208 (1996).

No Error in Instruction Quoting Statute Verbatim: Joshua Lloyd suffered a seizure after being transferred to the Kalispell Regional Hospital's security room. His personal representative sued the hospital and others. During trial, the District Court instructed the jury on negligence per se by quoting mental health statutes verbatim to the jury. The Supreme Court said that giving jury instructions by quoting directly from the statutes may not be the best practice, but noted that the instructions proposed by opposing counsel were also direct quotations of mental health statutes. Given that situation, the Supreme Court held that there was no error in giving jury instructions in the form of direct quotations from the statutes. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

Duty of Care of Children — Failure to Give All of Requested Instruction Cured by Argument of Counsel: Chad was hit, while on his bicycle, by a car driven by Matt. Matt testified that he stopped and looked at the intersection but did not see Chad on his bicycle. Chad's counsel requested a jury instruction on a child's standard of care, but one sentence of that instruction, providing that "A child is not held to the same standard of care as an adult." was deleted by the District Court. The Supreme Court held that in this case, it was not reversible error for the District Court to refuse to give all of the requested instruction because it is error only if the omission adversely affects the substantial rights of a party. Here, the plaintiff's substantial rights were not affected because his counsel's closing argument contained statements that nullified the effect of the District Court's refusal to give the requested instruction. Chambers v. Pierson, 266 M 436, 880 P2d 1350, 51 St. Rep. 921 (1994).

Reversible Error Not to Instruct Jury on Law of Important Theory of Party's Case: Chad was hit, while on his bicycle, by a car driven by Matt. Matt testified that he stopped and looked at the intersection, but did not see Chad on his bicycle. Chad's counsel requested a jury instruction on the duty of automobile drivers to observe what is to be seen at an intersection, but the District Court refused to give the instruction. Citing Smith v. Rorvik, 231 M 85, 751 P2d 1053 (1988), the Supreme Court held that it was reversible error for the District Court not to instruct the jury on an important part of a party's theory in the case. Chambers v. Pierson, 266 M 436, 880 P2d 1350, 51 St. Rep. 921 (1994).

Jury Instructions as a Whole Sufficiently Instructed Jury: Mannix, a corporate officer fired by the board of directors, argued that the lower court erred in refusing to submit to the jury his proposed instructions on the scope of authority of the board of directors of the defendant corporation. The Supreme Court held that, taken as a whole, the instructions were sufficient as to the scope of the board's authority and that the lower court had not abused its discretion in refusing the plaintiff's instructions. Mannix v. Butte Water Co., 259 M 79, 854 P2d 834, 50 St. Rep. 691 (1993).

Criminal Trial — Time and Place of Alleged Offense: The District Court did not err by instructing the jury that the state was not required to state the time and place of an alleged criminal offense with impossible precision. St. v. Scott, 257 M 454, 850 P2d 286, 50 St. Rep. 353 (1993).

Proposed Instruction on Elements of Partnership Properly Rejected: The District Court did not err in refusing a proposed jury instruction setting out criteria for the existence of a partnership when the proposed instruction was not an accurate statement of prior cases establishing the elements of partnership. Barrett v. Larsen, 256 M 330, 846 P2d 1012, 50 St. Rep. 96 (1993).

Not Error to Fail to Instruct That Severity of Injury Did Not Mean There Must Be Negligence: A doctor in a medical malpractice case argued on appeal that the judge should have given a "mere fact of injury" instruction because no instruction was given to prevent the jury from believing that because the injuries were so severe, there must have been negligence. There was no error because the given instructions stated in part: (1) that plaintiff had the burden of proving the doctor was negligent, that the plaintiff was injured, and that the doctor's negligence was a proximate cause of plaintiff's injury; (2) that it is the doctor's duty to use the skill and learning ordinarily used in like cases by other doctors practicing in that same specialty and holding the same national board certification and that violation of that duty is negligence; and (3) that the proper test for determining negligence in a doctor's actions is whether the doctor meets the

accepted standards of skill and care. O'Leyar v. Callender, 255 M 277, 843 P2d 304, 49 St. Rep. 1008 (1992).

Negligence of County in Maintaining Jail — Failure to Give Jury Instruction on Business Invitees Not Error: The plaintiff was injured when she fell against a wall in a jail bathroom after slipping on a wet floor. The District Court refused to give a jury instruction dealing with nonliability of a business owner to a business invitee for danger known or obvious to the plaintiff. The District Court gave only a general instruction on the duty of the county established in another case. Following Goodnough v. St., 199 M 9, 647 P2d 364 (1982), the Supreme Court held that if the instruction taken as a whole states the applicable law of the case, a party cannot claim reversible error. The Supreme Court held that the county was not prejudiced by the District Court's failure to give the requested instructions. Moralli v. Lake County, 255 M 23, 839 P2d 1287, 49 St. Rep. 872 (1992).

Proposed Instruction on Same Subject — Refusal to Give Thayer Instruction Not Error When Covered in Other Instructions: Appellant contended that the District Court erred in refusing to give the following instruction from Thayer v. Hicks, 243 M 138, 793 P2d 784 (1990): "Plaintiffs are not required to eliminate all possible causes of damages in order to prove causation." However, other instructions informed the jury on causation. When other instructions adequately cover the law relating to a particular issue, it is not error to refuse a proposed instruction on the same subject. Valley Properties Ltd. Partnership v. Steadman's Hardware, Inc., 251 M 242, 824 P2d 250, 49 St. Rep. 13 (1992).

Showing of Prejudice Required to Prevail on Claim of Error in Giving Jury Instruction: As stated in Jacobsen v. St., 236 M 91, 769 P2d 694 (1989), a party assigning error to the giving of a jury instruction must show prejudice in order to prevail. Absent a showing by appellant that failure to give a particular instruction adversely affected his substantial rights and as long as the jury is properly instructed on the applicable law, the failure to give an instruction does not constitute reversible error. Walden v. St., 250 M 132, 818 P2d 1190, 48 St. Rep. 893 (1991), followed in Geiger v. Sherrodd, Inc., 262 M 505, 866 P2d 1106, 50 St. Rep. 1661 (1993). See also Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998).

Duty of Court to Review Jury Instructions:

Jury instructions on appeal are to be viewed in their entirety and in light of the evidence presented. Hash v. St., 247 M 497, 807 P2d 1363, 48 St. Rep. 277 (1991).

When considering jury instructions it must be remembered that often a jury is deluged with numerous instructions, many of which attempt to explain complex questions of law. The court on review must therefore balance the possible confusion created by layer upon layer of instructions with the necessity of providing the appropriate legal theories. Goodnough v. St., 199 M 9, 647 P2d 364, 39 St. Rep. 1170 (1982).

Constructive Wrongful Discharge — "Without Due Process of Law": In a case for constructive wrongful discharge, it was reversible error for the court to instruct the jury that "without due process of law" is equivalent to "without authority of law". The jury was not correctly instructed concerning the requirements of due process, nor was it properly instructed on the type of conduct required for liability in a case under 42 U.S.C. 1983. Doohan v. Bigfork School District No. 38, 247 M 125, 805 P2d 1354, 48 St. Rep. 121 (1991).

Proposed Instruction on Preparation of Employment Termination Check Properly Rejected: The appellant argued that the lower court erred in rejecting the appellant's proposed instruction setting out for the jury the fact that state law required an employee to be paid immediately upon separation. The Supreme Court disagreed on the basis that the plaintiff had argued that the check had been made out before his meeting with management, demonstrating that the decision to fire him had been made prior to any hearing. The Supreme Court held that the instruction would mislead and confuse the jury and that each side had the opportunity during trial to argue the significance of the check being made out prior to the hearing. Barrett v. Asarco, 245 M 196, 799 P2d 1078, 47 St. Rep. 1980 (1990).

Plaintiff Entitled to Instruction Adaptable to His Case: A railroad employee sued the railroad for injuries he received on the job. The defendant objected to the wording of a jury instruction proposed by the plaintiff and adopted by the lower court. The defendant argued that the instruction imposed a bias upon the jury against the defendant's position that no manpower or equipment was available to assist the plaintiff at the time he was injured. The Supreme Court ruled that in a Federal Employers' Liability Act action in which the plaintiff has submitted to the jury evidence tending to prove an actionable violation of the Act, he is entitled to an instruction adaptable to his case. Kalanick v. Burlington N. RR Co., 242 M 45, 788 P2d 901, 47 St. Rep. 532 (1990).

Question of Statutory Applicability Preserved for Appeal: Defendant argued that by failing to include a violation of statute claim in a pretrial order, plaintiffs abandoned the claim on appeal. However, the issue was properly preserved through jury instructions when plaintiffs presented an instruction that stated the statutory language verbatim. Further, the statute was the subject of a motion for summary judgment. Notwithstanding certification, an order denying summary judgment is interlocutory; thus, the applicability of the statute was not waived insofar as it was presented in the motion for summary judgment. Whitehawk v. Clark, 238 M 14, 776 P2d 484, 46 St. Rep. 1053 (1989).

Instruction Stating Applicable Law: In a case in which the plaintiff's proposed instruction had no basis in Montana law and other instructions adequately presented the applicable law, the plaintiff could not claim reversible error as to the giving or denying of certain instructions. Feller v. Fox, 237 M 150, 772 P2d 842, 46 St. Rep. 694 (1989).

Emotional Distress Damages — Error to Submit to Jury: Jury instruction on emotional distress damages was improper when the evidence was insufficient to raise a question of fact about the existence of severe emotional distress. Defendant's cross-claim alleged only that he felt bad, lost sleep, and became withdrawn as a result of the defendant's failure to release plaintiff's personal guaranty in violation of the alleged agreement. The Supreme Court endorsed the severe emotional distress standard found in the Restatement (Second) of Torts, holding that the adoption of the standard was only a new interpretation of the existing "significant impact" requirement and not a departure from prior law. First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989), affirmed in Maloney v. Home & Inv. Center, Inc., 2000 MT 34, 298 M 213, 994 P2d 1124, 57 St. Rep. 144 (2000), to the extent that it addressed the "serious" or "severe" element articulated in Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995), which is synonymous with the "significant impact" element found in Johnson v. Supersave Mkt., Inc., 211 M 465, 686 P2d 209, 41 St. Rep. 1495 (1984).

Fiduciary Relationship — Error to Submit Instruction to Jury: Evidence attested to longstanding business relationship between defendant and First Bank but did not indicate that the bank had acted as a financial adviser to the defendant in a manner other than that common in the usual arm's-length debtor/creditor relationship. First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989).

Fraud — Refusal to Instruct on Actual Fraud Affirmed: The Supreme Court ruled that an instruction on actual fraud was warranted only if the requesting party raised a question of fact by presenting some evidence on each of the nine elements of actual fraud. The District Court did not err in refusing to instruct the jury on actual fraud when the defendant failed to introduce evidence that the bank made a knowingly false representation and intended the defendant to rely on it to his detriment. First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989).

Malicious Prosecution Damages — Error in Submitting Instruction to Jury: Defendant's counterclaim alleged that he had suffered lost profits and damage to his reputation as a result of the plaintiff's suit. No evidence that the suit was wrongful was introduced, and the Supreme Court held that the utilization of the legal process to resolve a good faith controversy cannot constitute a basis for damages. The court further held that the counterclaim was in reality a charge of malicious prosecution and that one of the basic elements, termination of a prior proceeding in favor of the alleging party, was not present making it an error to submit the issue to the jury. First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989).

Negligence and "Res Ipsa" Instructions on Negligent Suppression of Forest Fire: In an action against the state for negligence in suppressing a forest fire, the Supreme Court held that disputed jury instructions on the reasonable person, hindsight, and intervening cause correctly stated the principles of negligence law and related to the exercise of reasonable care by the state. It was not error for the court to refuse to give an instruction on res ipsa loquitur because by the definition stated in the instruction, it did not appear to apply to the case. Jacobsen v. St., 236 M 91, 769 P2d 694, 46 St. Rep. 207 (1989).

Jury Instruction on Issue of Retaliation for Participation in Discrimination Action: Acts of retaliation for participating in proceedings before the Human Rights Commission are discrimination actions separate and apart from the claim of discrimination in the original proceedings. Plaintiff is therefore entitled to jury instructions based on his claim of retaliation and is further entitled to comment on the retaliation in oral argument. Mahan v. Farmers Union Cent. Exch., Inc., 235 M 410, 768 P2d 850, 46 St. Rep. 96 (1989).

Instruction Adequate Concerning Shifting of Blame: Instruction adopted by the trial court was adequate in directing the jury that the only parties that could be held liable were those

named in the suit at the time of trial. Rollins v. Blair, 235 M 343, 767 P2d 328, 46 St. Rep. 39 (1989).

Objection Raised for First Time on Appeal: When objections to instructions at trial were based on redundancy but not on wording, the Supreme Court refused to consider a challenge to wording on appeal. The Supreme Court will not consider a challenge to an instruction based upon a reason that was not raised in the court below. Ahmann v. Am. Fed. S&L Ass'n, 235 M 184, 766 P2d 853, 45 St. Rep. 2305 (1988), followed in Greytak v. RegO Co., 257 M 147, 848 P2d 483, 50 St. Rep. 204 (1993), and in Geiger v. Sherrodd, Inc., 262 M 505, 866 P2d 1106, 50 St. Rep. 1661 (1993).

Failure to Assert Rights Under Will for Seven Years — Instructions on Equity Claims Refused: Plaintiffs who waited 7 years to assert their rights under decedent's will were not entitled to proposed instructions relating to laches and equitable estoppel. The rule that a party is entitled to jury instructions adaptable to his theory of the case is not absolute. The instructions must be supported by credible evidence. Plaintiffs were not entitled to the aid of equity. The District Court did not err in refusing to instruct the jury on estoppel and laches or to include those issues in the special verdict form for the jury. Tope v. Taylor, 235 M 124, 768 P2d 845, 45 St. Rep. 2242 (1988).

Jury Instructions on Proximate Cause Not Appropriate in Criminal Case: Defendant in a homicide case argued that refusal to give his offered instructions on proximate causation deprived him of the opportunity for the jury to consider his theory that the victim's death was a result of the victim's own negligence. Proximate cause is not a term that is generally used in criminal jury instructions. Problems created by concepts of proximate cause should be faced as problems of the culpability required for conviction and not as problems of causation. St. v. Magruder, 234 M 492, 765 P2d 716, 45 St. Rep. 2075 (1988).

Instruction in Comparative Negligence, Not Sudden Emergency: A jury instruction, which presented three standards of care expected of motor vehicle drivers and said that failure to meet the standards constituted negligence, was more concrete than the sudden emergency instruction banned in White v. Phillips, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986). Because it spoke to both drivers, it was considered an instruction in comparative negligence, not one in sudden emergency, and was properly given. Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988).

Coexistence of Instructions on Parol Evidence and Waiver: An instruction prohibiting consideration of parol evidence on what the contract language required for performance may coexist with an instruction and evidence on waiver. Pipe Indus. Ins. Fund Trust v. Consol. Pipe Trades Trust, 233 M 162, 760 P2d 711, 45 St. Rep. 1392 (1988).

Instructions Not Identical — Not Repetitious: The trial court gave two instructions on waiver that adequately covered applicable law but refused to give another offered instruction, holding it inapplicable. Of the given instructions, each covered areas left out by the other; other portions were simply repetitive, not conflicting. Instructions not essentially identical are not unduly repetitive. Pipe Indus. Ins. Fund Trust v. Consol. Pipe Trades Trust, 233 M 162, 760 P2d 711, 45 St. Rep. 1392 (1988).

Inapplicable Subject Matter in Proposed Instructions: The Supreme Court cited In re Estate of Hogan, 218 M 428, 708 P2d 1018, 42 St. Rep. 1711 (1985), in holding that a party is not prejudiced by a refusal of proposed instructions when the subject matter of the instructions is not applicable to the facts or supported by trial evidence. Webcor Electronics, Inc. v. Home Electronics, Inc., 231 M 377, 754 P2d 491, 45 St. Rep. 695 (1988), followed in St. v. Barnes, 232 M 405, 758 P2d 264, 45 St. Rep. 1150 (1988). See also Cline v. Durden, 246 M 154, 803 P2d 1077, 47 St. Rep. 2306 (1990).

Jury to Be Informed of Effect of Verdict: The Supreme Court adopted the reasoning of the Idaho Supreme Court, as expressed in Seppi v. Betty, 579 P2d 683 (1978), in holding that Montana juries can and should be trusted with the information about the consequences of their verdicts. Upon the request of a party, the trial court must give this instruction unless the court finds the issue so complex as to confuse the jury. Martel v. Mont. Power Co., 231 M 96, 752 P2d 140, 45 St. Rep. 460 (1988).

Instruction on Duty to Display Traffic Warning Flags — Important Theory of Case: Plaintiff objected to giving of an instruction regarding his duty to display warning flags on the highway near his disabled vehicle on the ground that because a truck parked behind the disabled vehicle was exhibiting its flashing emergency lights, there was no need for warning flags. The Supreme Court disagreed, noting both the statutory duty to place warning flags and defendant's right to instruction on that duty as an important theory of the case. Smith v. Rorvik, 231 M 85, 751 P2d 1053, 45 St. Rep. 451 (1988).

Instruction on Duty to Reduce Speed Improperly Denied — Important Theory of Case: The District Court improperly denied defendant's proposed instruction on relative duties between a pedestrian on a highway and a driver approaching the pedestrian, citing as grounds for denial: (1) 61-8-303 does not apply to pedestrians not in a crosswalk; and (2) under evidence in the case, the driver, prior to the accident, did not perceive any special hazard with respect to the pedestrian. The Supreme Court remanded because 61-8-303 applied to all pedestrians whether or not in a crosswalk and because the second reason was an issue for determination by the jury. The duty of the driver to reduce speed was an important part of the theory of plaintiff's case. Refusal to instruct constituted reversible error. Smith v. Rorvik, 231 M 85, 751 P2d 1053, 45 St. Rep. 451 (1988).

Investigative Responsibility of Newspaper Before Publishing: A newspaper has a duty to investigate before publishing when it has facts that indicate material is highly suspect. The Supreme Court remanded this case upon finding that a jury instruction defining "reckless disregard of the truth" as being equivalent to having serious doubts about the truth tended to shield a newspaper from its investigative responsibility. Sible v. Lee Enterprises, Inc., 224 M 163, 729 P2d 1271, 43 St. Rep. 2101 (1986).

Jury Instruction on Presumption of Accidental Fire Inappropriate — Evidence of Arson: Defendant's proposed jury instruction that ". . . ordinarily, it will be presumed that an unexplained fire was caused by an accident or natural causes or, at least, that it was not of criminal origin" was properly refused when suspicious facts strongly indicating arson accompanied the fire. St. v. Atlas, 224 M 92, 728 P2d 421, 43 St. Rep. 2042 (1986).

No Bad Faith Instruction in Absence of Actual Knowledge of Defects — Knowledge Not Imputed: Plaintiff contended that District Court erred in not instructing the jury on breach of the implied covenant of good faith and fair dealing, arguing that the covenant should have been applied to a real estate partnership and to a development partnership. The Supreme Court found no error in refusing to instruct as against the real estate partnership because it was not shown at trial that the partnership had actual knowledge of claimed defects in the land necessary to constitute bad faith. The court further held that while knowledge may be imputed to a real estate partnership as a member of a development partnership, it cannot be imputed from the development partnership to the real estate partnership. Bushnell v. Cook, 221 M 296, 718 P2d 665, 43 St. Rep. 825 (1986).

Jury Instruction Regarding Ambiguities in Product Labeling and Instructions for Use — Issue of Fact: Herbicide manufacturer contended the District Court erred in instructing the jury that ambiguities in the wording on product labels and in application instructions were to be construed against the manufacturers, claiming that this rule of construction was a rule of law for the court to apply and not a proper subject for a jury instruction. Plaintiff argued that the instruction was justified because the manufacturer presented the meaning of the application instructions as a factual issue at trial. The Supreme Court agreed, concluding that the jury instruction was a correct statement of law under the facts of the case. Vandalia Ranch, Inc. v. Farmers Union Oil & Supply Co., 221 M 253, 718 P2d 647, 43 St. Rep. 790 (1986).

No Evidence in Record to Warrant Jury Instruction on Mitigating Circumstances: Defendant contended District Court erred in refusing to give jury instructions on the lesser offense of mitigated deliberate homicide. On appeal, the Supreme Court found no error in refusing to instruct for two reasons: (1) the only potentially mitigating circumstance presented at trial concerned defendant's use of alcohol on the night in question; however, in St. v. White, 194 M 421, 632 P2d 1118, 38 St. Rep. 1417 (1981), the court held that voluntary intoxication alone was insufficient to show the extreme mental or emotional stress which would mitigate deliberate homicide charges; and (2) since defendant's main defense at trial was alibi, he was entitled either to an acquittal or to be found guilty, and if the jury believed his testimony, it would have been inconsistent with finding defendant guilty of mitigated deliberate homicide. St. v. Grant, 221 M 122, 717 P2d 562, 43 St. Rep. 685 (1986).

Verbatim Reading of Unfair Claim Settlement Practices as Jury Instruction — Harmless Error: An insurer claimed the District Court erred in including in its charge to the jury a verbatim reproduction of the 14 proscribed unfair claim settlement practices contained in 33-18-201, contending that a majority of the practices had no applicability to this case. On appeal, the Supreme Court found there was at least an arguable basis for submission to the jury of 12 of the 14 practices enumerated, and that inclusion of the two inapplicable practices in the jury instruction was harmless and not prejudicial. Britton v. Farmers Ins. Group, 221 M 67, 721 P2d 303, 43 St. Rep. 641 (1986).

Sudden Emergency Instruction — No Longer to Be Used: The Supreme Court held that the sudden emergency instruction may no longer be used because the instruction, which provided a

test for actions done in the course of a sudden emergency, added nothing to the established law applicable to any negligence case and might only leave an impression in the minds of jurors that a driver is somehow excused from the ordinary standard of care because an emergency existed. White v. Phillips, 220 M 14, 713 P2d 983, 43 St. Rep. 133 (1986), distinguished in Palmer v. Farmers Ins. Exch., 233 M 515, 761 P2d 401, 45 St. Rep. 1694 (1988), and followed in Cline v. Durden, 246 M 154, 803 P2d 1077, 47 St. Rep. 2306 (1990).

Duty to Warn of Known Danger — Lack of Warning of Known Danger as Defect: In a tort action over injury caused by a hay baler, the Supreme Court held, based on the holding of Brown v. N. Am. Mfg. Co., 176 M 98, 576 P2d 711 (1978), that it was error to instruct the jury that a manufacturer has no duty to warn a person who claims to be entitled to a warning if the person actually knows of the danger. Under the facts of this case, there is a duty to warn of a known danger if the product is unreasonably dangerous and lack of such warning can make an otherwise nondefective product defective. Tacke v. Vermeer Mfg. Co., 220 M 1, 713 P2d 527, 43 St. Rep. 123 (1986). Recognition of a failure to warn claim and the Brown criteria were applied in Riley v. Am. Honda Motor Co., Inc., 259 M 128, 855 P2d 196, 50 St. Rep. 714 (1993). See also Emery v. Federated Foods, Inc., 262 M 83, 863 P2d 426, 50 St. Rep. 1454 (1993).

Tort Action — Refusal to Instruct on Party's Central Contention — Reversible Error: In a tort action, it was error for the District Court to refuse to instruct on the central contentions of the plaintiff and instead undertake to instruct the jury in an incomplete manner. Taken as a whole, the instructions did not allow the jury to consider plaintiff's central contentions regarding unnecessary hazard rendering the machine defective and unreasonably dangerous. It is reversible error to refuse to instruct on an important part of a party's theory of the case. Tacke v. Vermeer Mfg. Co., 220 M 1, 713 P2d 527, 43 St. Rep. 123 (1986).

Instructions Taken as Whole Not Contradictory: On issue of partial abandonment of an easement, the jury instructions taken as a whole were not contradictory; thus, the trial court did not commit error in giving certain of the instructions to the jury. As stated in Rock Springs Corp. v. Pierre, 37 St. Rep. 1378 (1980), the instructions are considered given in their entirety. Where the jury instructions, taken as a whole, state the law applicable to the case, a party cannot claim reversible error as to the giving of certain instructions. Flynn v. Siren, 219 M 359, 711 P2d 1371, 43 St. Rep. 10 (1986).

Denial of Proposed Jury Instructions — No Error: The defendant was convicted of sexual intercourse without consent and on appeal contended that denial of two of his proposed jury instructions constituted error. At trial, he had sought to introduce the victim's medical and Youth Court records in an attempt to impeach her credibility as a witness. The District Court refused to allow inspection of the records, and the Supreme Court ruled that because of the refusal, a jury instruction relating to credibility based on such records could not be given. His second proposed instruction stated the precaution that rape is easy to allege and difficult to defend against and called for instructing the jury to view the victim's testimony with caution. The Supreme Court, quoting St. v. Liddell, 211 M 180, 685 P2d 918, 41 St. Rep. 1293 (1984), ruled that such a cautionary instruction "is an improper and unwarranted comment on the evidence and is not required under the law or by reason of public policy. Therefore, such an instruction should not be given." The propriety of denying the defendant's proposed jury instructions was adequately supported, and conviction was affirmed. St. v. Mendenhall, 219 M 328, 721 P2d 1255, 42 St. Rep. 2060 (1985).

Questioning on Voir Dire: Trial judge did not abuse his discretion in allowing attorney to pose to prospective jurors hypothetical questions about possible instructions from the court to ascertain if the prospective jurors would follow the law as given to the jury by the court. Hill v. Turley, 218 M 511, 710 P2d 50, 42 St. Rep. 1783 (1985), followed in Young v. Horton, 259 M 34, 855 P2d 502, 50 St. Rep. 662 (1993).

Technical Error — Not Reversible: In a condemnation action, the jury was given an instruction with a technical defect. On appeal, appellants failed to show any prejudice or interference with their substantial rights by reason of the instruction. Mere technical defects in the instructions, if considered as a whole, do not render such errors reversible error. Unless an error affects the substantial rights of an appellant, judgment will not be reversed. St. v. DeTienne, 218 M 249, 707 P2d 534, 42 St. Rep. 1557 (1985), followed in Winslow v. Mont. Rail Link, Inc., 2005 MT 217, 328 M 260, __P3d__ (2005).

"Substantial Factor" Rule To Apply:

The substantial factor rule applies when two causes concur to bring about an injury and either cause would have been sufficient for the result. Thus, it applied in this case when the necessity for amputation of the leg of a state prison inmate could have been caused either by the inmate's preexisting condition of arteriosclerosis of the blood vessels of the legs or by the

negligence of doctors treating him for an ingrown toenail. Kyriss v. St., 218 M 162, 707 P2d 5, 42 St. Rep. 1487 (1985).

The Supreme Court stated its approval of the "legal cause" (substantial factor) instruction in this medical malpractice case involving alleged concurrent and subsequent tortfeasors (surgeon, nurses, and radiologist). The court stated that the rule was developed primarily for cases such as the one under consideration in which application of the "but for" (proximate cause) rule would allow each defendant to escape responsibility because the conduct of one or more others would have been sufficient to produce the same result. Rudeck v. Wright, 218 M 41, 709 P2d 621, 42 St. Rep. 1380 (1985), followed in Kyriss v. St., 218 M 162, 707 P2d 5, 42 St. Rep. 1487 (1985), and Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122, 53 St. Rep. 428 (1996).

Instruction on Duty to Examine Bank Statement That Was Not Sent: Trial court properly refused defendant bank's offered jury instruction on the duty of plaintiff depositor to examine statements and report errors within a reasonable time because the statements were not sent to depositor and there was no question in the case as to his unauthorized signature or as to alterations. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Instructions Expanding Pleadings — Prejudice Negated by New Trial on Other Grounds: The grant of a new trial negated any prejudice to defendant from unexpected proposed supplemental jury instructions submitted by plaintiff on the last court day before trial began. The defendant argued the additional instructions were in effect amendments to the pleadings and contained new legal theories. Tribby v. NW. Bank of Great Falls, 217 M 196, 704 P2d 409, 42 St. Rep. 1133 (1985).

Instructions on Statutes Preferred: In a wrongful death action arising out of a head-on collision, plaintiff offered instructions quoting federal and state laws which concern the dimming of headlights at night on the highway. The court gave the instruction concerning the federal regulations but refused to give the instruction quoting 61-9-220 and 61-9-221. Plaintiff pointed out that a violation of the federal regulation may be considered by the jury in determining negligence, while a violation of a Montana statute is negligence as a matter of law. The Supreme Court said it would have been preferable for the District Court to instruct on Montana statutes as they pertain to the use of high and low beams of headlights at night. The court also found that the instruction given was consistent with the statutes, so the jury was not misled. Lindberg v. Leatham Bros., Inc., 215 M 11, 693 P2d 1234, 42 St. Rep. 137 (1985).

Submission of Instruction Not Needed in Order to Appeal State's Instruction: The state contended that because appellant did not submit a jury instruction defining "reasonable doubt", he should be barred from complaining about the state's instruction that was given by the court. That rule applies, however, only when the court fails to instruct on a point of law. The appellant clearly voiced his objection to the instruction and stated his reasons with particularity. The court, nonetheless, overruled the objection and made no effort to strike, clarify, or alter the instruction in response to appellant's objection. The appellant preserved his assignment of error. St. v. Lucero, 214 M 334, 693 P2d 511, 41 St. Rep. 2509 (1984).

No Error in Giving, Refusing Certain Instructions: There was no error in refusing one instruction when the point was adequately covered in another instruction. The instruction that an original survey of real property boundary must, whenever possible, be retraced is not inconsistent with the instruction that jury, in making decision, is not to consider or conjecture as to effect of decision on boundaries or corners of adjacent lands owned by persons not parties to suit. Therefore, both instructions were justifiable. Funk v. Robbin, 212 M 437, 689 P2d 1215, 41 St. Rep. 1848 (1984), followed in Cline v. Durden, 246 M 154, 803 P2d 1077, 47 St. Rep. 2306 (1990).

Indemnity — Refusal to Instruct on Active/Passive Negligence Not Reversible Error: Where the plaintiff supplier of certain air pollution control equipment brought an action against the defendant manufacturing company for breach of warranty, the District Court did not err in refusing to instruct the jury on the active/passive negligence of the plaintiff. The record in this case shows that there was no active negligence on the part of the plaintiff and he therefore did not lose his right to indemnity under the rationale of Town Pump, Inc. v. Diteman, 191 M 98, 622 P2d 212, 38 St. Rep. 54 (1981). Iowa Mfg. Co. v. Joy Mfg. Co., 206 M 26, 669 P2d 1057, 40 St. Rep. 1479 (1983).

"Negative" Jury Instructions Discouraged as Confusing to Jury: Where the defendant in a condemnation action sought compensation for the decreased value of his property as a result of heat, dust, and noise arising from travel upon a proposed interstate frontage road, the District Court did not err in refusing to give an instruction requested by the state that injected a nonissue into the case. Under the rationale of Brown v. N. Am. Mfg., 176 M 98, 576 P2d 711 (1978), the

court has discouraged the use of such negative instructions to prevent confusion. St. v. Howery, 204 M 417, 664 P2d 1387, 40 St. Rep. 975 (1983).

Standard Self-Defense Instruction Given — Repetitious Instruction Tailored to Facts Held Improper: In aggravated assault trial, the 9th instruction fully set forth the elements of self-defense and the 10th instruction related to self-defense by one assaulted with fists, as defendant claimed he had been. The 10th instruction was repetitious and may have placed undue emphasis on the requirements for self-defense. On remand following reversal on another issue, the court recommended that the repetitious instruction not be given. St. v. White, 202 M 491, 658 P2d 1111, 40 St. Rep. 235 (1983).

Jury Instruction — Breadth of Statutory Incorporation by Reference: Section 69-4-201 specifically incorporates only the construction standards of the National Electrical Safety Code rather than the code in its entirety. In the absence of specific statutory incorporation, the provisions of the National Electrical Safety Code can only furnish evidence of a standard of care to be considered in determining negligence. Therefore, the District Court's refusal to instruct the jury that violation of any provision of the National Electrical Safety Code constitutes negligence per se was proper. Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594, 40 St. Rep. 23 (1983), overruled in Martel v. Mont. Power Co., 231 M 96, 752 P2d 140, 45 St. Rep. 460 (1988), and followed with respect to the Architects' Handbook of Professional Practice in Taylor, Thon, Thompson & Peterson v. Cannaday, 230 M 151, 749 P2d 63, 45 St. Rep. 102 (1988).

Defendant Entirely Liable — Evidence Not Permitting Apportionment: Plaintiff injured his back when the seat in the locomotive he was operating broke and threw him backward. Plaintiff had had two prior back injuries which had been successfully treated. Defendant objected to the following instruction, contending it was an improper statement of the law: "Where a pre-existing condition exists which has been aggravated by the accident, it is your duty, if possible, to apportion the amount of disability and pain between that caused by the pre-existing condition and that caused by the accident. But if you find that the evidence does not permit such an apportionment, then the defendant is liable for the entire disability." The Supreme Court found the instruction proper, relying on an analogous situation in Azure v. Billings, 182 M 234, 596 P2d 460 (1979), and held that a plaintiff should not go uncompensated should the evidence not permit an apportionment of injuries and damages. Callihan v. Burlington N., Inc., 201 M 350, 654 P2d 972, 39 St. Rep. 2158 (1982), followed in Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998).

Lack of Basis for Instructions: In a suit by tenants against a landlord whose building burned, the trial court properly refused the landlord's requested instructions since some of them had no citation of authority showing them to be correct statements of the law, the landlord did not point to the record evidence justifying the instructions, the jury was adequately instructed on both the common-law negligence and the negligence per se theories, and the requested instructions were repetitious and were conflicting since they did not distinguish between the two negligence theories. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Repetitious Instructions: Repetitious instructions setting forth abstract principles of law should be avoided. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Horseback Riding Injury — Jury Instructions on Effect of Contributory Negligence Properly Given: Where, as a result of an injury occurring prior to the effective date of the comparative negligence statute, the plaintiff sued the defendant for injuries received when the plaintiff was thrown from his horse, there was sufficient evidence from which the jury could find that the plaintiff was contributorily negligent and the District Court did not commit error in giving verbatim the Montana Jury Instruction Guide instruction No. 4 on the effect of contributory negligence. Waatti v. Dollan, 193 M 329, 631 P2d 1279, 38 St. Rep. 1060 (1981).

Horseback Riding Injury — Jury Instructions Properly Refused — Harmless Error: Where, as a result of an injury occurring prior to the effective date of the comparative negligence statute, the plaintiff sued the defendant for injuries received when the plaintiff was thrown from his horse, the District Court did not err in refusing to give the plaintiff's jury instructions relating to the defendant's negligence. Because the jury based its decision on the plaintiff's contributory negligence, the defendant's negligence could not have affected the result in this case. If any error occurred, it was harmless. Waatti v. Dollan, 193 M 329, 631 P2d 1279, 38 St. Rep. 1060 (1981).

"Mere Happening" Instruction — Propriety — No Inference Except Res Ipsa Loquitur: Plaintiff, a mail carrier, was attempting to negotiate a left turn. Evidence was unclear as to whether he signaled for the turn. The roadway into which he was attempting to turn was a private driveway open to public use. While turning he was struck by defendant, who was attempting to pass. The road was lined for passing and visibility was clear. The jury was

instructed that "[t]he mere fact that an accident happened, considered alone, does not give rise to legal inference that it was caused by negligence or that any party to this action was negligent or otherwise at fault". The Supreme Court said that it can be confusing to a jury to give this instruction and recommended against it, but held that it was not prejudicial error to give the instruction in this case in light of the facts of the case and other instructions given. The Supreme Court affirmed that the "mere happening" instruction is totally incompatible in res ipsa loquitur cases. It is the law in negligence cases that negligence may not be inferred from the happening of an accident, but that res ipsa loquitur is an exception to the rule. Sampson v. Snow, 194 M 392, 632 P2d 1122, 38 St. Rep. 1441 (1981).

Proposed Jury Instructions — Definition of "Impeach" — Consideration of Instructions as a Whole: A defendant was convicted of sexual intercourse without consent and sexual assault. On appeal, he alleged error in the failure to give a jury instruction on the definition of "impeach". The Supreme Court held that the definition was not necessary because the jury was fully instructed on that aspect of the law and defense counsel had not been precluded from arguing his theory of the case. Another alleged error was in the failure to give an instruction outlining certain types of evidence that could serve to impeach a witness' testimony. The Supreme Court said that, although it would not have been error to give such a specific instruction, it was unnecessary. The instructions given contained the substance of this omitted instruction. The instructions as a whole were considered in determining adequacy. St. v. Camitsch, 192 M 124, 626 P2d 1250, 38 St. Rep. 563 (1981).

Instruction on Entitlement of Broker to Sales Commission Held Incorrect — No Error in Refusal: In an action by the plaintiff real estate brokerage firm to recover a real estate sales commission from the defendant, the trial court did not err in refusing the defendant's proposed instructions, relating to payment of the sales commission. The proposed instruction was misleading in that it implied that a broker employed to "sell or effect a sale" would not be entitled to his commission if the sale had not been consummated, even if such failure was due to acts of the seller. A broker is entitled to his commission even if the sale has not been completed if a ready, willing, and able buyer is procured and the failure to consummate was solely due to the wrongful acts or interference of the seller. Assoc. Agency of Bozeman, Inc. v. Pasha, 191 M 407, 625 P2d 38, 38 St. Rep. 344 (1981).

Jury Instruction Correct as to Real Estate Law — No Prejudice Shown Upon Referral: In an action by the plaintiff real estate brokerage firm to recover a real estate sales commission from the defendant, the trial court did not err in refusing to give the defendant's requested jury instruction. A party is not prejudiced by a refusal of his proposed instruction where the subject matter of the instruction is not applicable to the pleadings or the facts, is not supported by the evidence, or is adequately covered by other instructions submitted to the jury. While the instruction accurately sets forth the law that a landowner must be given a copy of the listing agreement, the subject was never raised in the pleadings and the defendant admitted that he may have received a copy and misplaced it. Thus, no error was committed. Assoc. Agency of Bozeman, Inc. v. Pasha, 191 M 407, 625 P2d 38, 38 St. Rep. 344 (1981).

No Prejudice From Superfluous Instruction: In an action by the plaintiff real estate brokerage firm to recover a real estate sales commission from the defendant, the trial court did not err in refusing to give the defendant's requested instruction setting forth the law of the Statute of Frauds. The contract at issue is not an oral contract for deed but the written listing agreement signed by the defendant. As there is no dispute over the listing agreement, the instruction was unnecessary and the defendant was not prejudiced by its refusal. Assoc. Agency of Bozeman, Inc. v. Pasha, 191 M 407, 625 P2d 38, 38 St. Rep. 344 (1981).

Denial of Instruction as Incorrect Statement of Law — Primary Duty of Avoiding Collision: The appellant claimed error in the trial court's denial of his proposed jury instruction stating that the primary duty of avoiding an accident is on a vehicle approaching from the rear when the vehicle in front has signaled for 100 feet. This was an inaccurate statement of the law, and as given, the jury instructions adequately explained the duties of the passing motorist and the left-turning motorist. Even if it had been a correct statement of the law, the proposed statement would have added nothing to the jury's understanding of the applicable law. Burns v. U. & R. Express, 191 M 343, 624 P2d 487, 38 St. Rep. 302 (1981), followed in St. v. DeGraw, 235 M 53, 764 P2d 1290, 45 St. Rep. 2154 (1988).

Wrongful Death Action — Jury Entitled to Consider Whether Contractor Followed Directions of State: In a wrongful death action in which the decedent's surviving spouse brought suit against the state's contractor for negligently failing to warn the decedent of an abrupt edge at the shoulder of a highway construction project, the court properly instructed the jury that it could consider whether the defendant properly followed the directions and instructions of the state.

These directions are one factor to be considered in determining whether the contractor acted reasonably. Workman v. McIntyre Constr. Co., 190 M 5, 617 P2d 1281, 37 St. Rep. 1637 (1980).

Manufacturer's Duty to Warn in Strict Liability Cases — Erroneous Instruction Not Prejudicial: Where plaintiffs who were injured in the fall of an elevator brought a products liability action based on strict liability against the manufacturer, of the elevator cable, it was error for the court to instruct the jury that the manufacturer has a duty to warn of defects known to him only if he believes that the user of the product will not discover the defect. In strict liability cases, a manufacturer is not relieved of the duty to warn because of any prior experience by the consumer with the product. However, where the evidence showed that the failure to warn was not the cause of the plaintiffs' injuries, the erroneous instruction was not prejudicial. Rost v. C. F. & I. Steel Corp., 189 M 485, 616 P2d 383, 37 St. Rep. 1657 (1980), distinguished in Krueger v. Gen. Motors Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989).

"Mere Happening" Instruction Found Incompatible: The "mere happening" instruction in a res ipsa case may suggest to the jury that they are foreclosed from considering the evidence provided by the happening of the accident itself. The instructions in this case were found so incompatible that a reversal was required. Helmke v. Goff, 182 M 494, 597 P2d 1131 (1979).

Failure to Properly Instruct: There was a complete failure to instruct the jury on damages and to properly instruct the jury on the issues relating to respondent's counterclaims. Hence, the trial court decision was vacated and remanded for a new trial. Billings Leasing Co. v. Payne, 176 M 217, 577 P2d 386 (1978).

Circumstantial Evidence Instruction Proper Only When No Direct Evidence: A confession, such as that appearing in the record, constitutes direct evidence of the corpus delecti; thus it is not error to refuse a circumstantial evidence instruction. St. v. Hallam, 175 M 492, 575 P2d 55 (1978).

Negligence Per Se — Directed Verdict: The court should have granted a directed verdict against defendant truckdriver who carelessly placed himself in a position of not being able to stop behind codefendant's truck and negligently passed to avoid collision but collided instead with an oncoming vehicle in which plaintiff's husband was a passenger. The court was in error to instruct the jury on sudden emergency when the driver's negligence created his own emergency. Kudrna v. Comet Corp., 175 M 29, 572 P2d 183 (1977).

Basis for Approving Instructions: The court did not err in refusing certain instructions when repetitious, misleading, or an incorrect statement of the law, or in giving instructions which were a correct statement of all relevant rules that have emerged from accepted case authorities. McGee v. Burlington N., Inc., 174 M 466, 571 P2d 784 (1977).

Effect of Preliminary Instruction — Criminal Trial: Judge's reading cautionary instruction in substantially standard language prior to introduction of evidence was not error. St. v. Armstrong, 172 M 296, 562 P2d 1129 (1977).

Instructions to Be Evaluated as a Whole: When jury instructions as a whole correctly state the law, prejudice is not created because of refusal of a proposed instruction. Brothers v. Virginia City, 171 M 352, 558 P2d 464 (1976); St. v. Anderson, 171 M 188, 557 P2d 795 (1976); Holland v. Konda, 142 M 536, 385 P2d 272 (1963).

Comment on Evidence: Court erred in giving jury instruction based on its own finding of fact from inconclusive testimony. Leary v. Kelly Pipe Co., 169 M 511, 549 P2d 813 (1976).

Refusal to Give Negligence Instruction — Conflicting Evidence: Refusal of instruction on reckless misconduct and the defense of contributory negligence was error in negligence action where both drivers were driving late at night without headlights, and reasonable men could reach opposing conclusions as to whether or not defendant was willfully and wantonly negligent. Mallory v. Cloud, 167 M 115, 535 P2d 1270 (1975).

Instructions — Theory of the Case: When defendant bank was sued for negligently cashing plaintiffs' check, the bank was entitled to instruction regarding possible defenses based upon the provisions of the U.C.C. since a party is entitled to have instructions given which are adaptable to his theory of the case. Williams v. Mont. Nat'l Bank of Bozeman, 167 M 24, 534 P2d 1247 (1975).

Instructions in Sex Offense Cases: Refusal to give an instruction that the testimony of a complaining witness in a sex offense case should be viewed with caution since the charge is easily made and difficult to disprove is not in error unless specific cause is shown for distrusting the testimony of the complaining witness such as manifest malice, desire for revenge, or an absence of corroborating evidence tending to support the facts testified to by the complaining witness. St. v. Ballew, 166 M 270, 532 P2d 407 (1975).

Specificity of Objections — Purpose: Objections to jury instructions must be specific. The purpose of this rule is to give the judge an opportunity to correct his own errors, and objections

will not be heard on appeal unless they were initially raised at trial. Highway Comm'n v. Beldon, 166 M 246, 531 P2d 1324 (1975), followed in Geiger v. Sherrodd, Inc., 262 M 505, 866 P2d 1106, 50 St. Rep. 1661 (1993).

Rules of the Road — Instructions on Nonapplicable Law as Error: In action for negligence in making left turn in no passing zone, it was error to instruct jury on inapplicable laws prohibiting anyone from driving on left side of road, especially when the instruction was combined with instruction that statutory violations are negligence as a matter of law. Rude v. Neal, 165 M 520, 530 P2d 428 (1974).

No Evidence of Negligence — Instruction in Ordinary Care Proper: In action for wrongful death of boy who was killed by brahma bull at rodeo, jury instructions on ordinary care of a reasonable person were sufficient where there was no proof of negligence against the rodeo company. Ross v. Golden St. Rodeo Co., 165 M 337, 530 P2d 1166 (1974).

Instructions — Motor Vehicle Negligence — Error: Court erred in giving instructions which permitted jury to find plaintiff contributorily negligent when such was impossible as a matter of law. Smith v. Babcock, 157 M 81, 482 P2d 1014 (1971).

Instructions — Negligence — Effect of F.E.L.A.: Instructions correctly blended motor vehicle, state negligence, and Federal Employer's Liability Act negligence laws, and jury was properly charged. Salvail v. Great N. Ry., 156 M 12, 473 P2d 549 (1970).

Interchange of Words — Preserving for Review: Appellant who objected to jury instruction but did not specifically object to an interchange of words therein did not preserve review of the interchange. Cross v. Tretheway, 155 M 337, 471 P2d 538 (1970).

Instructions Proper — Negligence — Failure to Offer Instructions: Instructions were proper on issue of wanton negligence. Plaintiff was precluded from assigning several instructions as error because he failed to offer any instructions on the issue. Gunderson v. Brewster, 154 M 405, 466 P2d 589 (1970).

Refusal to Give Instructions — Deprivation of Defense: Denial of offered instructions which were adaptable to defendant's theory of the case was prejudicial error where such denial deprived him of a possible defense of assumption of risk. Wollan v. Lord, 142 M 498, 385 P2d 102 (1963), distinguished in Graveley v. Springer, 145 M 486, 402 P2d 41 (1965).

Res Ipsa Loquitur — Instruction to Be Offered: If plaintiff desired the jury instructed on the doctrine of res ipsa loquitur, it was his duty to tender such instruction and request that it be given. Whitney v. NW. Greyhound Lines, Inc., 125 M 528, 242 P2d 257 (1952).

Instructions to Be Obeyed: Instructions to the jury constitute the law of the case and must be obeyed by the jury. A verdict contrary to them is against law, even though they be erroneous, necessitating a new trial, as where under the undisputed evidence an instruction amounted to one to find for defendant, whereas the jury found for plaintiff. Ingman v. Hewitt, 107 M 267, 86 P2d 653 (1938).

Failure to Request Instruction on Evidence Objected to — Effect: Where in an action against a principal and his surety declarations of the former were admissible as to him but inadmissible as to the latter, failure of the surety to request an instruction that such evidence should be limited in its application to the principal barred the surety from complaining of the court's ruling admitting the evidence over objection. Outlook Farmers' Elevator Co. v. Am. Sur. Co. of New York, 70 M 8, 223 P 905 (1924).

Objection to Unspecific Instruction — Offer of Instruction Required: A party who desires a more specific instruction than the one given must offer one to conform with his views of the law. Zanos v. Great N. Ry., 60 M 17, 198 P 138 (1921); Heitman v. Chicago, Milwaukee, & St. Paul Ry., 45 M 406, 123 P 401 (1912); Rand v. Butte Elec. Ry., 40 M 398, 107 P 87 (1910); St. v. Broadbent, 19 M 467, 48 P 775 (1897); Mulligan v. Mont. Union Ry., 19 M 135, 47 P 795 (1897).

Transcript on Appeal: Section 93-5502, R.C.M. 1947 (superseded by Rule 46, M.R.Civ.P.), providing what shall be deemed excepted to, was not designed to modify the provision of subsection 5 of section 93-5101, R.C.M. 1947 (superseded by Rule 51, M.R.Civ.P.), so as to do away with the necessity of identifying or authenticating, in the transcript on appeal, an instruction which was refused. Roberts v. Sinnott, 54 M 114, 169 P 49 (1917).

Objection to Instructions — Application of Rule: The provision that at the settlement of the instructions the particular grounds of objection or exception to those deemed erroneous shall be stated, else a motion for a new trial shall not be granted nor a cause reversed by the Supreme Court for error in them, applies only to instructions given and not to those refused. Billings Realty Co. v. Big Ditch Co., 43 M 251, 115 P 828 (1911).

SPECIFICATION OF OBJECTION REQUIRED

Failure to Object — Waiver of Right to Appeal: Failure to object to a jury instruction at the trial level amounts to a waiver of the right to raise an objection on appeal. St. v. Holzapfel, 230 M 105, 748 P2d 953, 45 St. Rep. 53 (1988), citing St. v. Long, 223 M 502, 726 P2d 1364, 43 St. Rep. 1948 (1986). Holzapfel was followed in Kneeland v. Luzenac America, Inc., 1998 MT 136, 289 M 201, 961 P2d 725, 55 St. Rep. 541 (1998).

No Objection to Jury View — New Trial Not Granted: Plaintiff contended that District Court erred in not granting a new trial when the jury was allowed to view the property prior to the time the plaintiff rested her case and in not giving a cautionary instruction. However, the record showed that plaintiff's counsel made no objection to the jury view and did not request a cautionary instruction. The Supreme Court found no District Court error for a procedure to which plaintiff did not object. Bushnell v. Cook, 221 M 296, 718 P2d 665, 43 St. Rep. 825 (1986).

No Objection to Instructions — Law of the Case: An instruction given without objection becomes the law of the case. Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985).

Lack of Basis for Instructions: In a suit by tenants against a landlord whose building burned, the trial court properly refused the landlord's requested instructions for some of them had no citation of authority showing them to be correct statements of the law, the landlord did not point to the record evidence justifying the instructions, the jury was adequately instructed on both the common-law negligence and the negligence per se theories, and the requested instructions were repetitious and were conflicting, as they did not distinguish between the two negligence theories. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Objections Not Raised at Trial — Effect: Instructions were not reviewable on appeal because objections made did not cover objections and contentions urged on appeal. The objection must point out where the evidence is insufficient in order to preserve it for appeal. Roberts Realty Corp. v. Great Falls, 160 M 144, 500 P2d 956 (1972); Dieruf v. Gallaher, 156 M 440, 481 P2d 322 (1971); Salvail v. Great N. Ry., 156 M 12, 473 P2d 549 (1970); Vogel v. Fetter Livestock Co., 144 M 127, 394 P2d 766 (1964). See also Zimmerman v. Bozeman Prod. Credit Ass'n, 233 M 156, 759 P2d 166, 45 St. Rep. 1387 (1988); Reno v. Erickstein, 209 M 36, 679 P2d 1204 (1984).

Appellate Review of Erroneous Instructions: The Supreme Court, in reviewing errors assigned on the giving of instructions, may consider only the particular objections presented to the trial court at the time the instructions were settled. Holland Furnace Co. v. Rounds, 139 M 75, 360 P2d 412 (1961); Teesdale v. Anschutz Drilling Co., 138 M 427, 357 P2d 4 (1960); Brunnabend v. Tibbles, 76 M 288, 246 P 536 (1926); Stiemke v. Jankovich, 72 M 363, 233 P 904 (1925); Eablonski v. Close, 70 M 292, 225 P 129 (1924); Humber v. Marshall, 60 M 267, 198 P 747 (1921); Lehane v. Butte Elec. Ry., 37 M 564, 97 P 1038 (1908).

Failure to Object — New Trial or Appeal Unavailable: The District Court is precluded from granting a new trial for error in an instruction not specifically pointed out at the time of settlement of the instructions, and on appeal the Supreme Court will not consider any error not so pointed out. Pilgeram v. Haas, 118 M 431, 167 P2d 339 (1946); Lundquist v. Jennison, 66 M 516, 214 P 67 (1923).

Appellate Review — Objection Required at Time Instructions Settled: In reviewing instructions, the Supreme Court is limited to objections made at the time the instructions were settled. Tripp v. Silver Dyke Min. Co., 70 M 120, 224 P 272 (1924); St. v. Newman, 66 M 180, 213 P 805 (1923); Morgan v. Hines, 65 M 306, 211 P 778 (1922); Sanborn Co. v. Powers, 58 M 214, 190 P 990 (1920); Stokes v. Long, 52 M 470, 159 P 28 (1916); Flathead County St. Bank v. Ingham, 51 M 438, 153 P 1005 (1915); Allen v. Bear Creek Coal Co., 43 M 269, 115 P 673 (1911); Frederick v. Hale, 42 M 153, 112 P 70 (1910).

No Review of Improper Instruction: The Supreme Court in its review of instructions is limited to the objections made by counsel for appellant at the time they were settled. Though an instruction may be incorrect but not open to the particular objection urged against it, the court may not declare error on that account. Outlook Farmers' Elevator Co. v. Am. Sur. Co. of New York, 70 M 8, 223 P 905 (1924).

Statutory Requirements as Controlling: An assignment of error based on the refusal of an instruction may not be considered on appeal where the instruction is not identified or presented in the manner required by statute. Roberts v. Sinnott, 54 M 114, 169 P 49 (1917).

SUFFICIENCY OF OBJECTION

Inadvertent Omission of Instruction by Court — Objection by Affidavit — Waiver: The trial court inadvertently omitted an instruction regarding the standard of care for a bicyclist. One of the plaintiff's attorneys noticed the omission but did not object or bring the omission to the

court's attention until later when filing an affidavit. Plaintiff moved for a new trial based on the omission. The Supreme Court affirmed the trial court's denial, holding that the objection was untimely, that the lack of the instruction did not prejudice plaintiff, and that failure to object at the time that the instructions were given constituted waiver of the objection. Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996).

Failure to Object to Court Solution for Improper Jury Instruction — New Trial Precluded: During settlement of jury instructions, plaintiff withdrew an objectionable instruction, but the instruction was inadvertently read to the jury anyway. The court reported to the jury that the attorneys had stipulated that the instruction should be removed, the correct instruction was given, and the erroneous instruction was not sent to the jury room. Defendant argued that because the inadvertent instruction was a misstatement of law, he was prejudiced and therefore entitled to a new trial. The Supreme Court followed Rasmussen v. Sibert, 153 M 286, 456 P2d 835 (1969), in holding that even if defendant objected to the reading of the incorrect instruction, there was no objection made to the solution used by the trial court in dealing with the mistake. Because defendant did not move for mistrial or other corrective action, choosing instead to submit the case to the jury based on the posture that it was in, he was precluded from requesting relief in the nature of a mistrial for the first time on appeal after receiving a verdict he considered adverse. The same rationale applied to defendant's complaint regarding an allegedly improper closing argument by plaintiff's attorney. Okland v. Wolf, 258 M 35, 850 P2d 302, 50 St. Rep. 412 (1993).

Motor Vehicle Accident — Sudden Emergency Instruction Usually Improper: As defendant passed codefendant driving downhill, codefendant speeded up and defendant cut in front of him while only 20 feet from an oncoming vehicle. Codefendant overturned in the other lane, and the next two oncoming vehicles were involved in a collision with him. Defendant's proposed sudden emergency doctrine instruction was properly refused. The instruction should not be given in an ordinary motor vehicle accident case. It is unnecessary and confusing, and the ordinary rules of negligence are applicable and sufficient. Further, a test for giving the instruction is that the perilous situation was not created by the person confronted by it and whom the instruction favors; in this case, whether defendant was negligent was very much in dispute, and the instruction was a comment on the evidence as it implied no negligence on his part. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984), followed in Cline v. Durden, 246 M 154, 803 P2d 1077, 47 St. Rep. 2306 (1990).

Negligence Instruction Commenting on Evidence — Theory of Instruction Covered by Other Instructions: Defendant's instruction based on the theory that codefendant was 100% negligent was denied because the court believed it commented on the evidence. Other instructions adequately covered the theory that codefendant was 100% negligent, and the jury found the codefendant 100% negligent. The instruction was thus properly denied. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984).

Sufficiency of Objection — Incorrect Statement of Law — Sufficiency of Evidence: In settling a boundary dispute, the Supreme Court held that the objection to a jury instruction as being an incorrect statement of law was insufficient, not having specified the defect. Considering the jury instructions as a whole, the Supreme Court held that the jury was fully and correctly instructed on the law, that there was substantial evidence to support its verdict, and that no prejudice to the defendants arose from the failure of the court to give a proffered jury instruction. Nott v. Booke, 194 M 251, 633 P2d 678, 38 St. Rep. 1507 (1981).

Insufficient Objection — Reversal Improper: Where the objections to instructions did not specifically point out the alleged error, the Supreme Court may not reverse the cause on that account. Adams & Gregoire, Inc. v. Nat'l Indem. Co., 141 M 103, 375 P2d 112 (1962); Franck v. Hudson, 140 M 480, 373 P2d 951 (1962); Dimich v. N. Pac. Ry., 136 M 485, 348 P2d 786 (1959).

Negligence Action — Objection Found Insufficient: In a personal injury action based on negligence, objection to instructions because they placed a higher duty on defendants than that fixed by law was not sufficiently specific to be subject to review. LeCompte v. Wardell, 134 M 490, 333 P2d 1028 (1958).

Contract Action — Objection Found Insufficient: An objection to the effect that the giving of an instruction in an action to recover on an insurance policy was "an attempt by the court to nullify" a provision of the contract was insufficient to put the court in error. Scinski v. Great N. Life Ins. Co., 110 M 106, 99 P2d 218 (1940).

Specific Objection Not Included in General Objection: Where a party at time of settlement of instructions stated a general objection to an instruction, a new and different ground of objection not included in the general one was not properly available either on motion for new trial or on appeal. Brennan v. Mayo, 100 M 439, 50 P2d 245 (1935).

Specification of Law Not Required: The rule that no judgment shall be reversed on appeal for any error in instructions not specifically pointed out and excepted to at their settlement does not require that the party interposing an objection also state the correct principle of law upon which it is based. Though the objection was based on a wrong principle, if the instruction was actually erroneous, its review is nevertheless proper. First Nat'l Bank v. Perrine, 97 M 262, 33 P2d 997 (1934).

Instruction Unsupported by Evidence: An objection to an instruction that the evidence did not warrant its giving was insufficient under the provision that requires the objecting party to specify particularly wherein the instruction was insufficient or did not state the law. St. v. Daly, 77 M 387, 250 P 976 (1926).

Incorrect Statement of Law: An objection to an instruction that it was an incorrect statement of the law and would have a tendency to mislead the jury was insufficient to entitle the alleged error to review where it did not point out wherein the proposed instruction was objectionable. Brunnabend v. Tibbles, 76 M 288, 246 P 536 (1926).

Law Review Articles

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).

Montana Jury Instruction Guides, Lessley, 27 Mont. L. Rev. 125 (1965).

Collateral References

Trial *key* 182 through 296.

89 C.J.S. Trial §§484 through 771.

75A Am. Jur. 2d Trial §1077, et seq.

Provision in Rule 51, Fed.R.Civ.P. and similar state rules and statutes, requiring court to inform counsel, prior to argument to jury, of its proposed action upon requests for instructions. 91 ALR 2d 837.

Coercive effect of verdict urging by judge in civil case. 19 ALR 2d 457, §§10 through 13 superseded by 6 ALR 4th 1066.

Construction and application of provision of Rule 51 of Federal Rules of Civil Procedure requiring party objecting to instructions or failure to give instructions to jury, to state "distinctly the matter to which he objects and the grounds for objections". 35 ALR Fed. 727.

Rule 52. Findings by the court; judgment on partial findings

Case Notes

No Mandatory Requirement That Court Accept Proposed Findings and Conclusions: The court properly exercised its discretion under this rule in declining to accept the plaintiff's proposed findings of fact and conclusions of law. There is no mandatory requirement that the court accept them. Grabenstein v. Sunsted, 237 M 254, 772 P2d 865, 46 St. Rep. 780 (1989).

Rule 52(a). Effect.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 21, 1969, AMENDMENT

Explanation of change: Sections 93-5302, 93-5305, 93-5306, and 93-5307, R. C. M. 1947, are hereby superseded. The purpose of changing Rule 52, along with the change made in Rule 46, is twofold. It should eliminate the confusions that now exist with respect to the lack of necessity of making exceptions to the rulings and orders of the court, as distinct from the requirement that appropriate exceptions be made to findings of the court on trial of fact issues. In addition, it incorporates in this one rule the existing practice and procedure with respect to exceptions to findings of the court, and eliminates the necessity of researching for, and referring separately to, controlling statutes, case decisions, and rules, and then trying to correlate all three.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 52(a). The amendment to the fifth sentence conforms the rule to the 1983 Amendment of the Federal Rule. For a discussion of the amendment see the advisory committee note to the Federal Rule.

The last two sentences are new and do not appear in the Federal Rule. The next to last sentence is modeled after the language of Rule 59(f) (Order Granting New Trial). It is only applicable in the event that the court grants the motion and the order is appealable. The amendment answers the disapproval leveled in recent Montana Supreme Court decisions that

the trial court had granted summary judgment but failed to state the reasons therefor. See Stepanek v. Kober Construction, (1981) 191 Mont. 430, 625 P.2d 51.

Hopefully the last sentence will set to rest any problems arising out of the verbatim adoption by trial courts of counsels' proposed findings of fact and conclusions of law. The practice has been disapproved in recent Montana Supreme Court decisions although the adoption of counsels' findings and conclusions does not appear to be reversible error in and of itself, provided such findings and conclusions are supported by the evidence and law of the case. See Baer v. Baer, (1982) 199 Mont. 21, 647 P.2d 835.

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform the rule to the 1991 amendments of the Federal Rules.

Compiler's Comments

1993 Amendment: In third sentence, near beginning after "fact", inserted "whether based on oral or documentary evidence"; at end of sixth sentence substituted "subdivision (c) of this rule" for "Rule 41(b)"; and made minor changes in style.

Amendments — Identity With Federal Rule: The 1969 amendment rewrote the first part of the rule and made it into a separate paragraph requiring that findings be reduced to writing and served on the parties.

The 1971 amendment restored the language as it stood prior to the 1969 amendment, with minor changes; and inserted new provisions as the second, third, and fifth sentences. This amendment made the rule identical with the Federal Rule. As of July 31, 1983, this rule was still identical to the Federal Rule. On August 1, 1983, an amendment to the Federal Rule became effective allowing findings and conclusions to be given orally by the court. The 1984 amendment incorporated that change into the Montana Rule.

The amendment of October 9, 1984, in fifth sentence deleted "If an opinion or memorandum of decision is filed", after "conclusions of law" inserted "are stated orally and recorded in open court following the close of the evidence or", and after "appear" deleted "therein" and inserted "in an opinion or memorandum of decision filed by the court"; and inserted last two sentences.

On August 1, 1985, an amendment to the Federal Rule became effective that provided for the same standard of review of findings of fact "whether based on oral or documentary evidence".

As of May 1, 1990, the rule was identical to the Federal Rule except for the provision on standard of review added to the Federal Rule in 1985 and the two new sentences added to the end of the Montana Rule in 1984.

Case Notes

General 880
Form of Findings and Conclusions 888
Findings Not Clearly Erroneous 890
Standard of Appellate Review 899

GENERAL

Error in Failure to Set Out Findings of Fact When Modifying Parenting Plan: Findings of fact are required when a District Court considers a petition for modification or amendment of a parenting plan. Although specific findings regarding each element in 40-4-212 are not necessary, the court must set forth the essential and determining facts upon which its conclusion rests. In the present case, the record was devoid of any oral or written findings of fact, and the District Court abused its discretion by amending a parenting plan without making the required findings and conclusions, constituting reversible error. In re Marriage of Lawrence, 2005 MT 125, 327 M 209, 112 P3d 1036 (2005). See also In re Marriage of Ulland, 251 M 160, 823 P2d 864 (1991).

Improper Grant of Summary Judgment Without Hearing: The town of Virginia City sought to enjoin defendants from constructing a personal residence based on alleged permit violations. After a show cause hearing in District Court, a preliminary injunction was issued precluding further construction. Both parties filed cross-motions for summary judgment, which was granted to the town. Defendants moved to vacate pending completion of briefing and filing of transcripts and moved for oral argument, but the motions were denied. Defendants appealed, alleging that the District Court erred by granting summary judgment without affording defendants a hearing. The Supreme Court agreed. Summary judgment is only proper when there are no issues of material fact revealed in the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, and the moving party is entitled to judgment as a matter of law. Under Rule 56(c), M.R.Civ.P., a hearing is contemplated at which the District Court will consider not so much legal arguments, but rather whether there exist genuine issues of material fact, and in the ordinary case, the parties have a right to a summary judgment hearing unless the

hearing is explicitly waived. In Cole v. Flathead County, 236 M 412, 771 P2d 97 (1989), the Supreme Court noted that there may be an occasion when under the law and the facts adduced, the movant would be so clearly entitled to summary judgment as a matter of law that a District Court might by order dispense with the necessity of a hearing, but there was no such order in the present case. Rather, the language in the District Court's summary judgment order failed to state with sufficient particularity the rationale underlying the ruling, particularly the defenses raised in defendants' cross-motion for summary judgment. Although the District Court stated that it considered the entire record, there was no reference to considerations of defendants' affidavits. At one point, the court acknowledged that defendants were entitled to an evidentiary hearing, but failed to grant one, instead determining substantive questions that should have been left for a trial on the merits when granting injunctive relief. The only hearing afforded the parties in this case took place before discovery was conducted or responsive pleadings were filed, in noncompliance with Rule 56(c), M.R.Civ.P., and this rule. The District Court abused its discretion in granting summary judgment without affording defendants a summary judgment hearing. Summary judgment was reversed, and the case was remanded for further proceedings. Virginia City v. Olsen, 2002 MT 176, 310 M 527, 52 P3d 383 (2002).

Validity and Enforceability of Memorandum of Understanding — Findings of Facts and Conclusions of Law Not Required: The District Court ruled that the parties had entered into a valid and enforceable memorandum of understanding (MOU) regarding the parties' obligations applicable to an agricultural lease. The defendants argued that the MOU was simply an agreement to agree, that only a formal settlement agreement would bind the parties, and that the District Court erred in finding the MOU to be binding without setting out its findings of fact and conclusions of law. The plaintiff maintained that the MOU was an unconditional settlement agreement, that a more formal settlement document was not necessary to finalize or carry out the MOU, and that the court had no duty to set out its findings and conclusions. The Supreme Court found no error in the District Court's ruling and affirmed. All interested parties were present at the settlement conference and participated in negotiations, which ended with all the parties signing the MOU, memorializing the agreement among the signatories. Clearly there was a meeting of the minds during negotiations, and all the parties anticipated being bound by the MOU. The MOU was not conditioned upon the execution of a formal settlement agreement, so one was not necessary. The Supreme Court has recognized the validity of similar MOUs in Hetherington v. Ford Motor Co., 257 M 395, 849 P2d 1039 (1993), and Marta Corp. v. Thoft, 271 M 109, 894 P2d 333 (1995), and concluded that the agreement memorialized in the MOU here was a valid unconditional resolution of the parties' claims that effectively released any claims of the signatories. Further, under this rule, findings and conclusions are unnecessary on decisions of motions except for judgments at trial, which did not apply in this case. The District Court did not abuse its discretion in denying a defendant's motion to file an amended answer and counterclaim addressed to the original complaint, because those claims were also resolved by the MOU. Bar OK Ranch, Co. v. Ehlert, 2002 MT 12, 308 M 140, 40 P3d 378 (2002).

Scope of Review on Appeal:

The Supreme Court reviews the findings of a trial court sitting without a jury to determine if the findings are clearly erroneous. Clear error occurs if: (1) the findings are not supported by substantial credible evidence; (2) the trial court has misapprehended the effect of the evidence; or (3) a review of the record leaves the Supreme Court with the definite and firm conviction that a mistake has been committed. Evidence will be viewed in the light most favorable to the prevailing party. Here, evidence was substantial that three separate agreements memorialized one transaction for the sale and purchase of three ice cream distributor businesses, that a related consulting agreement was merely a promissory note wherein the seller agreed to finance the balance of the purchase price, and that the seller did not "sell, transfer, assign, and deliver" one of the distributor agreements to the buyer as promised. Norwood v. Serv. Distrib., Inc., 2000 MT 4, 297 M 473, 994 P2d 25, 57 St. Rep. 8 (2000).

Appellants must show by a clear preponderance of the evidence that the findings of fact of the District Court are incorrect, and it is their burden to do so before the Supreme Court may disturb those findings of fact. Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978).

Denial of Contractual Liability by Both Defendant Entities — Claims Put in Issue — Burden of Proof — Proposed Findings to Be Based Upon Evidence — No Evidence of Intent to Mislead as Basis for Relief From Judgment: Wright Oil sued Goodrich for petroleum products allegedly delivered but not paid for. Goodrich denied liability, claiming that the products were for the use of West Yellowstone Snowmobile Rentals, Inc. (WYSR), which owned Westgate Texaco, operated by Goodrich. Wright Oil amended its complaint to include WYSR, and after a bench trial, the District Court held against Goodrich because no evidence had been presented proving a contract

between WYSR and Wright Oil. Wright Oil then filed a motion for relief from judgment under Rule 60(b)(6), M.R.Civ.P., seeking relief from the District Court's failure to hold against WYSR. On the basis of evidence not presented at trial, the District Court granted the motion and ordered an evidentiary hearing to reopen the case against WYSR regarding WYSR's contractual liability to Wright Oil. WYSR appealed. The Supreme Court held that the District Court incorrectly granted the motion because the circumstances of the District Court's failure to hold WYSR liable for the debt to Wright Oil were not so extraordinary as to warrant relief from judgment under Rule 60(b)(6), M.R.Civ.P. The Supreme Court noted that WYSR's denial of its liability put the allegation of its contractual liability at issue under Rule 8(b), M.R.Civ.P., and under 26-1-401 and 26-1-402, Wright Oil had the burden of going forward with the evidence of WYSR's contractual liability but failed to present evidence of a contractual relationship between WYSR and Wright Oil. The fact that Goodrich alleged that WYSR was liable for the debt could not, the Supreme Court held, be taken as an admission by WYSR that it was liable for the amounts due. Further, the Supreme Court noted that Wright Oil should not have been surprised by WYSR's proposed findings of fact that it was not liable for the debt because under this rule, a party's proposed findings of fact must be supported by the evidence, and Wright Oil failed to produce that evidence of liability. Wright Oil & Tire Co. v. Goodrich, 284 M 6, 942 P2d 128, 54 St. Rep. 811 (1997).

Findings of Fact and Conclusions of Law Unnecessary for Decisions on Motions: Welch argued that the District Court had erred in adopting the figures for child support supplied by his ex-wife without any accompanying findings of fact and conclusions of law. The Supreme Court held that this rule provides that findings of fact and conclusions of law are unnecessary on decisions on motions and that although the Supreme Court encourages lower courts to include findings and conclusions, this encouragement does not translate into an absolute requirement. In re Marriage of Welch, 273 M 497, 905 P2d 132, 52 St. Rep. 1081 (1995).

Court Error in Arriving at Conclusion of Law Before Finding Facts: The plaintiff, Marry, was injured in an automobile accident involving a Deputy Sheriff. The lower court found the parties equally at fault and ordered that neither receive damages. Marry appealed on the basis that even if she were 50% negligent, she suffered more damages and should receive some money from the defendant. On reconsidering the case, the lower court stated that it was its intention that the plaintiff not receive any money and amended one of its findings to hold that Marry's negligence was greater than the defendant's and she was not entitled to recovery. The Supreme Court reversed on the basis that the lower court did not reexamine the evidence in amending its order. It formulated its conclusion of law first and then changed the findings of fact to conform to the conclusion already arrived at. Marry v. Missoula County Sheriff's Dept., 263 M 152, 866 P2d 1129, 50 St. Rep. 1751 (1993).

Denial of Motion to Change Venue — Explanation Within Court Discretion: Under this rule, when a court grants a motion under Rule 12 or Rule 56, M.R.Civ.P., the court shall support its order with an explanation of its reason, but there is no comparable requirement for orders denying motions to change venue. A District Court is at liberty to deny a venue motion with or without comment. Therefore, it was not error for a court to provide an explanation for why defendant's motion for change of venue was denied, nor was it error for the court to direct plaintiff to prepare an appropriate memorandum and order for the court to sign. I.S.C. Distrib., Inc. v. Trevor, 259 M 460, 856 P2d 977, 50 St. Rep. 880 (1993).

Vacation of Injunction for Failure to Support It With Findings of Fact and Conclusions of Law: Because the District Court improperly failed to make supporting findings of fact and conclusions of law when it issued its injunction, the Supreme Court had no basis to decide whether the injunction itself was proper. Therefore, the Supreme Court vacated the injunction and remanded for reconsideration and issuance of findings of fact and conclusions of law. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993).

Failure of District Court to Rule on Counterclaim for Emotional Distress and Attorney Fees as Requiring Remand — Refusal to Make Findings on Appeal: Plaintiff realty corporation brought an action in District Court to find defendants in default for failure to make payments under a contract for deed. Defendants counterclaimed for damages and attorney fees, alleging that as a result of plaintiff's breach of its fiduciary duty, defendants suffered emotional distress. The District Court made findings and conclusions that plaintiff breached its fiduciary duty to defendants, but the court failed to rule on defendants' counterclaim. The Supreme Court held that the failure of the District Court to rule on the counterclaim required a remand to the District Court for that purpose. The Supreme Court refused to make findings and conclusions on appeal, holding that deference to the District Court's position to observe the witnesses and assess their

credibility required that the District Court make the findings. Cont. Realty, Inc. v. Gerry, 251 M 150, 822 P2d 1083, 48 St. Rep. 1134 (1991).

Failure to Specify Grounds for Summary Judgment — Remand: Failure of the District Court to specify the grounds for summary judgment rulings with sufficient particularity to apprise the parties and the appellate court of the rationale underlying the rulings resulted in remand of the case with instructions to enter reasons in support of summary adjudication. Johnston v. Am. Reliable Ins. Co., 248 M 227, 810 P2d 1189, 48 St. Rep. 405 (1991), following Stepanek v. Kober Constr., 191 M 430, 625 P2d 51 (1981), and followed in Ravalli County Bank v. Gasvoda, 253 M 399, 833 P2d 1042, 49 St. Rep. 488 (1992). On remand, the District Court stated its reasons for granting respondents' summary judgment based on respondents' argument that a mobile home was lawfully repossessed. On subsequent appeal, the Supreme Court found that the home was actually converted. It was within the Supreme Court's power to reverse the District Court's grant of summary judgment and order summary judgment in favor of the appellant as a matter of law when all facts bearing on the issue were before the Supreme Court. Johnston v. Am. Reliable Ins. Co., 253 M 253, 833 P2d 176, 49 St. Rep. 495 (1992).

Supreme Court Deference to Workers' Compensation Court Judgment: The Supreme Court held that there was conflicting evidence concerning whether or not the claimant had suffered an additional injury or if his disability was the result of a prior accident. The court stated that when there was conflicting evidence, it would, in most cases, defer to the trial court. Sharkey v. Atl. Richfield Co., 238 M 159, 777 P2d 870, 46 St. Rep. 1169 (1989), followed in White v. Ford, Bacon & Davis Tex., Inc., 256 M 9, 843 P2d 787, 49 St. Rep. 1117 (1992).

Failure to File Notice of Entry of Judgment — Amended Complaint Allowed: Unless posttrial motions are made by the losing party under Rule 59, M.R.Civ.P., or this rule, the losing party is not required to adhere to the 30-day period for filing a notice of appeal until proper service of notice of entry of judgment is made. This rule applies to orders that may become final as well as to judgments. In this case, notice of entry of judgment was not served and no posttrial motions were made. The time for appeal did not begin to run, the order of dismissal of the original complaint did not become final, and the District Court had jurisdiction to grant leave to file an amended complaint. The District Court had not lost subject matter jurisdiction. Hankinson v. Picotte, 235 M 143, 766 P2d 242, 45 St. Rep. 2259 (1988).

Plaintiffs Not Entitled to Instructions on Equity Issues — Findings and Conclusions Unnecessary: Plaintiffs who waited 7 years to assert their rights under decedent's will were not entitled to proposed instructions relating to laches and equitable estoppel. No questions of equity were ever placed before the jury nor were such claims appropriate. Therefore, the trial judge was not required to make findings and conclusions. Tope v. Taylor, 235 M 124, 768 P2d 845, 45 St. Rep. 2242 (1988).

Correctable Error — No Reversal: The District Court was determined to be in error in finding appellant had received $2,000 in temporary maintenance, when in fact she had received only $1,000. This error is correctable and does not constitute an abuse of discretion by the District Court rising to the level of reversible error. In re Marriage of Turbes, 234 M 152, 762 P2d 237, 45 St. Rep. 1805 (1988).

Error in Findings — Judgment Affirmed: In a contract dispute between the buyer and seller of property, the seller objected to 35 specific findings of the trial judge. The Supreme Court held that the trial court erred both in stating that seller took no action to collect default fees and in describing the buyer's expenses in improving the property. The findings were amended to reflect these facts. However, no change was required in the judgment, and the other challenged findings were supported by testimony and evidence. Schilke v. Bean, 232 M 125, 755 P2d 565, 45 St. Rep. 930 (1988).

Findings and Conclusions Unnecessary on Motions for Summary Judgment: The Supreme Court has on several occasions followed the portion of this rule that states that findings of fact and conclusions of law are not required to be entered upon motions for summary judgment. Pertinent cases are cited in this opinion. Simmons v. Jenkins, 230 M 429, 750 P2d 1067, 45 St. Rep. 328 (1988), followed in Gypsy-Highview Gathering System, Inc. v. Dept. of State Lands, 231 M 330, 753 P2d 317, 45 St. Rep. 657 (1988).

Failure to Separate Findings of Fact and Conclusions of Law — Undue Prejudice Not Shown — No Reversible Error: District Court failure to specifically separate findings of fact and conclusions of law, in the absence of evidence of undue prejudice, did not constitute reversible error. Yellowstone Conference of the United Methodist Church v. D.A. Davidson, Inc., 228 M 288, 741 P2d 794, 44 St. Rep. 1528 (1987).

Review of STAB Decision — Additional Evidence: When additional evidence is presented during review of a STAB decision under 15-2-303, such evidence may be introduced before the

court rather than the agency. Findings of fact and conclusions of law are then required to be made by the court. If the court does not permit or receive additional evidence, written findings and conclusions by the court are not required. Hi-Line Radio Fellowship v. Dept. of Revenue, 227 M 150, 737 P2d 886, 44 St. Rep. 955 (1987).

Judgment Distinguished: Findings of fact and conclusions of law are not the judgment, but merely the foundation for the judgment. Reintsma v. Lawson, 223 M 520, 727 P2d 1323, 43 St. Rep. 1962 (1986); State ex rel. King v. District Court, 107 M 476, 86 P2d 755 (1939); Galiger v. McNulty, 80 M 339, 260 P 401 (1927); State ex rel. Reser v. District Court, 53 M 235, 163 P 1149 (1917).

Ambiguous Insurance Policy Provision — Summary Judgment Reversed: An insurance policy that did not clearly state whether it provided uninsured motor vehicle coverage when the driver was insured but the ownership of the vehicle was not was held to be ambiguous; therefore, under the rationale that an ambiguous provision is construed against the insurance company, the policy was interpreted to provide coverage. The District Court grant of summary judgment holding that the policy did not provide uninsured motor vehicle coverage was reversed. St. Farm Mut. Auto. Ins. Co. v. Taylor, 223 M 215, 725 P2d 821, 43 St. Rep. 1667 (1986).

No Basis to Reopen Dissolution Decree: The appellant did not claim the existence of unconscionability, fraud, or any other inequitable situation that would give a court a legal basis upon which to reopen a dissolution decree. She attempted to enhance enforcement of the judgment that incorporated the parties' stipulations as to the property division by making a motion to modify. She was precluded by statutory time limits and by the fact that she had no legal basis to compel a court to reopen the judgment. Since no conditions existed that would justify reopening the judgment, the District Court was not required to enter findings of fact. Keirle v. Keirle, 210 M 214, 681 P2d 703, 41 St. Rep. 1016 (1984).

Real Estate Valuations — Conflicting Appraisals — Grounds for Adopting One Over Another: In an action for rescission of a contract for the sale of a ranch for $558,200, the seller's appraiser valued the ranch at about $870,000, the buyers' appraiser valued it at about $515,000, and the court found its value to be $635,000. The only possible source for the court's figure was seller's testimony that she had a second appraisal of $635,000. The appraiser was not called as a witness, and his report was not put in evidence. The court's figure was based on data that could not be cross-examined by sellers, and acceptance of the $635,000 appraisal was error, though harmless. In the future, all trial judges valuing real estate should explain in the court's findings why one appraiser's figure is believed over another's so that the Supreme Court can assess the conscientiousness or reasonableness of the lower court's exercise of its broad discretion. Deist v. Wachholz, 208 M 207, 678 P2d 188, 41 St. Rep. 286 (1984).

No Duty to Outline All Evidence in Findings: Judge trying divorce proceeding without a jury was not obligated to outline all the testimony presented at trial in his findings of fact, and no error was found on appeal in which husband claimed the judge ignored evidence husband had submitted and failed to make necessary findings thereon. Cherewick v. Cherewick, 205 M 75, 666 P2d 742, 40 St. Rep. 1106 (1983), followed in Yellowstone Basin Properties, Inc. v. Burgess, 255 M 341, 843 P2d 341, 49 St. Rep. 1051 (1992). Yellowstone Basin Properties, Inc. was followed in Garrison v. Averill, 282 M 508, 938 P2d 702, 54 St. Rep. 454 (1997), and Madison Addition Architectural Comm. v. Youngwirth, 2000 MT 293, 302 M 302, 15 P3d 1175, 57 St. Rep. 1244 (2000).

Findings and Conclusions Required With Injunction: The parties entered an oral agreement for plaintiff to loan money to defendant to purchase a semitruck, subject to an oral security interest and repayment schedule. Plaintiff later located defendant and the truck in Missoula and filed a complaint alleging breach of contract and replevin. An injunction was also requested. Following a show cause hearing, plaintiff was given immediate temporary custody of the truck and allowed to operate it to mitigate his damages. Defendant appealed the ruling under Rule 1(b), M.R.App.P. The Supreme Court vacated the injunction, holding that the court's order failed to preserve the status quo. It determined substantive property rights and did not set forth findings of fact and conclusions of law at the time the injunction was issued. Ensley v. Murphy, 202 M 406, 658 P2d 418, 40 St. Rep. 173 (1983).

Ambiguity of Contract Clause — Conclusion of Law: Contract ambiguities are questions of fact, and on appeal the Supreme Court would ordinarily limit their review to the "clearly erroneous" standard of review. The initial determination of whether or not an ambiguity exists is one of law. Thus, the determination by the District Court that a default clause is ambiguous is a conclusion of law freely reviewable. When on review the Supreme Court finds that the clause is not ambiguous, the court is free to rely on its own interpretation of the clause. SAS Partnership v. Schafer, 200 M 478, 653 P2d 834, 39 St. Rep. 1883 (1982).

Balancing Expert and Lay Testimony: A trier of fact is free to disregard the expert testimony of a party's witness and adopt the testimony of the other party if the other party's evidence is credible and substantial. Rose v. Rose, 201 M 86, 651 P2d 1018, 39 St. Rep. 1971 (1982).

Award of Fees Reasonable — Appeal to Clarify Alternative Judgment Not Frivolous: In an original judgment of October 31, 1979, plaintiffs were given the alternatives of either repairing a damaged irrigation ditch or paying damages of $5,500. The case was appealed to the Supreme Court, and in Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981), the court found substantial evidence to support the District Court's findings. This became the law of the case. The case was remanded for a determination of attorney fees to be awarded to defendant. On remand, attorneys for defendant requested fees of $11,000. The District Court awarded fees of $2,000 based on testimony received. The Supreme Court found that this finding was not clearly erroneous. The court also declined to award attorney fees for the appeal under Rule 32, M.R.App.P., because plaintiffs were justified in bringing the appeal to clarify the alternative judgment. Marta v. Smith, 200 M 414, 650 P2d 1387, 39 St. Rep. 1839 (1982).

Facts Argued in Brief Irreconcilable — Court's Finding Clearly Erroneous: Although the facts argued in the parties' briefs with regard to delinquent child support payments were irreconcilable, the trial transcript indicated that the respondent was current on the payments. The court's finding of delinquent payments was, therefore, clearly erroneous. Baer v. Baer, 199 M 21, 647 P2d 835, 39 St. Rep. 1178 (1982).

Decisions on Motions — When Findings and Conclusions Unnecessary: On wife's motion to enforce decree of dissolution of marriage dissolved some 8 months prior to the motion, the trial court entered an order in her favor without making findings of fact and conclusions of law. Husband's appeal was not an appeal from a judgment following trial, and findings and conclusions were not required under this rule's provision that findings and conclusions are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). Baker v. Baker, 198 M 371, 646 P2d 522, 39 St. Rep. 1031 (1982).

Findings of Income and Marital Estate Clearly Erroneous — Evidence in Support of Findings Required: Where, in an action for divorce, the uncontradicted evidence of the husband showed his annual net income to be $9,000 a year and the value of the marital estate to be $740,673.95, the District Court erred in adopting wholesale the proposed findings of the wife that the husband's income was $21,000 a year and the value of the marital estate was $760,000. Wholesale adoption of proposed findings and conclusions is a practice disapproved by the Supreme Court and in this case resulted in clearly erroneous findings unsupported by the evidence. In re the Marriage of Beck v. Beck, 193 M 166, 631 P2d 282, 38 St. Rep. 1054 (1981).

Findings and Conclusions Entered After Notice of Appeal — Loss of Jurisdiction: An employer appealed from an order of the Workers' Compensation Court determining that its former employee was permanently totally disabled. Through various stages of the case, the court failed to make findings of fact. Notice of appeal to the Supreme Court was filed. A week later the court entered its findings of fact and conclusions of law in support of its original order reinstating benefits cut off by the employer. The Supreme Court agreed with the appellant/employer that the supplemental findings entered after the notice of appeal was filed could not be considered. The trial court had lost jurisdiction, except for ancillary matters, when the notice of appeal was filed. The order reinstating the claimant's benefits, determining that she was permanently totally disabled and ordering the employer to pay a penalty and attorney fees, was not an interim order because, unless appealed, it would have to be obeyed. Therefore, proper findings and conclusions were needed to support the order. A new hearing was ordered with discovery to be enforced against both parties. Churchhill v. Holly Sugar Corp., 192 M 533, 629 P2d 758, 38 St. Rep. 860 (1981), overruled, at least in relation to Rule 54(b), M.R.Civ.P., certification of findings, by Klaudt v. Flink, 202 M 247, 658 P2d 1065, 40 St. Rep. 64 (1983).

Findings Supporting Continued Maintenance Properly Made — Issue Not Before the Court: Where the marriage of the parties was previously dissolved and the wife awarded maintenance without being required to seek employment in order that she be able to care for her handicapped child at home, the District Court did not err, upon a petition for discharge of the maintenance award, in adopting the respondent's proposed findings and conclusions. With the exception of a finding regarding increased financial need, there was sufficient evidence before the court showing no change in the child's need for special care to support the findings and conclusions that were adopted, no matter who drafted them. As the issue of increased spousal maintenance was not before the court, that finding must be vacated. Tidball v. Tidball, 192 M 1, 625 P2d 1147, 38 St. Rep. 482 (1981).

Findings of Fact and Conclusions of Law Required — Case in Equity and Tried to Jury: In this case concerning a contract for deed, the Supreme Court remanded the cause to the District

Court for a determination of several factual issues. It held that, because the case was in equity, the District Court should have entered findings of fact and conclusions of law even though the cause was tried to a jury. The jury's interrogatories did not state the facts underlying the decision. Unless both parties agreed to be bound by a jury decision without further findings by the court, the findings of the jury were advisory only and the District Court was required to make findings under this rule. Three reasons for requiring findings of fact were stated: (1) as an aid to the trial judge's adjudication; (2) for res judicata and estoppel purposes; and (3) to facilitate appellate review. Stoddard v. Gookin, 191 M 495, 625 P2d 529, 38 St. Rep. 326 (1981).

Appointment of Lead Counsel for Consolidated Cases — Hearing and Findings Unnecessary on Motion: In an action against the defendant for damages caused by a range fire, in which action numerous related cases were consolidated for trial, the District Court did not err in failing to hold an evidentiary hearing prior to the appointment of one attorney as lead counsel for all of the consolidated cases. Because Rule 52(a), M.R.Civ.P., provides that findings are unnecessary on decisions on motions, the court's decision under Rule 42(a), M.R.Civ.P., did not require findings and there was therefore no obligation on the District Court to provide an evidentiary hearing. Means v. Mont. Power Co., 191 M 395, 625 P2d 32, 38 St. Rep. 351 (1981).

Property Held Prior to Enactment of Tax Payment Requirement — No Adverse Possession Established — Court Presumed Correct Despite Lack of Finding: Plaintiffs were properly denied adverse possession of yard space on the basis of nonpayment of taxes even though no finding was made regarding whether the property was held prior to enactment of the statute requiring payment of taxes to establish adverse possession. The District Court's judgment is presumed correct, and the Supreme Court will draw every legitimate inference to support that presumption. Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981).

Application of Debtor's Payment to Past Due Account With Creditor — Debtor's Instructions — Creditor's Lien Despite Payment: Defendant contracted for a new building. The contractor purchased materials from the plaintiff through a subcontractor who had an account with the plaintiff. When the subcontractor was paid by the defendant, he in turn paid the plaintiff. The plaintiff applied the payment to the subcontractor's past due account, then later filed a lien against the defendant. The defendant appealed from a judgment upholding the lien. Because a creditor is bound by the instructions given to him by his debtor as to the application of a payment, the issue on appeal was the instructions the subcontractor gave to the plaintiff. With no trial court finding of a duty of the plaintiff to apply the funds paid to it by the subcontractor to the bill for materials used by the defendant, the Supreme Court followed the clear mandate from the Legislature and held that the defendant was liable to the plaintiff on the lien judgment against him, while recommending that the Legislature review the statute. Gen. Elec. Supply v. Mont. Auto. Ass'n, 189 M 553, 617 P2d 136, 37 St. Rep. 1715 (1980), distinguished in Witbart v. Witbart, 204 M 446, 666 P2d 1217, 40 St. Rep. 995 (1983).

Moving Expenses and Attorney Fees Upon Dissolution of Marriage — Failure to Make Findings and Conclusions: Where, following entry of the court's order dissolving the marriage of the parties, the Supreme Court remanded the case to the District Court for additional findings of fact concerning a military pension, the District Court was also directed to rule on and make findings of fact concerning the appellant's requests for moving expenses and attorney fees if the appellant renews her requests. Failure of the District Court to make findings only results in needless remands of the case to the District Court for determination of the issues. Ebert v. Ebert, 189 M 477, 616 P2d 379, 37 St. Rep. 1674 (1980).

Findings Upon Questions Not in Dispute: Plaintiff power company appealed from the refusal of the District Court to adopt a certain finding. The Supreme Court held that the District Court is not required to make a finding on a fact which has no real relation to the prime issue contested in a case, notwithstanding entry of evidence in pretrial court bearing on the irrelevant issue. Mont. Power Co. v. Kravik, 189 M 369, 616 P2d 321 (1980).

Attorney's Fees — Reliance by Courts on Experts: In determining attorney's fees, the court as a jury is not bound absolutely to the testimony of expert witnesses. It can reduce or increase the figures submitted to it by experts as reasonable attorney's fees, and as long as its findings are not clearly erroneous the determination made in its discretion will not be disturbed. St. v. Helehan, 189 M 339, 615 P2d 925 (1980).

Prevailing Party Not Presenting Expert Testimony: Plaintiffs contracted with defendant to build their log home. Before and after occupancy of the home structural problems requiring repair occurred. At trial plaintiffs were awarded damages against the defendant. On appeal defendant claimed that findings that the roof had not been constructed as planned and bid, and that construction defects by defendant brought about the instability and unsafe nature of the house, were not supported by credible evidence especially since the District Court did not accord

any weight to the testimony of defendant's expert architect. The Supreme Court rejected the claim, stating that when substantial evidence in the record supports the findings of the District Court, the fact that the prevailing party does not present expert testimony does not mean that the testimony produced by experts on the other side is inherently superior. When the evidence is conflicting but the findings are supported by substantial credible evidence, the findings of the District Court will be upheld. Carroccia v. Todd, 189 M 172, 615 P2d 225 (1980).

Findings Required in Probate Proceeding: Although Rule 52, M.R.Civ.P., is seldom used in probate proceedings, it must be applied to this case to enable the Supreme Court to know precisely the questions presented for appellate review, because they cannot be determined from the record. In re Estate of Murphy, 183 M 127, 598 P2d 612 (1979).

Credibility of Witness: Findings of fact may not be set aside unless clearly erroneous and due regard will be given to the opportunity of the trial court to judge the credibility of the witnesses. The District Court did not abuse its discretion by ruling in favor of the defendant on one issue after the defendant's credibility had been impeached on a separate issue. Kis v. Pifer, 179 M 344, 588 P2d 514 (1978). See also Rafanelli v. Dale, 278 M 28, 924 P2d 242, 53 St. Rep. 746 (1996), and Walls v. Travelers Indem. Co., 281 M 106, 931 P2d 712, 54 St. Rep. 82 (1997). Walls was followed in Paterson v. Mont. Contractor Comp. Fund, 1999 MT 158, 295 M 120, 983 P2d 300, 56 St. Rep. 623 (1999).

Testimony Not Directly Controverted — Judge Not Bound: A trial judge is not bound to find in favor of a party simply because one of his witness's testimony is not directly controverted. Holloway v. Univ. of Mont., 178 M 198, 582 P2d 1265 (1978).

Findings of Fact — Definition and Purpose: The findings of fact required by Rule 52(a), M.R.Civ.P., are nothing more than a recordation of the essential and determining facts upon which the District Court rested its conclusions of law and without which the District Court's judgment would lack support. The purpose of requiring findings of fact is three-fold: as an aid in the trial judge's process of adjudication; for purposes of res judicata and estoppel by judgment; and as an aid to the appellate court on review. Barron v. Barron, 177 M 161, 580 P2d 936 (1978), followed in Clemans v. Martin, 221 M 483, 719 P2d 787, 43 St. Rep. 994 (1986). See also Lake v. Lake County, 233 M 126, 759 P2d 161, 45 St. Rep. 1354 (1988), and Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003).

Rules Regarding Effect of Stipulations: Court did not go beyond agreed statement of facts in making its findings. In considering an agreed statement of facts a court may make any reasonable inference of which the facts might be susceptible as if the facts had been gleaned from testimony. When a court feels it needs evidence beyond that in the agreed statement to make its decision, it may refer to evidence outside of the agreed statement. Grinde v. Tindall, 172 M 199, 562 P2d 818 (1977).

Subsequent Accounting Not a New Judgment: Where a judgment contains a provision that either party may petition the court for a supplemental decree and accounting in the event the parties cannot agree upon the remaining balance due, it is considered an interlocutory judgment and a subsequent judgment of accounting is not a new judgment, but a clarification of the prior interlocutory judgment as no rights in the prior judgment were changed, nor were any of the formerly settled issues changed. Heller v. Osburnsen, 168 M 232, 541 P2d 1032 (1975).

Findings and Conclusions Unnecessary — Motions Under Other Rules: Findings of fact and conclusions of law are unnecessary on decisions with respect to motions made under Rule 12, Rule 56, or any other motion except as provided in Rule 41(b). Eisemann v. Hagel, 157 M 295, 485 P2d 703 (1971).

Summary Judgment — Reversal Based on Findings: Even though findings are not required in granting summary judgment, if findings are made that form the basis for judgment and if the evidence does not support the findings, the judgment will be reversed. Upper Missouri G & T Elec. Co-op v. McCone Elec. Co-op, Inc., 157 M 239, 484 P2d 741 (1971).

Nonjury Case — Findings and Conclusions Properly Made: Here, the case being tried without a jury, the court properly made findings of fact and conclusions of law. Tolson v. Tolson, 145 M 87, 399 P2d 754 (1965).

Additional Findings After Judgment: Since courts have the inherent power to correct or amend their judgments so as truly to express what was actually passed upon and decided, they may also, after entry of judgment, add to or make additional findings, which are but the foundation for the judgment so long as the judgment itself is not substantially changed. O'Keefe v. Routledge, 110 M 138, 103 P2d 307 (1940).

FORM OF FINDINGS AND CONCLUSIONS

Adoption of One Party's Findings and Conclusions in Estate Dispute Not Grounds for Reversal: The conservator of an estate contended that the District Court erred by adopting the findings and conclusions of the decedent's niece and by denying the conservator's motion to alter or amend the judgment after receiving a brief in support and the niece's response but before the conservator filed a reply brief. The Supreme Court noted that a court's adoption of the findings and conclusions of a prevailing party is not grounds for reversal, but rather the question is whether the findings are sufficiently comprehensive, pertinent, and supported by substantial evidence to provide a basis for the decision. In this case, the findings were sufficiently comprehensive and supported by substantial evidence, and the decision was affirmed. Further, although the Supreme Court does not condone or encourage entering orders prior to the expiration of the time for briefing, the conservator offered no argument or analysis to support a conclusion that the conservator's due process rights were implicated by denial of the motion to alter or amend the judgment, so denial of the motion also did not constitute grounds for reversal. In re Estate of Stukey, 2004 MT 279, 323 M 241, 100 P3d 114 (2004). See also In re Marriage of Hurley, 222 M 287, 721 P2d 1279 (1986), and In re Marriage of Nikolaisen, 257 M 1, 847 P2d 287 (1993).

Defendant's Proposed Findings Adopted Verbatim — Lack of Evidentiary Support Warranting Remand: The District Court essentially adopted the findings and conclusions proposed by Service Distributing, Inc. (SDI), prior to trial. Generally, a District Court's findings will not be disturbed unless they are clearly erroneous or unsubstantiated by the evidence. Here, Norwood claimed, and the Supreme Court agreed, that SDI did not offer any evidence at trial in support of several of the findings or file any posttrial findings omitting or modifying the pretrial proposed findings, which were not supported by substantial evidence. In fact, several of the District Court's findings and conclusions were clearly erroneous and legally incorrect, and the Supreme Court reversed and remanded. Norwood v. Serv. Distrib., Inc., 2000 MT 4, 297 M 473, 994 P2d 25, 57 St. Rep. 8 (2000). See also Baer v. Baer, 199 M 21, 647 P2d 835 (1982).

Motion to Enforce Divorce Degree — Written Findings and Conclusions Not Required: Corliss brought a motion to enforce a part of her divorce decree relating to her ex-husband's payment of medical expenses. The District Court denied the motion but failed to make written findings and conclusions. Corliss sought to reverse the District Court's order, arguing that the District Court had failed to make written findings and conclusions and that written findings and conclusions were required by In re Marriage of Bliss, 187 M 331, 609 P2d 1209 (1980), and Jones v. Jones, 190 M 221, 620 P2d 850 (1980). The Supreme Court distinguished both Bliss and Jones, pointing out that there were no findings at all in either of those cases and noting that in the case of the denial of Corliss's motion, the District Court had made specific oral findings of fact that were shown in the written District Court record. The Supreme Court concluded that those oral findings were sufficient to support the District Court's denial of Corliss's motion. In re Marriage of Johnson, 1999 MT 254, 296 M 311, 989 P2d 356, 56 St. Rep. 1011 (1999).

Summary Judgment — Reversal for Insufficient Specificity of Dismissal Rationale: Although findings of fact and conclusions of law are unnecessary in Rule 12 and Rule 56, M.R.Civ.P., decisions, a District Court is required under this rule to specify the grounds for granting a motion with sufficient particularity to apprise the parties and the appellate court of the rationale for the ruling. The lower court was reversed for failing to state that no genuine issue of material fact existed. Cole v. Flathead County, 236 M 412, 771 P2d 97, 46 St. Rep. 469 (1989).

Request for Remand for More Specific Findings — Denied as Caused by Party: A party who failed to take advantage of his opportunity to present specific evidence to the District Court in a dissolution of marriage action was denied a remand for more specific findings because such findings were caused by his actions and, furthermore, the Supreme Court determined there was substantial evidence to sustain the District Court's judgment. In re Marriage of Merry, 213 M 141, 689 P2d 1250, 41 St. Rep. 2009 (1984).

Failure to Find Property Subject to Distribution — Conflicting Findings Requiring Remand: Where the District Court found, in a dissolution proceeding, that a coin collection was acquired by the wife's wages during the marriage and therefore constituted property subject to division and awarded the collection to the wife but failed to include the collection in a list of property subject to division, the Supreme Court remanded the case to the District Court for amendment of the findings in a manner consistent with the Supreme Court opinion. Glasser v. Glasser, 206 M 77, 669 P2d 685, 40 St. Rep. 1518 (1983).

Effect of Inconsistent Findings: In a case seeking to modify a child custody decree, the trial court made conflicting findings based on evidence presented by both the mother and the father. The Supreme Court stated that the trial court's findings did not reveal the basic facts on which

the trial court relied. The case was remanded with directions to enter findings of fact to resolve the conflicts in the evidence. Wilmot v. Wilmot, 199 M 477, 649 P2d 1295, 39 St. Rep. 1535 (1982).

Actual Fraud in Execution of Contract for Deed — Compliance With Pollution Laws — Doctrine of "Implied Findings": Where the plaintiffs sued for damages caused by the defendants' fraud in the execution of a contract for deed for the sale of a shale and concrete block plant, alleging misrepresentation by the defendant company and its agents as to the plant's status of compliance with air pollution laws, the court did not err in finding the defendants guilty of actual fraud. Actual fraud is always a question of fact, and there was ample evidence upon which the court could find that the factual requisites for actual fraud had been satisfied. Although the court did not make a specific finding that the plaintiff relied upon the false representations by the defendants, the Supreme Court will engage the doctrine of "implied findings" so long as those findings are not inconsistent with express findings and assume that the court found reliance upon the defendants' misrepresentation. Poulsen v. Treasure St. Indus., Inc., 192 M 69, 626 P2d 1822, 38 St. Rep. 218 (1981), holding on "implied findings" followed in Interstate Brands Corp. v. Cannon, 218 M 380, 708 P2d 573, 42 St. Rep. 1670 (1985), H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000), and St. v. Wooster, 2001 MT 4, 304 M 56, 16 P3d 409 (2001). Interstate was followed in In re Mental Health of S.C., 2000 MT 370, 303 M 444, 15 P3d 861, 57 St. Rep. 1584 (2000).

Findings Sufficient to Determine Net Worth — Discretion of Court: While the District Court in a divorce dissolution failed to make a specific finding of net worth, the findings as a whole are sufficient to determine the net worth and to decide whether the distribution was equitable. All of the major assets were valued by the court, and the court specifically found that the husband had a greater opportunity to acquire a residence in the future and that the wife's age, skills, and custodial status justified allocation of the house to the wife. The District Court has far-reaching discretion in resolving property divisions, and its judgment will not be altered unless a clear abuse of discretion is shown. Nunnally v. Nunnally, 192 M 24, 625 P2d 1159, 38 St. Rep. 529 (1981).

Necessity of Proper Findings and Conclusions — Incorporation of Property Settlement: An action for the dissolution of marriage was brought, and dissolution was granted. The parties entered into a property settlement a week before the decree of dissolution was entered. About 3 months later, one party brought a motion to incorporate the agreement in the court's final decree. The other party objected to the adoption of the visitation provisions. After a hearing, the District Court entered a supplemental decree of dissolution, incorporating all the terms of the property settlement agreement. On appeal, the appellant argued that the trial court erred in incorporating the property settlement without making specific findings of fact regarding the impact of the visitation provided for on the best interests of the child. The Supreme Court held that the purpose of the findings and conclusions required under the rule of civil procedure was to provide a foundation for the court's judgment. The record should include the essential and determining facts upon which the court rested its conclusions of law and without which the judgment would lack support. The finding of fact and conclusion of law that the visitation provision in the property settlement agreement was in the best interests of the child failed to set forth the essential and determining facts upon which the court rested its conclusion. Without those factors, the Supreme Court was unable to determine the propriety of the determination. The case was remanded for the required factual findings. Jones v. Jones, 190 M 221, 620 P2d 850, 37 St. Rep. 1973 (1980). See also In re Marriage of Johnson, 1999 MT 254, 296 M 311, 989 P2d 356, 56 St. Rep. 1011 (1999).

Maintenance and Support Order — Invalidated for Lack of Findings and Conclusions: A District Court order of maintenance and child support that failed to comply with Rule 52(a), M.R.Civ.P., by finding the facts specially and stating conclusions of law separately was held invalid. Park v. Park, 190 M 180, 619 P2d 1200, 37 St. Rep. 1874 (1980).

Particularity of Findings on Property Distribution — Not Necessarily Required if Directive Items Considered: On appeal relating to his divorce settlement agreement, the former husband contended that the trial court erred in making an "equitable" grant of personal property without making certain findings, such as the net worth of the marital estate. The Supreme Court reiterated an earlier holding that a District Court need not set forth its findings with particularity if there is substantial evidence that the court was aware of and considered the directive items of 40-4-202. The trial court held a hearing on all elements in a marital estate, and there was no substantial evidence that the court did not consider the whole estate in finding that the separation agreement was deficient. The existence of a valid agreement presumes that the net worth of the parties has been considered in the disposition of their property by the agreement. There was substantial evidence here that the net worth of the parties was

established by the District Court and by the settlement agreement. Harris v. Harris, 189 M 509, 616 P2d 1099, 37 St. Rep. 1696 (1980).

Factual Support for Maintenance Award Required: Maintenance payments require an affirmative showing as a condition precedent to their award. The existence or lack of this condition precedent is to be shown by a recordation of the essential and determining facts upon which the court rested its conclusions of law and without which the judgment lacks support. Schultz v. Schultz, 183 M 20, 597 P2d 1174 (1979).

General Findings: Very general findings of fact and conclusions of law will support a judgment when they substantially follow the allegations of the pleadings. Farmers St. Bank v. Mobile Homes Unlimited, 181 M 342, 593 P2d 734 (1979).

Incomplete Findings Sufficient: If the findings ascertain the ultimate facts and sufficiently conform to the pleadings and the evidence to support the judgment, they will be regarded sufficient, though not as full and complete as might be desired. Farmers St. Bank v. Mobile Homes Unlimited, 181 M 342, 593 P2d 734 (1979).

Statement of Ultimate Fact as Conclusion of Law: A statement of ultimate fact retains its character as such, although it could also be read as a conclusion of law. Holloway v. Univ. of Mont., 178 M 198, 582 P2d 1265 (1978).

Modification of Maintenance and Support — Factual Determinations Imperative: The pertinent factors in 40-4-203 and 40-4-204, with findings of fact to support them, should be set out in the District Court's decision. Otherwise the appellate court has nothing upon which to base its review. Moreover, under 40-4-208 the District Court can grant modification or termination of maintenance and support only if there is a showing of circumstances making the payments unconscionable, which compels proper findings and conclusions. Capener v. Capener, 177 M 437, 582 P2d 326 (1978).

Failure of Probate Court to Make Findings and Conclusions: When the District Court entered an order admitting a will to probate but failed to make findings of fact and conclusions of law stating its basis for the order, the order was reversed and case remanded with instructions to provide such information in order that the Supreme Court not be forced to speculate as to the reasons for the District Court's decision. In re Craddock, 173 M 8, 566 P2d 45 (1977).

Findings of Ultimate Versus Evidentiary Fact: The court need only make findings of ultimate facts and not evidentiary facts. The court need not find proposed facts submitted by a party which are evidentiary facts related to an ultimate fact found against the party. Erickson v. Fisher, 170 M 491, 554 P2d 1336 (1976).

Sufficiency of Findings: Lower court ruling that "no cause of action or claim exists or has been proven" and "the same is hereby dismissed" was sufficient compliance with rules despite plaintiff's contention that findings of fact and conclusions of law did not meet requirements of rules. Mondakota Gas Co. v. Becker, 151 M 513, 445 P2d 745 (1968).

Failure to Make Findings as Grounds for Reversal: Upon proper request it is the duty of the District Court to make findings, in the absence of which the cause presents grounds for reversal. Ballenger v. Tillman, 133 M 369, 324 P2d 1045 (1958).

Findings Referring to Complaint: Even though findings based upon the allegations of the pleadings are valid they must be weighed as to sufficiency by the complaint or pleadings upon which they are based and if the findings of fact refer to the complaint, then to be sufficient, the complaint must state a cause of action. Ballenger v. Tillman, 133 M 369, 324 P2d 1045 (1958).

Findings Mixed With Opinion: Written findings of fact and conclusions of law should be separately stated in case tried by the court without a jury, and not made a part of any other document, even though not expressly requested by the parties. The purpose of such treatment of the findings and conclusions is that no question may arise as to their properly being a part of the judgment roll or of the record on appeal. Opinion, intermingled with other matters, containing the court's view of the evidence was equivalent to its findings of fact, and may be made a part of the record by amendment to show what he considered proved, the balance being disregarded. Coffman v. Niece, 110 M 541, 105 P2d 661 (1940).

Separate Findings and Conclusions: In every case specific findings should be made upon all material issues of fact raised by the pleadings, followed by the appropriate conclusions of law, indicating the judgment to be entered thereon. Bordeaux v. Bordeaux, 43 M 102, 115 P 25 (1911).

FINDINGS NOT CLEARLY ERRONEOUS

Finding of Permissive Use of Cotenants' Fractional Interest Not Clearly Erroneous: Foley brought an action to quiet title to ranch property, claiming that title had been acquired from the cotenants by adverse possession of fractional interests acquired by two siblings in the distribution of their father's estate. Foley had operated the ranch since 1947, paid all taxes on

the property, and built two homes, a garage, haysheds, barns, irrigation works, and fences. None of the surviving siblings ever claimed an interest in the profits from the ranch, and Foley never offered to share them. Foley never sought permission from the siblings to build any structure on the ranch or to use the property other than as he wished. The siblings professed that they always wanted Foley to operate the ranch as he saw fit, provided that the property not be mortgaged or sold. When Foley and his wife divorced in 1996, the District Court ordered the sale of the ranch to satisfy the settlement agreement. Title problems frustrated the sale, prompting the quiet title action. Following a bench trial, the District Court concluded that as a matter of law, Foley was a tenant in common with the two surviving siblings who had not quitclaimed their interests to Foley and that one cotenant could not gain title to another cotenant's interest by adverse possession. The court also found as a matter of fact that Foley's use of the cotenant's interests had been permissive. Foley contended on appeal that the findings and conclusions were erroneous. The testimony on the question of whether Foley's use was permissive was conflicting, with Foley testifying that he had always asserted his complete ownership of the ranch and that his longstanding arguments with his siblings established his claim as hostile, while the wife of Foley's deceased brother testified that until these proceedings, Foley had never asserted that she or her late husband had no interest in the ranch, but instead had asked her to sign over her interest on several occasions. Her testimony provided substantial credible evidence that, at least until he tried to sell the property, Foley's use of his siblings' fractional interests was in conformity with their wishes and was permissive. The District Court was in the best position to evaluate the credibility of the witnesses and to give each its proper weight. The finding that Foley was a permissive user of his cotenants' fractional interest was not clearly erroneous and was thus affirmed. Foley v. Arvidson, 2000 MT 388; 304 M 43, 16 P3d 389, 57 St. Rep. 1650 (2000).

Constructive Fraud for Failure to Disclose Risk of Erosion to Field Planted in Old River Channel: The sellers of farm land and an irrigation system failed to disclose to the buyers that the field at pivot three was an old river bed that had been filled but not riprapped and that the field was subject to increased risk of erosion. The buyers spent $99,575 to fix the impairment and sued for damages. The District Court found that the sellers were liable for constructive fraud for failure to disclose, and the sellers contested the District Court findings. The Supreme Court affirmed. The District Court was capable of finding that a risk of increased erosion existed without the benefit of expert testimony. Further, the court's conclusion, that filling the old river bed and creating a greatly increased risk of erosion was a serious impairment, was not clearly erroneous. Moreover, the court did not err in holding that the buyers had no way of knowing of the increased risk, even though a conversation with the the sellers' employee who performed the backfill work would have revealed the problem. The buyers were not required to speak with the sellers' employees before purchasing, particularly given the fact that when the field at pivot three was cleared and leveled, it looked like any other field. The sellers also contended that the buyers had merely to ask their own consultant, who would have informed them of the origin and obvious condition of the field. However, the buyers' consultant did not inspect the fields until after closing of the sale and thus could not have provided the buyers with any knowledge. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Action to Quiet Title in Mining Company Shares — Credible Evidence of Outstanding Shares — District Court Upheld: Safronoff and others were defendants in an action to quiet title to outstanding shares of the defunct Sun Mining, Inc., which was involuntarily dissolved by the state. The District Court reviewed all of the evidence before it, including a list of outstanding shares prepared by Sun Mining's secretary-treasurer shortly before the company was dissolved, the number of shares held by each shareholder according to each shareholder's stock certificate, and oral testimony, and found that the secretary-treasurer's list was the only credible evidence. Safronoff appealed the decision of the District Court, contending that he should have been awarded additional shares. Relying upon Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285 (1991), and St. v. Bower, 254 M 1, 833 P2d 1106 (1992), the Supreme Court applied the "clearly erroneous" standard to the District Court's findings of fact and held that although there were conflicts in the evidence before it, the District Court reasonably relied upon this evidence and that the District Court's findings of fact were not clearly erroneous. Duncan v. Allen, 1998 MT 316, 292 M 180, 970 P2d 1036, 55 St. Rep. 1296 (1998).

Decedent's Estate — Findings Not Clearly Erroneous: On May 31, 1994, Joseph executed a will bequeathing his estate to his former wife, Mary. On June 14, 1994, while Joseph was in a nursing home, Joseph and Mary signed a declaration of marriage. On July 1, 1994, Joseph executed a will renouncing the marriage and bequeathing the estate to a sister. Mary initiated

informal probate proceedings under the May 31 will, and the sister initiated informal probate proceedings under the July 1 will. The court ordered that the July 1 will be admitted to formal probate and declared void the declaration of marriage. On appeal, the Supreme Court held that the District Court erred in invalidating the declaration of marriage but affirmed the portion of the court's order admitting the July 1 will to probate. Mary failed to show reversible error in any of the challenged findings. In re Estate of Flynn, 274 M 199, 908 P2d 661, 52 St. Rep. 1190 (1995).

Court Not Required to Make Findings on All Evidence Submitted: Vanderburg argued that the trial court had erred because it failed to make 11 additional findings of fact based on evidence that had been submitted. The Supreme Court held that the trial court is not required to make findings based on all evidence submitted and that in the present case, the findings of fact were sufficient to support the court's judgment. In re Seizure of $23,691.00, 273 M 474, 905 P2d 148, 52 St. Rep. 1063 (1995).

Findings in Case of Fraudulent Oil Well Sales Not Clearly Erroneous: Boedecker was convicted of fraudulently selling interests in oil well property to Berlin without disclosing his interest in the transaction or the fact that production had been sold to another company, without taking reasonable care in evaluating the property sold to Berlin, and without consulting with Berlin in another sale transaction. Citing Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285 (1991), followed in Daines v. Knight, 269 M 320, 888 P2d 904, 52 St. Rep. 8 (1995) the Supreme Court held that the standard of review was whether the findings of fact were clearly erroneous and that the Supreme Court would further examine whether the findings were supported by substantial credible evidence, whether the trial court misapprehended the effect of the evidence, and determine whether the Supreme Court was left with a conviction that a mistake has been committed. The Supreme Court found that there was substantial credible evidence supporting all of the District Court's findings and that they were not clearly erroneous. Berlin v. Boedecker, 268 M 444, 887 P2d 1180, 51 St. Rep. 569 (1994). See also Strom v. Logan, 2001 MT 30, 304 M 176, 18 P3d 1024 (2001).

Finding of Business Interruption Losses Affirmed: DeTienne Associates sued Montana Rail Link (MRL) after an explosion caused by one of MRL's locomotives damaged the hotel owned by DeTienne. DeTienne introduced evidence of business interruption losses. Citing Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285 (1991), the Supreme Court upheld the findings because the District Court's findings were supported by substantial credible evidence, the District Court did not misapprehend the effect of the evidence, and the Supreme Court was not left with a firm and definite conviction that a mistake had been committed. DeTienne Associates Ltd. Partnership v. Mont. Rail Link, Inc., 264 M 16, 869 P2d 258, 51 St. Rep. 125 (1994).

Supported Findings Challenged on Basis of Sometimes Irrelevant Inferences From and Interpretations of Those Findings: In an action to invalidate provisions of a trust, appellants' challenges to seven specific findings depended on appellants' inferences from and interpretations of the findings. Some of appellants' points were irrelevant. The findings were supported by the record and were not clearly erroneous. In re McKittrick Trust, 262 M 406, 865 P2d 1099, 50 St. Rep. 1613 (1993).

Equitable Distribution of Investment Account: The District Court properly exercised its equity power in dividing the proceeds of an investment account by taking into consideration other equities existing between the parties connected with the main subject of the suit and by granting relief necessary to an entire adjustment of the subject. Tondu v. Akerley, 259 M 194, 855 P2d 116, 50 St. Rep. 754 (1993).

Challenge of Juror for Cause — Standard of Review: In clarifying the standard of review applicable to challenge of a juror for cause, the Supreme Court adopted the standard for findings of fact set out in this rule. Because factual determinations of juror appropriateness are being made by the trial court, the "clearly erroneous" standard applies to review of a trial court's decision to deny a challenge for cause. The Supreme Court will not substitute its judgment for that of the trial court absent a showing that the lower court's findings are clearly erroneous, even if there is evidence in the record to support contrary findings. Walden v. St., 250 M 132, 818 P2d 1190, 48 St. Rep. 893 (1991). This standard was applied to criminal cases in St. v. Cope, 250 M 387, 819 P2d 1280, 48 St. Rep. 949 (1991).

STAB Recalculation of Value of Grain Storage Facilities Properly Ordered by District Court: When the State Tax Appeal Board (STAB) ignored evidence regarding the loading capacity of three grain elevators in calculating the value of the elevators for taxation purposes, the District Court properly ordered STAB to recalculate the value based on the simple arithmetic evidence. United Grain Corp. v. Dept. of Revenue, 248 M 297, 811 P2d 555, 48 St. Rep. 440 (1991).

No Unlawful Interference With Ditch Easement: Plaintiff contended that construction of a pond constituted an unlawful interference with his ditch easement, depriving him of water and

reducing the value of his property. The District Court's findings that the pond had nothing to do with plaintiff's water shortage, but rather that the shortage was caused by an upstream user exercising his full right to the water, were not clearly erroneous and were therefore affirmed on appeal. Boylan v. Van Dyke, 247 M 259, 806 P2d 1024, 48 St. Rep. 188 (1991).

Psychotherapy for Paranoid Wife Appropriate Expense: The husband appealed a maintenance award to the wife that included an amount to pay for her psychotherapy. The Supreme Court ruled that there was substantial evidence proving that the wife suffered from a paranoid mental disorder that if not treated would impair her ability to find employment. The court also found that there was ample evidence for the lower court to find that physical abuse by the husband was causative of the wife's psychological problems. In re Marriage of Ernst, 243 M 114, 793 P2d 777, 47 St. Rep. 1034 (1990).

Failure to Notify Second Mortgagor of Sales and Future Advances Not Breach of Fiduciary Duty: Absent findings of clear error, a District Court decision that a first mortgagor breached no fiduciary duty to second mortgagor by failing to notify of property sales and future advances was affirmed. The court properly found it was the second mortgagor's obligation to discover the existence and extent of the future advance clause by requesting a copy of the deed of trust and to investigate more closely the actual terms of the instrument prior to entering the second mortgage. Serv. Funding, Inc. v. Craft, 234 M 431, 763 P2d 1131, 45 St. Rep. 2030 (1988).

Child Custody — Reliance on Expert Testimony Not Clearly Erroneous: The lower court heard testimony from numerous witnesses, including experts, as to the issue of child custody. The court did not abuse its discretion in relying heavily on the testimony and observations of two of the experts concerning the children's wishes, interrelationship of the children with their parents, and the mental and physical health of all individuals. In re Marriage of Ereth, 232 M 492, 757 P2d 1312, 45 St. Rep. 1223 (1988).

False Representations — Ability to Construct Hog Barns — Findings Not Clearly Erroneous: There was testimony showing defendant knowingly made material false representations that he could construct water-flush hog barns—promises that he could not keep. Plaintiff had a right to rely on defendant and was injured because of that reliance. Although there were conflicting findings, the Supreme Court found no clear error constituting abuse of discretion. Roberts v. Mission Valley Concrete Indus., Inc., 222 M 268, 721 P2d 355, 43 St. Rep. 1254 (1986).

Six Findings of Fact Omitted — No Abuse of Discretion: Plaintiff contended six findings of fact omitted by the District Court resulted in erroneous conclusions of law detrimental to her. Specifically, she claimed she was entitled to a larger judgment. She acknowledged any one of the alleged abuses would not be sufficient to mandate a new trial or amended judgment, but together they constituted sufficient abuse to warrant action. The Supreme Court noted it would not disturb findings of fact in a nonjury civil action unless they were clearly erroneous. The court then declined to disturb the District Court's findings as being clearly erroneous in this case. Sharbono v. Darden, 220 M 320, 715 P2d 433, 43 St. Rep. 400 (1986).

Inclusion of Retirement Pension as Marital Asset: In a dispute concerning valuation of marital assets, the wife argued that because she contributed in the course of the marriage her teacher's salary as compared to the ranching losses contributed by the husband, it was inequitable to include her teacher's retirement pension as a marital asset. The trial court included as a marital asset that portion of the value of the pension rights earned during the marriage, as established by the testimony of an economist. The wife failed to meet her burden of showing that such finding was clearly erroneous. The Supreme Court upheld the trial court findings in light of substantial credible evidence, ruling that under In re Marriage of Rolfe, 216 M 39, 699 P2d 79, 42 St. Rep. 623 (1985), retirement benefits are classed as part of the marital estate. In re Marriage of Sirucek, 219 M 334, 712 P2d 769, 42 St. Rep. 2065 (1985), followed in In re Marriage of Pryor, 224 M 488, 731 P2d 895, 43 St. Rep. 2358 (1986).

Bank Foreclosure of Mortgage — Supported by Substantial Credible Evidence: Plaintiff bank foreclosed on certain parcels of real estate pledged as collateral for business loans after the bank refused an extension of the note unless the loan principal balance was substantially reduced. The trial court had before it substantial credible evidence to find the bank properly could foreclose the mortgage without liability for damages to the defendants' business. There was also substantial credible evidence for the court's denial of the defendants' counterclaim for breach of the covenant of good faith and fair dealing. Therefore, the standard for review set forth in this rule is met. Cent. Bank of Mont. v. Eystad, 219 M 69, 710 P2d 710, 42 St. Rep. 1850 (1985).

Substantial Credible Evidence of Medical Malpractice — Ingrown Toenail — Amputation of Leg: Substantial credible evidence supported a jury verdict of medical malpractice when treatment of a state prison inmate's ingrown toenail resulted in the amputation of his leg, even though the attending physicians contended that the inmate suffered from a preexisting

condition of arteriosclerosis of the blood vessels of the legs which was the cause of the amputation. Kyriss v. St., 218 M 162, 707 P2d 5, 42 St. Rep. 1487 (1985).

Agreement Represents Intention of Parties: A loan consolidation and extension agreement between the parties superseded prior oral negotiations, and it was not clearly erroneous for the trial court to find that the agreement represents the intention of the parties. The finding is supported in the testimony of the bank officers and the execution of the written instruments following the oral negotiations. First Nat'l Bank of Missoula v. McGuinness, 217 M 409, 705 P2d 579, 42 St. Rep. 1288 (1985).

Execution and Delivery of Quitclaim Deed Supported in Evidence — Effect: The District Court found that a quitclaim deed was executed and delivered by the Morins to the Mapstons before a typewritten note was signed by Mapstons to convey the subject property to Morins. This central finding of fact was held to be clearly supported in the evidence. The legal effect of the finding is that the quitclaim deed constituted a gift to Mapstons, no consideration being necessary. The transfer vested all actual title which Morins then had, since no different intention was expressed or necessarily implied. The typewritten note cannot be specifically enforced by Morins because they had not received an adequate consideration for the contract and because the contract lacks mutuality. Moreover, no involuntary trust was created. Morin v. Mapston, 217 M 403, 705 P2d 118, 42 St. Rep. 1283 (1985).

Custodial Parent Found Unstable and Alcoholic — Modification Granted: The Supreme Court refused to set aside, as not supported by evidence, a District Court order granting a change of a child's custody from the mother to the father when evidence indicated that: (1) the mother's lifestyle and living situation lacked stability; (2) the mother had been arrested for driving under the influence of alcohol with the child in her vehicle; (3) the mother had attended a residential alcoholism treatment center but had failed to stop drinking or follow up on her problem after her discharge; and (4) the father was able and willing to provide a more stable environment for the child. In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

Workers' Compensation — Out-of-Pocket Expenses — Findings Supported by Evidence: The Workers' Compensation Court found that out-of-pocket expenses incurred by claimant's mother during claimant's hospital stay were not medically necessary and denied request for reimbursement. The Supreme Court affirmed and held that substantial evidence supported the verdict, and that the Supreme Court may not set aside the findings of the Workers' Compensation Court unless the findings are clearly erroneous. Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985).

Substantial Credible Evidence to Support Motor Vehicle Damage Award: The trial court's findings of fact with regard to the damage to the plaintiff's vehicle and reasonable costs of repairs were clear and specific. The testimony of two auto repairmen constituted substantial credible evidence upon which the court could base its findings of fact on this issue. Findings will not be overturned unless there is a clear preponderance of evidence against them. Round v. Reikofski, 216 M 54, 699 P2d 72, 42 St. Rep. 634 (1985).

Evidence of Emancipation of Minor Child: When evidence in a URESA action indicated that the minor child lived away from the obligee but was not earning enough money to support herself, the District Court's determination that the minor child was not emancipated was not clearly erroneous. State of Oregon ex rel. Worden v. Drinkwalter, 216 M 9, 700 P2d 150, 42 St. Rep. 599 (1985).

Construction of Exclusionary Clause — Findings Not Clearly Erroneous: District Court determined that arrangement by which insured purchased truck for use of son-in-law in exchange for free hauling of insured's hay and cattle was on a share expense basis, and as such not excluded from coverage under insurance policy provision that excluded coverage for lease or rental. Supreme Court affirmed District Court judgment and held that the policy clause was ambiguous, capable of at least two interpretations, and as such capable of construction against the insurance company. The District Court findings were not clearly erroneous and therefore must be sustained. Bauer Ranch, Inc. v. Mtn. W. Farm Bureau Mut. Ins. Co., 215 M 153, 695 P2d 1307, 42 St. Rep. 255 (1985).

Equitable Division of Property and Water Rights — No Compensation or Attorney Fee: The court held that under the clearly established standard of review of a nonjury civil action, the trial court did not err in finding in a partition action that the defendants were entitled to the one-half share in the West Gallatin Canal Company, that the plaintiff was not entitled to compensation for the water right awarded, and that plaintiff was not entitled to attorney fees for bringing the partition action. The court examined the equity of the proceeding in its entirety and concluded that the fact that one party may have received less water than it started with does not make the partition inequitable. The partition of the property and appurtenant water rights was based on

substantial credible evidence and resulted in an equitable division among the cotenants. Kravik v. Lewis, 213 M 448, 691 P2d 1373, 41 St. Rep. 2228 (1984), followed in Frank DeHaan, Inc. v. Gallatin-Madison Ranch Co., 250 M 304, 820 P2d 423, 48 St. Rep. 963 (1991).

No Common-Law Marriage — Absence of Immediate Creation or Mutual Agreement to Marry: As in Sartain, cited below, the Supreme Court applied the standard of review set forth in Cameron, also cited below, and found that the purported common-law marriage lacked the essential of immediate creation. A common-law marriage cannot be created piecemeal but rather comes instantly into being or does not come at all. The District Court correctly applied Montana common-law marriage standards. In re White, 212 M 228, 686 P2d 915, 41 St. Rep. 1705 (1984).

The Supreme Court concluded that there is substantial evidence to support the District Court's findings of fact that no common-law marriage existed between Sherri and deceased and that deceased's ex-wife, Peggy, should be appointed personal representative. The findings of fact are not clearly erroneous and were not set aside. Because of contradictions in the evidence, the court respected the Rule 52, M.R.Civ.P., requirement that due regard be given to the opportunity of the District Court to judge the credibility of witnesses and applied the standard of review set forth in Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978). The District Court properly applied Montana common-law marriage standards. Those standards were applied in Estate of Murnion, 212 M 107, 686 P2d 893, 41 St. Rep. 1627 (1984), in finding a mutual agreement to marry. In contrast, there was no evidence of any such agreement between Sherri and deceased. In re Sartain, 212 M 206, 686 P2d 909, 41 St. Rep. 1691 (1984).

Maintenance Award — Findings Sufficiently Specific Where Appellant of Little Help and Lacks Credibility: The parties were married to each other twice. Following the second dissolution, the wife was awarded maintenance until remarriage, death, or passage of 10 years. The District Court found that the property distributed to wife was income-consuming as opposed to income-producing property. The wife was facing a monthly deficit situation. The husband, through financial wheeling and dealing, had previously taken considerable amounts from the estate of the wife. The husband failed to substantiate his financial position, and his credibility was questionable. The Supreme Court found that the trial court had done its best to make statutory findings with no help from the husband. The wife's current standard of living was considerably lower than during the marriage. The award of maintenance was proper and was supportable based on the facts and the weight given to the witness' credibility. Thompson v. Thompson, 208 M 156, 676 P2d 223, 41 St. Rep. 237 (1984).

Contradictory Evidence in Custody Dispute — Findings Supported by Substantial Evidence: Where there was contradictory evidence introduced by the parties to a custody dispute, the Supreme Court held that the findings of fact, while lacking in detail, were sufficiently supported by record evidence, especially that of a county social worker, to support the District Court's findings that the welfare of the parties' children was endangered by being in their mother's custody. C.C.W. v. H.M.W., 205 M 498, 668 P2d 1065, 40 St. Rep. 1455 (1983).

No Fraud Found in Sale of Real Property — Theory of Negligent Misrepresentation Abandoned — Findings and Conclusions Not Clearly Erroneous: Where the plaintiffs agreed to purchase a bar and restaurant from the defendant seller and later brought an action for damages against the county and the county sanitarian, claiming that the sanitarian misrepresented the capacity of the sewer system and conditions of a county license, the findings and conclusions of the District Court were supported by substantial evidence and were not clearly erroneous. The District Court found that the plaintiffs failed to prove their claim of fraud and that the theory of negligent misrepresentation had been abandoned by the plaintiffs. The record contained conflicting evidence but showed that there could have been a misunderstanding between the parties, and a misunderstanding will not support a claim for fraud in the inducement. The statements made by the defendant may have been negligent, but the District Court properly concluded that by failing to argue the theory of negligent misrepresentation, the plaintiffs evidenced an intention to abandon that theory. Lacey v. Herndon, 205 M 379, 668 P2d 251, 40 St. Rep. 1375 (1983).

Substantial Evidence of "Injury": Substantial evidence exists to support the District Court's finding that claimant suffered an injury within the meaning of 39-71-119 since medical evidence indicated that he had a preexisting condition, chronic obstructive pulmonary disease, that was made worse by his inhalation of air containing a high concentration of grain dust. Ridenour v. Equity Supply Co., 204 M 473, 665 P2d 783, 40 St. Rep. 1012 (1983).

Architect and Not Contractor Liable for Inadequate Specifications: There was sufficient evidence presented to the District Court to support its findings that the architect's water system specifications for a new school building were inadequate. A contractor is not responsible for errors or defects in the plans and is not liable, absent negligence on his part, when the owner's

plans and specifications prove defective. Ace Plumbing & Heating, Inc. v. School District, 204 M 81, 662 P2d 1327, 40 St. Rep. 678 (1983).

Diversion of Joint Business Account Funds for Personal Use: The accountant for one party to a joint business account testified as an expert and stated that about one-half of a $9,000 sum the party withdrew from the account was used for personal purposes and that in his opinion the remainder was used for business purposes. The other party testified that the whole amount was impermissibly withdrawn and used for the withdrawing party's own benefit. The accountant's testimony did not conclusively establish that the money was not diverted from the account for nonbusiness purposes, and a finding that the money was withdrawn and converted to the personal use of the withdrawing party was based upon substantial credible evidence and was affirmed. Rose v. Rose, 201 M 86, 651 P2d 1018, 39 St. Rep. 1971 (1982).

Award of Costs and Attorney Fees — Use of Contingency Agreement: Defendants defaulted on a promissory note. The bank and defendants negotiated a new note and executed a security agreement. This note provided the debtor would be liable for collection costs, including reasonable attorney fees, upon default. Defendants defaulted, and the bank repossessed and sold the security. A deficiency remained. The bank retained an attorney under a contingency fee agreement to collect the deficiency, and suit was filed. Defendants' answer raised defenses necessitating research and investigation. The attorney discovered defendants owned unmortgaged land, which they were attempting to transfer. The bank attached the land and acted as its own surety and purchased a separate surety bond. The trial court included the bond in allowable costs and awarded $5,000 in attorney fees to the bank. The bond was required under 27-18-204, and under the note was clearly a cost of collection. The attorney estimated 50 hours of work. The trial court followed the guidelines of Crncevich v. Georgetown Recreation Corp., 168 M 113, 541 P2d 56 (1975), for awarding attorney fees and found that since he would be entitled to more under the contingency agreement, which was not binding on the court, the award was reasonable. The Supreme Court found that the trial court's findings and conclusions adequately supported the award. First Nat'l Bank v. Beckstrom, 200 M 323, 651 P2d 45, 39 St. Rep. 1778 (1982).

Award of Child Support — Not Clearly Erroneous: Only when the findings of the District Court are clearly erroneous will they be set aside. There was substantial credible evidence in the record to affirm the District Court's judgment on child support; thus the determination of the father's child support obligation is not clearly erroneous. McConnell v. Dempster, 200 M 276, 650 P2d 799, 39 St. Rep. 1740 (1982).

Action on Promissory Notes Held in Trust — Real Party in Interest: The plaintiff bank filed an action to collect payment on four promissory notes, and the defendant contended that the bank was not a real party in interest to the case. The Supreme Court found that the District Court's finding that the plaintiff was the holder of legal title to each of the promissory notes and that it was therefore a real party in interest was supported by substantial evidence in both the transcripts and exhibits. First Nat'l Bank & Trust of Wibaux v. Sec. Bank, 199 M 168, 648 P2d 1166, 39 St. Rep. 1270 (1982).

Sufficient Rejection of Nonconforming Goods: Plaintiff sold defendants an irrigation system and pump. Plaintiff substituted a different type of pump for the one ordered by defendants. Plaintiff and his supplier installed the system, and defendants paid for everything but the pump and its installation. Plaintiff and his supplier supervised the digging of the sump for the installation of the pump but did not test it. The pump became clogged before any water ever came out of it. The supplier cleaned the pump and had an agent reinstall it. Defendants tried unsuccessfully to get the system to work and called plaintiff to complain several times. Defendants finally told plaintiff to come and get the pump and refused to pay for it. They later purchased a different pump, which operated the system properly. Plaintiff sued for the price of the pump and installation costs. The District Court entered judgment for the defendants. Plaintiff contends that the District Court's findings of fact and conclusions of law were insufficient, failing to adequately address the provisions of the U.C.C. governing rejection of nonconforming goods. The Supreme Court found that although the findings and conclusions could have been better, there was substantial evidence to support the conclusions that: (1) the goods were nonconforming; (2) there was a failure to cure the defects of the pump; and (3) the use of the pump was in fact a prolonged effort to determine why the pump failed to work and to cure the defect, and as such was not an act inconsistent with the seller's ownership. There was no acceptance by the defendants, no use inconsistent with the ownership of the plaintiff, and no delay in offering the return of the nonconforming pump significant enough to justify a conclusion that defendants had accepted the pump. Steinmetz v. Robertus, 196 M 311, 637 P2d 31, 38 St. Rep. 2067 (1981).

Refusal to Reopen Default Divorce Upheld — Findings Not Clearly Erroneous: Appellant was personally served with a petition for dissolution but failed to answer or otherwise appear. A default was entered, and 1 ½ years later the appellant moved to set aside the default and to obtain an accounting from his former spouse with respect to various items of personal property. The court refused to reopen the divorce decree and denied his motion for an accounting. The court found, with respect to the personal property, that appellant had made a gift of the personal property to his former spouse. On appeal, the Supreme Court found no basis in the record to determine that the District Court was clearly erroneous in finding that a gift had been made. Because of that, he was not entitled to an accounting and the District Court properly denied his motion. In re the Marriage of Lance v. Lance, 195 M 176, 635 P2d 571, 38 St. Rep. 1772 (1981).

Extra Capacity Factor in Allocating Cost of Service — Finding of Substantial Evidence Not Clearly Erroneous: The Public Service Commission's (P.S.C.) decision to reject the city's proposed extra capacity factor, which was based upon a contract provision between the city and an adjoining water district to allocate cost of services to the water district, was upheld by the Supreme Court. The P.S.C. had substantial evidence before it in determining the extra capacity factor to be assigned to the district, and the decision, which was based on actual water use and comparisons from large water consumers similar in extent of demand to the water district, was not clearly erroneous. Helena v. Dept. of Public Service Regulation, 194 M 173, 634 P2d 192, 38 St. Rep. 1560 (1981).

Normalization of Test-Year Data in Rate Determination — Finding of Sufficient Evidence Not Clearly Erroneous: The Public Service Commission (P.S.C.) has no statutory duty to normalize test-year data; it is within the Commission's discretion to determine when normalization is necessary, and the Supreme Court will not substitute its judgment for that of the P.S.C. on appeal. The P.S.C. had sufficient evidence before it upon which to reach a determination, and the P.S.C. did not act unreasonably nor did it establish a rate that was so low as to be confiscatory. Helena v. Dept. of Public Service Regulation, 194 M 173, 634 P2d 192, 38 St. Rep. 1560 (1981).

What Constitutes Excuse of Performance — Findings Not Clearly Erroneous: On appeal in a breach of contract action, the seller argued that the evidence showed he intended to deliver the calves to the buyer by the extended delivery date of December 15 but was excused from performance because of bad weather. The trial court, however, chose to believe that the seller did not so intend, which belief was supported by the facts. The findings were not clearly erroneous. Therefore, the trial court was upheld. Miller v. Titeca, 192 M 357, 628 P2d 670, 38 St. Rep. 853 (1981).

What Constitutes Excuse of Performance by Reason of Rejection: On appeal in a breach of contract action, the seller argued that the buyer had wrongfully rejected delivery after January 1. (The contract called for delivery in mid-November, but an extended delivery date of December 15 had been discussed.) The rejection allegedly made performance impossible due to the buyer's hindrance. The trial court found that the seller had never delivered any calves and concluded that the failure of the seller to make even partial performance amounted to a complete breach of the contract. The court's finding was supported by the evidence that the seller failed to tender delivery after January 1, that all he did was state on several occasions that he would be unable to deliver until January 1, and that the buyer had always demanded delivery by the (earlier) agreed date. After January 1, the seller took the calves to Billings and sold them at a price higher than the contract price without offering them to the buyer. Accordingly, the trial court's findings were held not clearly erroneous. Miller v. Titeca, 192 M 357, 628 P2d 670, 38 St. Rep. 853 (1981).

Family Farm — Installment Payments for Spouse's Share: Petitioner and respondent were divorced. In the decree dissolving the marriage, the trial judge divided the major asset, the family farm, awarding 55% to the husband and 45% to the wife. The farm had been in the husband's family since 1917. The husband was to pay the wife's share in four equal annual installments. The wife contends that the farm should have been sold so that she would have the opportunity of sharing in any gain realized on the property. She also contends that the settlement scheme is unfair because it allows the husband to retain income-producing property while she receives only cash. The dissolution decree was consistent with the policy of keeping a farm or ranch intact and operated as a unit upon dissolution whenever there is a reasonable means of providing a wife her equitable share of the property short of selling the land. The value of the estate is a question of fact for the District Court, and there was no showing that the valuation was "clearly erroneous". Giving the wife a lien on the property until the payments are made adequately protects her interests. Gomke v. Gomke, 192 M 169, 627 P2d 395, 38 St. Rep. 578 (1981), followed in In re Marriage of Bell, 220 M 123, 713 P2d 552, 43 St. Rep. 226 (1986).

Attorney's Fees Substantiated by the Evidence: Attorney's fees awarded to the wife in a marriage dissolution case were not excessive where the District Court's finding of the number of

hours necessary to represent the wife is substantiated by evidence in the record. Karr v. Karr, 192 M 388, 628 P2d 267, 38 St. Rep. 506 (1981).

Lump-Sum Award Double to Wife Where Husband Has Greater Earning Capacity — Findings Not Clearly Erroneous: A lump-sum award to the wife in a marriage dissolution of a proportion of the marital estate twice the husband's award was not an abuse of discretion by the District Court where the husband did have a greater earning capacity, despite his unemployment at the time of dissolution and immediately prior to the dissolution. Section 40-4-202 requires the District Court to consider the opportunity of the parties for future acquisition of capital asset and income. "Opportunity" is a broad word that includes the capacity of the parties to earn future income. The findings were therefore not clearly erroneous. Karr v. Karr, 192 M 388, 628 P2d 267, 38 St. Rep. 506 (1981).

No Finding of Enticement to Obtain Personal Jurisdiction: The District Court's finding that it had personal jurisdiction over respondent in a marriage dissolution is supported by the record and thus will be allowed to stand on appeal under Rule 52(a), M.R.Civ.P. Respondent's contention that he was enticed into the jurisdiction was found to have no basis since respondent stated that he was a resident of the state and he was taking care of his own and other family affairs. Karr v. Karr, 192 M 388, 628 P2d 267, 38 St. Rep. 506 (1981).

Findings of Reliance Not Clearly Erroneous: In an action by the plaintiff contractor against the defendant motor carrier for breach of contract, the finding by the District Court that the plaintiff relied upon the bid of the defendant was supported by substantial evidence. The evidence showed that the memorandum of the defendant was delivered to the plaintiff for the purpose of consummating a proposal previously offered by the defendant and that the plaintiff advised the defendant that the plaintiff would notify the defendant when the contract was to be performed. These findings were not clearly erroneous and therefore could not be set aside by the Supreme Court. Empire Steel Mfg. Co. v. Carlson, 191 M 189, 622 P2d 1016, 38 St. Rep. 101 (1981).

Sufficiency of Evidence of Oral Agreement Additional to Written Divorce Settlement Agreement: On appeal relating to his divorce settlement agreement, the former husband argued that there was insufficient evidence of an oral agreement between him and his former wife covering matters not in the written agreement. The Supreme Court said that there was no preponderance of evidence contrary to the findings at trial. The only evidence that the oral agreement did not exist was the husband's denial. The husband had put a car at his wife's disposal for several months after their separation, which action could properly be interpreted as an action in furtherance of his obligations under the oral agreement. The findings of the District Court were based on sufficient evidence to properly support the trial court's judgment. Harris v. Harris, 189 M 509, 616 P2d 1099, 37 St. Rep. 1696 (1980).

Attorney's Fees — Reliance by Courts on Experts: In determining attorney's fees, the court as a jury is not bound absolutely to the testimony of expert witnesses. It can reduce or increase the figures submitted to it by experts as reasonable attorney's fees, and as long as its findings are not clearly erroneous the determination made in its discretion will not be disturbed. St. v. Helehan, 189 M 339, 615 P2d 925 (1980).

Findings to Support Breach of Contract: The parties entered into a written agreement under which defendant was to selectively cut all merchantable timber on plaintiff's land that had been or was infected by the pine beetle. The evidence showed that defendant cut trees that were not merchantable and merchantable trees not affected by the pine beetle. He was also clearcutting sections of timber. This evidence was sufficient to support the District Court's findings of fact and conclusions of law that defendant had breached the contract. Madison Fork Ranch v. L & B Lodge Pole Timber Prod., 189 M 292, 615 P2d 900 (1980).

Child Support Determination — Error on Financial Matters: When the District Court's findings in determining child support were contradictory to the evidence of the husband's income, and when debt payments were allocated differently in two places in the decree, the findings were clearly erroneous, and thus cannot stand and must be reviewed again by the District Court. Benjamin v. Benjamin, 189 M 158, 615 P2d 218 (1980).

Recovery Limited to Specific Injury Statute: The workers' compensation court decided that the claimant was not entitled to permanent total disability benefits and limited his recovery to benefits under 39-71-707 (since repealed) and to such temporary total disability compensation benefits as he had received while convalescing. The decision was upheld since credible and substantial evidence appeared in the record in support of the workers' compensation court. McGee v. Indus. Indem. Co., 182 M 149, 595 P2d 1156 (1979).

Prior-Acquired and Gifted Property — Disposition: The trial court found the wife had not contributed financially to property gifted to the husband during the marriage and property

acquired by the husband prior to the marriage and that her contribution as a homemaker had not facilitated maintenance of that property. Any increase in the value of the property was the result of inflation. Such findings were not clearly erroneous, unsupported by the evidence, or made arbitrarily without employment of conscientious judgment or in excess of the bounds of reason. In re Jorgensen, 180 M 294, 590 P2d 606 (1979).

Independent Contractor Status Supported by Substantial Evidence: The trial court's finding that a general contractor did not lose his independent contractor status when the defendants began making direct payments to the contractor's employees and subcontractors in order to keep them from walking off the job was supported by substantial evidence. Kosmerl v. Barbour, 180 M 208, 589 P2d 1017 (1979).

Contracts: Where plaintiff's performance under a contract was prevented in part by the defendant and in part by the weather, the District Court did not err in awarding defendant only one-fourth of the balance due under the contract. Rosenquist v. Harding, 179 M 521, 587 P2d 416 (1978).

Validity of Election — Alternative Form of Government: The findings of fact and conclusions of law of the District Court upholding the validity of city and county alternative form of government elections and proceedings leading thereto were supported by substantial evidence. Schuman v. Study Comm'n of Yellowstone County, 176 M 313, 578 P2d 291 (1978).

Substantial Evidence — Findings Not Affected by Newly Discovered Evidence: Substantial credible evidence existed to support findings of fact and conclusions of law, and were unaffected by alleged "newly discovered" evidence which at best was merely cumulative. Furthermore, because the "new evidence" was at all times in the exclusive possession of appellants, motion for new trial was denied. Kartes v. Kartes, 175 M 210, 573 P2d 191 (1977).

Easement by Prescription — Findings Supported by Substantial Evidence: Where the District Court's judgment entered upon findings and conclusions declared the plaintiffs to be the owners of an easement by prescription for the use of a roadway across the defendant's land, the findings that the defendant's use of the road was open, notorious, exclusive, adverse, continuous, and uninterrupted were supported by substantial credible evidence. Lunceford v. Trenk, 163 M 504, 518 P2d 266 (1974), followed in Rasmussen v. Fowler, 245 M 308, 800 P2d 1053, 47 St. Rep. 2134 (1990).

Findings of Fact: The findings of fact set forth by the judge were sufficient to meet the requirements of this rule. Mondakota Gas Co. v. Becker, 151 M 513, 445 P2d 745 (1968).

STANDARD OF APPELLATE REVIEW

Standard of Review of Findings and Conclusions of District Court Sitting Without Jury: The Supreme Court reviews the findings of a District Court sitting without a jury to determine if the findings were clearly erroneous. Findings are clearly erroneous if substantial credible evidence does not support them, if the trial court misapprehended the effect of the evidence, or if a review of the record leaves the Supreme Court with the definite and firm conviction that a mistake was committed. The evidence will be viewed in the light most favorable to the prevailing party when determining whether substantial credible evidence supports the findings. A District Court's conclusions of law will be reviewed to determine whether the conclusions are correct. Ray v. Nansel, 2002 MT 191, 311 M 135, 53 P3d 870 (2002), following Guthrie v. Hardy, 2001 MT 122, 305 M 367, 28 P3d 467 (2001).

Scope of Review on Appeal:

The Supreme Court reviews the findings of a trial court sitting without a jury to determine if the findings are clearly erroneous. Clear error occurs if: (1) the findings are not supported by substantial credible evidence; (2) the trial court has misapprehended the effect of the evidence; or (3) a review of the record leaves the Supreme Court with the definite and firm conviction that a mistake has been committed. Evidence will be viewed in the light most favorable to the prevailing party. Here, evidence was substantial that three separate agreements memorialized one transaction for the sale and purchase of three ice cream distributor businesses, that a related consulting agreement was merely a promissory note wherein the seller agreed to finance the balance of the purchase price, and that the seller did not "sell, transfer, assign, and deliver" one of the distributor agreements to the buyer as promised. Norwood v. Serv. Distrib., Inc., 2000 MT 4, 297 M 473, 994 P2d 25, 57 St. Rep. 8 (2000).

Appellants must show by a clear preponderance of the evidence that the findings of fact of the District Court are incorrect, and it is their burden to do so before the Supreme Court may disturb those findings of fact. Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978).

Action to Quiet Title in Mining Company Shares — Credible Evidence of Outstanding Shares — District Court Upheld: Safronoff and others were defendants in an action to quiet title to

outstanding shares of the defunct Sun Mining, Inc., which was involuntarily dissolved by the state. The District Court reviewed all of the evidence before it, including a list of outstanding shares prepared by Sun Mining's secretary-treasurer shortly before the company was dissolved, the number of shares held by each shareholder according to each shareholder's stock certificate, and oral testimony, and found that the secretary-treasurer's list was the only credible evidence. Safronoff appealed the decision of the District Court, contending that he should have been awarded additional shares. Relying upon Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285 (1991), and St. v. Bower, 254 M 1, 833 P2d 1106 (1992), the Supreme Court applied the "clearly erroneous" standard to the District Court's findings of fact and held that although there were conflicts in the evidence before it, the District Court reasonably relied upon this evidence and that the District Court's findings of fact were not clearly erroneous. Duncan v. Allen, 1998 MT 316, 292 M 180, 970 P2d 1036, 55 St. Rep. 1296 (1998).

Common-Law Marriage — District Court Overturned: The standard of review of a District Court's findings of fact is whether the findings are clearly erroneous. The Supreme Court has adopted a three-part test to determine whether a District Court's findings of fact are clearly erroneous. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the District Court misapprehended the effect of the evidence, or if, after reviewing the record, the Supreme Court is left with a definite and firm conviction that a mistake has been made. In this case, involving an alleged common-law marriage, the Supreme Court overturned the District Court's conclusion that a common-law marriage did not exist, stating that although there was substantial evidence to support the lower court's findings of fact, the Supreme Court's review of the record led it to the conclusion that the District Court misapprehended the effect of the evidence. In re Estate of Hunsaker, 1998 MT 279, 291 M 412, 968 P2d 281, 55 St. Rep. 1144 (1998).

Alleged Failure to Disclose Agency Relationship — Resolution of Conflicting Evidence — Alternative Findings Not Required: Garrison purchased property on Flathead Lake through Averill, a real estate broker. Later, Garrison filed suit against Averill and the seller of the property, alleging that he, Garrison, considered Averill his agent and relied on Averill to represent his interests and that Averill was aware of that reliance. Garrison also argued that the District Court ignored testimony from his expert to the effect that Averill breached the standard of care by failing to document his disclosure to Garrison of his agency relationship with the seller. Garrison also alleged that Averill was negligent and that the negligence caused Garrison's damages. The Supreme Court pointed out testimony in the record from Averill's expert and concluded that the District Court had not ignored the testimony presented by Garrison but simply resolved conflicting evidence against Garrison. Citing Yellowstone Basin Properties, Inc. v. Burgess, 255 M 341, 843 P2d 341 (1992), the Supreme Court held that just because there is evidence in the record on which the District Court could have based certain findings of fact does not require the District Court to make those findings. Garrison v. Averill, 282 M 508, 938 P2d 702, 54 St. Rep. 454 (1997).

Supreme Court Clarifies That Standard of Review for Estate Cases at Equity Is the "Clearly Erroneous" Test: In reviewing a lower court's decision that a will could be admitted to probate because it was not the product of undue influence, the Supreme Court stated that the standard of review in estate cases at equity was inconsistent and contradictory. Under the statute, the test has tended to be whether substantial credible evidence supports the lower court's findings, while under the rule, the test has been whether the lower court's findings are clearly erroneous. The Supreme Court held that nothing in the statute precludes the use of the "clearly erroneous" test, while the rule, by its terms, mandates its use. Therefore, with respect to estate cases at equity, the standard of review would be the "clearly erroneous" test. In re Estate of Tipp, 281 M 120, 933 P2d 182, 54 St. Rep. 90 (1997).

Valuation of Farm Property — Adoption of Appraisal as Factual Issue Determined by District Court — "Clearly Erroneous" Standard Applicable: Upon the dissolution of Alan's and Linda's marriage, the District Court adopted the appraisal of Alan's expert witness, to the exclusion of the appraisal by Linda's expert. Linda raised numerous objections to the appraisal by Alan's expert. Citing Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 250 M 175, 819 P2d 158 (1991), the Supreme Court held that the valuation of property is a factual issue to be determined by the trial court and that when reviewing findings of fact on this subject, the Supreme Court is precluded from substituting its judgment for that of the trier of fact and may only set aside the findings of the trial court if they are clearly erroneous. The Supreme Court noted that the District Court set out specific reasons why the appraisal by Alan's expert was adopted and the appraisal by Linda's expert rejected. In re Marriage of Meeks, 276 M 237, 915 P2d 831, 53 St. Rep. 365 (1996), followed and clearly

erroneous standard applied in In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381, 57 St. Rep. 285 (2000).

Substantial Evidence of Negligence: Although in conflict with defendant's version of facts, substantial evidence existed to support plaintiff's claim. It was foreseeable that a freestanding light standard could fall and injure anyone in its path and that someone could act with a minimal amount of force in a manner to intervene with the standard's stability. The Supreme Court will not retry a case simply because the jury chooses to believe one side's evidence to the exclusion of the other and will not disturb a jury's negligence findings unless the results are inherently impossible to believe. Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158, 49 St. Rep. 473 (1992).

In reviewing the trial of a suit for damages suffered in a car accident, the Supreme Court refused to overturn a jury verdict of no negligence by respondent when the evidence indicated the following: (1) the respondent was traveling at a reasonable rate of speed; (2) respondent's headlamps were on and aimed properly; and (3) appellant and his companion were walking on the road, facing away from traffic, and wearing dark clothes on a dark night. Kukuchka v. Ziemet, 219 M 155, 710 P2d 1361, 42 St. Rep. 1916 (1985).

Evidence of Adequate Medical Care — Jury Finding of Lack of Medical Malpractice Affirmed: On appeal from judgment based on a jury verdict finding no medical malpractice for injuries sustained by a premature infant, the Supreme Court affirmed, finding sufficient evidence derived from expert testimony to establish a reasonable basis for the jury conclusion that medical care met or exceeded the applicable standard of care under the circumstances. Silvis v. Hobbs, 251 M 407, 824 P2d 1013, 49 St. Rep. 62 (1992).

Adoption by Workers' Compensation Court of Claimant's Proposed Findings, Conclusions, and Judgment: Appellant claimed reversible error by the Workers' Compensation Court's substantial, although not verbatim, adoption of claimant's proposed findings, conclusions, and judgment. Although under 39-71-2903 that court is governed by the Montana Administrative Procedure Act rather than by the Montana Rules of Civil Procedure, there is nothing in the Montana Administrative Procedure Act or the rules of the Workers' Compensation Court that prohibits the verbatim adoption of the prevailing party's proposed findings, conclusions, and judgment in a manner similar to that allowed for District Courts under this rule. Wolfe v. Webb, 251 M 217, 824 P2d 240, 49 St. Rep. 1 (1992), followed in In re Marriages of Boyer & Overman, 261 M 179, 862 P2d 384, 50 St. Rep. 1277 (1993).

Attorney Not Public Figure as Matter of Law — Summary Judgment Improperly Granted: Defendant attorney filed a defamation action against the Great Falls Tribune for damages arising from a published article, later retracted, that incorrectly reported that he was sought for criminal charges. In reversing the judgment and remanding the case, the Supreme Court held that the District Court erred in granting summary judgment because its factors did not specify with sufficient particularity the rationale underlying its ruling that the defendant was a public figure as a matter of law. Article II, sec. 7, Mont. Const., provides that in libel suits, the facts and the law are determined by the jury under the direction of the court. Review of the record revealed the existence of genuine issues of material fact that must be determined by a jury. Kurth v. Great Falls Tribune Co., 246 M 407, 804 P2d 393, 48 St. Rep. 13 (1991).

Condemnation Findings Not Challenged at Trial Court Level: A condemnation case was remanded for the lower court to determine certain factual questions concerning the city's proposed takeover of a privately owned water company. Upon appeal of the remanded case, the city did not allege that findings were clearly erroneous or unsupported by evidence. Therefore, the Supreme Court was bound by the findings. Missoula v. Mtn. Water Co., 236 M 442, 771 P2d 103, 46 St. Rep. 494 (1989).

Findings and Conclusions Not Completely Verbatim — Evidence of Judge's Thoughtful Consideration: A party specified as error a judge's verbatim adoption of findings of fact and conclusion of law proposed by the other party. The Supreme Court determined that they were not adopted completely verbatim and held that the judge's editing of findings and selective use of conclusions, as well as reliance on his own conclusions, evidenced thoughtful consideration by the judge deciding the case. Felton Inv. Group v. Taurman, 222 M 238, 722 P2d 1135, 43 St. Rep. 1228 (1986).

Reasonable Visitation Provision Replaced by Fixed Visitation Schedule — No Abuse of Discretion: Following dissolution of marriage, mother was granted custody of two minor children with reasonable visitation awarded to father. In the ensuing months, the father was permitted to visit the children only once and further attempts to arrange visitation were not successful since the mother had no phone and would not respond to messages. The father petitioned the District Court to grant a fixed visitation schedule, and the petition was granted. Although not required

under Rule 52(a), M.R.Civ.P. (Title 25, ch. 20), the order contained findings and conclusions, including evidence that the District Court Judge considered the best interests of the children and the conclusion that the mother's suggested graduated basis visitation schedule required reasonableness that was lacking in both parties. The Supreme Court held that the District Court's aid was necessary to clarify the meaning of "reasonable visitation" and found no abuse of discretion in the District Court Judge's conclusion. In re Marriage of Vinecke, 221 M 58, 716 P2d 638, 43 St. Rep. 633 (1986).

Proposed Findings and Conclusions of Counsel Adopted Verbatim:

The test applied by the Supreme Court to determine if the District Court's use of proposed findings of fact and conclusions of law was proper is whether the proposed findings are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence presented. In re Marriage of Benner, 219 M 188, 711 P2d 802, 42 St. Rep. 1943 (1985), followed in In re Marriage of Purkett, 222 M 225, 721 P2d 349, 43 St. Rep. 1217 (1986).

The Supreme Court rejected appellants' contention that, by adopting verbatim the bank's proposals, the District Court led itself into egregious error because it made no findings relating to appellants' affirmative defenses and counterclaims. Noting that this was a serious defect in the findings, the Supreme Court proceeded to treat the case as one of summary judgment and, relying on the finding that there was no specific agreement not to foreclose, held that there was no genuine issue of material fact raised in the defense and counterclaim issues that would merit remand. First Nat'l Bank of Missoula v. McGuinness, 217 M 409, 705 P2d 579, 42 St. Rep. 1288 (1985).

The court rejected defendants' argument that the District Court failed to exercise independent judgment by adopting the plaintiffs' proposed findings. The plaintiffs' findings, as adopted by the District Court, are supported by the record. The standard for review of findings made by a District Court is the same whether the District Court has prepared them or has adopted a party's proposed findings and conclusions. Bowman v. Prater, 213 M 459, 692 P2d 9, 41 St. Rep. 2236 (1984).

It is not good practice for the District Court to adopt verbatim (here, by mere photocopying) one party's proposed findings of fact and conclusions of law because it may lead to error. However, once the District Court adopts findings and conclusions, they become the court's own and may not be overturned on appeal unless they are clearly erroneous. The record in this case contains substantial credible evidence to support the court's findings and conclusions. R.L.S. & T.L.S. v. Barkhoff, 207 M 199, 674 P2d 1082, 40 St. Rep. 1982 (1983), followed in Turner v. Ferrin, 232 M 146, 757 P2d 335, 45 St. Rep. 946 (1988).

Although the practice is disapproved, the fact that District Court substantially adopted the findings proposed by counsel for one of the parties does not change the standard for review, which is that the findings are to stand if supported by law and evidence. LeProwse v. LeProwse, 198 M 357, 646 P2d 526, 39 St. Rep. 1053 (1982). See also Kowis v. Kowis, 202 M 371, 658 P2d 1084, 40 St. Rep. 149 (1983), In re Marriage of Jacobson, 228 M 458, 743 P2d 1025, 44 St. Rep. 1678 (1987), In re Marriage of Hagemo, 230 M 255, 749 P2d 1079, 45 St. Rep. 183 (1988), In re Marriage of Purdy, 234 M 502, 764 P2d 857, 45 St. Rep. 2084 (1988), In re Marriage of Walls, 278 M 413, 925 P2d 483, 53 St. Rep. 974 (1996), and In re Marriage of McDermott, 2003 MT 283, 318 M 13, 79 P3d 245 (2003). Purdy was followed in In re Marriage of Stufft, 276 M 454, 916 P2d 767, 53 St. Rep. 467 (1996).

Notwithstanding the duty imposed in Rule 52(a), M.R.Civ.P., upon a District Court to "find the facts specially and state separately its conclusions of law thereon", the rule is not automatically breached when a court adopts verbatim the proposed findings and conclusions submitted by the prevailing party, especially where, as here, the District Judge invited both parties to submit proposed findings and conclusions prior to making his decision. Adopted findings, though not the product of the District Judge's mind, are formally his and will stand if supported by the evidence. Billings v. P.S.C., 193 M 358, 631 P2d 1295, 38 St. Rep. 1162 (1981), followed in Sawyer-Adecor Int'l, Inc. v. Anglin, 198 M 440, 646 P2d 1194, 39 St. Rep. 1118 (1982).

The appellant argued that the District Court erred by adopting the proposed findings of fact, conclusions of law, and decree submitted by respondent. She suggested that a lower standard for review should exist for the review of findings and conclusions drafted by counsel than exists under the "clearly erroneous" standard of Rule 52(a), M.R.Civ.P. The Supreme Court declined to adopt this suggestion. The findings of fact and conclusions of law entered here by the court were comprehensive and supported by the evidence. They contained no clear error. Jensen v. Jensen, 193 M 247, 631 P2d 700, 38 St. Rep. 1109 (1981), followed in Donnes v. Orlando, 221 M 356, 720

P2d 233, 43 St. Rep. 890 (1986), and in Moore v. Hardy, 230 M 158, 748 P2d 477, 45 St. Rep. 108 (1988).

Commodity Credit Corporation Payments — Loan Not Sale: Substantial credible evidence supported the District Court's conclusion that a farm corporation treated loans of the federal Commodity Credit Corporation (CCC) as corporate debt. The CCC loans have few of the aspects of a true sale. There is no transfer of title. Actual title or ownership of the grain is not specifically transferred until the farmer either activates the nonrecourse clause or pays his loan. The government pays the farmer for storing the grain during the term of the loan, but aside from that has no other power to use the grain. Hass v. Hass Land Co., 217 M 246, 704 P2d 63, 42 St. Rep. 1170 (1985).

Substantial Evidence to Support Order of Commitment — Scope of Review: The Supreme Court found substantial evidence to support the lower court's order of commitment. The oral testimony of Dr. Hughes, various medical reports submitted by the psychiatrists, and hospital records were relied upon by the judge. Appellant expressly asked the Supreme Court to review the weight of Dr. Hughes' testimony. That is not the role of an appellate court. The trier of fact makes findings, and the Supreme Court will not disturb them unless shown to be clearly erroneous. In re G.S., 215 M 384, 698 P2d 406, 42 St. Rep. 451 (1985).

Employee of General Contractor Expert on Tile Installation — Standard of Review: In an action for breach of warranty brought by the general contractor against a subcontractor regarding installation of a tile floor, plaintiff's employee was allowed to testify as an expert witness on the subject of tile installation. The court rejected subcontractor's argument that the trial court abused its discretion in determining that the witness was an expert. Although the court expressed concern that witness was allowed to express his opinion on a skill of which he had no practical or personal involvement prior to preparation for trial, the fact that it would reach a different conclusion on the determination than that of the trial court does not render the trial judgment infirm. The trial court's ruling must be upheld unless shown to be clearly erroneous. Price Bldg. Serv., Inc. v. Christensen, 215 M 372, 697 P2d 1344, 42 St. Rep. 440 (1985). This standard applied in Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

No Indication of Weight Trial Court Placed on Inadmissible Evidence — New Trial: In the appeal of a conviction under 61-8-401 for driving under the influence of alcohol, the Supreme Court ruled inadmissible blood test results entered into evidence by the trial court. The Supreme Court further ruled that it could not decide whether there was sufficient evidence to convict the defendant without the blood test results because the Supreme Court had no indication of the weight the trial court placed upon the test in its decision. The case was remanded for a new trial. St. v. McDonald, 215 M 340, 697 P2d 1328, 42 St. Rep. 414 (1985).

District Court Findings Presumed Correct: The appellate standard for review is clear. The findings of the trial court are presumed to be correct if supported by substantial evidence. Robinson v. Schrade, 215 M 326, 697 P2d 923, 42 St. Rep. 401 (1985).

Medical Evidence Entered by Deposition — No Substantial Evidence to Deny Claim — Liberal Construction: Because the record on appeal of a Workers' Compensation Court decision consisted mainly of testimony by deposition, the court's function on review is different than the usual limited standard of review. When the critical evidence, particularly medical evidence, is entered by deposition, the Supreme Court is in as good a position as the Workers' Compensation Court to judge the weight to be given to such record testimony. A review of the medical experts' depositions in this case reveals a sharp conflict in the medical evidence presented in regard to the claimant's injury. The court held that the testimony of the expert relied on in the Workers' Compensation Court's findings did not amount to substantial evidence and that there was no causal relation between claimant's current symptoms and the original injuries suffered while under defendant's employ. Moreover, the Legislature has mandated that the Workers' Compensation Act be liberally construed. Shupert v. Anaconda Aluminum Co., 215 M 182, 696 P2d 436, 42 St. Rep. 277 (1985), followed in Frost v. Anaconda Co., 216 M 387, 701 P2d 987, 42 St. Rep. 889 (1985), and Weber v. Pub. Employees' Retirement Bd., 270 M 239, 890 P2d 1296, 52 St. Rep. 162 (1995).

Substantial Credible Evidence to Terminate Parental Rights: Evidence was held sufficient to support trial court's findings that appellant failed to comply with court-approved treatment plan and that appellant's condition which rendered her unfit to be a parent is unlikely to change within a reasonable time. Substantial credible evidence supports the findings, and they may not be set aside unless clearly erroneous. In re R.M.B., Youth in Need of Care, 213 M 29, 689 P2d 281, 41 St. Rep. 1925 (1984).

Substantial Evidence to Support Findings: The function of an appellate court in reviewing findings of fact in a civil action tried by the District Court without a jury is not to substitute its judgment for the trier of fact but to determine whether there is substantial credible evidence to support the findings of fact and conclusions of law. Although there is conflicting evidence, the record indicates substantial evidence upon which the District Court based its decision. Eliason v. Wallace, 209 M 358, 680 P2d 573, 41 St. Rep. 758 (1984), followed in Gypsy-Highview Gathering System, Inc. v. Dept. of State Lands, 231 M 330, 753 P2d 317, 45 St. Rep. 657 (1988).

Role of Supreme Court on Review:

The Supreme Court's function on review does not include retrial of the case. The Supreme Court may not substitute its judgment for that of the trial court. The reviewing court is confined to determining whether there is substantial credible evidence to support the findings of fact and conclusions of law. The court reviews the evidence in the light most favorable to the prevailing party. The evidence may be inherently weak and still be "substantial". General Mills, Inc. v. Zerbe Bros., Inc., 207 M 19, 672 P2d 1109, 40 St. Rep. 1830 (1983), following Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978); In re Estate of LaTray, 183 M 141, 598 P2d 619 (1979); Olson v. Westfork Properties, Inc., 171 M 154, 557 P2d 821 (1976); Hornung v. Estate of Lagerquist, 155 M 412, 473 P2d 541 (1970); followed in In re Estate of Lehner, 220 M 129, 714 P2d 130, 43 St. Rep. 231 (1986), and in Yellowstone Basin Properties, Inc. v. Burgess, 255 M 341, 843 P2d 341, 49 St. Rep. 1051 (1992). See also In re Marriage of Beitz, 211 M 111, 683 P2d 485, 41 St. Rep. 1247 (1984), and Emasco Ins. Co. v. Waymire, 242 M 131, 788 P2d 1357, 47 St. Rep. 636 (1990).

The standard for review of a District Court's findings is the same whether the court prepared the findings or adopted a party's proposed findings: the test, then, is whether the court abused its discretion by acting arbitrarily without employment of conscientious judgment or exceeded the bounds of reason in view of all the circumstances. The findings must stand if supported by the record. Error in adopting proposed findings is more an ethical than a legal breach and occurs when the proposed findings are relied upon to the exclusion of the proper consideration of facts and the exercise of independent judgment. In re Marriage of Goodmundson, 201 M 535, 655 P2d 509, 39 St. Rep. 2295 (1982), followed in In re Marriage of Merry, 213 M 141, 689 P2d 1250, 41 St. Rep. 2009 (1984). See also Johnson v. Johnson, 205 M 259, 667 P2d 438, 40 St. Rep. 1255 (1983).

Action to Increase Child Support — Standard of Appellate Review:

Five years after entry of the parties' original divorce decree, the District Court, on motion of the mother, ordered that the father's monthly child support payments be increased from $125 to $200. On appeal, the Supreme Court, noting that it will reverse the District Court only if its findings are clearly erroneous, declined to overrule the District Court. The Supreme Court stated that the factors relied upon by the District Court, i.e., the increase in the child's age and needs, inflation, and the fact that the wife's expenses exceed her income, rendered the terms of the original decree unconscionable within the meaning of 40-4-208. Johnson v. Johnson, 205 M 259, 667 P2d 438, 40 St. Rep. 1255 (1983).

On appeal of an action to increase a child support payment, the Supreme Court will view the record in a light most favorable to the prevailing party. Findings of a District Court will not be set aside unless they are clearly erroneous. When there is substantial credible evidence, though perhaps conflicting, the judgment of the District Court will not be overturned. Nicolai v. Nicolai, 193 M 203, 631 P2d 300, 38 St. Rep. 1100 (1981).

Substantial Credible Evidence in Support of District Court's Finding That Operation of Bar Did Not Create Nuisance: Plaintiffs, owners of a building in which defendants, lessees, operated a bar, filed an unlawful detainer action against defendants pursuant to 70-27-108. Plaintiffs claimed that defendants, by allowing loud music and noise in the bar, were violating an implied covenant not to operate their bar in such a manner as to create a nuisance. The trial judge ruled that the lease could not be canceled under any theory of nuisance because defendants were doing what they had a right to do, operate a bar. On appeal, the Supreme Court ruled that because substantial credible evidence supported the District Court's finding that the bar was not being operated as a nuisance, it was unnecessary to determine whether Montana law recognizes in real property leases an implied covenant on the part of the lessee to use the leased premises so as not to injure the lessor by creating a nuisance. Martinson v. Thompson, 205 M 264, 667 P2d 423, 40 St. Rep. 1259 (1983).

Evidence Insufficient As a Matter of Law: Testimony at trial did not clearly and convincingly establish that respondent, due to his mental condition, was unable to protect his life or health at the time of the trial. Therefore, the evidence that respondent was "seriously mentally ill" within the meaning of 53-21-102 was insufficient as a matter of law, and the District Court commitment order was vacated. In re R.T., 204 M 493, 665 P2d 789, 40 St. Rep. 1025 (1983).

Findings and Conclusions as to Water Rights Held Inadequate — Judgment Vacated and Remanded:

Although the Supreme Court has discouraged District Courts from the practice of adopting the prevailing party's proposed findings of fact and conclusions of law virtually verbatim, once adopted by the District Court the "clearly erroneous" standard of Rule 52(a), M.R.Civ.P., supports them on appeal. In re Marriage of Speer, 201 M 418, 654 P2d 1001, 39 St. Rep. 2204 (1982), followed in Glasser v. Glasser, 206 M 77, 669 P2d 685, 40 St. Rep. 1518 (1983).

When a midstream and downstream water user filed suit against the upstream user to have the District Court declare the relative water rights of the parties, the findings of fact and conclusions of law entered by the District Court were so bare and inadequate as to provide no basis for meaningful appellate review. Because it could not be determined from the District Court's bare conclusions (i.e., that the parties had failed to prove their case by a preponderance of the evidence and had abandoned their rights) what the factual or evidentiary basis for the District Court's decision was, the Supreme Court vacated the judgment as to all of the three parties, remanded the case to the District Court, and directed it to enter findings and conclusions that are reflective of the evidence presented at trial and the legal contentions of the parties. 79 Ranch, Inc. v. Pitsch, 193 M 229, 631 P2d 690, 38 St. Rep. 1048 (1981).

Ambiguity of Contract Clause — Conclusion of Law: Contract ambiguities are questions of fact, and on appeal the Supreme Court would ordinarily limit their review to the "clearly erroneous" standard of review. The initial determination of whether or not an ambiguity exists is one of law. Thus, the determination by the District Court that a default clause is ambiguous is a conclusion of law freely reviewable. When on review the Supreme Court finds that the clause is not ambiguous, the court is free to rely on its own interpretation of the clause. SAS Partnership v. Schafer, 200 M 478, 653 P2d 834, 39 St. Rep. 1883 (1982).

Evidence to Support Findings: On appeal, the court will not substitute its judgment for that of the trier of fact. Findings will not be overturned unless there is a clear preponderance of evidence against them, recognizing that evidence may be weak or conflicting yet still support the findings. On review, evidence will be reviewed in the light most favorable to the prevailing party. Miller v. Watkins, 200 M 455, 653 P2d 126, 39 St. Rep. 1867 (1982). See also Wallace v. Wallace, 203 M 255, 661 P2d 455, 40 St. Rep. 430 (1983), followed in Lacey v. Herndon, 205 M 379, 668 P2d 251, 40 St. Rep. 1375 (1983).

Expert Testimony Review — Substantial Evidence Most Favorable to Prevailing Party: Plaintiffs own a farm surrounded on three sides by the Flathead River and Flathead Lake. After Kerr Dam was built in 1939, the water table in the area began to rise. In 1960 plaintiffs filed suit claiming inverse condemnation of their land and damages due to the rising of the water table. The complaint was amended four times over the years and was finally tried in 1979. Defendant claimed that the cause was barred by prescription and the Statute of Limitations. At all times defendant denied any damage. The parties presented conflicting expert testimony as to whether the increase in the water table level was due to precipitation or the dam. The Supreme Court's standard of review is whether the findings of fact and conclusions of law are supported by substantial evidence (citing Kearns v. McIntyre Constr. Co., 173 M 239, 567 P2d 433 (1977)). The evidence must be reviewed in a light most favorable to the prevailing party in District Court (citing Johnson v. Johnson, 172 M 94, 560 P2d 1331 (1977)). There was substantial credible evidence to support the District Court's findings. Blasdel v. Mont. Power Co., 196 M 417, 640 P2d 889, 9 St. Rep. 219 (1982).

Findings Contradicted and Unsupported: The determination by the District Court that the wife's bachelor's degree in economics would enable her to find appropriate employment to support herself in a manner similar to that enjoyed during the marriage was contradicted by other findings and was unsupported by the record. Therefore, it was clearly erroneous and had to be reversed. Bowman v. Bowman, 194 M 233, 633 P2d 1198, 38 St. Rep. 1515 (1981).

Appellate Review of Facts — Action of an Equitable Nature: In equitable causes where issues are close, a degree of deference will be accorded the findings of the trial court since it is in a better position to make decisions of fact. Rule 52(a), M.R.Civ.P., requires findings of fact made by the District Court to be upheld unless they are clearly erroneous, but the rule does not make any distinction between equitable causes and cases at law; thus the Supreme Court in reviewing an action of an equitable nature must look to 3-2-204(5) and independently review all questions of fact as well as questions of law. In causes where the issues are not close, the standard for this review is to uphold the District Court on questions of fact unless there is a decided preponderance of the evidence against its findings. Rase v. Castle Mtn. Ranch, Inc., 193 M 209, 631 P2d 680, 38 St. Rep. 992 (1981).

Findings Supporting Continued Maintenance Properly Made — Issue Not Before the Court: Where the marriage of the parties was previously dissolved and the wife awarded maintenance without being required to seek employment in order that she be able to care for her handicapped child at home, the District Court did not err, upon a petition for discharge of the maintenance award, in adopting the respondent's proposed findings and conclusions. With the exception of a finding regarding increased financial need, there was sufficient evidence before the court showing no change in the child's need for special care to support the findings and conclusions that were adopted, no matter who drafted them. As the issue of increased spousal maintenance was not before the court, that finding must be vacated. Tidball v. Tidball, 192 M 1, 625 P2d 1147, 38 St. Rep. 482 (1981).

Prevailing Party Not Presenting Expert Testimony: Plaintiffs contracted with defendant to build their log home. Before and after occupancy of the home structural problems requiring repair occurred. At trial plaintiffs were awarded damages against the defendant. On appeal defendant claimed that findings that the roof had not been constructed as planned and bid, and that construction defects by defendant brought about the instability and unsafe nature of the house, were not supported by credible evidence especially since the District Court did not accord any weight to the testimony of defendant's expert architect. The Supreme Court rejected the claim, stating that when substantial evidence in the record supports the findings of the District Court, the fact that the prevailing party does not present expert testimony does not mean that the testimony produced by experts on the other side is inherently superior. When the evidence is conflicting but the findings are supported by substantial credible evidence, the findings of the District Court will be upheld. Carroccia v. Todd, 189 M 172, 615 P2d 225 (1980).

Nature of District Court Order — Mandamus — Action at Law: When the order of the District Court commands a school district to perform a duty that devolves upon it by operation of law, the order is in the nature of mandamus. Mandamus is an action at law. Therefore 3-2-204 does not apply. The District Court findings are to be reviewed on appeal under Rule 52(a), M.R.Civ.P. In re the "A" Family, 184 M 145, 602 P2d 157 (1979).

Findings by the Court: The findings of a trial court in a nonjury trial will not be reversed upon appeal, unless there is a clear preponderance of evidence against the findings. Steward v. Casey, 182 M 185, 595 P2d 1176 (1979).

Conflicts in Evidence: Although conflicts may exist in the evidence presented, it is the duty and function of the trial judge to resolve such conflicts. His findings will not be disturbed on appeal where they are based on substantial though conflicting evidence. Kostbade v. Buckingham, 182 M 137, 595 P2d 1149 (1979).

Conflicting Evidence in Findings: If a trial court's findings are sustained by competent and substantial although conflicting evidence, they will not be disturbed on appeal. Farmers St. Bank v. Mobile Homes Unlimited, 181 M 342, 593 P2d 734 (1979).

Review of Evidence on Appeal: The evidence will be reviewed in the light most favorable to the prevailing party, and the credibility of witnesses and weight accorded their testimony is for the District Court's determination in nonjury trials. Farmers St. Bank v. Mobile Homes Unlimited, 181 M 342, 593 P2d 734 (1979).

Review of Property Division: The rule for review of property division in marital cases is whether the District Court acted arbitrarily, without use of conscientious judgment, or exceeded the bounds of reason in view of all the circumstances. Kuntz v. Kuntz, 181 M 237, 593 P2d 41 (1979).

Workers' Compensation — Standard of Review: The findings and conclusions of the workers' compensation court, like those of District Courts, may not stand if there is a preponderance of the evidence against them when viewed in the light most favorable to the prevailing party. The findings of fact will not be set aside unless they are clearly erroneous. However, the Supreme Court is in as good a position to judge record testimony, as opposed to oral testimony, as the trial court. Hert v. Newberry, 178 M 355, 584 P2d 656, 587 P2d 11 (1978), clarified and rehearing denied in Hert v. Lumberman Mut. Cas. Co., 179 M 160, 587 P2d 11 (1978). Hert was held to no longer be authority for admissibility of medical records, in light of the 1990 adoption of ARM 24.5.317, in Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994).

Trial Court to Determine Ultimate Facts: The trial court's function in nonjury cases is to find ultimate facts from conflicting evidence, and those findings are sufficient if sustained by competent and substantial although conflicting evidence. Holloway v. Univ. of Mont., 178 M 198, 582 P2d 1265 (1978), followed in Kuhlman v. Rivera, 216 M 353, 701 P2d 982, 42 St. Rep. 863 (1985).

Court's Function — Determination of Substantial Credible Evidence: The court's function on review is not to substitute its judgment in place of the trier of facts but rather it is confined to

determining whether there is substantial credible evidence to support the findings of fact and conclusions of law. Although conflicts may exist in the evidence presented, it is the duty and function of the trial judge to resolve such conflicts. His findings will not be disturbed on appeal where they are based on substantial though conflicting evidence. Olson v. Westfork Properties, Inc., 171 M 154, 157 P2d 821 (1976), followed in In re Support of Rockman, 217 M 498, 705 P2d 590, 42 St. Rep. 1323 (1985), and In re Adoption of E.S.R., 218 M 118, 706 P2d 132, 42 St. Rep. 1448 (1985).

Preponderance of Evidence: Findings of fact made by trial court will not be disturbed where they are supported by preponderance of evidence. W. Foundry, Inc. v. Matelich, 150 M 228, 433 P2d 789 (1967).

Law Review Articles

Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 325 (1983).

Collateral References

Trial *key* 388 through 405.

89 C.J.S. Trial §§609 through 657.

75B Am. Jur. 2d Trial §§1962, 1968, 1970 through 1983, 1985 through 1990, 1997, 1999.

Propriety and effect of trial court's adoption of findings prepared by prevailing party. 54 ALR 3d 868.

Necessity, as condition of effectiveness of express finding on a matter in issue to prevent relitigation of question in later case, that judgment in former action shall have rested thereon. 133 ALR 840.

Rule 52(b). Amendment.

Commission Notes

COMMISSION NOTE
TO AUGUST 1, 1965, AMENDMENT

Under Rule 77(d) the prevailing party has 10 days after the entry of judgment to give the unsuccessful parties notice of such entry. The change in 52(b) is an adjustment to this provision, and is designed to meet the possibility that the prevailing party is the only party that knows of the entry of the judgment and waits 10 days before giving the unsuccessful party notice of such entry. The provision is similar to that found in Rule 59(b) and (e).

ADVISORY COMMITTEE'S NOTE
TO MAY 21, 1969, AMENDMENT

See Advisory Committee's Note under Rule 52(a).

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of August 1, 1965, inserted "service of notice of" before "entry of judgment" in the first sentence.

The amendment of September 7, 1965, added a second paragraph providing that motions to amend should be heard and determined within the time for determining motions for new trial as provided by Rule 59(d).

The 1969 amendment rewrote the rule to require that parties file written requests for findings, to remove as ground for appeal the want of findings not requested by the party, and to provide for exceptions to findings and the determination thereof.

The 1971 amendment restored the language as it stood prior to the 1965 amendments; inserted "notice of" before "entry of judgment" in the first sentence; and added new language as the third sentence. This amendment made the rule substantially identical to the Federal Rule. As of May 1, 1990, this rule was still identical to the Federal Rule, except for the inclusion of "notice of" as stated above.

Case Notes

Improper for District Court to Look Beyond Language of Amended Judgment Decree When Judgment Not Ambiguous or Obscure: Following remand of Harland v. Anderson, 169 M 447, 548 P2d 613 (1976), which awarded defendant summary judgment on plaintiff's claims for a prescriptive easement across defendant's property, the District Court took up plaintiff's alternative request to condemn an easement across defendant's land for plaintiff's use. In 1983, the court granted plaintiff an unrestricted easement, and defendant moved to amend the judgment to provide compensation for the taking of the easement, but the motion was denied. The parties then entered a stipulation providing $7,500 for defendant's attorney fees and costs, and the parties agreed not to appeal the amended judgment. The stipulation was approved.

Almost 20 years later, plaintiffs commenced litigation seeking declaratory and injunctive relief on grounds that defendant had wrongfully interfered with the 1983 unrestricted easement. Defendant claimed that the 1983 right-of-way was limited to agricultural and grazing purposes and moved for summary judgment on grounds of res judicata, judicial estoppel, laches, and waiver. The District Court concluded that the language of the 1983 amended judgment implied that the findings and conclusions were necessary to the judgment, so the court reviewed the 1983 findings and conclusions, concluded that the easement was restricted to agricultural and grazing purposes, granted defendant summary judgment on res judicata grounds, and dismissed plaintiffs' summary judgment motion and claim with prejudice. On appeal, plaintiffs asserted that the District Court erred in looking beyond the plain language of the 1983 amended judgment. The Supreme Court cited Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), for the holding that a District Court may refer to the entire record in an original case when construing a decree that is obscure or ambiguous, but that when the language of the decree is plain, there is no need to construe it or to resort to pleadings or evidence. In this case, the 1983 decree clearly and unambiguously granted plaintiff an unrestricted easement across defendant's ranch, and it was error for the District Court to look beyond the face of the decree instead of accepting it at face value and speculating as to the reasoning behind the particular result. Thus, summary judgment for defendant was reversed, and the District Court was ordered to enter summary judgment for plaintiffs. Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004).

Successor Judge Not to Issue Amended Findings of Facts Without Review of Original Trial Transcript — Reversible Error: It was reversible error for a District Court Judge who did not preside over an original bench trial to issue amended findings of fact without having the benefit of a transcript of the original proceeding. That judge does not have the necessary basis to act as an advised and intelligent factfinder, either in the first instance or in an amendatory fashion. Unless the parties have stipulated to the relevant and controlling facts, a judge who is asked to amend findings of fact entered by another judge cannot act on the motion to amend without reviewing the relevant portions of the trial transcript. FIRS Holding Co., Inc. v. Lemley, 272 M 490, 901 P2d 571, 52 St. Rep. 831 (1995).

Court Error in Arriving at Conclusion of Law Before Finding Facts: The plaintiff, Marry, was injured in an automobile accident involving a Deputy Sheriff. The lower court found the parties equally at fault and ordered that neither receive damages. Marry appealed on the basis that even if she were 50% negligent, she suffered more damages and should receive some money from the defendant. On reconsidering the case, the lower court stated that it was its intention that the plaintiff not receive any money and amended one of its findings to hold that Marry's negligence was greater than the defendant's and she was not entitled to recovery. The Supreme Court reversed on the basis that the lower court did not reexamine the evidence in amending its order. It formulated its conclusion of law first and then changed the findings of fact to conform to the conclusion already arrived at. Marry v. Missoula County Sheriff's Dept., 263 M 152, 866 P2d 1129, 50 St. Rep. 1751 (1993).

Interplay Between Time for Filing Notice of Appeal and Time for Filing Motion to Amend or Alter Judgment: District Courts retain jurisdiction to consider and resolve timely motions to alter or amend filed pursuant to or Rule 59(g), M.R.Civ.P., or this rule. A notice of appeal filed under Rule 5, M.R.App.P. (Title 25, ch. 21), prior to the expiration of the time allowed for motions to alter or amend but followed by such motions timely filed has no effect. Shull v. First Interstate Bank of Great Falls, 262 M 355, 864 P2d 1268, 50 St. Rep. 1594 (1993).

Issues Adequately Presented to Jury — Motion to Amend Verdict Properly Denied: Resolution of any conflicts in the evidence is in the province of the trier of fact. Therefore, when the issues were properly presented to the jury, it was not error for the trial court to deny a motion to alter or amend the verdict. DeVoe v. Gust. Lagerquist & Sons, Inc., 244 M 141, 796 P2d 579, 47 St. Rep. 1527 (1990).

Amendment Within Discretion of Court: The decision to amend and the manner of amendment lie squarely within the discretion of the court. The court is under no obligation to tailor its amendment to fit the specifications of the parties. Wagner v. Cutler, 232 M 332, 757 P2d 779, 45 St. Rep. 1092 (1988).

Contract Providing Attorney Fees as Part of Record — Fees Mentioned in Pretrial Order: A motion to amend pursuant to Rules 52(b) and 59(a), M.R.Civ.P., to include attorney fees was denied on the basis that defendants abandoned their claim for attorney fees by neglecting to state a claim in their pretrial order and because no evidence relative to fees was introduced at trial and therefore could not be added as a posttrial issue. The Supreme Court noted that attorney fees were contractually agreed to by the parties, so the issue of whether fees should be

awarded was not one that would have been argued at trial. Further, since the contract was before the court as evidence and since the issue of attorney fees was raised twice in the pretrial order, the issue was not outside the court's record. The case was remanded for determination of reasonable attorney fees. Bell v. Richards, 228 M 215, 741 P2d 788, 44 St. Rep. 1467 (1987).

Court Discretion to Order New Trial or Reopen Case — Jurisdiction to Amend Findings and Conclusions: Upon dissolution of a marriage, the District Court retained jurisdiction to determine the division of marital property. Following a 4-day trial, the court divided the property, whereupon both parties filed motions to amend the findings. A hearing was held. Subsequently, the court ordered the parties to appear for the limited purpose of testifying to the respective proposals for handling certain real estate, and the court then issued amended findings of fact and conclusions of law. Appellant contended that the District Court lacked jurisdiction to issue the amended findings because it failed to rule on the motions to amend within 45 days, pursuant to Rules 52(b) and 59(d), M.R.Civ.P. The Supreme Court disagreed, holding that the order to appear for limited testimony was essentially an order for a new trial and that under Rule 59(e), M.R.Civ.P., and 25-11-102, the District Court had jurisdiction to order a new trial on its own initiative or to reopen the case and thus had jurisdiction to amend the findings and conclusions. In re Marriage of Kink, 226 M 313, 735 P2d 311, 44 St. Rep. 681 (1987).

Motion to Amend as "Refresher" When Considerable Time Elapsed: After original findings and conclusions were entered, husband moved to amend. The motion was granted, and judgment on the amended findings and conclusions was entered. Wife contended the motion to amend should have been rejected. The Supreme Court found that due to elapsed time between trial and issuance of original findings and conclusions (10 months), the motion served mainly as a reminder or "refresher" to the trial court that the complex and extensive property of the parties may not have been entirely equitably divided in the original findings and conclusions. Such use of a motion to amend was held not to be unreasonable. In re Marriage of Gallinger/Weissman, 221 M 463, 719 P2d 777, 43 St. Rep. 976 (1986).

No Findings of Fact Made — Denial of Motion to Amend Proper: When the trial court rendered judgment as a matter of law and no findings of fact were made, the court's denial of the appellant's motion to amend his complaint was proper. This rule provides a method by which a trial court's findings of fact may be amended. Klundt v. St., 219 M 347, 712 P2d 776, 43 St. Rep. 1 (1986).

Findings of Court in Error — No Waiver of Indemnity Reimbursement From State: Appellant contracted with the state to build a segment of highway. Respondent subcontracted with appellant to do certain concrete work on bridges. The state designed cuts through a mountainous area that were too steep and had to be redone for stability. This delayed the project and the availability of concrete, increasing costs of construction. Appellant entered a supplemental agreement with the state that purported to waive claims for extra costs. The Supreme Court reversed the lower court finding that this provision precluded appellant from indemnity reimbursement from the state for extra money paid to respondent because of the delay. Under the waiver provision, the contractor could still claim expenses from conditions not within the knowledge of the parties at execution of the agreement. Unavailability of concrete because of delay was such a condition. The court noted that the judgment against the state was subject to 18-1-404. E.F. Matelich Constr. Co. v. Goodfellow Bros., Inc., 217 M 29, 702 P2d 967, 42 St. Rep. 1004 (1985).

Time for Motion to Amend Motion: Neither a motion to amend findings nor a motion for a new trial may be amended after the time allowed for filing the original motion has passed. In re Marriage of Wilson, 216 M 392, 701 P2d 1372, 42 St. Rep. 894 (1985).

Distinction Between Modification and Clarification of Decree: A final dissolution decree was entered on March 3, 1983. Because of later disputes between the parties concerning the property settlement, the District Court held two hearings and then entered an order: (1) setting March 3, 1983, as the date of valuation for some corporate stock that was awarded to the wife; and (2) giving the wife the right to choose the stock. On appeal, the Supreme Court held that neither action by the District Court was a modification of the dissolution decree in violation of the Montana Rules of Civil Procedure, but rather each was a clarification of the decree. In re Marriage of Rohrich, 211 M 130, 683 P2d 1308, 41 St. Rep. 1261 (1984).

Ex Parte Maintenance Order Entered After Final Decree Upheld: It was proper for the District Court to award wife temporary maintenance ex parte even though the effect of the award was amendment of the dissolution decree without holding the hearing required by Rule 52(b), M.R.Civ.P. The Supreme Court held that since the intent of the District Court's earlier order, i.e., that the wife be maintained pending final disposition of the matter, was not being carried out, it

was within the District Court's discretion to grant the wife temporary maintenance. In re Marriage of Rohrich, 211 M 130, 683 P2d 1308, 41 St. Rep. 1261 (1984).

Time Limits to Be Followed — Jurisdictional Requirement: The parties' marriage was dissolved on April 14, 1980, and a portion of the decree provided that the wife was to receive monthly payments equal to one-half the value of stock. On April 23, 1980, the wife moved under Rule 52(b), M.R.Civ.P., to amend the findings and judgment to correct the valuation of the stock. The motion was properly noticed for hearing under Rule 59(g), M.R.Civ.P. On May 1, 1980, the judge continued the hearing for 30 days upon written stipulation of counsel. The hearing was held on June 5, 1980, but no order was entered. The court finally held a later hearing after the wife again moved on May 4, 1981, and in an order dated October 7, 1981, denied her request. On appeal, the Supreme Court held that once the Rule 52(b) motion was made, the time limits of Rule 59(g) applied and a hearing had to be held within 10 days or the court could continue the hearing not to exceed 30 days. In this case, the court held the hearing 5 days later than the extended date and thereby lost jurisdiction of the motion. Further, the court did not rule on the motion within the required 15 days. Because the time for the wife's appeal began to run on the last day that the District Court could have ruled on the Rule 52 motion, her appeal was not timely and the Supreme Court had no jurisdiction. In re Marriage of Winn, 200 M 402, 651 P2d 51, 39 St. Rep. 1831 (1982).

Amending on Remand Judgment Upheld on First Appeal — Law of Case — Abuse of Discretion: In an original judgment of October 31, 1979, plaintiffs were given the alternatives of either repairing a damaged irrigation ditch or paying damages of $5,500. The case was appealed to the Supreme Court, and in Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981), the court found substantial evidence to support the District Court's findings. This became the law of the case. The case was remanded for a determination of attorney fees to be awarded to defendant. On remand, the District Court amended its conclusions and findings to omit the alternative allowing plaintiffs to repair the ditch and awarded damages without the submission of any additional evidence. On appeal, the Supreme Court found this to be an abuse of discretion, as none of the exceptions found in Rules 52(b), 60(a), or 60(b), M.R.Civ.P., applied. The court abused its discretion in not holding a hearing to determine if either alternative of the original judgment had been complied with. Marta v. Smith, 200 M 414, 650 P2d 1387, 39 St. Rep. 1839 (1982).

Notice of Appeal Divests Trial Court of Jurisdiction to Amend Judgment: After respondent moved to amend the judgment of the District Court, appellant filed a notice of appeal. The filing of the notice of appeal deprived the trial court of jurisdiction to amend the judgment. However, under 3-2-204, the Supreme Court can return jurisdiction to the trial court. United Farm Agency v. Blome, 198 M 435, 646 P2d 1205, 39 St. Rep. 1115 (1982).

Motion to Be Based on Record Alone: A motion to amend the findings and judgment was supported by an affidavit stating that appellant's former attorney was suffering from severe emotional problems during the trial. The motion was properly denied, as it must be based on the record as it existed at the time the findings were made. Matters outside the record may not be considered. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Notice of Appeal Filed — District Court Divested of Jurisdiction to Enter Nunc Pro Tunc Order: The findings, conclusions, and decree of dissolution were filed on December 2, 1980. Appellant filed a motion to alter the court's findings and conclusions on December 4, 1980, and filed a notice of appeal on January 7, 1981. On January 20, 1981, the District Court entered amended findings and conclusions and dated them, nunc pro tunc, December 12, 1980. The Supreme Court held that a trial court cannot enter supplemental findings after a notice of appeal has been filed. Bartmess v. Bartmess, 193 M 200, 632 P2d 299, 38 St. Rep. 1097 (1981).

Jurisdiction Over Appeal of Untimely Modification Order: The lower court order modified the findings of fact and conclusions of law more than 15 days after submission of appellant's posttrial motions. By exceeding the time period mandated by Rule 59, M.R.Civ.P., the District Court divested itself of jurisdiction to determine the motion, and its order was a nullity. The original notice of appeal from the second decree, based on that order, was untimely under Rule 5, M.R.App.P., and the Supreme Court has no jurisdiction as to the second decree. However, the jurisdictional defect is cured by the appellants having lodged an appeal to the first decree. Sell v. Sell, 193 M 88, 630 P2d 222, 38 St. Rep. 956 (1981).

Loss of District Court Jurisdiction Upon Filing Notice of Appeal — Findings and Conclusions Improperly Amended: In an action for damages resulting from the defendants' breach of contract by failing to complete the construction of a road for the plaintiff, the trial court committed reversible error in attempting to amend its findings of fact and conclusions of law after the defendants filed a notice of appeal. Since 1954 it has been the rule in Montana that when a notice of appeal is filed, personal and subject matter jurisdiction pass from the District Court to the

Supreme Court. When the District Court amended its findings and conclusions after filing of the notice of appeal, it did so without jurisdiction and the amendments were therefore void. Julian v. Buckley, 191 M 487, 625 P2d 526, 38 St. Rep. 128 (1981). See also St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Lack of Findings on Marital Home Not Correctable by Amendment After Time Limitations Expire: In a divorce settlement, the trial court findings contained no determination of the net worth of the parties, the net worth of the husband's medical practice, or the relative financial contributions of the two parties. The findings of fact also were inconclusive as to the value and disposal of the family home. Five months after the decree was entered, the husband petitioned for amendment, requesting award of the family home to him. Eleven months later the District Court found that it was the original intention of the court to distribute the home to the husband. The Supreme Court concluded that the District Court erred in its attempt to amend the decree. Under Rule 60(a), M.R.Civ.P., clerical errors in judgments may be corrected at any time since correction does not alter substantive rights of the parties. Here the attempted change adversely affected the wife's substantive rights by depriving her of her interest in the family home, a major asset of the marriage. Such error is judicial in nature and could not be corrected by the District Court except by motion made within the time limitations of Rules 50(b), 52(b), 59, or 60(b)(1), M.R.Civ.P. No such motion having been made, the error would have been correctable by appeal, which was never taken by either of the parties. The District Court therefore lacked jurisdiction to make the change effected by its entry of the amended findings and decree. The case was remanded. Thomas v. Thomas, 189 M 547, 617 P2d 133, 37 St. Rep. 1710 (1980).

Perfection of Appeal — Motion to Amend Findings Not Required: When a party's trial memorandum indicated that the opposing party's proposed findings were insufficient in two regards, the failure to move for amendment of the trial court's findings in that regard is not fatal to an appeal raising the same issue. Metcalf v. Metcalf, 183 M 266, 598 P2d 1140 (1979).

Violation of Montana Rules of Civil Procedure — Effect: Since counsel for petitioner violated Rule 77(d), M.R.Civ.P., by giving notice of entry of judgment himself rather than having the clerk of court serve notice of entry of judgment, opposing counsel was not required to adhere to the 30-day period for filing of notice of appeal until proper service was made. Thus, the District Court committed no error in denying petitioner's motion to strike all posttrial motions as untimely. Pierce Packing Co. v. District Court, 177 M 51, 579 P2d 760 (1978).

Appeal Not Timely: When a motion to vacate and set aside a portion of a judgment was made 46 days beyond the authority of Rule 52, M.R.Civ.P., it did not suspend the running of time permitted to file appeal under Rule 5, M.R.App.P. Appellant's contention that Rule 60, M.R.Civ.P., was applicable did not operate to vest the Supreme Court with jurisdiction to hear the appeal. First Nat'l Bank of Lewistown v. Fry, 176 M 58, 575 P2d 1325 (1978).

Distinction — Reopening Case: The time for filing motions under this rule applies when a party desires the findings and conclusions altered, not when a case is reopened to take further testimony. Compton v. Alcorn, 171 M 230, 557 P2d 292 (1976).

Amendment of Findings — New Trial Unnecessary: Where trial court's decision was not supported by findings of fact, proper procedure would have been to proceed under this rule providing that court may amend its findings or make additional findings and amend its decision accordingly. Higdem v. Whitham, 167 M 201, 536 P2d 1185 (1975).

Amendment of Findings and Judgment: A motion to alter, amend, and supplement findings of fact, conclusions of law and the judgment combined with a motion for a new trial, filed on September 28, 1965, was a motion contemplated by this rule and Rule 59(e) and was not governed by the time limits of Rule 59(d), M.R.Civ.P. State ex rel. Rozan v. District Court, 147 M 532, 416 P2d 19 (1966).

Findings of Court in Error — Railroad's Negligence: Court erred in finding railroad, inter alia, liable for injuries of plaintiff due to its willful, wanton, and reckless negligence. Sztaba v. Great N. Ry., 147 M 185, 411 P2d 379 (1966).

Law Review Articles

Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 325 (1983).

Collateral References

Trial *key* 400.

89 C.J.S. Trial §§638 through 642.

75B Am. Jur. 2d Trial §§1989, 1990.

Rule 52(c). Judgment on partial findings.

Compiler's Comments

1999 Amendment: In first sentence after "that party" substituted "with respect to a claim or defense" for "on any claim, counterclaim, cross-claim, or third-party claim"; and made minor changes in style. Amendment effective June 7, 1999.

Rule 52(d). Time for determining motions.

Advisory Committee Note

ADVISORY COMMITTEE'S NOTE TO OCTOBER 9, 1984, AMENDMENT

Subdivision 52(c) [redes. Rule 52(d), 1993]. The amendment provides for a time limitation for the determination of motions made under subdivision (b) of the rule.

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform the rule to the 1991 amendments of the Federal Rules.

Compiler's Comments

1999 Amendment: Near end increased time from 45 days to 60 days. Amendment effective June 7, 1999.

Rule Repealed: Supreme Court Order No. 10750-9, dated May 21, 1969, created a new Rule 52(c) requiring statement of conclusions of law and entry of judgment. Supreme Court Order No. 10750-10, dated October 22, 1971, effectively repealed Rule 52(c) as it then read by omitting it from Rule 52 as amended. Note that in its October 9, 1984, amendment the court created a new Rule 52(c) (redes. Rule 52(d), 1993) containing provisions unrelated to former Rule 52(c).

Identity With Federal Rule: The rule is all new material with no counterpart in the Federal Rule.

Case Notes

Improper Grant of New Trial After Time to Move for New Trial Expired: A substitute District Court Judge assumed jurisdiction of a marriage dissolution case 1 day after the husband moved for reconsideration or a new trial. The motion for a new trial was granted 76 days later. The wife contended that the court exceeded its jurisdiction because the motion was granted more that 60 days after being filed, in violation of Rule 59(d), M.R.Civ.P., and this rule. The husband argued that an equitable exception to the rules should be granted because the presiding judge was substituted between the time when the motion was filed and when it was ruled upon. The Supreme Court declined to make an exception, reiterating that the time and procedural limitations for motions subsequent to judgment are mandatory and strictly enforced. The District Court exceeded its jurisdiction in ordering a new trial after the time to rule on the motion had expired, so the order was reversed. In re Marriage of Richards, 2001 MT 183, 306 M 212, 31 P3d 1002 (2001).

Denial by Failure to Rule on Motion — Not Error When Underlying Issues Upheld on Appeal: When a District Court fails to rule within 45 days as provided in this rule, the motion is considered denied. However, such denial does not constitute error if the same issues raised in the motion were appealed and on appeal the District Court's judgment was held to be correct on such issues. Garza v. Peppard, 222 M 244, 722 P2d 610, 43 St. Rep. 1233 (1986).

Rule 53. Masters

Case Notes

Acceptance of Special Master's Report in Partnership Dissolution Case Not Error: The District Court appointed an accountant as a special master to examine and report on a complicated partnership dissolution. One of the partners complained that the District Court erred in adopting the findings of a special master because the special master did not comply with this rule, failing to hold proceedings on the record and preparing findings of fact and conclusions of law. The Supreme Court disagreed. The special master complied with the directive of the District Court by holding hearings with the parties, receiving evidence, and issuing a report, and although the findings and conclusions were not in a typical legal format, they were not clearly erroneous, and the District Court was required to accept the special master's report. McCormick v. Brevig, 2004 MT 179, 322 M 112, 96 P3d 697 (2004).

Special Master's Report Properly Considered and Findings Adopted: The Fiedlers stipulated to the procedures to be followed in disposing of partnership property, agreeing that a special master would handle the sale and distribution of the property. On appeal, Joseph Fiedler contended that the special master exceeded the authority granted by the District Court, resulting in prejudicial treatment and improper distribution of the partnership assets. The

Supreme Court held that the parties were bound by the stipulation, noting that there had been ample consideration of the special master's report and that the trial court had not misapprehended the effect of the evidence. Absent clear error, the special master's findings of fact were properly accepted. Fiedler v. Fiedler, 266 M 133, 879 P2d 675, 51 St. Rep. 691 (1994).

Rule 53(a). Appointment and compensation.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 53(a). The amendment broadens the definition of "master" to include an assessor, which also appears in the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of July 31, 1983, this rule was still identical with the Federal Rule, except that the Federal Rule included "a commissioner, and an assessor" in the definition of "master". On August 1, 1983, an amendment to the Federal Rule became effective, deleting the reference to "commissioners" and "standing masters" and exempting full-time masters from the Rule's compensation provisions. The 1984 amendment to the Montana Rule inserted "assessor". As of May 1, 1990, the preceding comments were still applicable.

Amendments: The amendment of October 9, 1984, in second sentence inserted "and an assessor".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Reversal of Hearing Examiner's Findings — Power of Workers' Compensation Court to Order New Trial: The Workers' Compensation Court appointed a hearing examiner to hear evidence in an injury case, but it was for the court to make the final decision. The examiner's findings, conclusions, and proposed decision were submitted to the court for approval. It was within the court's power to order a new trial on the ground that the examiner apparently disregarded or was not aware of evidence crucial to the case. Gould v. Liberty Mut. Fire Ins. Co., 233 M 494, 766 P2d 213, 45 St. Rep. 1671 (1988), distinguishing Walter v. Evans Prod. Co., 207 M 26, 672 P2d 613 (1983).

Contract Allowing Costs to Prevailing Party — Contrary Subsequent Agreement: In an action in which each party claimed breach of a contract, where the parties agreed to an order that each would pay one-half of a special master's fee, the order was not in error, even though the contract provided for costs to the prevailing party. Schmidt v. Colonial Terrace Associates, 215 M 62, 694 P2d 1340, 42 St. Rep. 182 (1985).

Appointing Ministerial Officer to Assess Damages: The court erred in appointing a ministerial officer to determine the cost of repairs which the court would assess as damages; it makes the award indefinite and delegates an exclusive judicial function. McMahon v. Falls Mobile Home Center, 173 M 68, 566 P2d 75 (1977).

Collateral References

Reference *key* 35, 36, 76.
76 C.J.S. References §§40, 42.
66 Am. Jur. 2d References §§15, 16, 19, 20.
Amount of master's fee in divorce proceedings. 89 ALR 2d 377.

Rule 53(b). Reference.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical to the Federal Rule, except that matters "of difficult computation of damages" is added as an exception in cases tried to the court and on August 1, 1983, an amendment to the Federal Rule became effective that allowed a magistrate to serve as a special magistrate with the consent of the parties.

Case Notes

Discretion of Court: Existence of exceptional conditions requiring reference was for trial court to determine in exercise of sound discretion, and where numerous persons were to be

examined at various places, a reference was proper. Bair v. Bank of Am. Nat'l Trust & Sav. Ass'n, 112 F2d 247 (9th Cir. 1940), affirming Bank of Am. Nat'l Trust & Sav. Ass'n v. Bair, 34 F. Supp. 857 (D.C.Mont. 1939).

Collateral References

Reference *key* 5, et seq.

76 C.J.S. References §§3, 4, 10.

66 Am. Jur. 2d References §5, et seq.

Propriety of reference in connection with fixing amount of alimony. 85 ALR 2d 801.

Compulsory reference where complaint alleges nonreferable cause of action but the answer by way of counterclaim or defense sets up facts involving examination of long accounts. 102 ALR 1062.

Rule 53(c). Powers.

Commission and Advisory Committee Notes

COMMISSION NOTE

The rule is identical with the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 53(c). The amendment conforms the rule to the 1983 Amendment of the Federal Rule in recognizing the abrogation of Rule 43(c) by the Montana Rules of Evidence.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of July 31, 1983, the above commission note was still applicable. On August 1, 1983, an amendment to the Federal Rule became effective that deleted the reference to Rule 43(c) in favor of a general reference to the Federal Rules of Evidence. The 1984 amendment to the Montana Rule made a similar change with reference to the Montana Rules of Evidence. As of May 1, 1990, the rules were identical except for the reference to Rules of Evidence.

Amendments: The amendment of October 9, 1984, in last sentence substituted "the Montana Rules of Evidence" for "Rule 43(c)".

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Challenge of Special Master's Findings to Be Timely Made in Written Objection: Under this rule, the trial court shall accept the special master's findings, in nonjury actions, unless they are clearly erroneous. The burden of challenging the special master's findings is on the party objecting. The related burden of establishing that a finding is clearly erroneous is also on the party objecting. The intent of this rule is that all objections to a special master's report must be timely made in a party's written objections. The Supreme Court will no longer entertain objections that are not made to the District Court at that juncture. In re Marriage of Doolittle, 265 M 168, 875 P2d 331, 51 St. Rep. 450 (1994).

Failure to Submit Order of Reference to Master — Harmless Error: When a special master is appointed, the District Court must give the special master an order of reference to follow. In this case, the court failed to submit an order of reference and the special master's proposed decision went directly to the District Court. The court in turn stated its finding that there was an equitable division of marital debts and assets. Although the court erred by not following the procedure outlined in Rule 53, M.R.Civ.P., the court found that the special master, as instructed, had equitably divided the marital property and liabilities. The acceptance of the special master's decision did not materially affect the parties' rights and did not constitute reversible error. In re Marriage of Dreesbach, 265 M 216, 875 P2d 1018, 51 St. Rep. 374 (1994).

Proceedings Supplementary to Execution — Method of Examination: Where referee is appointed to conduct proceedings supplementary to execution in response to an application for an order requiring judgment debtor to appear and answer concerning his property, notice to the judgment debtor need not be given before ordering his examination or the examination of third persons in absence of statutory requirement. The time and place for appearance of the debtor are properly left to be fixed by the referee within bounds of the statute. Bair v. Bank of Am. Nat'l

Trust & Sav. Ass'n, 112 F2d 247 (9th Cir. 1940), affirming Bank of Am. Nat'l Trust & Sav. Ass'n v. Bair, 34 F. Supp. 857 (D.C. Mont. 1939).

Books and Accounts Examined: A Writ of Supervisory Control will not be granted to compel the vacation of an order of reference made by the District Court, in an action on a contract in which plaintiff claimed to be entitled to certain commissions, and alleged that an examination of a long and complicated account was necessary to a determination of the cause, before it had ascertained whether in fact a contract existed between the parties, where the return showed that plaintiff had already examined the books of the relator company at its invitation, that some of the books and accounts had been produced and examined before the referee, and where no claim was made that books or accounts not pertinent or material to the inquiry were required to be produced. State ex rel. Butte Land & Inv. Co. v. District Court, 37 M 226, 95 P 843 (1908).

Collateral References

Reference *key* 29, 47.

76 C.J.S. References §51, et seq.

66 Am. Jur. 2d References §22, et seq.

Rule 53(d). Proceedings.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Failure to Submit Order of Reference to Master — Harmless Error: When a special master is appointed, the District Court must give the special master an order of reference to follow. In this case, the court failed to submit an order of reference and the special master's proposed decision went directly to the District Court. The court in turn stated its finding that there was an equitable division of marital debts and assets. Although the court erred by not following the procedure outlined in Rule 53, M.R.Civ.P., the court found that the special master, as instructed, had equitably divided the marital property and liabilities. The acceptance of the special master's decision did not materially affect the parties' rights and did not constitute reversible error. In re Marriage of Dreesbach, 265 M 216, 875 P2d 1018, 51 St. Rep. 374 (1994).

Collateral References

Reference *key* 29, 53 through 56, 61, 72.

76 C.J.S. References §§57, 62.

Voluntary dismissal where case has been submitted to referee. 126 ALR 302.

What courts or officers have power to punish for contempt. 73 ALR 1185; 54 ALR 318; 8 ALR 1543.

Rule 53(e). Report.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

COMMISSION NOTE TO 1993 AMENDMENT

The amendment conforms the rule to the 1991 amendments of the Federal Rule.

Compiler's Comments

1993 Amendment: In (1), at end of second sentence, inserted "serve on all parties notice of the filing", in third sentence, after "reference,", inserted "the master" and substituted "the report" for "it", and substituted last sentence concerning service of report on parties for former sentence

that read: "The clerk shall forthwith mail to all parties notice of the filing"; and made minor changes in style.

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Acceptance of Special Master's Report in Partnership Dissolution Case Not Error: The District Court appointed an accountant as a special master to examine and report on a complicated partnership dissolution. One of the partners complained that the District Court erred in adopting the findings of a special master because the special master did not comply with Rule 53, M.R.Civ.P., failing to hold proceedings on the record and preparing findings of fact and conclusions of law. The Supreme Court disagreed. The special master complied with the directive of the District Court by holding hearings with the parties, receiving evidence, and issuing a report, and although the findings and conclusions were not in a typical legal format, they were not clearly erroneous, and the District Court was required to accept the special master's report. McCormick v. Brevig, 2004 MT 179, 322 M 112, 96 P3d 697 (2004).

Failure to File Motion or Affidavit Requesting Custody Modification — Adoption of Special Master Report Improper When Jurisdiction Lacking: Both the father and the mother filed motions for contempt of court, claiming failure by the other party to abide by past court orders regarding custody and visitation. A special master was appointed to make a final report concerning all pending custody, visitation, child support, medical expenses, and contempt issues between the parties. The special master submitted a report recommending changing primary physical custody from the mother to the father, and the report was adopted. However, the only pending issue was the question of contempt. Neither party moved for or filed an affidavit requesting a custody modification. Under Rule 53, M.R.Civ.P., a special master's authority is limited to the issues or acts stated in the order of reference to the special master. Thus, the District Court erred in adopting the special master's report recommending a custody change because the court lacked jurisdiction to do so absent a motion or affidavit for modification. In re Marriage of Lundby, 1998 MT 122, 289 M 74, 959 P2d 485, 55 St. Rep. 486 (1998), distinguishing In re Marriage of Stout, 216 M 342, 701 P2d 729 (1985).

Failure to Submit Order of Reference to Master — Harmless Error: When a special master is appointed, the District Court must give the special master an order of reference to follow. In this case, the court failed to submit an order of reference and the special master's proposed decision went directly to the District Court. The court in turn stated its finding that there was an equitable division of marital debts and assets. Although the court erred by not following the procedure outlined in Rule 53, M.R.Civ.P., the court found that the special master, as instructed, had equitably divided the marital property and liabilities. The acceptance of the special master's decision did not materially affect the parties' rights and did not constitute reversible error. In re Marriage of Dreesbach, 265 M 216, 875 P2d 1018, 51 St. Rep. 374 (1994).

Rule Not Permissive — Objection Required: In an attempt to excuse an untimely objection, husband contended that the use of the word "may" in subsection (2) of this rule makes the rule strictly permissive rather than mandatory because it does not say that a party must object or lose the right to contest the findings. The Supreme Court disagreed, noting that there can be no other reason for setting a 10-day limit than to require that objecting parties meet that limit or waive their rights to object. "May" refers to the permission given to "any party" to object; however, the objection must be made within 10 days. In re Marriage of Hayes, 259 M 302, 856 P2d 229, 50 St. Rep. 805 (1993).

Master's Report Conclusive Unless Clearly Erroneous: The plaintiff, in a partnership dissolution action, argued that the lower court had erred in finding that a tavern he had given his ex-wife during his divorce was partnership property and that the court erred in placing a $50,000 value on the property. The Supreme Court held that there was sufficient evidence to find that the tavern had been originally purchased with partnership funds and therefore remained a partnership asset. The court also ruled that the valuation placed on the property was that arrived at by a court-appointed master and that unless clearly erroneous, the valuation was binding on the lower court. Mehl v. Mehl, 241 M 310, 786 P2d 1173, 47 St. Rep. 292 (1990), followed in Frank v. Birky, 250 M 11, 817 P2d 696, 48 St. Rep. 850 (1991).

Hearing on Report: No hearing is necessary when no objections are made to report by parties after being notified by clerk that special master has filed his report. State ex rel. Ross v. District Court, 150 M 233, 433 P2d 778 (1967).

Advisory Findings: Where, under an order of reference, a referee has no power to decide any of the issues made by the pleadings, his findings are not conclusive on the court, but advisory

merely, and it is not necessary for the court to make a formal order setting aside the findings of the referee before proceeding to make findings of its own. Murphy v. Patterson, 24 M 575, 63 P 375 (1901).

Force of Report Determined by Reference: Where the reference provided that a referee should take testimony, and state a complete account between the parties, but did not authorize him to hear and to determine the issues, his findings cannot be given the effect of a special verdict since the force to be given to the report of a referee depends not only upon the nature of the action, but upon the terms of the order of reference. Murphy v. Patterson, 24 M 575, 63 P 375 (1901).

Delay in Reporting — Effect: The failure of a referee to file his report within the statutory time after the closing of the testimony does not invalidate the report or the judgment rendered thereon. Emerson v. Bigler, 21 M 200, 53 P 621 (1898).

Referee Limited by Reference: The terms of an order of reference determine the scope of the referee's authority, and a referee who is appointed to state an account between parties has no authority to determine the whole issue. The court can disregard the findings of the referee, allowing or disallowing specific items in the account. Bradshaw v. Morse, 20 M 214, 50 P 554 (1897). See also Murphy v. Patterson, 24 M 575, 63 P 375 (1901).

Collateral References

Reference *key* 78, et seq.
76 C.J.S. References §73, et seq.
66 Am. Jur. 2d References §§30 through 37.
Relief from stipulations. 161 ALR 1161.

VII. Judgment

Part Law Review Articles

The Effect of Lack of Jurisdiction, Slaight, 16 Mont. L. Rev. 54 (1955).

Rule 54. Judgments — costs

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 54(a). Definition — form.

Compiler's Comments

Identity With Federal Rule: This rule adds to the Federal Rule the definition of a judgment as "the final determination of the rights of the parties in an action or proceeding". As of May 1, 1990, the rules were identical except for insertion of this language in the Montana Rule.

Case Notes

Relitigating Issues Raised in Bankruptcy Proceeding Barred by Res Judicata: In defendants' bankruptcy proceeding, they contended that notes issued by plaintiff contained a usurious interest rate and were prompted by fraud. The Bankruptcy Court determined that the notes were valid, enforceable, and unaffected by usury or fraud. During plaintiff's subsequent collection proceeding in District Court, defendants sought to amend their answer to allege usury, but the District Court held that the Bankruptcy Court's judgment barred defendants' claim under res judicata and granted summary judgment for plaintiff. On appeal, the Supreme Court affirmed. The Bankruptcy Court's judgment was accorded finality as to the issues raised or that could fairly have been raised in the adversary proceeding. Defendants were not precluded from litigating any of their defenses to the notes in the bankruptcy proceeding and thus were barred from relitigating the usury issue in District Court. Absent a genuine issue of material fact relating to defendants' default on the notes, summary judgment for plaintiff was proper. Olympic Coast Inv., Inc. v. Wright, 2005 MT 4, 325 M 307, 105 P3d 743 (2005), following Fox v. 7L Bar Ranch Co., 198 M 201, 645 P2d 929 (1982), and distinguishing Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604 (1993).

No District Court Jurisdiction to Award Attorney Fees Beyond Mandatory Time Limit: Final judgment was entered on January 8, 2003, and the next day plaintiffs filed a motion requesting attorney fees. Defendant objected, and the District Court conducted a hearing on the matter on February 25, 2003. The court finally granted the motion on April 3, 2003. Defendant contended on appeal that the award was untimely, and the Supreme Court agreed. Under Rule 59(g), M.R.Civ.P., a mandatory jurisdictional time limit requires a ruling on a motion for attorney fees within 60 days after final judgment or the motion is considered denied. The District Court had until March 10, 2003, to rule on the motion, but failed to do so. Thus, the court lacked jurisdiction to enter an order granting attorney fees in April, and the award was reversed. Assoc. Press v. Crofts, 2004 MT 120, 321 M 193, 89 P3d 971 (2004).

Multiple Claims — No Appeal Available Absent Final Judgment — Remand: Plaintiff brought several employment claims against the state. The District Court certified judgment for the state on one claim, and plaintiff moved for partial summary judgment on another, but the motion was denied. However, there was no final judgment certified on that claim, so no appeal on that issue was available. Because the motion for partial summary judgment was not final and appealable, the Supreme Court remanded for further proceedings on that claim. Losleben v. Oppedahl, 2004 MT 5, 319 M 269, 83 P3d 1271 (2004).

No Final Judgment When Multiple Parties Involved but Summary Judgment Granted to Only One Party — Express Direction for Entry of Judgment Required: Purchasers of real property sued the seller and the seller's agent over an alleged access problem. The District Court granted summary judgment to the seller, but denied summary judgment for the seller's agent because material facts remained in dispute regarding the agent's disclosure of information pertaining to the access problem. Plaintiffs then appealed the summary judgment that was granted to the seller. The Supreme Court held that the order granting summary judgment to the seller was not a final judgment and thus was not appealable because in an action involving multiple parties, a final judgment as to one or more but not all of the parties may be entered only upon an express determination by the District Court that there is no just reason for delay and upon an express direction for entry of judgment. In this case, there was no indication or certification by the District Court that the matter should be certified as final, and absent a final judgment, no appeal was available. The appeal was dismissed without prejudice and remanded for further proceedings. Trombley v. Mann, 2001 MT 154, 306 M 80, 30 P3d 355 (2001). See also Shull v. First Interstate Bank of Great Falls, 262 M 355, 864 P2d 1268 (1993).

Oral Decree of Dissolution Improperly Granted at Hearing — Continuing Jurisdiction by District Court: At a hearing on the parties' petition for dissolution, the court orally granted the petition but reserved its judgment on the issues of custody, maintenance, and support. The Supreme Court held that the District Court improperly granted an oral decree of dissolution and was without jurisdiction to do so. The Supreme Court noted that under 40-4-103(4), a decree includes a judgment and that under this rule, a judgment is the final determination of the rights of the parties. In this case, because the District Court did not intend its decree to be its final determination, the Supreme Court held that the District Court had continuing jurisdiction over the rights of the parties following the oral decree. In re Marriage of Bukacek, 274 M 98, 907 P2d 931, 52 St. Rep. 1141 (1995).

Filing Notice of Appeal — District Court Deprived of Jurisdiction: A judgment entered after filing of a notice of appeal was invalid because the notice of appeal deprived the District Court of further jurisdiction. In re Marriage of Carlson, 220 M 204, 714 P2d 116, 43 St. Rep. 295 (1986).

Finality of Judgment — Award of Attorney Fees: A general contractor was awarded damages under a materials and labor bond. Attorney fees, an element of damages provided for in the bond, were to be determined at a later hearing. Because the attorney fees were based on the bond, the subject matter of the action, the judgment was not final and could not be appealed until actual determination of attorney fees. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Judgment Unsupported by Conclusions — Child Support Modification: Where the petitioner sought the modification of a divorce decree in order to increase the amount of child support payments she was receiving from $100 to $210 monthly and appealed the order of the trial court, the Supreme Court did not reach the issues presented by the petitioner because the judgment entered in the case clearly conflicted with the trial court's findings and conclusions. The trial court concluded that the additional $100 be paid to petitioner but the judgment provided that the additional $100 be kept by the respondent in a trust fund. Because the judgment was not supported by the conclusions, the Supreme Court remanded the case and directed the trial court to enter a judgment consistent with the findings and conclusions. Dempster v. McConnell, 191 M 153, 622 P2d 680, 38 St. Rep. 121 (1981).

Failure to Enter Findings or Judgment on Counterclaim: When the trial court did not enter a judgment or make a general finding on defendant's counterclaim alleging defective performance, it cannot be implied that the claim was without merit. The cause was remanded for entry of findings and judgment disposing of the counterclaim. Bauer v. Cook, 182 M 221, 596 P2d 200 (1979).

Action Not "Pending Before the Court": Suits which had been reduced to judgment were not, once time for appeal had passed, "pending before the court" so as to make them amenable to consolidation, and court could not properly consolidate suits with similar suits by other claimants which had not been reduced to judgment. Peavey Co. v. Agri-Services, Inc., 163 M 394, 517 P2d 718 (1974).

Order Equivalent to Final Judgment: An order dismissing a complaint and denying leave to amend was equivalent to final judgment although judgment had not been entered. Prentice Lumber Co., Inc. v. Hukill, 161 M 8, 504 P2d 277 (1972).

Judgment Not Final by Its Terms: A judgment in a water rights case which ordered admeasurement and distribution of water pursuant to prior decree, installation of headgates, and retention of jurisdiction during 1962 irrigation season, stating that the judgment was interlocutory and that final judgment would be made after 1962 season, was not appealable as a final judgment. Whitcomb v. Helena Water Works Co., 142 M 171, 382 P2d 822 (1963).

Dismissal as Judgment: An order dismissing an action is a final judgment from which an appeal can be perfected if the order has the effect of finally determining the rights of the parties. Kelly v. Harris, 158 F. Supp. 243 (D.C. Mont. 1958).

Injunction Appealable: A judgment and order granting an injunction in interpleader action was appealable. Cent. Mont. Stockyards v. Fraser, 133 M 168, 320 P2d 981 (1957).

Denial of Prohibition Not Judgment: Order of District Court denying petition for Writ of Prohibition to restrain Justice Court from further proceedings in criminal action was not a judgment. State ex rel. Aho v. Justice Court, 131 M 585, 313 P2d 542 (1957).

Accounting Not a Judgment: An order for an accounting is not a judgment since it is not a final determination of the rights of the parties. It is not final, but is a necessary step to determine what if anything the plaintiff has coming from the defendant. Corcoran v. Fousek, 125 M 223, 233 P2d 1040 (1951).

Quashing of Writ Not Judgment: In proceeding for Writ of Certiorari an order sustaining a motion to quash and dismissing the proceeding was a judgment. State ex rel. Walker v. Bd. of Comm'rs, 120 M 413, 187 P2d 1013 (1947), distinguished in Kelly v. Harris, 158 F. Supp. 246 (D.C. Mont. 1958).

Order for Sale of Estate Property: A proceeding for the sale of estate property is a continuous one, and the order of confirmation of the sale is the only judgment or final order in the proceeding finally determining the rights of the parties. In re Ryan's Estate, 114 M 281, 134 P2d 732 (1943).

Findings and Conclusions Not Judgment — Time for Appeal: Findings and conclusions of the court in a case tried as an equity action are not the judgment of the court so that the time for taking a cross-appeal commenced to run from the date of the judgment based on the findings, rather than from the date of the findings and conclusions, which were merely the basis for the judgment. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

Divorce Denied — Case Still Pending: Although an order dismissing an action is a final judgment, where District Court merely denied a divorce on the ground the plaintiff had not been a resident of the state for 1 year and did not dismiss the case, the action was still pending, there was no final determination of the rights of the parties and no final judgment. Hence, no appeal could be taken and supervisory control was proper to review the action of the trial court. State ex rel. Duckworth v. District Court, 107 M 97, 80 P2d 367 (1938).

"Final Judgment" to Be Determined by Contents: An order of the District Court having the effect of finally determining the rights of the parties is a judgment, irrespective of the title given it; it must be judged by its contents and substance. State ex rel. Meyer v. District Court, 102 M 222, 57 P2d 778 (1936), distinguished in Kelly v. Harris, 158 F. Supp. 243 (D.C. Mont. 1958).

Action Still "Pending" if Appealed: While a judgment is defined as the final determination of the rights of the parties to an action or proceeding, the action must be regarded as still pending until final determination on appeal or until the time for appeal has passed. Davis v. Bell Boy Gold Min. Co., 101 M 534, 54 P2d 563 (1936).

Order Allowing Attorney's Fees: An order made in an estate matter allowing an attorney's fee for services rendered to a special administrator was not a "judgment" within the meaning of 31-1-110, allowing interest on judgments, such an order being no more than a settlement of one of the matters arising in a probate proceeding preparatory to a final judgment. In re Bielenberg's Estate, 98 M 546, 40 P2d 49 (1935).

Workmen's Compensation Award as Judgment: The final determination by the District Court of the rights of the employer and employee with relation to an award made under the Workmen's Compensation Act, Ch. 96, L. 1915, is a judgment. Paulich v. Republic Coal Co., 97 M 224, 33 P2d 514 (1934).

Denial of Writ of Review Not Judgment: Where a court refused to take jurisdiction of an application for Writ of Review, thus in effect declining to issue process to bring the other party into court, the order in that behalf was not a judgment from which an appeal lay. State ex rel. Musselshell County v. District Court, 89 M 531, 300 P 235 (1931).

Interlocutory Judgment as Final Judgment: A final judgment is not necessarily the last one in an action; a judgment which is conclusive of any question in a case is final as to that question. Kline v. Murray, 79 M 530, 257 P 465 (1927).

Decree in Equity Similar to Judgment at Law: Decrees in equity are judgments and are, so far as they award a recovery of money, in nowise different from judgments at law. Kline v. Murray, 79 M 530, 257 P 465 (1927); State ex rel. Happel v. District Court, 38 M 166, 99 P 291 (1909); Raymond v. Blancgrass, 36 M 449, 93 P 648 (1908), explained in Lewis v. Lewis, 109 M 42, 94 P2d 211 (1939).

Order Overruling Motion to Strike: Where an affidavit has been filed in support of a motion to modify a decree of divorce, an order overruling a motion to strike such affidavit is not an "appealable order" nor a "judgment". Weed v. Weed, 55 M 599, 179 P 827 (1919), distinguished in State ex rel. Monteath v. District Court, 97 M 530, 37 P2d 567 (1934).

Dismissal of Action Not Judgment: An order entered in the minutes of the court sustaining a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to the complaint, and directing a dismissal of the action is not a judgment. Pentz v. Corscadden, 49 M 581, 144 P 157 (1914), distinguished in Kelly v. Harris, 158 F. Supp. 243 (D.C. Mont. 1958).

Decree in Equity as Final Decree: If, after a decree in equity has been entered, no further questions could come before the court except such as are necessary for carrying the decree into effect, it is final. Bryant v. Davis, 22 M 534, 57 P 143 (1899); Arnold v. Sinclair, 11 M 556, 29 P 340 (1892).

Judgment Declaring a Trust as Final: A judgment declaring a trust and removing the trustee is a final order, notwithstanding that it directs the trustee to file an inventory and an account of all property received by him as trustee. Bryant v. Davis, 22 M 534, 57 P 143 (1899).

Judgment on the Pleadings: An order of court granting a defendant's motion for judgment on the pleadings is a judgment in defendant's favor. Whitbeck v. Mont. Cent. Ry. & Great N. Ry., 21 M 102, 52 P 1098 (1898).

Collateral References

Judgment *key* 1, 24.

49 C.J.S. Judgments §§1, 2, 7, 62, et seq.

46 Am. Jur. 2d Judgments §§1, 3, 83.

Conclusiveness of judgment of dismissal in bastardy proceedings. 37 ALR 2d 840.

Rule 54(b). Judgment upon multiple claims or involving multiple parties.

Commission Notes

Subdivision (b) has been changed to conform to the amendment proposed by the Federal Advisory Committee, it being the purpose to make it clear that the rule is applicable when an action is terminated as to some but not all of the parties, a matter as to which there is a conflict under the present Federal Rule.

Compiler's Comments

Identity With Federal Rule: A 1961 amendment of the Federal Rule adopted the proposal of the Federal Advisory Committee referred to in the above commission note, but in a slightly different form than in the Montana Rule.

Case Notes

District Court Decision Regarding Constitutionality of One Issue Precluding Consideration of Other Constitutional Questions — Certification to Supreme Court Proper: Baumgardner raised numerous issues concerning the constitutionality of 2001 amendments to the Public Employees' Retirement System. The District Court decided that the amendments were an unconstitutional delegation of legislative power but did not consider other issues related to the amendments. The Public Employees' Retirement Board moved to certify the judgment as final, and the motion was granted. On appeal, Baumgardner contended that certification was improper because the District Court did not resolve all of the pending issues. The Supreme Court disagreed. Once the amendments were declared unconstitutional on the delegation question, there was no need for the District Court to consider other challenges to the constitutionality of the amendments, so certification was appropriate, and the case was properly submitted to the Supreme Court. Baumgardner v. Pub. Employees' Retirement Bd., 2005 MT 199, 328 M 179, 119 P3d 77 (2005).

Improper Certification of Partial Summary Judgment as Final Order When Issues Still Pending — No Supreme Court Jurisdiction to Hear Appeal: In order for an order to be properly certified to the Supreme Court, the criteria in Roy v. Neibauer, 188 M 81, 610 P2d 1185 (1980), and Weinstein v. Univ. of Mont., 271 M 435, 898 P2d 101 (1995), must be met, including a clear articulation of the reasons and factors underlying the decision for certification, so the appellate

court has some basis for distinguishing between well-grounded orders that have considered all the relevant factors and mere boilerplate approval unsupported by facts of legal analysis. Here, the certification order failed to address numerous claims that were not clearly resolved in District Court and that were still technically pending. Thus, the case was not ready for appellate review, and because the District Court failed to enumerate the factors in Roy and Weinstein, the Supreme Court was without jurisdiction to hear the appeal. The certification order was reversed, and the case was remanded for further proceedings. Kohler v. Croonenberghs, 2003 MT 260, 317 M 413, 77 P3d 531 (2003), followed in In re Marriage of Armstrong, 2003 MT 277, 317 M 503, 78 P3d 1203 (2003).

No Supreme Court Jurisdiction to Address Certified Question Absent Final Judgment in District Court — Use of Rule to Gain Advisory Opinion Improper: Following a prior remand (see Bell & Marra, pllc v. Sullivan, 2000 MT 206, 300 M 530, 6 P3d 965 (2000)), a question arose regarding whether the previous appeal resolved issues related to viability of the parties' counterclaims. Plaintiff therefore requested that the District Court certify the question to the Supreme Court to clarify what the original order meant and to save the trial court and the parties the time and effort of misreading the decision and going through a trial process that might ultimately be ruled unnecessary on subsequent appeal. The motion was granted, but the Supreme Court dismissed the appeal with prejudice. Courts should not certify difficult issues to the Supreme Court in order to obtain guidance for the remainder of the case because the purpose of certification is not to provide an advisory opinion to the District Court. Use of the certification process was improper in this case because there were neither multiple claims nor multiple parties. The District Court abused its discretion in certifying its order as final, so there was no final judgment for the Supreme Court to consider. Because the District Court abused its discretion, the Supreme Court was without jurisdiction to entertain the appeal, so the case was remanded for adjudication of the counterclaims. Bell & Marra, pllc v. Sullivan, 2003 MT 56, 314 M 378, 66 P3d 294 (2003). See also Roy v. Neibauer, 188 M 81, 610 P2d 1185 (1980).

No Final Judgment When Multiple Parties Involved but Summary Judgment Granted to Only One Party — Express Direction for Entry of Judgment Required: Purchasers of real property sued the seller and the seller's agent over an alleged access problem. The District Court granted summary judgment to the seller, but denied summary judgment for the seller's agent because material facts remained in dispute regarding the agent's disclosure of information pertaining to the access problem. Plaintiffs then appealed the summary judgment that was granted to the seller. The Supreme Court held that the order granting summary judgment to the seller was not a final judgment and thus was not appealable because in an action involving multiple parties, a final judgment as to one or more but not all of the parties may be entered only upon an express determination by the District Court that there is no just reason for delay and upon an express direction for entry of judgment. In this case, there was no indication or certification by the District Court that the matter should be certified as final, and absent a final judgment, no appeal was available. The appeal was dismissed without prejudice and remanded for further proceedings. Trombley v. Mann, 2001 MT 154, 306 M 80, 30 P3d 355 (2001). See also Shull v. First Interstate Bank of Great Falls, 262 M 355, 864 P2d 1268 (1993).

Failure to Participate in Water Court Hearing — Attorney Fees Assessed as Sanction for Defense of Unreasonable Appeal: Despite warnings from the Water Court of the consequences, plaintiffs chose not to participate in a Water Court hearing, thereby creating no record of their issues and preserving none of their arguments for appeal. They appealed anyway, contending that the Water Court's findings were in error. The Supreme Court first found that the findings and conclusions were correct, then sanctioned plaintiffs pursuant to Rule 32, M.R.App.P. (Title 25, ch. 21), finding that defendant was entitled to attorney fees incurred in defending an appeal that was taken without any substantial or reasonable grounds, that delayed the case, and that wasted the resources of defendant and the Supreme Court. Swinger v. Collins, 1999 MT 202, 295 M 447, 984 P2d 151, 56 St. Rep. 787 (1999).

Party Voluntarily Intervening Subject to Adverse Judgment: Double AA Corporation sought specific performance to require Newland & Company, a trust company, to convey land that it held in trust and had entered into a contract to sell to Double AA. Sievers intervened in the case, arguing that specific judgment should not be granted on the basis that he had purchased part of the remainder interest in the trust property and had a first option to purchase the property based on the remainder interest. Sievers sought a ruling from the lower court that he had the first option to purchase the property. The Supreme Court held that the lower court had not abused its discretion in ruling that Sievers did not have a first right of purchase even though not all of the remainder interest holders had intervened in the case to protect their interests. Even though they had not intervened, the remainder interest holders were aligned with the trustee,

and any decision that Sievers might have obtained that was adverse to the trustee would also have been adverse to them. Double AA Corp. v. Newland & Co., 273 M 486, 905 P2d 138, 52 St. Rep. 1073 (1995), distinguishing Warnack v. Coneen Fam. Trust, 266 M 203, 879 P2d 715 (1994).

Claims Arising From Same Facts Treated as Single Claim — Roy Factors Not Satisfied — Factors Inappropriately Considered for Certification: Weinstein sued the university for breach of contract following his dismissal as head of the Mansfield Center. Weinstein included in his complaint several claims based on theories arising from the same fact situation. Two of the defendants were dismissed. Weinstein sought and received certification pursuant to this rule from the District Court. The Supreme Court reiterated the factors listed in Roy v. Neibauer, 188 M 81, 610 P2d 1185 (1980), to be considered in determining whether the District Court abused its discretion in granting certification. Citing cases decided under Rule 54(b) of the federal Rules of Civil Procedure, the Supreme Court held that because all of Weinstein's claims arose from a single factual situation, the case constituted a partial adjudication of a single claim and because the case against the remaining defendant arose from the same facts as the cases against the two dismissed defendants, the Supreme Court was in reality being asked to decide a case remaining in the District Court. The Supreme Court found that these factors mitigated against granting certification under this rule. The Supreme Court also held that other reasons relied upon by the District Court for certification, such as to control further litigation, to enhance settlement, and because an appeal was likely, were insufficient and inappropriate reasons to grant certification. For all of these reasons, the Supreme Court held that the District Court abused its discretion in granting certification, and the Supreme Court was without jurisdiction to hear the appeal. Weinstein v. Univ. of Mont., 271 M 435, 898 P2d 101, 52 St. Rep. 578 (1995).

Multiple Claims and Multiple Parties — Express Direction for Entry of Judgment Required for Final Judgment: In an action involving multiple claims and multiple parties, a final judgment as to one or more but fewer than all of the claims or parties may be entered only upon an express determination by the court that there is no just reason for delay and upon an express direction for entry of judgment. Shull v. First Interstate Bank of Great Falls, 262 M 355, 864 P2d 1268, 50 St. Rep. 1594 (1993), followed in Trombley v. Mann, 2001 MT 154, 306 M 80, 30 P3d 355 (2001).

Direct Appeal of Venue Question — Certification of Judgment Not Required: Following summary dismissal of all Missoula defendants, the trial court granted the motion of defendant Kalispell doctor for a change of venue to Flathead County, certifying the summary judgment order as final pursuant to this rule. When the venue question was appealed to the Supreme Court, the doctor asserted that the Supreme Court did not have jurisdiction to determine whether venue was properly transferred because the order under this rule did not mention the order changing venue. However, under Rule 1, M.R.App.P. (Title 25, ch. 21), direct appeal of an order changing or refusing to change venue is allowed, and as such, certification under this rule is not required. Emery v. Federated Foods, Inc., 262 M 83, 863 P2d 426, 50 St. Rep. 1454 (1993).

Offset of Tort Judgment With Amount Owed on Contract Underlying Tort as Within Equity Power of Court: Defendant fraudulently induced plaintiffs to purchase property by misrepresenting the quality of the road that she intended to build as access to the property. The District Court required her to file an accounting reflecting the principal balance due her from each of the plaintiffs for property purchased under the contracts for deed, and the court then offset and credited the amounts due plaintiffs from the judgment against the balance of the principal owed by plaintiffs under the contracts for deed. Although the contracts themselves were not at issue, the respective obligations of the parties arose from the same transaction and damages were related to the value of the premises and the purchase price, which was the basis of the principal under the contract. It was within the equity power of the court to allow a setoff of debts under these circumstances because that power exists independent of statute when grounds for equitable interposition are shown, such as fraud or insolvency. Dew v. Dower, 258 M 114, 852 P2d 549, 50 St. Rep. 454 (1993). On remand, the District Court found that although one cotenant had quitclaimed all interest in the property to the plaintiff cotenant, the right to personal damages did not pass with the transfer of the property. Clarifying Dew, supra, the Supreme Court noted that the discussion regarding the equity power of the District Court was confined solely to its ability to set off the principal balances on the contracts for deed against the damages plaintiff sustained. As such, the District Court was not invested with the broad equitable power to award plaintiff 100% of the personal damages attributable to fraud when he was not entitled to such an award by law. Because the underlying action was for personal damages, not property damages, the court properly determined that plaintiff was entitled to only 50% of the personal damages arising from defendant's fraud. However, the court miscalculated the amount of accrued interest owing, so the case was remanded for a recalculation of damages. Dew v. Dower,

269 M 286, 888 P2d 421, 51 St. Rep. 1388 (1994). See also S. Surety Co. of N.Y. v. Maney, 121 P2d 295 (Okla. 1941).

Theories of Recovery Limited Through Instructions Following Filing of Amended Complaint — No Prejudice: An original complaint alleged theories of bad faith, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, and fraud. Three weeks prior to trial, plaintiff filed an amended complaint that defendant asserted changed the theories to equitable estoppel, fraud, and bad faith. Prior to settling of instructions, the District Court, on its own motion, dismissed plaintiff's claims of equitable estoppel, fraud, bad faith, and punitive damages and allowed the case to go forward on theories of constructive fraud and negligent misrepresentation. The action by the court in limiting the theories of recovery through instructions had the effect of removing much of defendant's claimed prejudice through the allowance of the amended complaint. Phil-Co Feeds, Inc. v. First Nat'l Bank in Havre, 238 M 414, 777 P2d 1306, 46 St. Rep. 1380 (1989).

Setoff or Counterclaim Pleaded — One Judgment Required: When a setoff or counterclaim is pleaded, it becomes part of a single controversy between the parties, requiring only one verdict and one judgment according to the facts. Therefore, the grant of two separate judgments arising out of the same general issue constituted an improper procedure. (See 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff 157.) Bottrell v. Am. Bank, 237 M 1, 773 P2d 694, 46 St. Rep. 561 (1989), following Stensvad v. Miners & Merchants Bank of Roundup, 196 M 193, 640 P2d 1303 (1982).

Water Right of State in Bean Lake — Drainage Adjudication Process — Appealability of State's Claim Under Finality of Decision Rules: As part of the statewide water rights adjudication process, the Department of Fish, Wildlife, and Parks filed a claim for a pre-1973 "use" water right appropriation for recreation, fishing, and wildlife purposes in the waters of Bean Lake. In recent consolidated cases relating to drainage areas, the Supreme Court dismissed appeals because a certificate had not been obtained under this rule. In effect, the court held that the causes were not final for purposes of appeal. In this case, the court accepted jurisdiction under its power of general supervisory control over the Water Courts. The Department had filed 15 to 17 similar claims in various drainages, the same issues would recur, and a decision in the present case would help speed the water adjudication process. In re Water Rights in Dearborn Drainage, 234 M 331, 766 P2d 228, 45 St. Rep. 1948 (1988).

Determination of Final Water Rights Judgment Under Rule — Appeal From Water Court: This rule provides for and allows a water right claimant to seek and procure from the Water Court an express direction for the entry of a final judgment as to his claim upon the express determination of the Water Court that there is no just reason for delay. Such action under this rule constitutes a final judgment within the meaning of 85-2-235, which provides for appeals from the Water Court. In re Adjudication of Sage Creek Water Rights, 234 M 243, 763 P2d 644, 45 St. Rep. 1876 (1988).

Agency Question of Fact: In a zoning variance controversy, plaintiffs claimed a city-county planning board and city board of adjustments granted the variance without proper notice, without a hearing, and without considering legal requirements. The District Court dismissed the claim as to defendant and granted summary judgment. The Supreme Court reversed, saying the plaintiff may be able to show the planning board is directly liable to plaintiffs because of its acts through its agent. Borrowing on California precedent, the court held that allegations of agency are questions of fact and should not be decided on a motion for summary judgment. The court noted that in dealing with government entities this is not always true because a principal cannot delegate authority it does not possess. This can be determined by establishing the authority which, as a matter of public record, citizens are charged with knowing. The court also noted that while a government principal's authority may be limited by law, the principal may exceed that authority in its day-to-day activity, thereby existing in fact although precluded by law. The dismissal and summary judgment were reversed. Stillman v. Fergus County, 220 M 315, 715 P2d 43, 43 St. Rep. 396 (1986).

Certification Requirements Not Mere Formality: Plaintiff, appearing pro se, failed to seek or obtain certification of a matter for appeal. The mere statement of the judge in a partial final judgment that "there is no just reason for delay in entering this judgment as a final judgment" is not sufficient to meet the certification requirement. The Rule 54(b) certification requirement is not a mere formality but is a necessary and valuable tool for preventing piecemeal litigation and waste of the resources of both the litigants and the courts. McDonald v. Unirex, Inc., 221 M 153, 721 P2d 302, 43 St. Rep. 330 (1986), followed in Milk River Prod. Credit Ass'n v. Big Hook Land & Cattle Co., 239 M 496, 783 P2d 359, 46 St. Rep. 1861 (1989).

Order Not Appealable When All Issues Not Decided and Undecided Issues Not Certified: An order of the District Court, not certified under Rule 54, M.R.Civ.P. (Title 25, ch. 20), entering summary judgment for one party, ruling that party entitled to attorney fees, and ordering a later hearing for the purpose of determining the amount of the attorney fees, was not a final order for the purpose of filing an appeal. Boles v. Ler, 213 M 266, 692 P2d 1, 41 St. Rep. 2106 (1984).

Appeal of Water Court Order Regarding Two Parties Before Final Decree — Rule 54(b) Certification of Tort Issues: A Water Court order awarding priorities between two parties is a final and appealable order even though the basin-wide adjudication has not been completed. It is necessary that their respective irrigation water allowances be determined without waiting for the basin-wide decree before appealing to the Supreme Court. The fact that trespass and damage claims have not yet been decided does not deprive the Supreme Court of jurisdiction to hear the appeal. The Water Court properly entered a Rule 54(b) certification. The determination of these claims is beyond the jurisdiction of the Water Court, but they cannot be decided until the water rights are resolved. Hill v. Merrimac Cattle Co., Inc., 211 M 479, 687 P2d 59, 41 St. Rep. 1504 (1984).

Damage Award to Appropriator of Costs of Lawsuit Filed to Enforce Rights: In a water rights dispute, upstream junior appropriators damaged downstream senior appropriators' headgate. A lawsuit over their respective water rights ensued, and the senior appropriators were successful both at trial and on appeal. At trial, the jury awarded the senior appropriators their court costs and attorney fees as damages. The Supreme Court refused to overturn the award, ruling that the costs of the lawsuit were consequential to the interference with the headgate and not so remote as to preclude recovery. Cate v. Hargrave, 209 M 265, 680 P2d 952, 41 St. Rep. 697 (1984).

Permissible to Provide Reasons for Certification After Appeal Filed: The failure of the District Court to provide its reasons for a proper certification until after the notice of appeal was filed does not render the certification defective as long as the guidelines of Rule 54(b), M.R.Civ.P., have been complied with. Klaudt v. Flink, 202 M 247, 658 P2d 1065, 40 St. Rep. 64 (1983), overruling Churchhill v. Holly Sugar Corp., 192 M 533, 629 P2d 758, 38 St. Rep. 860 (1981).

Determination and Certification Necessary: Absent (1) an express determination that there is no just reason for delay and (2) certification as final judgment, an order adjudicating the rights and liabilities of less than all parties is not appealable. Benders v. Stratton, 202 M 150, 655 P2d 989 (1982); followed in Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

Dismissal of Claims Without Certification Held Not Appealable — Multiple Parties: Where the claims of two of the three plaintiffs for breach of contract, misrepresentation, and trespass were dismissed for failure to state a claim, the dismissal was not appealable without certification under Rule 54(b), M.R.Civ.P. In Tobacco River Lumber, Inc. v. Yoppe, 176 M 267, 577 P2d 855 (1978), the Supreme Court held the dismissal of the claims of one of several parties to be appealable because the practical effect of the dismissal was to leave the party without judicial relief. However, in the instant case the remaining plaintiff sought the same relief as those whose claims were dismissed. The order dismissing those claims must therefore be considered interlocutory and not final. Benders v. Stratton, 202 M 150, 655 P2d 989, 39 St. Rep. 2389 (1982).

Order Denying Motion for Summary Judgment Not Appealable Notwithstanding Certification: The defendant appealed the District Court's denial of a motion for summary judgment after the District Court certified its order under Rule 54(b), M.R.Civ.P. The Supreme Court held that the order was not appealable notwithstanding the District Court's certification because under Rule 1, M.R.App.P., an order denying a motion for summary judgment is an interlocutory order, which fact cannot be changed by certification under Rule 54(b), M.R.Civ.P. Jackson v. Burlington N., Inc., 201 M 123, 652 P2d 223, 39 St. Rep. 1998 (1982).

Order Not Appealable When Certified Judgment Never Docketed in Record: The District Court made an express order that the Clerk of Court enter final judgment in a case certified for appeal under Rule 54(b), M.R.Civ.P., but a final judgment was never docketed in the record. Under these circumstances the Supreme Court has no jurisdiction to decide an appeal. Jackson v. Burlington N., Inc., 201 M 123, 652 P2d 223, 39 St. Rep. 1998 (1982).

Award of Attorney Fees Not Separate Claim: A general contractor was awarded damages under a materials and labor bond. Attorney fees, an element of damages provided for in the bond, were to be determined at a later hearing. Because the attorney fees were based on the bond, the subject matter of the action, multiple claims were not involved. The judgment was not final and could not be appealed until actual determination of attorney fees. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Denial of Certification of Partial Summary Judgment Not Subject to Appeal: If a trial court abuses its discretion in certifying an order of partial summary judgment as final under this rule,

an appellate court is without jurisdiction to entertain the appeal. Reidy v. Anaconda-Deer Lodge County, 196 M 127, 637 P2d 1196, 38 St. Rep. 2188 (1981), followed in Weinstein v. Univ. of Mont., 271 M 435, 898 P2d 101, 52 St. Rep. 578 (1995). See also Taylor Rental Corp. v. Ted Godwin Leasing, Inc., 199 M 280, 648 P2d 1168, 39 St. Rep. 1358 (1982).

Certification of Judgment as Final — Factors Considered by Appellate Court: An appellate court will normally consider the following factors when considering a Rule 54(b), M.R.Civ.P., certification: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review may be mooted by future developments in the District Court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a counterclaim that could result in a setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expenses, and the like. Reidy v. Anaconda-Deer Lodge County, 196 M 127, 637 P2d 1196, 38 St. Rep. 2188 (1981); Roy v. Neibauer, 188 M 81, 610 P2d 1185 (1980); followed, in part, in Jackson v. Burlington N., Inc., 201 M 123, 652 P2d 223, 39 St. Rep. 1998 (1982).

Certification of Partial Summary Judgment — Judicial Policy: When reasonable alternatives are available, the Supreme Court will not allow a case to be fragmented to allow successive appeals by a process of lower court grants of partial summary judgment followed by certification of finality. Reidy v. Anaconda-Deer Lodge County, 196 M 127, 637 P2d 1196, 38 St. Rep. 2188 (1981).

Vacation of Partial Summary Judgment — Certification as Abuse of Discretion: On appeal from partial summary judgment disallowing one of three items of damages and certified as final below, determination of the appeal would finally settle the matter and might reduce trial time, but the trial court abused its discretion in certifying the issues for appeal and the partial summary judgment was vacated without prejudice. The delay caused by the appeal would result in undesirable consequences, such as added costs, unwarranted delay, and additional attorney fees. Further, the issue on appeal might be mooted by the final decision of the District Court, as well as by a finding of no liability for that item of damages; and reasonable alternatives to fragmented appeal were available, such as a bifurcated trial, first on liability, then on damages. Reidy v. Anaconda-Deer Lodge County, 196 M 127, 637 P2d 1196, 38 St. Rep. 2188 (1981).

Certified Appeal Allowed Despite Failure to Comply With Procedural Rules: A seller was granted summary judgment against a buyer. Several months later, the court amended its order nunc pro tunc and certified the case for appeal under Rule 54(b), M.R.Civ.P. Despite failure to comply with the Montana Rules of Appellate Procedure, the Supreme Court chose to hear the appeal under Rules 3, 10, and 21, M.R.App.P. Marcus Daly Mem. Hosp. v. Borkoski, 191 M 366, 624 P2d 997, 38 St. Rep. 322 (1981).

Multiple Claims and Parties — Certification Required for Appeal Because of Impleader of Third Party: Where the plaintiff corporation brought an action against the defendant insurance company to collect an account and the defendant impleaded a third-party defendant, a final judgment against the defendant insurance company was interlocutory in nature and could not be appealed absent an express determination by the court that there was no just reason for delay. Rule 14, M.R.Civ.P., expressly provides that an entry of judgment upon either the original claim or the third-party claim must comply with Rule 54(b), M.R.Civ.P. Because the court did not make the express determination required, the appeal is premature. Pioneer Concrete & Fuel, Inc. v. Apex Constr., Inc., 190 M 229, 620 P2d 854, 37 St. Rep. 2023 (1980).

Differing Considerations for Summary Judgment and Final Judgment: The considerations which result in a grant of summary judgment are not the same considerations relevant to an order of final certification under Rule 54(b), M.R.Civ.P. Under summary judgment procedure, the essential inquiry is whether material facts are disputed. Under Rule 54(b) procedure, the inquiry is whether, after balancing the competing factors, finality of judgment should be ordered to advance the interests of sound judicial administration and public policy. Knight & Co. v. Ft. Belknap Indian Agency Housing Authority, 188 M 218, 612 P2d 1290 (1980).

Summary Judgment Improper Where Rights of All Parties Have Not Been Adjudicated: An order granting summary judgment is not final where the rights and liabilities of all parties have not been adjudicated. Knight & Co. v. Ft. Belknap Indian Agency Housing Authority, 188 M 218, 612 P2d 1290 (1980).

Certification of Judgment as Final — Discretion of Judge — Findings to Be Set Out: It is within the discretion of the District Court to grant or deny a request to certify a judgment as final. The decision should not be entered lightly. The District Court must find that there is "no just reason for delay" and the factors underlying that decision must be clearly articulated. Roy v.

Neibauer, 188 M 81, 610 P2d 1185 (1980). See also Weinstein v. Univ. of Mont., 271 M 435, 898 P2d 101, 52 St. Rep. 578 (1995).

Certification of Judgment as Final — Guidelines: The guiding principles for a Rule 54(b), M.R.Civ.P., certification may be summarized as follows: (1) the burden is on the party seeking final certification to convince the District Court that the case is the "infrequent harsh case" meriting a favorable exercise of discretion; (2) the District Court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final; and (3) the District Court must marshal and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated. Roy v. Neibauer, 188 M 81, 610 P2d 1185 (1980).

Summary Judgment Against Less Than All Defendants — Appeal Improper: A summary judgment in favor of one of two defendants was not a final order under the provisions of Rule 54(b), M.R.Civ.P., and in the absence of compliance with the certification requirements of that rule the summary judgment was not appealable. Roy v. Neibauer, 188 M 81, 610 P2d 1185 (1980).

Hazard Insurance — No Issue: Although the plaintiffs claimed that defendant insurers were negligent regarding the issuance and delivery of a hazard insurance policy, the policy issued conforms to the contract it was extended to cover and its lack of delivery was not shown to affect recovery, thus the defendant insurers were entitled to judgment as a matter of law. Dooling v. Perry, 183 M 451, 600 P2d 799 (1979).

Interlocutory Judgment: When a District Court does not direct entry of a final judgment on the claim of invalidity of a marriage or make an express determination that there is no just reason for delay in entering final judgment on that claim, there is no right of immediate appeal because the judgment is interlocutory and may be changed at any time prior to entry of a final judgment adjudicating all the claims, rights, and liabilities of all the parties. Adams v. Adams, 183 M 26, 598 P2d 197 (1979).

Requirements of Rule: Rule 54(b), M.R.Civ.P., requires the trial court to determine that there is no just reason for delay and to direct the entry of judgment before judgment will be final as to one or more but fewer than all of the claims or parties in a multiple claim or multiple party action. Krusemark v. Hansen, 182 M 291, 597 P2d 48 (1979).

Failure to Enter Findings or Judgment on Counterclaim: When the trial court did not enter a judgment or make a general finding on defendant's counterclaim alleging defective performance, it cannot be implied that the claim was without merit. The cause was remanded for entry of findings and judgment disposing of the counterclaim. Bauer v. Cook, 182 M 221, 596 P2d 200 (1979).

Lack of Jurisdiction for Appeal: When multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express direction for the entry of judgment. The District Court did not make an express determination that there was no just reason for delay and an express direction for the entry of a final judgment in compliance with Rule 54(b), M.R.Civ.P. For this reason the Supreme Court did not have jurisdiction to entertain on appeal. Knoepke v. SW. Ry., 182 M 74, 595 P2d 376 (1979).

Immediate Appeal From Partial Judgment: This is a proper case for a Writ of Supervisory Control because relator wife has no plain, speedy, and adequate remedy at law by appeal. Neither 40-4-108 nor Rule 1, M.R.App.P., provides for immediate appeal from a partial judgment. Instead, the right of immediate appeal from a judgment on part but not all of the claims for relief in a single action is governed by Rule 54(b), M.R.Civ.P. State ex rel. Marlenee v. District Court, 181 M 59, 592 P2d 153 (1979).

Amendment to Include Codefendant: Case would be remanded to District Court for purpose of amending, by incorporating appropriate terms, judgment which omitted to name defaulting codefendant who was jointly and severally liable on obligation. White v. Nollmeyer, 151 M 387, 443 P2d 873 (1968).

Writ of Supervisory Control Denied: When appeal is available from a summary judgment, the Supreme Court will not issue a Writ of Supervisory Control without extremely extenuating circumstances. Circumstances here were insufficient. State ex rel. Kober v. District Court, 147 M 116, 410 P2d 945 (1966).

Optional Claims May Be Dispensed With: Holder of note secured by contracts of unconditional guarantee and real estate mortgage may plead alternatively as to theory of recovery with court having authority under the rules to dispense with any claim left unadjudicated. Bozeman Deaconess Foundation v. Cowgill, 143 M 98, 387 P2d 435 (1963).

Promissory Note — Judgment Not Bar to Action: A judgment against one of several makers of a promissory note, jointly and severally liable thereon, does not merge the instrument so as to bar an action thereon against the others. Lepper v. Jackson, 102 M 259, 57 P2d 768 (1936).

Joint and Several Liability: Where several defendants are jointly and severally liable, the District Court may enter judgment against one or more of them, letting the action proceed against the others. Stauffacher v. Great Falls Pub. Serv. Co., 99 M 324, 43 P2d 647 (1935); State ex rel. Stiefel v. District Court, 37 M 298, 96 P 337 (1908).

Dismissal of Joint Tortfeasor — Modification of Common-Law Rule: The common-law rule that a joint judgment against two alleged tortfeasors may not be reversed as to one and permitted to stand as against the other, has been modified, and the Supreme Court will in a negligence action where the evidence does not justify a verdict against one defendant reverse the judgment with direction to dismiss the action as to him, and affirm it as to the other shown to have been negligent. Mellon v. Kelly, 99 M 10, 41 P2d 49 (1935).

Employer and Employee — Concurrent Negligence: The plaintiff, in an action against a railway company and one of its employees for injuries caused to him in being ejected from a freight train by one of the company's brakemen, has the option to proceed against either or both of the defendants by whose concurrent negligence the wrong was done. Golden v. N. Pac. Ry., 39 M 435, 104 P 549 (1909). See also Chenoweth v. Great N. Ry., 50 M 481, 148 P 330 (1915); Grorud v. Lossl, 48 M 274, 136 P 1069 (1913); Verlinda v. Stone & Webster Eng'r Corp., 44 M 223, 119 P 573 (1911); Knuckey v. Butte Elec. Ry., 41 M 314, 109 P 979 (1910); Rand v. Butte Elec. Ry., 40 M 398, 107 P 87 (1910).

Assignment to Partners — Partners Dismissed: Where several parties are sued as assignees for the benefit of creditors, and a partnership is alleged to exist between them, but it appears from the findings that the assignment was not to the firm but to one of the partners individually, a judgment may be properly entered against the individual partner and the action dismissed as to the others. Knatz v. Wise, 16 M 555, 41 P 710 (1895). See Logan v. Billings & N. Ry., 40 M 467, 107 P 415 (1910).

Law Review Articles

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).
Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 326 (1983).
Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 351 (1981).

Collateral References

Judgment *key* 236, et seq.
49 C.J.S. Judgments §33, et seq.
Modern status of state court rules governing entry of judgment on multiple claims. 80 ALR 4th 707.

Rule 54(c). Demand for judgment.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical with the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 927
Default Judgment 930
General Prayer for Relief 930

GENERAL

No Authority of Court to Order Refund of Taxes Paid Without Protest Absent Legislative Authorization: The District Court ordered that numerous parties who properly petitioned to be excluded from an irrigation district should be reimbursed for back taxes paid by the parties as of the date of their petitions. The irrigation district appealed, and the Supreme Court reversed. Tax refunds are a matter of legislative discretion, and absent specific legislative authorization, a court has no power to refund taxes paid without protest. RSG Holdings v. Missoula Irrigation

District, 2004 MT 214, 322 M 369, 96 P3d 1131 (2004), followed in Petitioners I-549 v. Missoula Irrigation District, 2005 MT 100, 326 M 527, 111 P3d 664 (2005). See also Geil v. Missoula Irrigation District, 2004 MT 217, 322 M 388, 96 P3d 1127 (2004).

Guardian Entitled to Award of Attorney Fees for Appointment as Guardian — Award in Nonadversarial Proceeding Held Not to Violate General Rule for Award of Attorney Fees — Award Approved Though Not Requested in Original Petition for Appointment: Appellant contested the payment of $30,000 in legal fees from the estate of a ward to the attorney representing the guardian appointed by the District Court, arguing that the general rule is that attorney fees are not payable to a prevailing party without special statutory provisions to the contrary and that the original petition for appointment of the guardian did not include a request for payment of attorney fees. The Supreme Court affirmed the order of the District Court awarding the fees. The Supreme Court pointed out, citing opinions from other states, that the general rule regarding payment of fees applies to adversarial proceedings and that the appointment of a guardian is not an adversarial proceeding but is a proceeding in rem to promote the bests interests of the ward and to protect the ward's estate. The Supreme Court also held that under this rule, the District Court may grant relief to which a party is entitled regardless of whether the party has specifically requested the relief granted. The Supreme Court noted that the payment of the guardian's legal fees by the estate of the ward is relief to which the guardian would be entitled under 72-5-428(1) if the petition for appointment was brought in good faith and the appointment was in the bests interests of the ward. In re Estate of Bayers, 1999 MT 154, 295 M 89, 983 P2d 339, 56 St. Rep. 607 (1999).

Appeal of Judgment Involving Declaratory Judgment and Injunction: Defendant argued that an appeal that concerned declaratory judgment was premature because plaintiff did not seek Rule 54(b), M.R.Civ.P., certification of the court's order. However, because plaintiff's motion for partial summary judgment involved both the declaratory judgment and an injunction issue and because plaintiff validly exercised the right to appeal the court's denial of the request for an injunction, the appeal was not considered premature and the entire case was subject to review by the Supreme Court. Hennen v. Omega Enterprises, Inc., 264 M 505, 872 P2d 797, 51 St. Rep. 369 (1994).

Judgment to Grant Relief Entitled: The District Court did not err in awarding damages in excess of those requested in a complaint and petition for supplemental relief. Petitioner's failure to request specific money damages or coercive damages did not hinder the court's ability to order the relief necessary to effectuate its judgment. Goodover v. Lindey's Inc., 255 M 430, 843 P2d 765, 49 St. Rep. 1059 (1992).

Trial Necessary on Facts in Support of Relief Not Specifically Requested: This rule allows a court to grant relief to which a party is entitled even if such relief was not demanded in the party's pleading. However, the court may not grant relief not specifically requested when the facts and issues necessary to support that relief have not been tried and proved at trial. Therefore, the District Court's order to proceed with a sale of trust property was in error when the validity of the sale agreement and the equitable question of specific performance were never properly raised and litigated. In re George Trust, 253 M 341, 834 P2d 1378, 49 St. Rep. 424 (1992), following the rationale in Smith v. Zepp, 173 M 358, 567 P2d 923 (1977).

Theories of Recovery Limited Through Instructions Following Filing of Amended Complaint — No Prejudice: An original complaint alleged theories of bad faith, breach of fiduciary duty, breach of implied covenant of good faith and fair dealing, and fraud. Three weeks prior to trial, plaintiff filed an amended complaint that defendant asserted changed the theories to equitable estoppel, fraud, and bad faith. Prior to settling of instructions, the District Court, on its own motion, dismissed plaintiff's claims of equitable estoppel, fraud, bad faith, and punitive damages and allowed the case to go forward on theories of constructive fraud and negligent misrepresentation. The action by the court in limiting the theories of recovery through instructions had the effect of removing much of defendant's claimed prejudice through the allowance of the amended complaint. Phil-Co Feeds, Inc. v. First Nat'l Bank in Havre, 238 M 414, 777 P2d 1306, 46 St. Rep. 1380 (1989).

Judge's Discretion to Award Maintenance When Not Specifically Requested: A court's discretion to award relief to which a party is entitled, even if it is not requested, under this rule is subject in dissolution proceedings to established statutory dissolution guidelines. Under 40-4-203, a court is required to make specific findings regarding maintenance. The findings are subject to review. In re Marriage of Hughes, 236 M 427, 770 P2d 499, 46 St. Rep. 482 (1989), followed in In re Marriage of Haney, 267 M 107, 882 P2d 497, 51 St. Rep. 981 (1994).

Retroactive Child Support: Once the issue of child support is before the trial court, pursuant to the parties' pleadings, the court has jurisdiction to award retroactive child support from the

time of separation and is not limited to the child support prayed for or agreed to by the parties. In re Marriage of Di Pasquale, 220 M 497, 716 P2d 223, 43 St. Rep. 557 (1986).

Effect of Statement of Damages on Amount Recoverable for Federal Jurisdiction Purposes: This case was removed to federal court but remanded to the Montana District Court, based on jurisdictional amounts. While discussing the options a plaintiff has with regard to the specification of damages for purposes of removal to federal court in light of the provisions of 25-4-311, 25-4-313, and 25-4-314, the federal District Court discussed Rule 54(c), M.R.Civ.P. The court said it did not interpret the rule, which provides that the statement of claims is not a limitation on what the plaintiff ultimately may recover, as imposing on a plaintiff's option of avoiding federal jurisdiction by seeking less than the requisite amount for diversity jurisdiction. Rollwitz v. Burlington N., 507 F. Supp. 582, 38 St. Rep. 264 (D.C. Mont., 1981).

Hazard Insurance — No Issue: Although the plaintiffs claimed that defendant insurers were negligent regarding the issuance and delivery of a hazard insurance policy, the policy issued conforms to the contract it was extended to cover and its lack of delivery was not shown to affect recovery, thus the defendant insurers were entitled to judgment as a matter of law. Dooling v. Perry, 183 M 451, 600 P2d 799 (1979).

Attorney Fee — Quiet Title Action: Even though defendant in a quiet title action for a tax deed had not prayed for a reasonable attorney fee she should have been allowed one as the successful party. Plaintiff was not entitled to attorney fees as "successful party" because that designation was intended to mean the party obtaining the tax deed and not the party receiving reimbursement for taxes, penalties, and interest paid. Niles v. Carbon County, 174 M 20, 568 P2d 524 (1977).

Forfeiture Improper — Grant of Relief Not Requested: Interpreting the forfeiture clause of a mine sale contract against plaintiffs, the parties for whose benefit the provision was created, it can hardly be said that the contract requires forfeiture for failure to produce 300 yards of material each working day. The appropriate remedy is an award of damages for breach of contract, even though not requested in the pleadings. Smith v. Zepp, 173 M 358, 567 P2d 923 (1977).

Divorce — Failure to Request Property Settlement: Where pleadings of both parties in divorce proceedings showed that they expected the court to make orders relative to the property, the court had authority to vest all the property in the husband and order alimony paid where justified by the facts, even though neither party had asked for that specific disposition. Libra v. Libra, 157 M 252, 484 P2d 748 (1971).

Inconsistent Theories for Recovery: The rule that a party may not adopt one theory of the case in his complaint and recover upon another, or adopt one theory in the trial court and insist upon a different one on appeal, is not affected by the provision that the District Court may grant plaintiff any relief consistent with his complaint and fairly embraced within the issues. Outlook Farmers' Elevator Co. v. Am. Sur. Co. of New York, 70 M 8, 223 P 905 (1924).

Relief Justified by Facts: If upon the facts stated, from any point of view, the plaintiff is entitled to relief, the complaint will be sustained. Simonsen v. Barth, 64 M 95, 208 P 938 (1922); Hamilton v. Hamilton, 51 M 509, 154 P 717 (1916); Hicks v. Rupp, 49 M 40, 140 P 97 (1914); Anaconda Copper Min. Co. v. Thomas, 48 M 222, 137 P 380 (1913); Raymond v. Blancgrass, 36 M 449, 93 P 648 (1908); Donovan v. McDevitt, 36 M 61, 92 P 49 (1907); Merk v. Bowery Min. Co., 31 M 298, 78 P 519 (1904); State ex rel. Russel v. Tooker, 18 M 540, 46 P 530 (1896); Kleinschmidt v. Steele, 15 M 181, 38 P 827 (1895); Davis v. Davis, 9 M 267, 23 P 715 (1890); Leopold v. Silverman, 7 M 266, 16 P 580 (1888); Gillett v. Clark, 6 M 190, 9 P 823 (1886); Morse v. Swan, 2 M 306 (1875).

Unintelligible Complaint — Relief Properly Denied: Where the complaint not only does not state a cause of action but is unintelligible, the rule that if from the facts stated it is apparent that plaintiff is entitled to some relief, the pleading will be upheld, does not obtain. Wing v. Brasher, 59 M 10, 194 P 1106 (1921).

Relief Consistent With Complaint to Be Awarded: When there is appearance and answer by the defendant, any relief may be awarded which is consistent with the complaint and embraced within the issues, but the award may not extend further in any case. Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910); Merk v. Bowery Min. Co., 31 M 298, 78 P 519 (1904).

Allegation as Prayer for Relief: Though a complaint has no formal prayer for judgment, it is sufficient if it contains an allegation showing the limits of the plaintiff's claim, as such an allegation serves the same practical purpose as a formal prayer for judgment. Pearce v. Butte Elec. Ry., 41 M 304, 109 P 275 (1910).

Stipulation for Judgment Prayed — Multiple Defendants: Where in a foreclosure suit the principal defendants enter into a stipulation that the judgment may be entered against them in

accordance with the prayer of the complaint, it is error for the court to direct, in its decree, not only the sale of the property and the application of the proceeds to the satisfaction of the mortgages, but also the application of the surplus to the satisfaction of judgments set up in the plaintiff's replication to the answer of another defendant holding liens on the property. Manuel v. Turner, 36 M 512, 93 P 808 (1908).

Prayer Not Stated: Informality of the prayer in a complaint, or the total absence of one, is not ground for demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed). Donovan v. McDevitt, 36 M 61, 92 P 49 (1907).

DEFAULT JUDGMENT

Failure to Litigate Claims Justifying Dismissal of Counterclaims With Prejudice — Lack of Specific Findings on Counterclaims Not Erroneous: Defendants failed to litigate the claims against them, resulting in default judgment in plaintiffs' favor and dismissal of defendants' counterclaims with prejudice. On appeal, defendants asserted that the District Court committed reversible error in failing to mention the counterclaims and enter general findings from which the Supreme Court could determine whether the counterclaims had merit. The Supreme Court affirmed dismissal of the counterclaims. Failure to litigate the claims justified dismissal of the counterclaims with prejudice, and entry of the default judgment on the issues in the complaint also served to settle any compulsory counterclaims arising out of the transaction or occurrence that was the subject of the suit. Further, the District Court did not err in failing to make specific findings regarding the counterclaims because the counterclaims were considered dismissed and res judicata upon entry of the default judgment in favor of plaintiffs. Caplis v. Caplis, 2004 MT 145, 321 M 450, 91 P3d 1282 (2004).

Custody — Relief Not Specifically Demanded: In an action seeking termination of the parental rights of the natural parents, the award of full care and custody of the child to her aunt and uncle, the institution of a restraining order against the mother's boyfriend to prevent him from molesting the child, and for such other relief as the District Court deemed proper, the District Court had authority to name the child's aunt and uncle her general guardians under the fourth paragraph of the prayer for relief. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Interest Award Exceeding Prayer: When an award of interest on the purchase price recovered in a default judgment exceeded the amount in the prayer, it was ordered amended. Purington v. Soundwest, 173 M 106, 566 P2d 795 (1977).

Divorce — Failure to Preserve Alleged Error: Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with Rule 55(b), M.R.Civ.P., and no relief different from that demanded in the complaint was granted in violation of this rule, an appeal on those grounds was dismissed by Supreme Court upon its own motion where no application to set aside default or judgment was made under Rule 60(b). Sowerwine v. Sowerwine, 148 M 195, 418 P2d 859 (1966).

Relief Limited by Complaint: The relief granted as to defaulting defendants cannot exceed that which is demanded in the complaint. Steinbrenner v. Love, 113 M 466, 129 P2d 101 (1942); Stillwater County v. Kenyon, 89 M 354, 297 P 453 (1931).

Quiet Title Action — Inconsistent Allegations: In an action to quiet title, the complaint spoke in the present tense, no reference being made to claim of title as of an earlier date. One of defendants answered and plaintiff replied setting up title as of the earlier date. Appealing defendants were served by publication and defaulted. The court should have decreed that plaintiff's title be quieted as of the date of filing of the complaint. Stillwater County v. Kenyon, 89 M 354, 297 P 453 (1931).

Mortgage Foreclosure: In a mortgage foreclosure suit, the court may order the land to be sold en masse without a foundation being laid therefor in the pleadings, and therefore the sale could be ordered as against defaulting defendants even though plaintiff did not in his prayer ask that it be so sold. Elston v. Hix, 67 M 294, 215 P 657 (1923).

GENERAL PRAYER FOR RELIEF

Deficiency Judgment — Order to Assign Future Proceeds From Separate Cause of Action to Judgment Creditor Not Erroneous: Andersen executed a promissory note in favor of the Alpine Buffalo, Elk and Llama Ranch, Inc. (Alpine), and secured the note with real property. When no payments were made, Alpine received a judgment and foreclosure decree. After Andersen's property was sold, Alpine also received a deficiency judgment in the amount still owing. Andersen neither appealed the judgment nor made payment. Alpine later learned that Andersen was plaintiff in a pending malpractice claim against her former attorney, so Alpine sought and received an assignment of the prospective proceeds from that action. Andersen appealed the

assignment order, claiming that Alpine's reliance on Rule 70, M.R.Civ.P., was misplaced because that rule is a civil contempt statute that applies only to a contemptuous party. Alpine conceded the inapplicability of the rule, but the Supreme Court pointed out that Rule 70 was not the sole basis for Alpine's motion for assignment, citing Smith v. Foss, 177 M 443, 582 P2d 329 (1978), for the proposition that a District Court possesses jurisdiction to enter any necessary orders to enforce its judgments. The District Court's assignment order did not assign Andersen's legal malpractice cause of action to Alpine, nor did Alpine receive all legal rights and title to that action. Rather, the assignment order merely required Andersen to assign future proceeds from the other litigation to Alpine in an amount limited to the funds necessary to satisfy the deficiency judgment amount. Andersen failed to establish error in the District Court's order requiring Andersen, as judgment debtor, to assign future proceeds from the separate cause of action to Alpine, the judgment creditor. Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001), distinguishing Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935), and Youngblood v. Am. St. Ins. Co., 262 M 391, 866 P2d 203 (1993).

Appointment of Guardian: In an action seeking (1) termination of the parental rights of the natural parents, (2) the award of full care and custody of the child to her aunt and uncle, (3) the institution of a restraining order against the mother's boyfriend to prevent him from molesting the child, and (4) for such other relief as the District Court considered proper, the District Court had authority to name the child's aunt and uncle her general guardians under the fourth paragraph of the prayer for relief. Wenz v. Schwartze, 183 M 166, 598 P2d 1086 (1979).

Divorce — Payment of Money: In divorce action it was not error for court to adjudge that plaintiff recover from defendant the amount which she had withdrawn from the bank although such relief was not requested in the prayer where the prayer asked "for such other and further relief as to the court may seem meet and equitable in the premise". Rogers v. Rogers, 123 M 52, 209 P2d 998 (1949), explained in Key v. Clements, 133 M 344, 323 P2d 603 (1958), distinguished in Chapman v. Chapman, 137 M 544, 354 P2d 184 (1960).

General Principles of Relief: A prayer in the complaint for such other and further relief as may be meet and agreeable to equity and good conscience warrants the granting of any relief to which plaintiff is entitled on the allegations and proof. Merk v. Bowery Min. Co., 31 M 298, 78 P 519 (1904).

Collateral References

Judgment *key* 204, et seq.

49 C.J.S. Judgments §§49, 67.

Rule 54(d). Costs.

Commission Notes

Subdivision (d) is adjusted to state practice by making reference to the state and its officers, agencies and political subdivisions, rather than to the United States and its officers and agencies. Also, the last two sentences of Federal Rule subdivision (d) are omitted. These provide: "Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court." Such provisions do not accord with our present state practice, and it is believed that the present state statutes on the subject of costs are preferable.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Summary Judgment — Deposition Costs Recoverable if Deposition Used in Dispositive Manner: In summary judgment actions, deposition costs are recoverable when a deposition is used in a dispositive manner. Here, depositions were not necessary to decide defendant's summary judgment motion because the grant of summary judgment was based purely on statutory interpretation and undisputed facts not derived from the depositions, so defendant's motion for deposition costs was properly denied. Ritchie v. Ennis, 2004 MT 43, 320 M 94, 86 P3d 11 (2004). See also Roy v. Neibauer, 191 M 224, 623 P2d 555 (1981).

Easement Dispute — Attorney Fees Improperly Awarded — Foy and Randono Distinguished — Costs Sustained: Smalls brought a quiet title action against Goods for determination of an easement. Goods counterclaimed to quiet title to an easement for themselves. The District Court found in favor of the Smalls on the easement issue and awarded Smalls $8,536 in attorney fees and $759 in costs. The Supreme Court reversed on the issue of attorney fees, holding that there was no applicable exception to the general rule that attorney fees cannot be awarded absent a

contractual agreement or other special circumstances. The Supreme Court held that the District Court improperly relied upon Foy v. Anderson, 176 M 507, 580 P2d 114 (1978), and Martin v. Randono, 191 M 266, 623 P2d 959 (1981). The Supreme Court stated that the Randono case stands for the proposition that fees may not be awarded as costs and that Foy is distinguishable in that in Foy, fees were awarded to a person who had sought to avoid legal action, unlike the Smalls who initiated litigation in this case. Although expressing no opinion on the applicability of Rule 11 and this rule to the case before it, the Supreme Court also pointed out that fees could be awarded as a sanction under Rule 11 and that costs could be awarded pursuant to this rule. However, the Supreme Court did sustain the award of costs to Smalls, noting that the purposes for which costs were awarded by the District Court were of the type of costs allowable under 25-10-201. Small v. Good, 284 M 159, 943 P2d 1258, 54 St. Rep. 825 (1997).

Plaintiff Awarded Fifty Percent Share in Mining Company as Prevailing Party for Purposes of Costs: Cowles brought an action against Sheeline to quiet title to a Montana mining claim. At the outset of the case, each party claimed 100% of the shares of the mining company. The District Court awarded both Cowles and Sheeline 50% of the shares in the mining company and awarded costs to Cowles as the prevailing party. The Supreme Court held that the District Court did not err in awarding costs to Cowles because he received the relief asked for at trial. Cowles v. Sheeline, 259 M 1, 855 P2d 93, 50 St. Rep. 653 (1993).

Award of Attorney Fees by Judge Who Did Not Try Case — No Abuse of Discretion: Parties had 2 months following judgment and prior to a change in jurisdiction to bring the matter of attorney fees before the judge who presided over a lien foreclosure action. Neither side did, and jurisdiction of the action was transferred from the 13th to the 16th Judicial District. Defendant later claimed the new judge abused his discretion by awarding fees in a case he did not try because he could not know all of the circumstances surrounding the foreclosure action. The Supreme Court held that a judge's jurisdiction over a case is a matter of law and that while it is preferable that the presiding trial judge consider the matter of attorney fees, it is not mandatory. Finding no abuse of discretion, judgment was affirmed. Donnes v. Orlando, 221 M 356, 720 P2d 233, 43 St. Rep. 890 (1986).

Granting Witness Air Fare Costs Following Appeal: The filing of a notice of appeal did not deprive the District Court of jurisdiction to grant a pending bill for costs. However, the court properly disallowed as a cost the air fares for witnesses. Powers Mfg. Co. v. Leon Jacobs Enterprises, 216 M 407, 701 P2d 1377, 42 St. Rep. 906 (1985).

Contempt Order — Costs Award Proper — Attorney Fees Award Improper: In reviewing a contempt order that arose out of a water rights dispute, the Supreme Court ruled that an award of costs to the irrigation district as the prevailing party was proper, but that an award of attorney fees to the district was not proper. The court reasoned that no applicable statute or contractual provision provided for attorney fees and that the case did not fit within the exceptions recognized in Foy v. Anderson, 176 M 507, 580 P2d 114, 35 St. Rep. 811 (1978). State ex rel. Foss v. District Court, 216 M 327, 701 P2d 342, 42 St. Rep. 845 (1985).

Attorney Fees — General Rules for Determining Prevailing Party: No single factor solely determines the prevailing party for the purpose of attorney fees. The party awarded a money judgment is not necessarily the successful or prevailing party, though such a judgment is an important factor in deciding who prevailed. A party surviving an action involving a counterclaim, setoff, refund, or penalty and who has the net judgment should generally be considered the prevailing party. If a counterclaiming defendant receives only a portion of his requested relief, but the plaintiff's claim is totally denied, the defendant should receive his attorney fees. If plaintiff and defendant both seek relief and each is awarded part of the requested relief, the party prevailing on the main issue in controversy must be allowed attorney fees. Schmidt v. Colonial Terrace Associates, 215 M 62, 694 P2d 1340, 42 St. Rep. 182 (1985).

Contract Allowing Costs to Prevailing Party — Contrary Subsequent Agreement: In an action in which each party claimed breach of a contract, where the parties agreed to an order that each would pay one-half of a special master's fee, the order was not in error, even though the contract provided for costs to the prevailing party. Schmidt v. Colonial Terrace Associates, 215 M 62, 694 P2d 1340, 42 St. Rep. 182 (1985).

No Explicit Authority for Award of Attorney Fees in Disqualification Action: As there is no provision in 3-1-802 that allows a judge to award attorney fees to a party or damages to a nonparty, such award is improper. Unless a statute provides explicitly for an award of attorney fees to the prevailing party, a court cannot make such an award. In re Marriage of Gahr, 212 M 481, 689 P2d 257, 41 St. Rep. 1879 (1984).

Motion for Attorney Fees Following Judgment — Not Costs — Timeliness of Motion: The defendants signed a contract to purchase a tract of land from plaintiffs. The contract provided for

attorney fees to the prevailing party in an action commenced on the contract. Plaintiffs filed suit alleging that under the contract and various oral agreements, defendants had agreed to pay a real estate commission to plaintiffs. The trial court granted summary judgment to defendants, holding that written evidence of an agreement to pay a commission did not exist. No notice of entry of judgment was ever filed. Defendants later moved to set an attorney fee award. The trial court ruled that under Title 25, ch. 10, attorney fees were not recoverable costs and that the motion for costs was not timely, as it was not filed within 5 days of judgment. On appeal, the Supreme Court held that attorney fees were awardable under the contract and that defendants' motion was essentially a motion to amend judgment under Rule 59(g), M.R.Civ.P. The motion was timely made since no notice of entry of judgment was ever filed. Cook v. Harrington, 203 M 479, 661 P2d 1287, 40 St. Rep. 580 (1983).

Title Insurers' Failure to Defend Suit Against Insured — Insured's Costs Awarded: Adjoining landowner sued insured for interference with his easement rights, title insurance companies refused to defend, insured hired his own counsel, the suit was settled, and adjoining landowner again sued insured when insured refused to abide by the settlement. The insurers again refused to defend. The policy obligated insurers to defend any litigation founded upon a defect, lien, encumbrance, or other matter insured against. Insurers had failed to disclose and insure against the easements, though they were contained in the title records. The insurers acted in bad faith in refusing to defend the first suit but not in refusing to defend the second suit, since it arose from insurers' refusal to abide by the settlement in the first suit. Insurers were liable to insured for his costs in defending the first suit, and punitive damages could be imposed for failure to defend. Lipinski v. Title Ins. Co., 202 M 1, 655 P2d 970, 39 St. Rep. 2283 (1982).

Burden of Proof on Appeal: Where defendant objected to an item of awarded costs, the ruling of the trial judge on the item did not indicate on which of two grounds it was based, and defendant's raising of questions was thus not sufficient to carry defendant's burden of showing the item was not reasonable and necessary, the Supreme Court could not say whether the item was properly allowed and must therefore sustain the trial court's ruling. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Prima Facie Case for Costs: Verified memorandum of costs and disbursements of plaintiffs was prima facie evidence that the funds were necessarily expended and properly taxable to defendant unless, as a matter of law, they appeared otherwise on the face of the memorandum. Defendant had the burden of overcoming the prima facie case, and the award of costs was affirmed where defendant failed to carry its burden of showing the items of cost were not reasonable and necessary as found by the trial court. Swenson v. Buffalo Bldg. Co., 194 M 141, 635 P2d 978, 38 St. Rep. 1588 (1981).

Costs Awardable to Party Prevailing at Trial: Plaintiffs contracted with defendant to build their log home. Before and after occupancy of the home structural problems requiring repair occurred. Plaintiffs prevailed at trial but were denied costs. Costs are awardable under Rule 54(d), M.R.Civ.P., and 25-10-101(3). The Supreme Court held that plaintiffs were entitled to costs at trial. Carroccia v. Todd, 189 M 172, 615 P2d 225 (1980).

Deposition for Defendant's Benefit — Costs Disallowed: Section 25-10-201 particularly enumerates allowable costs under this rule. Where cost of taking plaintiff's deposition was made merely for the convenience of defendant's counsel, defendant cannot include such cost in his bill of costs because deposition was for his benefit. Deposition was never filed with the District Court, and plaintiff's counsel did not have any practical means of securing a copy. Johnson v. Furgeson, 158 M 170, 489 P2d 1032 (1971).

Dismissal to Include Costs: A judgment of dismissal carries with it a judgment for costs just as much as does a judgment on the merits. Graham v. Superior Mines, 100 M 427, 49 P2d 443 (1935).

Amended Memorandum of Costs — Filing Improperly Denied: The District Court should have permitted an amended memorandum of costs to be filed, in which no new items were sought to be added to the original, but the sole purpose of which was to furnish the objecting party with information relative to alleged expenditures, the absence of which from the original was claimed to be prejudicial. It is not necessary to make a preliminary showing that such information was omitted by inadvertence, surprise, or excusable neglect. Neary v. N. Pac. Ry., 41 M 480, 110 P 226 (1910).

Request for Costs Judgment Not Bar to Appeal: Where a plaintiff elects to stand on his complaint after demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) sustained, it is the duty of the court to render judgment against him for costs so as to place him in a position to appeal. Where the plaintiff is compelled to ask the court to enter such

judgment, it is not such a consent to the judgment as to debar him of the right to appeal. Stevenson v. Matteson, 13 M 108, 32 P 291 (1893).

Collateral References

Costs *key* 32.

20 C.J.S. Costs §§8 through 10.

20 Am. Jur. 2d Costs §§10 through 26, 89, 96.

Authority of trial judge to impose costs or other sanctions against attorney who fails to appear at, or proceed with, scheduled trial. 29 ALR 4th 160.

Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims. 66 ALR 3d 1115.

Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as "prevailing party" or "successful party". 66 ALR 3d 1087.

Liability of state, or its agency or board, for costs in civil action to which it is a party. 72 ALR 2d 1379.

Rule 55. Default

Case Notes

Default Proper as Sanction for Discovery Abuses: Alleging that she was defrauded out of nearly $1 million, Cass properly served defendants with a complaint, summons, and discovery requests. Defendants failed to respond to the discovery requests, and the District Court held defendants in default, awarding Cass $1,736,547.20. Defendants moved to set the judgment aside, but the request was denied, and defendants appealed, arguing that the default judgment should have been set aside pursuant to this rule when Cass filed an amended pleading. However, the record clearly showed that the District Court dismissed the case pursuant to Rule 37, M.R.Civ.P., based on defendants' failure to comply with discovery requests and a court order to answer discovery, rather than on this rule for defendants' failure to defend. Although default could have been applied under either rule, the District Court obviously faced a litigant who simply was not going to respond to properly served discovery, so entry of default under Rule 37, M.R.Civ.P., was not an abuse of discretion, and the judgment was affirmed. Cass v. Composite Indus. of Am., Inc., 2002 MT 226, 311 M 406, 56 P3d 322 (2002).

Improper Grant of Summary Judgment on Basis That Prior Default Judgment Barred Further Claim Under Insurance Policy: Generally, under this rule, a default judgment based on one party's failure to answer under Rule 8, M.R.Civ.P., permits the nondefaulting party to assert that all factual allegations in the pleadings are considered admitted in ascertaining liability. This general rule is an exception to an overriding principle that cases are to be tried on the merits and that judgments by default are not favored. Construing the interplay between the two procedural rules, the Supreme Court adopted the general rule in 6 Moore's Fed. Prac. 55.10 (2nd Ed. 1966) that although at "the time of entry of default, the facts alleged by the plaintiff in the complaint are deemed admitted", plaintiff's conclusions of law are not considered established. Further, although not factually identical to the present case, under Aldrich & Co. v. Donovan, 238 M 431, 778 P2d 397, 46 St. Rep. 1393 (1989), the deemed admissions resulting from one party's failure to respond to an amended counterclaim, because of a technicality, cannot sustain a claim for fraud in a subsequent motion for summary judgment. Here, plaintiff's husband's arson, fraud, concealment, misrepresentation, and false swearing were considered by the District Court to have been admitted through an otherwise valid default judgment based on the husband's failure to answer or appear, barring the wife's subsequent claim for insurance coverage and warranting summary judgment for the insurance company. The Supreme Court reversed, holding that the determination whether the husband committed each of these acts is a conclusion of law that can be reached only after applying particular rules of law to specific findings of fact and cannot be "deemed admitted" through a default judgment absent any legitimate evidence in the record. Lane v. Farmers Union Ins., 1999 MT 252, 296 M 267, 989 P2d 309, 56 St. Rep. 990 (1999). See also Wheat v. Safeway Stores, Inc., 146 M 105, 404 P2d 317 (1965), and Maulding v. Hardman, 257 M 18, 847 P2d 292, 50 St. Rep. 141 (1993).

Notice of Hearing of Default Judgment — No Conflict Between Uniform District Court Rules and Rules of Civil Procedure: The controlling rules relating to the entry of default judgments are found in this rule and, with respect to service, are found in Rules 5 and 6, M.R.Civ.P. The Uniform District Court Rules do not enlarge, vary, or control the provisions of the Montana Rules of Civil Procedure. Fed. S&L Ins. Corp. v. Anderson, 233 M 339, 760 P2d 80, 45 St. Rep. 1537 (1988).

Rule 55(a). Entry.

Commission and Advisory Committee Notes

Subdivisions (a) and (d) of the rule are identical with the Federal Rule.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 935
Motion Preventing Default 936

GENERAL

Default Judgment Distinguished: It is clear under this rule and Rule 55(b), M.R.Civ.P., that an entry of default by the Clerk of Court and an entry of default judgment by the District Court are two distinctly different acts. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Failure to Answer by Time of Application for Entry of Default — Default Properly Entered: Following defendant's failure to timely answer complaint, plaintiffs made timely application for entry of default. Defendant then answered, and 5 days later plaintiffs filed an affidavit for entry of default and default was entered by the Court Clerk. The Clerk properly entered the default, since no answer or appearance had been timely made at the time of the application for default. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Child Custody Disputes — Defaults Disfavored: The father sought a modification of custody of his children. His wife failed to file her response within the time provided by the rules. The father argued that he was entitled to custody of his children by default. The Supreme Court held that any doubt in the late filing of an answer should be resolved by trial on the merits of the case, and custody cases present a compelling reason for a hearing on the merits. Duffey v. Duffey, 193 M 241, 631 P2d 697, 38 St. Rep. 1105 (1981).

Failure to Attend Pretrial Conference — Default Properly Ordered: In an action by the plaintiff for damages caused by the defendant's failure to provide an irrigation system, the District Court did not err in entering a default judgment against the defendant for his failure to attend a pretrial conference. Entry of a default judgment is a drastic sanction to impose for failure to attend a pretrial conference, and the court should only resort to such a remedy in extreme situations where there is a clear record of continual delay, abuse, and disregard of the court's authority. Because the defendant displayed a continual disregard for the trial court's authority and because there was sufficient evidence to support the finding that the defendant received a copy of the order for the conference, there was no evidence that the District Court abused its discretion. Calaway v. Jones, 191 M 353, 624 P2d 991, 38 St. Rep. 340 (1981).

Effect of Entry of Default — Further Pleading Prevented: A party against whom a default has been entered has no standing to file further pleadings, absent fraud, unless the default is set aside. Carbon County v. Schwend, 182 M 89, 594 P2d 1121 (1979).

Bankruptcy Discharge — Effect on Default Judgment: Defendant in a tort action obtained a discharge in bankruptcy prior to entry of a default judgment but was denied in his application to the state court to set aside the default judgment in which defendant alleged that the judgment had been entered in violation of the stay occasioned by the filing of the petition in bankruptcy. Defendant's appeal of that denial to the Supreme Court was remanded to the District Court with directions to dismiss the default judgment against the defendant. Palmer v. Bracy, 177 M 433, 582 P2d 324 (1978).

Defendant Failed to Appear: When no one appeared on behalf of defendant at the trial, the court had no alternative but to grant plaintiff's motion for default judgment. Archer v. LaMarch Creek Ranch, 174 M 429, 571 P2d 379 (1977).

Notice of Default Not Required: Clerk of court is not required to give a notice of entry of default to the defendant. Johnson v. Matelich, 163 M 329, 517 P2d 731 (1973).

Answer Filed After Entry by Clerk: Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion

for default, but before actual hearing on the motion, since entry of default by clerk requires no notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for "good cause shown" as they were entitled to do under rules. Sealey v. Majerus, 149 M 268, 425 P2d 70 (1967).

Unsigned Default to Be Corrected: The clerk's act in entering the default is purely ministerial and any mistakes of the clerk as distinguished from the judicial acts of the court are subject to correction by amendment of the court records. That the default was not "properly signed" would at best be but a clerical error or mistake which could not affect the substantial rights of the parties. Galbreath v. Aubert, 116 M 490, 157 P2d 105 (1944).

Withdrawal of Appearance: Where attorney filed demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) and answer in behalf of five defendants, but later discovered he was without authority as to one, and filed his withdrawal of the pleading as to the one, plaintiff by filing his praecipe for default recognized that there had been no appearance that would cure defective service of summons. Aronow v. Bishop, 112 M 611, 120 P2d 423 (1941).

Additional Time Impliedly Granted: Failure of plaintiff to cause defendant's default to be entered is an implied grant of further time in which to make appearance. Mitchell v. Banking Corp. of Mont., 81 M 459, 264 P 127 (1928).

Default After Appearance a Nullity: A judgment by default can be entered only where the defendant has wholly failed to make an appearance, either general or special; and where it is entered notwithstanding appearance made, it is premature and a nullity. Taylor v. Southwick, 78 M 329, 253 P 889 (1927).

Acquiescence by Plaintiff: Where defendant does not make appearance within the statutory limit and plaintiff permits further time to elapse without taking action, he thereby impliedly grants the former further time, and if appearance is made thereafter and before default is entered, it is timely, and subsequent entry of judgment by default is void. Edenfield v. Seal Co., 74 M 509, 241 P 227 (1925).

Rule Not Mandatory: The provision that where no appearance has been made by defendant within the time specified, "the clerk must enter" his default is directory only, not mandatory. Edenfield v. Seal Co., 74 M 509, 241 P 227 (1925); State ex rel. Kohl v. District Court, 46 M 348, 128 P 582 (1912).

Clerk's Power to Default: The power of the clerk to enter a default in any case is restricted to those in which no appearance either general or special has been made. Missoula Belt Line Ry. v. Smith, 58 M 432, 193 P 529 (1920).

Appearance by Counsel Only — No Default: The failure to appear in person at a trial after issues joined does not constitute a default, where counsel is present, and it was not necessary to move to set aside the order of the court directing the entry of a default. Sell v. Sell, 58 M 329, 193 P 561 (1920).

Default After Appearance: The mere appearance of a defendant does not prevent his default from being entered; judgment by default may be had when there has been a failure to do the things indicated. Donlan v. Thompson Falls Copper & Mill. Co., 42 M 257, 112 P 445 (1910).

Failure to Answer — Motion as Appearance: Where defendants filed no pleadings except a motion to dissolve a preliminary injunction, until after the time to answer had expired, their default was properly entered without notice, though such motion be regarded as an appearance. Donlan v. Thompson Falls Copper & Mill. Co., 42 M 257, 112 P 445 (1910).

MOTION PREVENTING DEFAULT

Motion for Summary Judgment Held Sufficient to Prevent Default: Klock brought a civil action against various county, town, and bank officials for violating his civil rights. After the defendants' motion to dismiss was denied, the defendants filed a motion for summary judgment. Klock moved for entry of a default judgment, claiming that the defendants had failed to "answer" the complaint. The Supreme Court upheld the District Court's refusal to grant Klock's motion, holding that a default judgment may be entered under this rule only if a party has failed to plead or "otherwise defend" against the complaint. The Supreme Court held that the defendants' motion for summary judgment satisfied the requirement that the defendants "otherwise defend" against the complaint. Klock v. Cascade, 943 M 1262, 943 P2d 1262, 54 St. Rep. 829 (1997).

Motion to Change Venue: Where a motion for a change of venue was timely served and filed in the action by defendant's attorney, defendant was not in default. USF&G Co. v. St., 136 M 148, 345 P2d 734 (1959); McLeod v. McLeod, 124 M 590, 228 P2d 965 (1951).

Appearance by Motion Preventing Default: Appearance by motion, whether general or special, prevents entry of default prior to disposition of the motion. Paramount Publix Corp. v. Boucher, 93 M 340, 19 P2d 223 (1933).

Challenge to Filing of Supplemental Complaint — Time for Answer Extended: The filing of a motion challenging the jurisdiction of the court to make an order permitting a supplemental complaint to be filed without notice, constituted a special appearance only and extended defendant's time for making appearance on the merits until the motion was determined. State ex rel. Bingham v. District Court, 80 M 97, 257 P 1014 (1927).

Challenge to Jurisdiction — Time for Answer Extended: The filing by the defendant of a motion challenging the jurisdiction of the court before he interposes his answer or demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) extends the time for making appearance on the merits until the motion is determined. Missoula Belt Line Ry. v. Smith, 58 M 432, 193 P 529 (1920).

Motion as Challenge to Jurisdiction: A motion requiring the attorney for the adverse party to produce his authority challenges the jurisdiction of the court. Missoula Belt Line Ry. v. Smith, 58 M 432, 193 P 529 (1920).

Collateral References

Judgment *key* 92 through 177.
49 C.J.S. Judgments §§187 through 218.
46 Am. Jur. 2d Judgments §§265 through 321.

Rule 55(b). Judgment.

Commission and Advisory Committee Notes

COMMISSION NOTE

Subdivision (b)(1) has been changed by adding the clause, "and has been personally served, otherwise than by publication or personal service outside this state," thus requiring application to the court for judgment by default in cases of service by publication or personal service outside Montana. In subdivision (b)(2) the words "or guardian ad litem" have been added near the end of the first sentence, and "state of Montana" has been substituted for "United States" at the end of the subdivision.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

The changes in Rules 55(b)(1) and 55(c) are being made because it appears that as long as the procedure for proof of service is reliable, there is no real basis for distinguishing between personal service within and without the state of Montana.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of October 9, 1984, the above commission note was not applicable regarding personal service. The Montana Rule adds the following to the end of (1) of the Federal Rule: "and has been personally served. No judgment by default shall be entered by the clerk when service has been by publication." Except for this variation, and the variations in (2) indicated in the above commission note, the rules were identical, as of May 1, 1990.

Amendments: The 1964 amendment inserted "an" before "account" in the final sentence of paragraph (2).

The amendment of October 9, 1984, in (1) at end of first sentence deleted "otherwise than by publication or personal service outside of this state"; and inserted second sentence.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 937
Clerk's Error 940

GENERAL

Prima Facie Case for Foreclosure — Default Judgment Proper: In order to make a prima facie case for foreclosure, a lender is required to show three elements: (1) the debt of the borrowers; (2) nonpayment of the debt; and (3) present ownership of the debt by the lender. Evidence of the presence of these elements, coupled with a sufficient showing of attorney fees, was adequate for a default judgment to be entered against debtors. NW. Farm Credit Serv., ACA v. Lund, 255 M

114, 841 P2d 490, 49 St. Rep. 910 (1992). See also First Nat'l Bank of Albuquerque v. Quinta Land & Cattle Co., 238 M 335, 779 P2d 48 (1989).

Parents Sued in Capacity of Guardians — Notice Insufficient to Establish Individual Liability: Defendants were sued in their capacity as guardians of their minor son for the expenses incurred in connection with the birth of an illegitimate child fathered by their son. A default judgment was rendered against defendants. The Supreme Court reversed and vacated the default judgment, holding that the guardians' duty to safeguard the rights of their son during the legal proceeding did not subject them to personal liability for their son's allegedly wrongful acts. The Supreme Court also held that because the title of the case, the allegations in the complaint, and all motions at trial addressed the defendants in their capacity as guardians, they had insufficient notice of any likelihood of personal liability. Breuer v. Poe, 245 M 22, 797 P2d 944, 47 St. Rep. 1812 (1990).

Computation of Notice Period for Default Judgment — General Rule Regarding Procedural Defects: Defendant claimed that insufficient notice had been given under subsection (2) of this rule for judgment by default when the notice period was computed under Rule 6(a), M.R.Civ.P. Service was made upon defendant's counsel by mail. The question arose as to whether the rules intend that the noncourt days excluded under Rule 6(a) apply to additional days granted by virtue of mailing under Rule 6(e). The Supreme Court declined to rule on the question, instead affirming the default judgment on the grounds that: (1) defendant had ample notice of hearing; (2) the case was on the docket for more than 16 months after service of complaint and summons, but defendant took no other action except for a motion to dismiss; (3) defendant never answered the complaint; and (4) defendant did not allege or tender any proof that he had a meritorious defense to the suit for mortgage foreclosure. The court cited the general rule that a procedural defect with respect to notice of a default judgment must be considered with other factors before the judgment may be set aside. Therefore, even if notice was considered insufficient, in this case the other factors so outweighed the procedural defect as to require sustaining entry of the default judgment. Fed. S&L Ins. Corp. v. Anderson, 233 M 339, 760 P2d 80, 45 St. Rep. 1537 (1988).

Final Order — Timeliness of Appeal: A default judgment was entered against defendant in March, his motion to vacate was denied in April, the judgment was renewed in August after a hearing on damages, and defendant appealed in September. The appeal was timely since the hearing on damages was mandatory under this section because the damages were unliquidated; therefore, the April order could not be final. The fact that a judge, not a clerk, entered the default judgment does not negate the need for a hearing on damages. The August judgment was the final judgment, and appeal from that judgment was timely taken. Paxson v. Rice, 217 M 521, 706 P2d 123, 42 St. Rep. 1355 (1985).

Failure to Serve Notice — Default Rendered Voidable: Since the wife previously had appeared in this dissolution action, she was entitled to 3 days' written notice of the husband's motion for default judgment. The husband's failure to serve the requisite notice rendered the order of default judgment premature and voidable. In re Marriage of Neneman, 217 M 155, 703 P2d 164, 42 St. Rep. 1095 (1985), followed in Dean v. Hoepfner, 245 M 366, 801 P2d 579, 47 St. Rep. 2162 (1990), and in In re Marriage of Whiting, 259 M 180, 854 P2d 343, 50 St. Rep. 747 (1993).

Misrepresentation and Improper Process by Attorney — Sanctions: Since under 33-1-602 defendant, a foreign insurer, could only be served by service upon the Commissioner of Insurance, personal jurisdiction over insurer was not obtained when it was served at its Billings claim office. Thus, when plaintiffs' attorney appealed quashing of the service, the appeal was dismissed. Plaintiffs' attorney represented to the District Court's personnel that he had won the appeal and was entitled to a default judgment, and the personnel entered one against insurer for $150,000 punitive damages and $385 costs. The default judgment was void for want of jurisdiction, and the District Court correctly vacated it. As insurer was not properly served, the District Court properly ruled plaintiffs could not take depositions. The attorney was properly adjudged liable to insurer for $4,031.50 under 37-61-406, stating that an attorney guilty of deceit or collusion with intent to deceive the court or a party forfeits to the party injured by his deceit or collusion treble damages. LaFountaine v. St. Farm Mut. Auto. Ins. Co., 215 M 402, 698 P2d 410, 42 St. Rep. 496 (1985).

Entry of Default by Clerk Distinguished: It is clear under this rule and Rule 55(a), M.R.Civ.P., that an entry of default by the Clerk of Court and an entry of default judgment by the District Court are two distinctly different acts. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Failure to Appear at Hearing on Application for Default — Evidence Properly Taken: Plaintiffs gave defendant timely written notice that they would apply for judgment by default. The time for hearing was set, and neither defendant nor his representative appeared at the

hearing. There was no reason for the court not to proceed to take evidence for the purpose of determining damages. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

What Constitutes an Appearance: Appellant was personally served with a petition for dissolution of marriage. He failed to answer or otherwise appear, and a default was entered. One and one-half years later appellant moved to set aside the default on the grounds that he was not given the 3-day notice provided by Rule 55(b), M.R.Civ.P. He argued that he sent the District Judge two letters, and those letters constituted an appearance for purposes of Rule 55(b). The court disagreed. The District Judge did not read the letters, as it was his policy not to engage in correspondence with litigants. The letters themselves were not served on counsel for the petitioner or the petitioner, and no appearance fee of any kind was paid in connection with the letters. Appellant did not appear and was not entitled to a 3-day notice. In re Marriage of Lance v. Lance, 195 M 176, 635 P2d 571, 38 St. Rep. 1772 (1981).

Notice of Subsequent Proceedings: If a party "appears" by filing a motion he is entitled to notice of all subsequent proceedings. Big Spring v. Blackfeet Tribe of the Blackfeet Indian Reservation, 175 M 258, 573 P2d 655 (1978).

Failure to Give Notice of Application — Jurisdiction Proper: District Court was not deprived of jurisdiction to enter default judgment by plaintiff's failure to give 3-day notice required by subdivision (2) of this rule where defendant had taken no action from the time of the entry of the default judgment until his death, a period of approximately 13 months, the judgment was attacked for the first time by his executrix after approximately 1 year and 7 months had elapsed, and almost 4 years had passed when the motion to set aside and vacate judgment was filed. Sikorski & Sons, Inc. v. Sikorski, 162 M 442, 512 P2d 1147 (1973).

Failure to Serve Application for Judgment — Effect: Party's failure to serve defendant with notice of application for judgment did not preclude court from proceeding against defendant. Sikorski & Sons, Inc. v. Sikorski, 162 M 442, 512 P2d 1147 (1973).

Answer Filed After Entry by Clerk — Default Properly Given: Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion for default, but before actual hearing on the motion, since entry of default by clerk requires no notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for "good cause shown" as they were entitled to do under rules. Sealey v. Majerus, 149 M 268, 425 P2d 70 (1967).

Divorce Proceedings — Default Properly Entered: Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with this rule, and no relief different from that demanded in the complaint was granted in violation of Rule 54(c), M.R.Civ.P., an appeal on those grounds was dismissed by the Supreme Court on its own motion where no application to set aside the default or judgment was made under Rule 60(b). Sowerwine v. Sowerwine, 148 M 195, 418 P2d 859 (1966).

Discretion in Denying Vacating of Default Judgment: Court did not abuse its discretion in denying motion to vacate default judgment. Defendant here was neither unsuspecting nor unaware. Williams v. Superior Homes, Inc., 148 M 38, 417 P2d 92 (1966).

Failure to Give Notice of Application — Nonprejudicial Error: Where record showed that defendant took no action for nearly 3 months after default judgment had been entered, defendant was not prejudiced by plaintiff's failure to give written notice of application for default judgment as required by paragraph (2) of this rule, and District Court did not abuse its discretion in denying defendant's motion to vacate the default judgment filed under Rule 55(c), M.R.Civ.P. Williams v. Superior Homes, Inc., 148 M 38, 417 P2d 92 (1966).

Ministerial Function — Clerk to Comply With Statute: Clerk of court in entering a default judgment is performing a ministerial function and must follow procedures in detail and absolutely. Interstate Counseling Serv. v. Emeline, 144 M 409, 396 P2d 727 (1964).

Effect of Entry by Clerk: Where the Clerk of the District Court is empowered by statute to enter judgments, the judgment is one pronounced by law as a necessary consequence of the facts established. Lasby v. Burgess, 93 M 349, 18 P2d 1104 (1933).

Entry by Clerk as Judgment by Court: The ministerial act of the Clerk of the District Court in entering judgment upon default of defendant in an action for the recovery of money has the same effect as a judgment rendered upon a verdict of the jury, and the judgment roll is admissible in evidence in another action the same as though a formal judgment had been signed by the judge. Commercial Bank & Trust Co. v. Jordan, 85 M 375, 278 P 832 (1929).

Unliquidated Damages — Amount Not Admitted: In an action to recover unliquidated damages, the default of the defendant admits the cause of action and the material and

traversable allegations of the complaint, but not the amount of damages. Smotherman v. Christianson, 59 M 202, 195 P 1106 (1921).

Foreclosure of Lien — Judicial Action Required: An action for the foreclosure of a lien is not an action on contract for the recovery of money or damages only, and the rendition of a proper judgment on default in such an action requires judicial action, and not the performance by the clerk of a mere ministerial function. Soliri v. Fasso, 56 M 400, 185 P 322 (1919), distinguished in Barrett v. Morton, 137 M 190, 351 P2d 601 (1960).

CLERK'S ERROR

Estimate of Damages — No Authority to Enter Default: In an affidavit accompanying his complaint, plaintiff stated that he would have to expend at least $86,000 to correct defendant's error in building plaintiff's house. When defendant defaulted, the clerk of court entered a default judgment against defendant in the amount of $86,000. On appeal, the Supreme Court held that the amount was merely an estimate of the amount of the expected damages and did not constitute a sum certain and, therefore, the clerk of court did not have the authority to enter the default judgment. Hoyt v. Eklund, 249 M 307, 815 P2d 1140, 48 St. Rep. 681 (1991).

Harmless Error: Under Rule 61, omission of clerk of court to require affidavit of amount due under this rule before entry of default judgment in favor of plaintiff is not fatal unless refusal to take action with respect to the omission appears to the District Court inconsistent with substantial justice. Interstate Counseling Serv. v. Emeline, 144 M 409, 396 P2d 727 (1964).

Motion to Set Aside Default Properly Denied: Motion to set aside default judgment because of plaintiff's failure to file affidavit of amount due and owing when it requested entry of default judgment was properly denied where defendant permitted judgment to be satisfied from her property, and no reason to avoid the voidable judgment had been presented. Interstate Counseling Serv. v. Emeline, 144 M 409, 396 P2d 727 (1964).

Voidable Error: Entry of default judgment by clerk of court without requiring affidavit from plaintiff of amount due and owing rendered the judgment voidable but not void. Interstate Counseling Serv. v. Emeline, 144 M 409, 396 P2d 727 (1964).

Unauthorized Entry by Clerk: The clerk of the court in entering a judgment acts ministerially and not judicially, and must determine from the allegations of the complaint alone whether the action is one upon contract for the recovery of money or damages only, and if not then he has no authority to enter a judgment therein, and the judgment is a nullity. Soliri v. Fasso, 56 M 400, 185 P 322 (1919), distinguished in Barrett v. Morton, 137 M 190, 351 P2d 601 (1960).

Collateral References

Judgment *key* 93, 131.

49 C.J.S. Judgments §§204, 205.

46 Am. Jur. 2d Judgments §§265 through 321.

Effect under Federal Rule 55(b)(2) of failure, prior to taking default judgment against party who has appeared, to serve 3-day written notice of application for judgment. 51 ALR 2d 837.

Granting relief not specifically demanded in pleading or notice in rendering default judgment in divorce or separation action. 11 ALR 2d 340.

Construction and application of statute providing for entry of default judgment by clerk without intervention of court or judge. 158 ALR 1091.

Judgment by consent, confession, or default of principal as affecting sureties whose obligation is conditioned upon judicial determination of liability of principal. 51 ALR 1493.

Rule 55(c). Default — setting aside — extension of time by court or stipulation of parties.

Commission and Advisory Committee Notes

COMMISSION NOTE

In subdivision (c) the first two sentences have been added to the Federal Rule, for the purpose of preventing automatic default by reason of failure to comply with the exact requirements of the rules, requiring application for default by a party and permitting stipulation by the parties for extension of the times prescribed for appearance, motions, and pleadings.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

The changes in Rules 55(b)(1) and 55(c) are being made because it appears that as long as the procedure for proof of service is reliable, there is no real basis for distinguishing between personal service within and without the state of Montana.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Redraft of Rule — Identity With Federal Rule: Subsequent to the preparation of the above commission note, the Montana Civil Rules Commission redrafted Rule 55(c). In reporting to the Supreme Court, the Commission said: "We have also attached a redraft of Rule 55(c) as now proposed, and in brief we have merely inserted a provision that will give the court discretion to appoint a representative for any person served outside the boundaries of the state rather than to enter his default." The first sentence of Montana Rule 55(c), as enacted by the Legislative Assembly, is identical with Federal Rule 55(c). The second and succeeding sentences have been added. The 1984 amendment to the Montana Rule deleted the third sentence.

Amendments: The amendment of October 9, 1984, deleted former third sentence, which read: "Before entering the default of any person who has been served outside the boundaries of the state of Montana, the court may, in its discretion, appoint a representative for any such person even though such person has not appeared."

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 941
Policy Against Default 945
Discretion of Court 947
Form of Application to Open Default. 949
Neglect of Defendant 949
Mistake 951
Nonresident Defendant 952

GENERAL

Appropriate Standards for Setting Aside Entry of Default and Default Judgment: Defendant failed to respond to a complaint within 20 days, and default was entered in favor of plaintiff. Defendant sought to set aside the entry of default under the good cause standard provided under Cribb v. Matlock Communications, Inc., 236 M 27, 768 P2d 337 (1989). Plaintiff contended that in order to meet the good cause standard, a party would have to meet the higher excusable neglect standard set out in Blume v. Metropolitan Life Ins. Co., 242 M 465, 791 P2d 784 (1990). The District Court held that the Blume standard applied and that defendant's neglect was inexcusable, so default judgment was entered. On appeal, the Supreme Court took the opportunity to clarify the applicable standards. When the issue is the setting aside of a default judgment under Rule 60(b), M.R.Civ.P., either alone or in conjunction with an entry of default, the appropriate standard is the Blume excusable neglect standard. When the issue is the setting aside of an entry of default under this rule, as opposed to a default judgment, the appropriate standard is the Cribb good cause standard. This case involved setting aside an entry of default, so the court applied the Cribb standard. Defendant failed to show that its default was not willful, instead professing ignorance in the face of repeated warnings that if no answer was filed, a default would be taken. The Cribb standard also compels consideration of the prejudice to plaintiff and whether defendant had a meritorious defense. Plaintiff had a right to be apprised of defendant's defense in a timely manner, and defendant should have raised those claims in a timely fashion rather than ignore plaintiff's repeated attempts to elicit a responsive pleading. Defendant was correct that the proper standard to be applied in this case was the Cribb standard, but defendant nevertheless failed to show good cause to set aside entry of default under that standard. Thus, even though the District Court applied the wrong standard, it reached the correct result for the wrong reason, and the Supreme Court affirmed the default judgment. Essex Ins. Co. v. Jaycie, Inc., 2004 MT 278, 323 M 231, 99 P3d 651 (2004), followed in Peak Dev., LLP v. Juntunen, 2005 MT 82, 326 M 409, 110 P3d 13 (2005).

Order Vacating or Refusing to Vacate Default Judgment Appealable as Special Order After Final Judgment: Empire Fire and Marine Insurance Company (Empire) moved to set aside a default judgment against the company. After the motion was granted, Roberts, the plaintiff, appealed the order setting aside the judgment and Empire contested the jurisdiction of the Supreme Court to hear the appeal. The Supreme Court clarified the issue whether such an order is appealable, holding that an order vacating or refusing to vacate a judgment is appealable under Rule 1(b)(2), M.R.App.P. (Title 25, ch. 21), as an appeal of a special order after final

judgment. Roberts v. Empire Fire & Marine Ins. Co., 276 M 225, 915 P2d 872, 53 St. Rep. 359 (1996).

Invalidity of Default and Summary Judgments for Failure to Give Notice and Other Failures: Kenner's filing of two motions to dismiss constituted appearances in Moran's quiet title action, and Kenner was thus entitled to written notice of Moran's application for default judgment at least 3 days prior to the hearing on the application. The informal communications to Kenner's attorney by Moran's attorney, threatening to proceed with the quiet title action if Kenner did not fulfill the terms of a settlement agreement that the parties had signed, were not the equivalent of and could not substitute for the required notice. The failure to notify was compounded by failure to notify Kenner that the default judgment had been entered. Therefore, default judgment against Kenner was void, and Kenner's motion for summary judgment in Kenner's independent action to set aside the default judgment should have been granted. Furthermore, at the hearing in Kenner's action, Moran's request for summary judgment on Moran's counterclaim for specific performance of the settlement agreement should not have been granted because neither party had entered evidence on that issue, Moran had not moved for summary judgment, and Kenner had no notice of the request for summary judgment. Kenner v. Moran, 263 M 368, 868 P2d 620, 51 St. Rep. 94 (1994).

Determining Existence of Good Cause Standard: To determine a sufficient showing of good cause for setting aside a default entry, courts should consider: (1) whether the default was willful; (2) whether the plaintiff would be prejudiced if the default was set aside; and (3) whether the defendant presented a meritorious defense to plaintiff's claim. The court must also balance the interests of the defendant in the adjudication of his defense on the merits against the interests of the public and the court in the orderly and timely administration of justice. In addition, courts may consider: (1) whether there was a good faith mistake; (2) whether a harsh or large judgment would result; (3) the strong preference of adjudication on the merits; and (4) resolution of doubts in favor of granting a motion to set aside. Cribb v. Matlock Communications, Inc., 236 M 27, 768 P2d 337, 46 St. Rep. 156 (1989).

Standards Applicable to Setting Aside Default Entry and Default Judgment: The default entry is simply an interlocutory order that in itself determines no rights or remedies, whereas the default judgment is a final judgment that terminates the litigation and decides the dispute. Therefore, the "good cause" standard for setting aside a default entry under this rule is more flexible and lenient than the "excusable neglect" standard for setting aside a default judgment under Rule 60(b), M.R.Civ.P. Cribb v. Matlock Communications, Inc., 236 M 27, 768 P2d 337, 46 St. Rep. 156 (1989), followed in In re Marriage of Whiting, 259 M 180, 854 P2d 343, 50 St. Rep. 747 (1993).

Attorney Withdrawal With No Notice to Client — Default Set Aside: The lower court granted defendants' attorney's motion to withdraw and ordered him to notify defendants. Defendants claimed on appeal that they received no notice. The record showed no evidence of notice by the attorney and no evidence of the notice that 37-61-405 required plaintiff to give. A default was issued against defendants at a time when they had no attorney and were not represented at the hearing. Defendants properly raised on appeal the lack of the lower court's power to proceed to default. The case was remanded with directions to set the default aside and grant a rehearing. Mont. Bank of Roundup, N.A. v. Benson, 220 M 410, 717 P2d 6, 43 St. Rep. 485 (1986), followed in In re Marriage of Whiting, 259 M 180, 854 P2d 343, 50 St. Rep. 747 (1993).

Default Judgment Vacated for Lack of Evidence of Bad Faith or Willfulness: On March 19, 1976, Scott, a truck driver employed by England, struck and killed plaintiffs' elderly father in Alzada, Montana. No criminal charges were filed. Scott returned to Utah where he left England's employ. In April 1977, plaintiffs filed a wrongful death action seeking damages against England and Scott. England was personally served in Salt Lake City, and the office manager accepted service for Scott. In June 1978, plaintiffs noticed a deposition of Scott to take place in Ekalaka. Scott could not be located. Two years later, plaintiffs moved for a default judgment against Scott for failure to appear at the deposition. The trial court entered the default judgment on September 15, 1980. Scott was finally located in March 1981 and filed a motion to set aside the default. The trial court refused and held a hearing on damages. The Supreme Court vacated the judgment, saying there was no evidence showing willfulness or bad faith on the part of England or Scott. Ewalt v. Scott, 206 M 503, 675 P2d 77, 40 St. Rep. 1809 (1983).

Failure to Pay Fee for Filing Pleading: District Court did not abuse its discretion in refusing to set aside default judgment against defendant, and the judgment would not be overturned on appeal from denial of motion to set aside the default judgment, where the court found that negligent failure to pay filing fee for answer until 2 ½ months after filing of the answer was not excusable, that the fee was not filed until after plaintiffs requested entry of default, that the

answer did not present a prima facie meritorious defense, that the evidence overwhelmingly indicated there was no defense, and that defendant's reckless disregard for the rights and feelings of the plaintiffs and his attempt to prolong the litigation were adequate reasons to deny his motion to set aside the judgment. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Suit Attacking Judgment After Motion to Set Aside — New Issue Raised — Res Judicata Applied: In 1971 a default judgment had been entered against present plaintiffs, granting sole ownership of certain property to present defendant E.G.W., who sold the property to present codefendants in 1972. Plaintiffs' 1971 motion to set aside the default was denied. In 1981 plaintiffs sued for a one-half quieted interest, or in the alternative, an accounting and one-half the proceeds of the 1972 sale. The complaint was based on the claim that the 1971 judgment was void because it granted relief beyond that prayed for in the pleadings and the court lacked jurisdiction to grant the relief it granted. Res judicata barred litigation of the voidness issue because plaintiffs failed to raise it in their 1971 motion to set aside the default. Once there has been full opportunity to present an issue for judicial decision in a given proceeding, including jurisdiction issues, the court's determination in that proceeding must be accorded full finality as to all issues raised or which fairly could have been raised and their later consideration is precluded by res judicata. Wellman v. Wellman, 198 M 42, 643 P2d 573, 39 St. Rep. 752 (1982). See also First Bank v. District Court, 226 M 515, 737 P2d 1132, 44 St. Rep. 861 (1987), St. v. Perry, 232 M 455, 758 P2d 268, 45 St. Rep. 1192 (1988), and Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000).

Due Process Violations — Default Set Aside for Good Cause: On the basis of the total circumstances surrounding the proceedings, defendant tribe was denied a meaningful opportunity to appear and be heard. Late return of proof of service of summons could have contributed to the tribe's failure to appear, and coupled with other circumstances was "good cause" to set aside a default. Big Spring v. Blackfeet Tribe of the Blackfeet Indian Reservation, 175 M 258, 573 P2d 655 (1978).

Failure to Appeal — Issue Res Judicata: Defendant's failure to appeal the denial of his motion to set aside default judgment renders the decision res judicata and precludes the filing of a second action to litigate the same claim or issues decided by the court. Kamp Implement Co. v. Amsterdam Lumber, Inc., 166 M 435, 533 P2d 1072 (1975).

Notice Not Required — Good Cause Not Shown: Motion to set aside entry of default judgment grounded on failure of Clerk to give notice to defendant of entry of default failed to show good cause since no notice of entry of default by the Clerk of the District Court is required. Johnson v. Matelich, 163 M 329, 517 P2d 731 (1973).

Jurisdiction — Cannot Be Obtained by Consent: Objection to lack of jurisdiction over subject matter may be raised at any time. A court lacking jurisdiction cannot acquire it by consent of parties. Corban v. Corban, 161 M 93, 504 P2d 985 (1972).

Answer Filed After Entry by Clerk — Default Properly Given: Plaintiff was entitled to judgment by default where defendants filed answer after entry of default by clerk and receipt of notice of hearing on motion for default, but before actual hearing on the motion, since entry of default by clerk requires no notice to party in default, answer was filed after defendants had received notice of motion for default and defendants failed to move to set aside entry of default for "good cause shown" as they were entitled to do under rules. Sealey v. Majerus, 149 M 268, 425 P2d 70 (1967).

Discretion in Denying Vacating of Default Judgment: Court did not abuse its discretion in denying motion to vacate default judgment. Defendant here was neither unsuspecting nor unaware. Williams v. Superior Homes, Inc., 148 M 38, 417 P2d 92 (1966).

Default Judgment Set Aside — Improper Service: Because service upon a former employee was not service upon the company itself, default judgment was void for want of jurisdiction and set aside. Kraus v. Treasure Belt Min. Co., 146 M 432, 408 P2d 151 (1965).

Default Properly Opened: Fact that corporate defendant claimed Sheriff had never served summons upon the corporation, Sheriff did not remember service of the summons, and default was not taken until 7 years after the plaintiff was injured, constituted clear, unequivocal, and convincing proof to rebut weight accorded Sheriff's return of service of process under 25-3-302 to open default judgment. Sewell v. Beatrice Foods Co., 145 M 337, 400 P2d 892 (1965).

Premature Default Judgment — Voidable: A prematurely entered default judgment is voidable but not void. Sowerwine v. Sowerwine, 145 M 81, 399 P2d 233 (1965), followed in in Re Marriage of Neneman, 217 M 155, 703 P2d 164, 42 St. Rep. 1095 (1985).

Voidable Judgments: A default judgment entered prematurely pursuant to this section could not be set aside under Rule 60(b)(4), M.R.Civ.P., since Rule 60(b)(4) applies to void and not voidable judgments. Sowerwine v. Sowerwine, 145 M 81, 399 P2d 233 (1965).

Delay in Opening Default:

District Court did not abuse its discretion by refusing to open default taken on April 28, 1960, where defendant did not move to open the default until December 15, 1960. Strnod v. Abadie, 141 M 224, 376 P2d 730 (1962).

Vacation of a decree of divorce rendered upon default after publication of summons on the ground of fraud on the part of plaintiff, after a lapse of more than 15 months from its rendition, was error; defendant's remedy being an action in equity to set the decree aside on the ground stated. State ex rel. Thompson v. District Court, 57 M 432, 188 P 902 (1920).

Pending Action in Another State — Default Properly Set Aside: Trial court was correct in setting aside a default judgment entered in a divorce proceeding, where it was disclosed that at the time plaintiff instituted the divorce action in Montana there was pending a divorce action by defendant against plaintiff in California to which plaintiff had filed a cross-complaint. Petrol v. Petrol, 127 M 184, 259 P2d 338 (1953).

Alias Summons — Time for Answer Not Extended: Where defendant's delay in appearing was caused by belief that the service of an alias summons for the purpose of curing a defect in the original service extended the time for answering, the default judgment was properly set aside. Nelson v. Lennon, 122 M 506, 206 P2d 556 (1949).

Substitution of Real Party in Interest Allowed After Default: In action to quiet title, court was authorized after default of original defendant to set aside default, and permit assignee of timber rights to be substituted as the party defendant. State ex rel. Hilyard v. District Court, 120 M 342, 184 P2d 997 (1947).

Relief From Default for Failure to Serve Summons: Relief from a default judgment on the ground that defendant was not personally served with summons is by application to the trial court made within 1 year after rendition of judgment for permission to answer to the merits of the action, and upon expiration of such time limit the trial court is without jurisdiction to vacate the judgment. Complaint filed in instant case was insufficient to invoke the equity jurisdiction of the trial court. Housing Authority of City of Butte v. Murtha, 115 M 405, 144 P2d 183 (1943).

Jurisdictional Defect — Failure of Service as Affecting Default: Though failure to serve some persons interested in property sought to be condemned by a city housing authority did not affect its right to proceed against those served, those not personally served in proper time and who did not voluntarily appear could still within 1 year after rendition of judgment assert their rights and the county's lien for unpaid taxes against the interests of such owners remained unaffected by the proceedings already had. Housing Authority of City of Butte v. Bjork, 109 M 552, 98 P2d 324 (1940).

Execution After Default — Defendant's Remedy: Under the showing of personal service on defendant, her default and default judgment entered, issuance of execution on judgment and return showing complete satisfaction of the judgment, the matter had passed beyond jurisdiction of the court and it was without jurisdiction to pass on motion to set judgment aside, leaving defendant to her suit in equity to set it aside. State ex rel. Redle v. District Court, 102 M 541, 59 P2d 58 (1936).

Fraud — Relief by Suit in Equity: Motion informal in character, to have a default judgment procured by fraud set aside, is not so adequate a remedy as a suit in equity where the matter can be thoroughly investigated, and therefore failure of plaintiff to make such a motion did not bar recourse to equity. Stocking v. The Charles Beard Co., 102 M 65, 55 P2d 949 (1936); Bullard v. Zimmerman, 82 M 434, 268 P 512 (1928).

Motion to Open Default as Motion for New Trial: A motion to set aside a default judgment in a Justice of the Peace Court is akin to, or in effect, a motion for a new trial. Therefore, where such a motion has been made, the judgment is not final until the motion has been disposed of, and the time for appeal to the District Court does not start to run until the date of ruling on the motion. Davis v. Bell Boy Gold Min. Co., 101 M 534, 54 P2d 563 (1936), overruling State ex rel. Cobban v. District Court, 30 M 93, 75 P 862 (1904).

Probate Proceedings:

A decree of distribution of property of an estate may not be set aside on the ground of fraud or other irregularity under the provision for setting aside a default, the remedy of the aggrieved party being by suit in equity. State ex rel. O'Neil v. District Court, 96 M 393, 30 P2d 815 (1934).

The provisions authorizing the District Court to relieve a party from a default under conditions prescribed are applicable to probate proceedings, and the District Court may in a proceeding to determine heirship permit an heir who from any cause was not personally served

with notice to answer to the merits of the proceeding at any time within 1 year from the rendition of the judgment. The technical objection that such notice is not a "summons" and the proceeding not "an action" cannot be sustained. State ex rel. Hahn v. District Court, 83 M 400, 272 P 525 (1928).

Premature Default Judgment — Right to Vacate: A default judgment entered prematurely is not void, but voidable, and therefore requires a motion to set it aside. Such a motion however is one of right, not one of grace on the part of the trial court, and hence it is immaterial whether movant makes a showing sufficient to appeal to the court's discretion. Paramount Publix Corp. v. Boucher, 93 M 340, 19 P2d 223 (1933).

Execution After Default — Knowledge by Third Parties: Where third parties take property under execution sale with full knowledge of all the facts with relation to rendition of the judgment which is sought to be set aside as having been taken against movant through his mistake, surprise, or excusable neglect, and the facts warrant the relief, the remedy should also run against the third parties. Meyer v. Lemley, 86 M 83, 282 P 268 (1929).

Fraud — Decree of Divorce: Where a decree of divorce was nominally in favor of plaintiff wife but was in fact in favor of the defendant, and the plaintiff was induced to procure it through fraud perpetrated upon her by defendant to enable him to marry another woman, she could properly proceed in the original action by motion to have it vacated. Hall v. Hall, 70 M 460, 226 P 469 (1924).

Amendment of Complaint After Default: While as a general rule an amendment of the complaint made after default operates to open the default, provided it introduces a new cause of action or goes to the substance of the pleading, an amendment which goes no further than to substitute a new party plaintiff for the original one because of transfer of interest, is merely formal and has not that effect; it could be made only by leave of court and therefore defendant was not entitled to service of the complaint as thus amended. Price v. Skylstead, 69 M 453, 222 P 1059 (1924).

Notice to Plaintiff Required: In the absence of notice to the plaintiff, the court is without authority to set aside a default. State ex rel. Hart-Parr Co. v. District Court, 58 M 114, 190 P 982 (1920).

Default Based on Insufficient Complaint Subject to Collateral Attack: Since, when a judgment has been rendered by default upon a complaint which is insufficient by reason of its failure to state facts sufficient to constitute a cause of action, the complaint, with a memorandum of the default endorsed upon it, the summons and proof of service, and a copy of the judgment constitute the record under this section. The record itself discloses the infirmity of the judgment and the latter is exposed to collateral attack at any time when it is made the basis of a right. Crawford v. Pierse, 56 M 371, 185 P 315 (1919), distinguished in State ex rel. Delmoe v. District Court, 100 M 131, 46 P2d 39 (1935).

Default After Demurrer Overruled: Where a defendant's demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to an amended complaint has been overruled, and he has failed to file his answer within the time set by the court, and a judgment by default has been entered, the court may in its discretion and upon a proper showing set the judgment aside and permit the defendant to file an answer. State ex rel. Smotherman v. District Court, 50 M 119, 145 P 724 (1914).

Terms of Opening Default Unnecessary: An order vacating a default judgment will not be set aside merely because the court failed to impose terms. Nash v. Treat, 45 M 250, 122 P 745 (1912).

Referee's Acts Immaterial to Default: Wrongdoing on the part of a referee, which in nowise affects the integrity of the judgment entered in accordance with his report, is not ground for a new trial, but rather the statute applies to cases where a party has for one or more of the reasons mentioned been prevented from having a proper hearing in the first instance, and is in default. Ogle v. Potter, 24 M 501, 62 P 920 (1900).

POLICY AGAINST DEFAULT

Unintentional Default for Failure to Appear in Dissolution Proceeding — Abuse of Discretion in Refusal to Set Aside Default Judgment: On November 9, 1998, the wife gave her husband a copy of a petition for dissolution and summons. In early December 1998, the wife's Montana attorney contacted the husband by telephone at his home in Nevada and asked if the husband had reviewed the petition. The husband replied that he had only looked at it briefly and had not retained counsel. Following the conversation, the husband signed the acknowledgment of receipt of summons and petition and sent it back to the attorney, who did not receive it until December 10. However, because the acknowledgment had not been received within the specified timeframe, the attorney had the husband served personally on December 8. Believing that he

had responded appropriately and that the wife would propose a property settlement agreement, the husband took no further action. On December 29, 1998, default judgment was entered against the husband and on January 5, 1999, a final decree was entered, apportioning most of the marital debt to the husband. Upon receipt of the notice of entry of judgment, the husband retained counsel and, within a week, filed a motion to alter or amend judgment, for a new trial, or for relief from judgment. Both parties were granted extensions for further briefing. Subsequently, the parties realized that because the District Court had not issued a formal opinion within 60 days of the motion, as required in Rule 60(b), M.R.Civ.P., the husband's motion was considered denied. He appealed, contending that he had met his burden for setting aside the default judgment. The Supreme Court agreed. The husband's default was unintentional, based on the mistaken belief that the wife's attorney was going to prepare a property settlement proposal and that the husband's acknowledgment of service was the only act required of him until the parties negotiated an agreement. The Supreme Court favors resolution on the merits, and because the husband fulfilled the requirements of Rule 60(b), M.R.Civ.P., and this rule, the District Court's refusal to set aside the default judgment amounted to an abuse of discretion and reversible error. In re Marriage of Winckler, 2000 MT 116, 299 M 428, 2 P3d 229, 57 St. Rep. 486 (2000).

Trial Favored — Default Set Aside: Defendant was personally served with the complaint in the action and forwarded a copy of the summons and complaint to his attorney on the same day. The attorney never received the complaint and did not appear on behalf of defendant. The District Court entered defendant's default. Within 3 days of learning of the default, the attorney moved to set aside the default, and the District Court denied the motion. The Supreme Court held that the policy of the law is to favor trial on the merits and that no great abuse of discretion need be shown to warrant a reversal of an order denying a motion to set aside a default. Hoyt v. Eklund, 249 M 307, 815 P2d 1140, 48 St. Rep. 681 (1991), followed in Waldher v. Fed. Deposit Ins. Corp., 282 M 59, 935 P2d 1101, 54 St. Rep. 241 (1997).

Default Judgment Vacated for Lack of Evidence of Bad Faith or Willfulness: On March 19, 1976, Scott, a truck driver employed by England, struck and killed plaintiffs' elderly father in Alzada, Montana. No criminal charges were filed. Scott returned to Utah where he left England's employ. In April 1977, plaintiffs filed a wrongful death action seeking damages against England and Scott. England was personally served in Salt Lake City, and the office manager accepted service for Scott. In June 1978, plaintiffs noticed a deposition of Scott to take place in Ekalaka. Scott could not be located. Two years later, plaintiffs moved for a default judgment against Scott for failure to appear at the deposition. The trial court entered the default judgment on September 15, 1980. Scott was finally located in March 1981 and filed a motion to set aside the default. The trial court refused and held a hearing on damages. The Supreme Court vacated the judgment, saying there was no evidence showing willfulness or bad faith on the part of England or Scott. Ewalt v. Scott, 206 M 503, 675 P2d 77, 40 St. Rep. 1809 (1983).

Preference for Disposing of Cases on Merits: The record shows the plaintiff took a default after the defendant felt she had been assured she would be given time to negotiate a settlement, and the judgment entered exceeds by $150 the amount defendant owed plaintiff at the time the court entered judgment. The default judgment was therefore set aside because it is preferable to dispose of cases on their merits rather than maintain too strict a regard for technical rules of procedure. Little Horn St. Bank v. Real Bird, 183 M 208, 598 P2d 1109 (1979).

Doubt Resolved in Favor of Motion: Each case wherein it is sought to have a default judgment set aside must be determined on its own facts, and where the showing made leaves the court in doubt or is one upon which reasonable men might reach different conclusions, the doubt should be resolved in favor of the motion. Cure v. Southwick, 137 M 1, 349 P2d 575 (1960); Brothers v. Brothers, 71 M 378, 230 P 60 (1924), followed in Twenty-Seventh Street, Inc. v. Johnson, 220 M 469, 716 P2d 210, 43 St. Rep. 534 (1986). See also In re Marriage of Whiting, 259 M 180, 854 P2d 343, 50 St. Rep. 747 (1993).

Slight Abuse in Exceptional Cases: Default judgments are not favored and it is the policy of the law to have every case tried on its merits. While slight abuse of discretion in refusing to set aside a default judgment is sufficient to justify a reversal of the order, only in exceptional cases will the Supreme Court disturb the action of a trial court in reopening a default. Waggoner v. Glacier Colony of Hutterites, 127 M 140, 258 P2d 1162 (1953).

Slight Abuse as Sufficient: Since courts universally favor trial on the merits, slight abuse of discretion in refusing to set aside a default judgment is sufficient to justify a reversal of the order. Patterson v. Patterson, 120 M 127, 179 P2d 536 (1947); Brothers v. Brothers, 71 M 378, 230 P 60 (1924), followed in Twenty-Seventh Street, Inc. v. Johnson, 220 M 469, 716 P2d 210, 43 St. Rep. 534 (1986).

Manifest Abuse Required — Standard of Appellate Review: The setting aside of default judgments lies within the sound legal discretion of the trial court and reversal may be had only on a showing of manifest abuse, such judgments not being favored and it being the policy of the law to have cases tried on their merits. Courts in applying the statute granting discretion should exercise the same liberal spirit which prompted its enactment, and the Supreme Court requires a stronger showing of abuse to warrant a reversal of an order granting relief than is required in case the court refuses to do so. If an order setting aside a judgment may be justified on any ground, it will be sustained. Kosonen v. Waara, 87 M 24, 285 P 668 (1930).

DISCRETION OF COURT

Failure to Answer Complaint Not Excusable Neglect — Motion to Set Aside Default Properly Denied: Matthews filed a complaint in a wrongful discharge action, and the summons and complaint with an acknowledgment of service were forwarded to defendant's attorney. The attorney returned the acknowledgment, but the attorney's assistant failed to calendar the answer's due date and misfiled the summons and complaint in a different file. An answer was not timely filed, so Matthews sought and was granted a hearing on a default judgment and damages, but defendant's counsel did not attend the hearing, and a default judgment and damages of $185,000 were entered for Matthews. Defendant moved to set aside the default, but the District Court did not rule on the motion within 60 days, so the motion was considered denied. On appeal, defendant argued that the motion to set aside the default should have been granted on grounds of excusable neglect. However, by the time of the default hearing, the lack of attention to Matthew's complaint was a serious disregard of the judicial process and could not be considered excusable neglect, nor did the situation demonstrate extraordinary circumstances justifying setting aside the default judgment under Rule 60(b), M.R.Civ.P. Further, the actions of defense counsel did not constitute gross negligence or actual misconduct, and defendant was not completely innocent in the matter, so any neglect of counsel was properly charged to defendant. The District Court did not abuse its discretion in denying the motion to set aside the judgment, and the default judgment was affirmed. Matthews v. Don K Chevrolet, 2005 MT 164, 327 M 456, 115 P3d 201 (2005), applying the standard for setting aside a default in Blume v. Metropolitan Life Ins. Co., 242 M 465, 791 P2d 784 (1990). See also Lords v. Newman, 212 M 359, 688 P2d 290 (1984).

Slight Abuse of Discretion — Refusal to Set Aside Reversed: Appellate courts reverse refusals to set aside entries of default on a showing of slight abuse of discretion by the lower court. Prejudice, the lack of willfulness, and the presence of factual allegations supporting a defense constituted sufficient abuse of discretion to warrant reversal. Cribb v. Matlock Communications, Inc., 236 M 27, 768 P2d 337, 46 St. Rep. 156 (1989), followed in In re Marriage of Fronk v. Wilson, 250 M 291, 819 P2d 1275, 48 St. Rep. 936 (1991).

Lack of Notice — Default Judgment Voidable: Since the wife previously had appeared in this dissolution action, she was entitled to 3 days' written notice of the husband's motion for default judgment under Rule 55(b), M.R.Civ.P. The husband's failure to serve the requisite notice rendered the order of default judgment premature and voidable. The lack of notice does not automatically entitle a party to relief but is a consideration to be weighed by the court in exercising its discretion under this Rule. In re Marriage of Neneman, 217 M 155, 703 P2d 164, 42 St. Rep. 1095 (1985), followed in Dean v. Hoepfner, 245 M 366, 801 P2d 579, 47 St. Rep. 2162 (1990).

Standard of Review — Neglect of Attorney: The Supreme Court held that the trial court abused its discretion by failing to set aside a default judgment when the defendants were completely abandoned by their attorney (after he made a general appearance on behalf of the clients who had neither been served with process nor authorized him to so act), proceeded with diligence to rectify the court's action, and alleged a potential defense to the action. The Supreme Court determined that, under the facts of the case, it would be unconscionable to apply the general rule charging the client with the attorney's neglect. The Supreme Court clarified which standard of review applies in default cases: (1) when a trial court has granted a motion to vacate the default, a strict standard of review applies—the trial court's action will only be set aside upon a showing of manifest abuse; (2) when a trial court has denied a motion to set aside a default, a "no great abuse" standard applies—only "slight abuse" is sufficient to reverse an order refusing to set aside a default. Lords v. Newman, 212 M 359, 688 P2d 290, 41 St. Rep. 1793 (1984), followed in In re Marriage of Whiting, 259 M 180, 854 P2d 343, 50 St. Rep. 747 (1993), in In re Marriage of Martin, 265 M 95, 874 P2d 1219, 51 St. Rep. 443 (1994), and Peak Dev., LLP v. Juntunen, 2005 MT 82, 326 M 409, 110 P3d 13 (2005).

Default Judgment — Setting Aside — Abuse of Discretion: Plaintiffs owned land through which a road ran. The public used that road in a continuous and uninterrupted way for over 25 years without objection by the plaintiffs. Plaintiffs then filed a petition for abandonment of the road with the county and led the county to believe that further judicial action would be forestalled until completion of administrative proceedings on the petition. Plaintiffs then obtained a default judgment against the county 3 weeks before the county filed an answer to the plaintiffs' complaint. The county moved to set aside the default and the motion was granted. In reviewing this, the Supreme Court applied the rule that a District Court's discretion to set aside entry of default should be exercised liberally to promote trials on the merits and that an order setting aside default will be reversed only in exceptional cases. In finding no abuse of discretion by the District Court, the court found that the county had supported its attempt to cure the default not just by filing an answer but also by filing an affidavit detailing the circumstances of the default, which was sufficient to support the District Court's finding that the delay was not totally inexcusable. Additionally, the county had made a showing in its answer that there was a defense available to the plaintiffs' action since the public possessed a prescriptive easement. The easement's existence was found by the court to be supported by the plaintiffs' complaint itself. Accordingly there was no abuse of discretion in permitting the case to proceed to trial. McClurg v. Flathead County Comm'rs, 188 M 20, 610 P2d 1153 (1980).

Defendant Represented by Counsel — Motion Properly Denied: Denial of defendant's motion to set aside entry of default judgment and granting of plaintiff's motion for entry of default judgments were not an abuse of discretion where defendant's claims that he had not been informed of proceedings against him were countered by fact that he had been represented by counsel at material times and that he was aware of necessity of filing answer within 30 days of denial of his motion to dismiss. Johnson v. Matelich, 163 M 329, 517 P2d 731 (1973).

Judgment Set Aside — Lack of Knowledge by Defendant: Court's discretion was properly exercised when default judgment was set aside because it was obtained without knowledge of president or directors of defendant corporation. Prentice Lumber Co., Inc. v. Hukill, 161 M 8, 504 P2d 277 (1972).

Abuse of Discretion — Sufficient to Set Aside: Under the circumstances of this case, default judgment was set aside and judge's slight abuse of discretion in denying motion to set aside merited reversal. Sewell v. Beatrice Foods Co., 145 M 337, 400 P2d 892 (1965).

Slight Abuse in Exceptional Cases Required for Reversal: Default judgments are not favored. Although slight abuse of discretion in refusing to set aside a default judgment is sufficient to justify a reversal, only in exceptional cases will the Supreme Court disturb the action of a trial court in reopening a default. Cure v. Southwick, 137 M 1, 349 P2d 575 (1960).

Application in Exceptional Cases Only: While the Supreme Court will disturb the action of a trial court in opening default only in exceptional cases, no great abuse of discretion by the trial court in refusing to set aside a default need be shown to warrant a reversal. Holen v. Phelps, 131 M 146, 308 P2d 624 (1957).

Decree of Distribution: The District Court erred in refusing to take jurisdiction of a petition to set aside a decree of distribution, within 6 months after its rendition. State ex rel. O'Neil v. District Court, 96 M 393, 30 P2d 815 (1934).

No Great Abuse Required for Reversal: Judgments by default are not favored, it being the policy of the law to have every case tried upon its merits; trial courts in passing upon motions for opening default judgments should exercise the same liberal spirit which prompted the Legislature in enacting the provision authorizing opening of the default, and where a court refuses to grant such a motion no great abuse of discretion need be shown to warrant a reversal. Reynolds v. Gladys Belle Oil Co., 75 M 332, 243 P 576 (1926), followed in Twenty-Seventh Street, Inc. v. Johnson, 220 M 469, 716 P2d 210, 43 St. Rep. 534 (1986).

Review on Case-by-Case Basis: An application to set aside a default is addressed to the sound discretion of the trial court and its action will not be disturbed on appeal unless it is manifest that its discretion has been abused, each case being decided upon its own facts. Pac. Acceptance Corp. v. McCue, 71 M 99, 228 P 761 (1924); Robinson v. Petersen, 63 M 247, 206 P 1092 (1922).

Degree of Abuse Required: A stronger showing of abuse of discretion must be made to warrant a reversal of an order granting a motion to set aside a default than of one refusing it. Eder v. Bereolos, 63 M 363, 207 P 471 (1922).

Motion Directed to Court's Discretion: Applications to set aside default judgments are addressed to the discretion of the trial court, and its action thereon will not be interfered with unless a manifest abuse of discretion is shown. Eder v. Bereolos, 63 M 363, 207 P 471 (1922); Greene v. Rowan, 29 M 263, 74 P 456 (1903); Hegaas v. Hegaas, 28 M 266, 72 P 656 (1903).

Abuse of Discretion Required: An order refusing a motion to vacate a judgment on the ground of mistake, surprise, or excusable neglect will not be reversed on appeal, if no complaint is made that the lower court abused its discretion. Ferguson v. Parrott, 36 M 352, 92 P 965 (1907).

FORM OF APPLICATION TO OPEN DEFAULT

Counteraffidavits Not Permitted: In ruling on a motion to set aside a default, the affidavits of merits filed by the petitioner cannot be controverted by counteraffidavits. The court confines itself to an investigation of the affidavit of merits to see whether a prima facie defense is made out. Holen v. Phelps, 131 M 146, 308 P2d 624 (1957).

Presumption — Prima Facie Defense: Where defendant alleged that he was owner of the record title in his motion to set aside a default and in his affidavit of merits, he has set out a prima facie defense in view of 70-19-404 which provides that the person establishing legal title is presumed to be in possession. Holen v. Phelps, 131 M 146, 308 P2d 624 (1957).

Request to Open Default — Filing of Answer Required: A party defendant, on application to set aside his default, must in addition to excusing his delinquency support the motion by an affidavit of merits setting forth the facts constituting his defense, or tender with the motion and affidavit a copy of his proposed answer. Holen v. Phelps, 131 M 146, 308 P2d 624 (1957); State ex rel. Stephens v. District Court, 43 M 571, 118 P 268 (1911); Vadnais v. E. Butte Extension Copper Min. Co., 42 M 543, 113 P 747 (1911); Donlan v. Thompson Copper & Mill. Co., 42 M 257, 112 P 445 (1910); Pearce v. Butte Elec. Ry., 40 M 321, 106 P 563 (1910); Schaeffer v. Gold Cord Min. Co., 36 M 410, 93 P 344 (1908); Bowen v. Webb, 34 M 61, 85 P 739 (1906); Donnelly v. Clark, 6 M 135, 9 P 887 (1886).

Meritorious Defense Not to Be Controverted: On the hearing of a motion to set aside a default judgment, defendant's showing that he has a meritorious defense may not be controverted by evidence. Eder v. Bereolos, 63 M 363, 207 P 471 (1922).

Application Denied — Proposed Answer Insufficient: Assuming that an answer may supply the place of an affidavit of merits in aid of a motion to vacate a default judgment, such a pleading, which was in effect a general denial and did not set forth the facts upon which the defendant relied to defeat plaintiff's claim so as to enable the court to determine whether he had a prima facie defense upon the merits, was insufficient to warrant the granting of the motion. Vadnais v. E. Butte Extension Copper Min. Co., 42 M 543, 113 P 747 (1911); Donlan v. Thompson Falls Copper & Mill. Co., 42 M 257, 112 P 445 (1910); Pearce v. Butte Elec. Ry., 40 M 321, 106 P 563 (1910).

Purpose of Answer: The defaulted party must show that he has a defense, otherwise the court cannot determine whether justice will be promoted or retarded by setting aside the default. Vadnais v. E. Butte Extension Copper Min. Co., 42 M 543, 113 P 747 (1911).

Form of Affidavit: An affidavit of merits, on motion to set aside a default judgment, may be made by the attorney of an absent party, and the verification may be made upon information and belief. State ex rel. Kolbow v. District Court, 38 M 415, 100 P 207 (1909).

NEGLECT OF DEFENDANT

Failure of Defendants to Monitor Litigation — Relief From Default Judgment Properly Denied: Although default judgments are not favored, litigants nevertheless have a duty to monitor litigation. Here, the District Court did not abuse its discretion in refusing to set aside a default judgment when defendants: (1) knew that litigation was proceeding; (2) knew that a status conference had been scheduled but failed to attend in person or to hire an attorney to appear in their behalf; (3) failed to notify the court or the opposing party of their intention to miss the conference; (4) were aware that service upon the listed post-office box was considered effective service for all matters regarding the litigation; and (5) neglected to notify the court of a change of address. Caplis v. Caplis, 2004 MT 145, 321 M 450, 91 P3d 1282 (2004).

Failure to Litigate Claims Justifying Dismissal of Counterclaims With Prejudice — Lack of Specific Findings on Counterclaims Not Erroneous: Defendants failed to litigate the claims against them, resulting in default judgment in plaintiffs' favor and dismissal of defendants' counterclaims with prejudice. On appeal, defendants asserted that the District Court committed reversible error in failing to mention the counterclaims and enter general findings from which the Supreme Court could determine whether the counterclaims had merit. The Supreme Court affirmed dismissal of the counterclaims. Failure to litigate the claims justified dismissal of the counterclaims with prejudice, and entry of the default judgment on the issues in the complaint also served to settle any compulsory counterclaims arising out of the transaction or occurrence that was the subject of the suit. Further, the District Court did not err in failing to make specific findings regarding the counterclaims because the counterclaims were considered dismissed and

res judicata upon entry of the default judgment in favor of plaintiffs. Caplis v. Caplis, 2004 MT 145, 321 M 450, 91 P3d 1282 (2004).

No Abuse of Discretion in Granting Marriage Dissolution Default Judgment Given Failure to Establish Good Cause to Set Aside Default: The wife Florence petitioned for a legal separation to which her husband William did not respond. The District Court subsequently entered a default judgment against William, who appealed. The Supreme Court noted that default judgments are not favored and that a finding of even a slight abuse of discretion warrants setting aside a default judgment if good cause is shown. The court then applied the criteria in In re Marriage of McDonald, 261 M 466, 863 P2d 401 (1993), to determine whether William established good cause, which include whether: (1) the defaulting party proceeded with diligence; (2) the defaulting party's neglect was excusable; (3) the defaulting party has a meritorious defense to the claim; and (4) the judgment, if permitted to stand, will injure the defaulting party. William met the first and third criteria, but his neglect was not excusable, nor could he show that default would result in injury. Having failed to meet the McDonald good cause criteria, the court declined to address possible relief under Rule 60(b), M.R.Civ.P., and default judgment was affirmed. In re Marriage of Shannon, 2004 MT 25, 319 M 357, 84 P3d 645 (2004), distinguishing In re Marriage of Winckler, 2000 MT 116, 299 M 428, 2 P3d 229 (2000).

Failure to Respond — Disrespect for Judicial Process: The District Court did not abuse its discretion by entering a default judgment when husband ignored a petition and summons and, even though he claimed to have hired an attorney upon receipt of the petition, failed to pay a retainer, could not remember the attorney's name, and made no attempt to enter his appearance individually. In re Marriage of Mikesell, 257 M 482, 850 P2d 294, 50 St. Rep. 372 (1993).

Failure to File Written Request for Hearing on Wage Claims — Waiver of Right to Contest Amount: The District Court did not abuse its discretion in granting a default judgment on a claim for unpaid wages when defendant employers failed to file a written request for an administrative hearing to explain the claims, thereby waiving their right to later contest the claim amounts. State ex rel. Vetch v. Hulman, 225 M 327, 732 P2d 843, 44 St. Rep. 275 (1987).

Neglect of Attorney Attributable to Client: When defendant's attorney received notices and talked on the phone on behalf of his clients but failed to do anything in response to numerous requests by opposing counsel and continued to postpone preparation and filing of a pleading, the attorney's procrastination was a type of neglect which was properly attributable to a client and did not constitute abandonment, which would excuse neglect. The Supreme Court found no abuse of discretion in District Court's conclusion that the attorney's conduct was not excusable neglect. Paxson v. Rice, 217 M 521, 706 P2d 123, 42 St. Rep. 1355 (1985).

Default Preventable by Attorney — Client Not Absolutely Liable for Attorney's Neglect: It appears from a review of the record that attorney for appellants could have easily acted to prevent entry of default and default judgment. However, the court has moved away from the rule that a client is absolutely responsible for attorney's neglect. Lords v. Newman, 212 M 359, 688 P2d 290, 41 St. Rep. 1793 (1984). Furthermore, the court will not overturn a District Court order setting aside a default unless the order amounts to a manifest abuse of discretion. There are, in the affidavit of appellants' counsel, grounds to overturn the default, and that order must stand. Graham v. Mack, 216 M 165, 699 P2d 590, 41 St. Rep. 2521 (1984).

Standard of Review — Neglect of Attorney: The Supreme Court held that the trial court abused its discretion by failing to set aside a default judgment when the defendants were completely abandoned by their attorney (after he made a general appearance on behalf of the clients who had neither been served with process nor authorized him to so act), proceeded with diligence to rectify the court's action, and alleged a potential defense to the action. The Supreme Court determined that, under the facts of the case, it would be unconscionable to apply the general rule charging the client with the attorney's neglect. The Supreme Court clarified which standard of review applies in default cases: (1) when a trial court has granted a motion to vacate the default, a strict standard of review applies—the trial court's action will only be set aside upon a showing of manifest abuse; (2) when a trial court has denied a motion to set aside a default, a "no great abuse" standard applies—only "slight abuse" is sufficient to reverse an order refusing to set aside a default. Lords v. Newman, 212 M 359, 688 P2d 290, 41 St. Rep. 1793 (1984), followed in In re Marriage of Whiting, 259 M 180, 854 P2d 343, 50 St. Rep. 747 (1993), and Peak Dev., LLP v. Juntunen, 2005 MT 82, 326 M 409, 110 P3d 13 (2005).

Failure to Pay Fee for Filing Pleading: District Court did not abuse its discretion in refusing to set aside default judgment against defendant, and the judgment would not be overturned on appeal from denial of motion to set aside the default judgment, where the court found that negligent failure to pay filing fee for answer until 2 ½ months after filing of the answer was not excusable, that the fee was not filed until after plaintiffs requested entry of default, that the

answer did not present a prima facie meritorious defense, that the evidence overwhelmingly indicated there was no defense, and that defendant's reckless disregard for the rights and feelings of the plaintiffs and his attempt to prolong the litigation were adequate reasons to deny his motion to set aside the judgment. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Excusable Neglect — Local Custom Requiring That Absent Attorney Be Notified of Hearing: Husband's attorney failed to appear at District Court hearing on wife's motion to amend decree of dissolution of marriage and to hold husband in contempt for failure to pay child support. Court ruled in wife's favor by default. Husband moved to set aside default, claiming this was excusable neglect because by local custom and professional courtesy, attorney should have been notified of hearing. The District Court found excusable neglect but ordered husband's lawyer to pay wife's attorney fees. The Supreme Court dismissed the appeal for lack of jurisdiction because no final order had been entered by the District Court. Rex v. Rex, 199 M 328, 649 P2d 460, 39 St. Rep. 1432 (1982).

Excusable Neglect — Motion to Set Aside Improperly Denied: Plaintiff entered into a contract to sell real property and a beer license to Dayton, who assigned the contract to Borkoski. Plaintiff later brought an action against Dayton and Borkoski. Borkoski failed to appear and a default judgment was entered. Borkoski believed that he did not have to appear until Dayton was served. He also called the clerk of court, who said that no hearing date had been set. In addition, the defendant only had 6 days from the time served until the default judgment was entered. Borkoski sought to have the default set aside but his motion was denied. On appeal, the court found that these facts constitute excusable neglect and the District Court abused its discretion in not setting aside the default judgment. Kootenai Corp. v. Dayton, 184 M 19, 601 P2d 47 (1979).

Failure to Update Name of Registered Agent: Where a complaint was served on a person listed as the registered agent of the defendant corporation, but who was no longer the agent of the corporation, and the corporation diligently sought to defend the action upon receipt of actual notice, failure of the defendant corporation to replace the name of its registered agent was excusable neglect and entry of default judgment was an abuse of the trial court's discretion. Clute v. A.B. Concrete, 179 M 475, 587 P2d 392 (1978).

Motion Properly Denied: The court properly denied a motion to set aside a default judgment against a defendant who allegedly received no notice of the action because he failed to meet the burden of proving, as the moving party, inadvertence or excusable neglect. Purington v. Soundwest, 173 M 106, 566 P2d 795 (1977).

Papers Mislaid: Copies of summons and complaint were served on corporation's president and mislaid. A diligent search was made, but papers could not be found until too late. Defense counsel made assertion that no service had been had on his client, and opposing counsel remained silent when he should have spoken. The clerk's files showed no return, required to be made in 10 days, until day of entry of judgment, as serving officer mailed it to plaintiff's attorney where it remained for 18 days. Under these circumstances, District Court erred in denying motion to set aside judgment. Madson v. Petrie Tractor & Equip. Co., 106 M 382, 77 P2d 1038 (1938).

Neglect Alone Insufficient: The power granted to the District Court to set aside a default judgment is predicated upon the neglect of the movant, coupled with a showing of facts and circumstances which will reasonably excuse it. Hence, the presence of neglect alone is not sufficient to deny relief. Reynolds v. Gladys Belle Oil Co., 75 M 332, 243 P 576 (1926).

Attorney's Neglect Imputed to Client: The neglect of an attorney to make timely appearance is the neglect of the client and the latter can be relieved from the consequences of the attorney's neglect only on a showing which would excuse the client under like circumstances. First St. Bank of Thompson Falls v. Larsen, 72 M 400, 233 P 960 (1925).

Failure to Retain Attorney: Where defendant, after writing a letter to an attorney relative to the action against him, failed to have a consultation with the attorney as he had promised to do and to ascertain whether he would appear for him, and on his application to vacate the resultant default judgment did not attempt to excuse his own or the attorney's neglect, refusal of the motion to vacate was not an abuse of discretion. First St. Bank of Thompson Falls v. Larsen, 72 M 400, 233 P 960 (1925).

Forgetfulness Insufficient: Mere forgetfulness is not a sufficient excuse for setting aside a default judgment. Lovell v. Willis, 46 M 581, 129 P 1052 (1913).

MISTAKE

Failure of Pro Se Litigant to Include Filing Fee Considered Excusable Neglect Warranting Reversal of Default Judgment: A Texas defendant, acting pro se, filed a timely answer and

special appearance in response to plaintiff's complaint and summons, but failed to include the $65 filing fee, which was not mentioned in the summons. By the time that defendant learned that a filing fee was required to be submitted with the response, plaintiff had already applied for and received a default judgment without notice to defendant. Defendant's motion to set aside the default judgment was denied. On appeal, the Supreme Court held that defendant had acted with diligence and that the failure to appear was not due to inexcusable neglect or disrespect for the court, but that defendant mistakenly assumed that if the instructions in the summons were followed, the answer would be filed. Defendant satisfied the good cause criteria in this rule, and because defendant's default was not willful, the neglect was excusable under Rule 60(b), M.R.Civ.P. The District Court's refusal, by operation of law, to set aside the default judgment was at a minimum a slight abuse of discretion. Thus, because of the policy to resolve issues on the merits, the Supreme Court reversed the default judgment and remanded for further proceedings. Sun Mtn. Sports, Inc., v. Gore, 2004 MT 56, 320 M 196, 85 P3d 1286 (2004).

Unintentional Default for Failure to Appear in Dissolution Proceeding — Abuse of Discretion in Refusal to Set Aside Default Judgment: On November 9, 1998, the wife gave her husband a copy of a petition for dissolution and summons. In early December 1998, the wife's Montana attorney contacted the husband by telephone at his home in Nevada and asked if the husband had reviewed the petition. The husband replied that he had only looked at it briefly and had not retained counsel. Following the conversation, the husband signed the acknowledgment of receipt of summons and petition and sent it back to the attorney, who did not receive it until December 10. However, because the acknowledgment had not been received within the specified timeframe, the attorney had the husband served personally on December 8. Believing that he had responded appropriately and that the wife would propose a property settlement agreement, the husband took no further action. On December 29, 1998, default judgment was entered against the husband and on January 5, 1999, a final decree was entered, apportioning most of the marital debt to the husband. Upon receipt of the notice of entry of judgment, the husband retained counsel and, within a week, filed a motion to alter or amend judgment, for a new trial, or for relief from judgment. Both parties were granted extensions for further briefing. Subsequently, the parties realized that because the District Court had not issued a formal opinion within 60 days of the motion, as required in Rule 60(b), M.R.Civ.P., the husband's motion was considered denied. He appealed, contending that he had met his burden for setting aside the default judgment. The Supreme Court agreed. The husband's default was unintentional, based on the mistaken belief that the wife's attorney was going to prepare a property settlement proposal and that the husband's acknowledgment of service was the only act required of him until the parties negotiated an agreement. The Supreme Court favors resolution on the merits, and because the husband fulfilled the requirements of Rule 60(b), M.R.Civ.P., and this rule, the District Court's refusal to set aside the default judgment amounted to an abuse of discretion and reversible error. In re Marriage of Winckler, 2000 MT 116, 299 M 428, 2 P3d 229, 57 St. Rep. 486 (2000).

Representations by Plaintiff's Counsel: Trial court erred in refusing to set aside a default judgment entered after defendant's failure to answer, where evidence disclosed that defendant after being served with process went to see the plaintiff's lawyer, and not finding him in talked with an associate who promised to relay defendant's message to him to the effect that the plaintiff was suing the wrong colony, and defendant understood that no further action would be required. Waggoner v. Glacier Colony of Hutterites, 127 M 140, 258 P2d 1162 (1953).

Multiple Defendants — Mistake as to Meaning of Summons: Where, in an action against eight defendants, the one most vitally interested in the result was not served with summons and did not know that it had been brought until several days after default and the others relied upon him to make appearance and defend the action, and one of them was under the impression that the summons served upon him meant simply that he was to appear as a witness, etc., refusal to open the default was error. Delaney v. Cook, 59 M 92, 195 P 833 (1921).

Ignorance of Law No Excuse: Ignorance of the law governing time for presentation of a bill of exceptions for settlement is no excuse for a default. Canning v. Fried, 48 M 560, 139 P 448 (1914).

NONRESIDENT DEFENDANT

Action to Quiet Title: In an action brought for the purpose of removing clouds on title to real property, service of process was made upon nonresident defendants by publication. Their default was entered and they moved to have the decree vacated, not filing any affidavit in support of the motion. The application was addressed to the court's discretion and the applicants were required to make a showing that they did not have actual notice of the pendency of the action, and since

they did not do so, the motion was properly denied. Skinner v. Carlysle Oil Dev. Co., 80 M 464, 260 P 1038 (1927).

Conditions Required to Set Aside Default: The application of a defaulting nonresident defendant not personally served with summons, like that of one who has been personally served, but who through mistake, inadvertence, surprise, or excusable neglect suffered default to be taken against him and to have the judgment set aside, is addressed to the sound legal discretion of the District Court, and the movant must show that he did not have actual notice of the pendency of the action in time to make a defense, that he proceeded promptly to have the default set aside, that he has prima facie a defense upon the merits, and that the judgment if permitted to stand will affect him injuriously. Smith v. Collis, 42 M 350, 112 P 1070 (1910).

Probate Proceedings: After the default of all persons claiming as heirs of a deceased person who did not appear on a certain date to establish their heirship had been entered, foreign claimants filed a verified petition to set it aside. The claimants alleged that they did not become aware of decedent's death until after the default had been entered and that their interests would be lost to them if it was permitted to stand, and they made a prima facie showing that they were heirs at law of the decedent. Where it appeared that they exercised the utmost diligence in getting their claims before the court, such heirs should be allowed to appear in the proceedings, and it was error to refuse to set aside the default. State ex rel. Kolbow v. District Court, 38 M 415, 100 P 207 (1909).

Collateral References

Judgment *key* 135, et seq.

49 C.J.S. Judgments §§333 through 340.

47 Am. Jur. 2d Judgments §852, et seq.

False allegation of plaintiff's domicile for residence in the state as ground for vacation of default decree of divorce. 6 ALR 2d 596.

Mistaken belief or contention that defendant had not been served, or had not been legally served, with summons, as ground for setting aside default judgment. 153 ALR 449.

Rule 55(d). Plaintiffs, counterclaimants, cross-claimants.

Commission Notes

Subdivision (a) and (d) of the rule are identical with the Federal Rule. Subdivision (e) of the Federal Rule, prohibiting entry of default against the United States without establishment of the right to relief by evidence, has been omitted. Of course, any such state rule could only apply to the state; our present statutes do not treat the State of Montana differently from other litigants as regards the entry of default against it, and there seems to be no reason to change the law.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, that portion of the above commission note regarding the identical nature of the Federal Rule was still applicable.

Case Notes

Default for Failure to Reply: Where the allegations of the defendant's "further and separate defense" are such as to require a reply, and none is filed, defendant is entitled to have judgment entered without other proof than the pleadings. Anaconda Copper Min. Co. v. Thomas, 48 M 222, 137 P 380 (1913), explained in Matteson v. Ackerson, 104 M 239, 66 P2d 797 (1937).

Rule 56. Summary judgment

Case Notes

Opportunity for Opposing Parties to Present Facts Relevant to Summary Judgment Motion Required: The District Court granted summary judgment in a probate case, awarding a putative common-law spouse a portion of the estate. However, in this case, summary judgment constituted reversible error because the estate was not given notice and a full and fair opportunity to present facts relative to the summary judgment motion and to address issues of material fact regarding the claims of the putative spouse. In re Estate of Marson, 2005 MT 222, 328 M 348, 120 P3d 382 (2005), following Hereford v. Hereford, 183 M 104, 598 P2d 600 (1979).

Trust Matters Subject to Summary Judgment: Two sons, Thomas and William, sought to divide their mother's trust but failed to present sufficient evidence that good cause existed for the division. The District Court granted summary judgment to two other sons who were respondents. Thomas and William appealed on grounds that 72-33-416 necessitates a trial whenever trustees and beneficiaries have a disagreement about a trust, because of the inherent discretion in trust decisions, making summary judgment inappropriate for nearly all trust

matters. The Supreme Court disagreed. Not every situation involving family disagreements or moves by beneficiaries will necessarily constitute good cause for a trust decision. Here, Thomas and William were unable to demonstrate that the District Court's conclusion that good cause did not exist was incorrect. Because trust matters are subject to the same principles of summary judgment as other matters, absent a showing of good cause to divide the trust, summary judgment for respondents was proper. In re Stevens Revocable Trust, 2005 MT 106, 327 M 39, 112 P3d 972 (2005).

Failure to Establish Elements of Prima Facie Retaliation Case — Partial Summary Judgment Proper: The elements of a prima facie case under Title VII of the federal Civil Rights Act of 1964 are: (1) the plaintiff engaged in a protected activity; (2) thereafter, the employer took an adverse employment action against the plaintiff; and (3) a causal link existed between the protected activity and the employer's action. In cases under Title 49, ch. 2, commonly known as the Montana Human Rights Act, elements of a prima facie retaliation case generally consist of proof that the charging party was qualified for employment, was engaged in a protected activity, and was subjected to adverse action, as well as proof of a causal connection or other circumstances raising a reasonable inference that the charging party was treated differently because of the protected activity. In the present case, the Supreme Court applied the three-prong burden-shifting test for summary judgment motions in disparate treatment cases set forth in Heiat v. E. Mont. College, 275 M 322, 912 P2d 787 (1996), to evaluate whether Rolison's complaint constituted a prima facie case. Rolison established the protected activity element of a prima facie case by filing a gender discrimination case that the employer was aware of. However, Rolison failed to raise a genuine issue of material fact regarding the adverse employment action of the retaliation claim, thus failing the Heiat test for a prima facie case, so partial summary judgment for the employer on the state and federal discrimination claims was proper. Rolison v. Bozeman Deaconess Health Serv., Inc., 2005 MT 95, 326 M 491, 111 P3d 202 (2005). See also Wrighten v. Metropolitan Hosp., Inc., 726 F2d 1346 (9th Cir. 1984), and Beaver v. Dept. of Natural Resources and Conservation, 2003 MT 287, 318 M 35, 78 P3d 857 (2003).

Employer Unaware That Employee Would Be Injured During Routine Job Activity — No Showing of Employer Malice Under Sherner Standard: Olszewski was seriously injured while loading building trusses onto a flatbed truck. Olszewski recovered workers' compensation benefits but also brought an action alleging that the injury was covered under the 1999 intentional act exception in 39-71-413, which was in effect when the injury occurred. The District Court found no showing of malicious action on the part of the employer or foreman and granted summary judgment to the employer and foreman. On appeal, the Supreme Court applied the malicious intent standard in Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), and affirmed. Olszewski was unable to provide evidence that the employer knew that employees would actually be injured by a routine that was usually performed without incident, and absent a showing of that material fact, the statutory exception did not apply and summary judgment was proper. Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004).

Three-Year Statute of Limitations Applicable to Breach of Bailment Obligation: Pursuant to a breach of a bailment agreement related to the transfer of 10 horses and tack, plaintiff filed a claim for the value of the property, asserting that under 27-2-202(2), 5 years were allowed to bring the claim as a breach of contract. The District Court concluded that the voluntary bailment agreement was not a contract, but rather an obligation, which was governed by the 3-year statute of limitations in 27-2-202(3), and because the claim was not brought within 3 years, summary judgment for defendants was appropriate. On appeal, the Supreme Court affirmed. Regardless of the fact that plaintiff characterized the claim as a breach of contract, there was no evidence of an expressed agreement for sale of the property, so defendants were obligated but not contractually required to account for the property. Plaintiff's election to sue on a contract theory did not operate to grant 2 additional years for plaintiff to assert her rights. The District Court's conclusion that plaintiff's action was not timely was correct. Demarest v. Broadhurst, 2004 MT 147, 321 M 470, 92 P3d 1168 (2004).

Improper for District Court to Look Beyond Language of Amended Judgment Decree When Judgment Not Ambiguous or Obscure: Following remand of Harland v. Anderson, 169 M 447, 548 P2d 613 (1976), which awarded defendant summary judgment on plaintiff's claims for a prescriptive easement across defendant's property, the District Court took up plaintiff's alternative request to condemn an easement across defendant's land for plaintiff's use. In 1983, the court granted plaintiff an unrestricted easement, and defendant moved to amend the judgment to provide compensation for the taking of the easement, but the motion was denied. The parties then entered a stipulation providing $7,500 for defendant's attorney fees and costs, and the parties agreed not to appeal the amended judgment. The stipulation was approved.

Almost 20 years later, plaintiffs commenced litigation seeking declaratory and injunctive relief on grounds that defendant had wrongfully interfered with the 1983 unrestricted easement. Defendant claimed that the 1983 right-of-way was limited to agricultural and grazing purposes and moved for summary judgment on grounds of res judicata, judicial estoppel, laches, and waiver. The District Court concluded that the language of the 1983 amended judgment implied that the findings and conclusions were necessary to the judgment, so the court reviewed the 1983 findings and conclusions, concluded that the easement was restricted to agricultural and grazing purposes, granted defendant summary judgment on res judicata grounds, and dismissed plaintiffs' summary judgment motion and claim with prejudice. On appeal, plaintiffs asserted that the District Court erred in looking beyond the plain language of the 1983 amended judgment. The Supreme Court cited Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), for the holding that a District Court may refer to the entire record in an original case when construing a decree that is obscure or ambiguous, but that when the language of the decree is plain, there is no need to construe it or to resort to pleadings or evidence. In this case, the 1983 decree clearly and unambiguously granted plaintiff an unrestricted easement across defendant's ranch, and it was error for the District Court to look beyond the face of the decree instead of accepting it at face value and speculating as to the reasoning behind the particular result. Thus, summary judgment for defendant was reversed, and the District Court was ordered to enter summary judgment for plaintiffs. Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004).

No Requirement That Court Take as True Conclusions or Allegations With No Factual Basis or Contrary to What Has Been Adjudicated — Estoppel — Dismissal Proper: In Cowan v. Cowan, 2004 MT 68, 320 M 332, 87 P3d 443 (2004), the District Court held that a husband's parents and sister had no enforceable ownership interests in their own right to disputed marital property because any interest that they arguably had was dependent on the husband's equitable interest, which was litigated in the dissolution action in which the husband denied any interest in the property. Nevertheless, the parents and sister brought a separate action, claiming that the parents were trustors of a trust created for the husband's benefit and that the sister was a successor trustee or trust beneficiary. The District Court dismissed the complaint pursuant to Rule 12(b), M.R.Civ.P., for failure to state a claim. The parents and sister appealed, but the Supreme Court affirmed. The District Court did not consider matters outside the pleadings, which would have required that the dismissal motion be converted to a summary judgment motion, but properly considered only the complaint and incorporated documents. Moreover, the court was not under any duty to take as true legal conclusions or allegations that had no factual basis or that were contrary to what had already been adjudicated. Any purported interest in the property by the husband was barred by estoppel. The prior decision that adjudicated the husband's interest in the property extinguished any derivative claim that the parents and sister might have had, and the complaint and attached documents supported the District Court's granting of the motion to dismiss. Cowan v. Cowan, 2004 MT 97, 321 M 13, 89 P3d 6 (2004), following Kauffman-Harmon v. Kauffman, 2001 MT 238, 307 M 45, 36 P3d 408 (2001).

Summary Judgment for Third Party Affecting Final Judgment Reviewable on Appeal: A tennis club filed a negligence and breach of contract action against a contractor who constructed a tennis facility for the club. The contractor in turn filed a third-party negligence and breach of contract action against the subcontractor who prepared the ground surface and laid the asphalt for the tennis courts. The District Court granted summary judgment for the subcontractor, and the contractor appealed. The subcontractor contended that the judgment was not appealable because it was not designated in the notice of appeal, as required by Rule 4(c), M.R.App.P. (Title 25, ch. 21). The Supreme Court noted that summary judgments are generally interlocutory and not appealable until final judgment is rendered, but also noted that under Rule 2, M.R.App.P. (Title 25, ch. 21), any intermediate order or decision properly objected to that involves the merits or that necessarily affects the judgment, except a decision or order from which an appeal may be taken, is subject to review. The summary judgment in this case preceded and affected the final judgment, and because the contractor's objection was preserved, the summary judgment was reviewable on appeal. Glacier Tennis Club at The Summit, LLC v. Treweek Constr. Co, Inc., 2004 MT 70, 320 M 351, 87 P3d 431 (2004).

No Waiver of Attorney Fees by Injured Third-Party Claimant Who Prevails in Insurance Coverage Action on Remand: Following remand in Christensen v. Mtn. W. Farm Bureau Mut. Ins. Co., 2000 MT 378, 303 M 493, 22 P3d 624 (2000), the Christensens requested attorney fees incurred in the declaratory judgment action. The District Court denied the request, and the Christensens appealed. Defendant insurer argued that because the Christensens never requested attorney fees in their motion for summary judgment or in their first appeal, their right

to attorney fees was waived. Rule 8(a), M.R.Civ.P., requires that a party give notice of facts that the party expects to prove, and the facts must disclose the presence of all elements necessary to make out a claim. In this case, the defendant insurer had notice of the Christensens' desire to seek attorney fees because that relief was specifically prayed for in the initial petition for declaratory judgment, and defendant successfully defended against that request in District Court. However, the Christensens did not prevail until the case was remanded, so waiting to file a motion for attorney fees until prevailing on appeal was proper. Thus, the Christensens did not waive their entitlement to attorney fees. Mtn. W. Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, 315 M 231, 69 P3d 652 (2003), following Kunst v. Pass, 1998 M 71, 288 M 264, 957 P2d 1 (1998).

Legal Malpractice Action Not Brought Within Statutory Time Limit — Summary Dismissal Proper — Damage Rule Inapplicable: Plaintiff filed a legal malpractice action against defendant on December 17, 1999, 3 years and 8 days after the date that plaintiff's damages occurred. The District Court dismissed the claim as untimely under 27-2-206. On appeal, plaintiff contended that under the damage rule set out in Schneider v. Leaphart, 228 M 483, 743 P2d 613 (1987), and Uhler v. Doak, 268 M 191, 885 P2d 1297 (1994), the statute of limitations should have been tolled until notice of damages was actually received on December 23, 1996, which would have allowed filing until December 23, 1999. The Supreme Court disagreed. The damage rule is not the accepted standard in Montana. Under the statute of limitations for legal malpractice actions in 27-2-206, the time for filing is not tolled by a plaintiff's failure to discover damages, but runs from the date that plaintiff discovered or should through reasonable diligence have discovered the act or omission causing the damages. The claim or cause of action accrued on December 9, 1996, and the complaint filed on December 17, 1999, was beyond the statute of limitations, so summary dismissal for defendant was proper. Spolar v. Datsopoulos, 2003 MT 54, 314 M 364, 66 P3d 284 (2003).

No Obligation to Extinguish Lien Until Debt Fully Satisfied — Summary Dismissal of Action for Slander of Title Proper: Following a business default, defendant sought to enforce a lease agreement and received a judgment in Justice's Court for $7,156.56, including interest. In an effort to satisfy the judgment, plaintiff's wife paid $7,121.14. Plaintiff later attempted to refinance the disputed property and found that defendant's lien had not been extinguished, so plaintiff requested a partial satisfaction of judgment to his wife and release of the lien on the judgment. When defendant refused to release the lien, plaintiff sued for slander of title. Slander of title is an action in which one maliciously publishes false matter that brings into question or disparages the title to property, thereby causing special damages to the owner. Defendant was under no obligation to extinguish the lien until the judgment was fully satisfied. Because the wife's payment was $35.42 short of completely satisfying the judgment, defendant could not be said to have maliciously published false matter regarding the lien, so slander of title was not proved, and summary judgment for defendant was proper. Pryor v. Babcock Bldg. Corp., 2002 MT 68, 309 M 222, 45 P3d 35 (2002). See also First Sec. Bank of Bozeman v. Tholkes, 169 M 422, 547 P2d 1328 (1976), and Felska v. Goulding, 238 M 224, 776 P2d 530 (1989).

Adequate Notice and Opportunity to Respond to Revised Motion for Summary Judgment: Plaintiffs contended that the District Court improperly converted a Rule (12)(b), M.R.Civ.P., motion to dismiss to a motion under this rule for summary judgment, arguing that they were denied the opportunity to respond to affidavits submitted by defendant with its reply brief and that the District Court erred when it did not assume the facts stated in plaintiffs' complaint to be true, thus improperly resolving contested issues of fact. The Supreme Court noted that under Gebhardt v. D.A. Davidson & Co., 203 M 384, 661 P2d 855 (1983), when a District Court intends to convert a motion in this manner, notice should be given to the parties that the court intends to consider matters outside the pleadings, in order to give the party opposing summary judgment or dismissal the opportunity to produce additional facts by affidavit or otherwise that would establish a genuine issue of material fact and thereby avoid summary judgment if possible. However, in this case, the District Court did not convert the motion at a point when plaintiffs had no opportunity to respond. Rather, for reasons not apparent from the record, plaintiffs did not respond to the revised motion, nor at the time that the motion was heard did plaintiffs complain or ask for an opportunity to respond, even though it was clear that the motion for summary judgment would be heard. Instead, plaintiffs went beyond the pleadings in filing an affidavit with their response brief, but offered no further proof, and argued that the factual allegations in the complaint must be taken as true for purposes of a Rule 12(b) motion to dismiss. Therefore, plaintiffs had adequate notice of and opportunity to respond to the motion for summary judgment, and the District Court did not improperly convert the motion. Enger v. Missoula, 2001 MT 142, 306 M 28, 29 P3d 514 (2001).

Failure to Prove Mistake or Fraud in City Determination of Boundary of Special Improvement District — Summary Judgment Proper: The city of Missoula included plaintiffs' property in a storm sewer drainage special improvement district, and plaintiffs filed a complaint, alleging that pursuant to 7-12-4162, they could not be included in the special improvement district absent some benefit to them from the proposed system. The District Court heard contradicting evidence on the question of benefit, but concluded that plaintiffs failed to produce evidence of mistake or fraud as required in Stevens v. Missoula, 205 M 274, 667 P2d 440 (1983), and summarily dismissed plaintiffs' complaint. The Supreme Court affirmed. Under Stevens, a city's determination of benefit and creation of special improvement district boundaries is conclusive absent proof of mistake or fraud that precludes the exercise of sound judgment. Plaintiffs did not satisfy the threshold requirement in Stevens and thus could not prevail even if the facts articulated in the complaint were true. Enger v. Missoula, 2001 MT 142, 306 M 28, 29 P3d 514 (2001).

Interpleader Purporting to Release Potentially Liable Individuals Remanded for Clarification That Only Insurer Released Upon Payment of Policy Limits: The District Court granted an insurer's request in a prayer for interpleader for an order "enjoining and restraining each and all of the defendants from instituting or prosecuting further any proceeding on account of the incident or the insurance policy". Defendants claimed that the order infringed on their right to seek further relief from other potentially liable persons individually after the maximum policy limits were distributed. The Supreme Court noted that the measure of damages for negligence, notwithstanding available insurance proceeds, is the amount that will compensate the injured for all detriment proximately caused, but in this instance, it was not clear whether the insurer specifically requested additional relief for other parties or intended such a comprehensive exclusion of remedies. Pursuant to the principles of subject matter jurisdiction, the District Court should have released only the insurer from further claims, not the other potentially liable individuals involved. The case was remanded for a clarification of the order. Infinity Ins. Co. v. Dodson, 2000 MT 287, 302 M 209, 14 P3d 487, 57 St. Rep. 1196 (2000).

New Standard for Determining Whether Intentional or Malicious Act by Employer Constitutes Tortious Conduct — Summary Judgment Improper: Sherner was injured on the job and sued his employer, Conoco, Inc. (Conoco), for damages on grounds that Conoco was guilty of malicious acts or omissions that caused the injuries. The District Court ruled that the tort claim against Conoco was barred by the exclusivity provision in 39-71-411. Citing Calcaterra v. Mont. Resources, 1998 MT 187, 289 M 424, 962 P2d 590 (1998), the court concluded that Sherner was required to allege and establish that Conoco had actual knowledge that Sherner was being harmed in order to establish that Conoco's acts were malicious and, absent sufficient facts to raise a genuine issue of material fact that Conoco directed intentional harm at Sherner, granted summary judgment for Conoco. In District Court, Sherner sufficiently raised the issue of the proper standard for determining whether Conoco's act was malicious to allow the Supreme Court to address the issue on appeal, so the court proceeded to create a new standard, applying the plain meaning of the statutory definitions, by which to judge whether an act or omission is intentional or malicious. Applying common definitions of "intentional" and "act" and the appropriate definition of "malice" for use in 39-71-413—the one provided in 27-1-221, rather than the one in 1-1-204—the Supreme Court reversed, finding that genuine issues of material facts existed, regarding whether Conoco acted maliciously, as to preclude summary judgment. A worker need show only that an employer's act or omission, which caused the injury, was intentional or malicious to bring a tort action against the employer under 39-71-413. Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000), following Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986). See also Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971), and Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004), in which summary judgment was held to be proper under the Sherner standard absent evidence that an employer knew that an employee would actually be injured by a routine that was usually performed without incident.

Opinion Regarding Standard of Care in Obtaining Informed Consent Not Novel Scientific Evidence: The plaintiff's expert opined that the defendant physician violated the standard of care regarding informed consent when the physician failed to inform a patient that a greater risk was posed by placement of a thoracic spinal epidural catheter while the patient was anesthetized. The District Court decided that the expert's opinion regarding the standard of care was inadmissible because it was not based on scientific evidence supported by reliable methodology or research and awarded summary judgment to defendant on the basis that without a qualified medical opinion, plaintiff could not prove medical malpractice. In excluding the expert's opinion, the court concluded that plaintiff had attempted to introduce novel

scientific evidence of the type contemplated by Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (1993), and Hulse v. St., 1998 MT 108, 289 M 1, 961 P2d 75 (1998). Applying the twofold threshold obligation of a plaintiff in a medical malpractice action set out in Mont. Deaconess Hosp. v. Gratton, 169 M 185, 545 P2d 670 (1976), the Supreme Court noted that the Daubert test is limited to novel scientific evidence. Here, plaintiff sought to establish through expert testimony the amount of information that an anesthesiologist should provide to a patient in order to obtain the patient's informed consent, which is not novel scientific evidence. Thus, the District Court erred in relying on Daubert when excluding the expert testimony and in awarding summary judgment based on the conclusion that without a qualified medical opinion, plaintiff could not establish the existence of a legal duty as part of the prima facie case. The case was reversed and remanded. Gilkey v. Schweitzer, 1999 MT 188, 295 M 345, 983 P2d 869, 56 St. Rep. 734 (1999).

Denial of Agister's Lien by Summary Judgment — Vagueness of Underlying Agreement: While acknowledging that pursuant to Heckman & Shell v. Wilson, 158 M 47, 487 P2d 1141 (1971), an agister's lien may be enforceable without further specification in the underlying agreement regarding the price for the services, at a minimum, the material elements of a contract must be present in general terms. In the present case, not only were the material terms missing, but the agreement upon which the lien was based was so vague as to create more questions about the parties' expectations than it did purported certainties about their alleged obligations to perform. Because the agreement on which the claim of an agister's lien against the estate was unenforceable, the District Court did not err in summarily denying the existence of the lien. In re Estate of Bolinger, 1998 MT 303, 292 M 97, 971 P2d 761, 55 St. Rep. 1251 (1998).

District Court's Decision on Motion Reviewed De Novo by Supreme Court — Correct Decision Upheld Even if Reached on Incorrect Grounds: The lower court granted a sewer district's motion for summary judgment, ruling that the district had the right to impose hookup inspection fees on the appellant, Seypar, Inc. The Supreme Court stated that it reviewed the District Court's ruling on a de novo basis, applying the same evaluation as the lower court did. The Supreme Court also stated that in the present case, the facts were stipulated to and that therefore no genuine issues of fact existed. The only issue was to determine whether the District Court correctly concluded that the sewer district was entitled to summary judgment as a matter of law. The Supreme Court held that it would uphold the decision of a District Court, if correct, even if the decision was reached on incorrect grounds. Seypar, Inc. v. Water & Sewer District No. 363, 1998 MT 149, 289 M 263, 960 P2d 311, 55 St. Rep. 578 (1998).

Direct Evidence of Discriminatory Intent — Standard of Proof — Heiat Criteria Applicable to Cases Involving Circumstantial Evidence: The summary judgment burdens of proof discussed in Heiat v. E. Mont. College, 275 M 322, 912 P2d 787 (1996), are not limited only to cases of sex discrimination brought under federal law, but rather apply in all types of discrimination cases whether based on federal or state law. However, the Heiat test is confined to use in cases in which discriminatory intent can only be proved by circumstantial evidence. In a direct evidence case, one in which the parties do not dispute the reason for the employer's action but only whether that action is illegal discrimination, the standard is that the employer must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. That method of proof, as set out in ARM 24.9.610(5), is the proper test in cases in which the plaintiff presents direct evidence of discrimination. Traditional summary judgment principles apply to direct evidence discrimination cases, requiring the moving party to establish that no material issues of fact exist and that the movant is entitled to judgment as a matter of law. If the employer is the moving party, the employer has the burden of showing that no issues of material fact remain and that plaintiff cannot prove a prima facie case of discrimination as a matter of law. Reeves v. Dairy Queen, Inc., 1998 MT 13, 287 M 196, 953 P2d 703, 55 St. Rep. 44 (1998), clarified and followed in Hafner v. Conoco, Inc., 1999 MT 68, 293 M 542, 977 P2d 330, 56 St. Rep. 277 (1999). See also Stuart v. First Sec. Bank, Havre, 2000 MT 309, 302 M 431, 15 P3d 1198, 57 St. Rep. 1309 (2000) (the Heiat test was applied in determining that the bank's reasons for denying an agricultural loan to Native Americans were not a pretext for discrimination).

Motion for Summary Judgment Held Sufficient to Prevent Default: Klock brought a civil action against various county, town, and bank officials for violating his civil rights. After the defendants' motion to dismiss was denied, the defendants filed a motion for summary judgment. Klock moved for entry of a default judgment, claiming that the defendants had failed to "answer" the complaint. The Supreme Court upheld the District Court's refusal to grant Klock's motion, holding that a default judgment may be entered under Rule 55, M.R.Civ.P., only if a party has failed to plead or "otherwise defend" against the complaint. The Supreme Court held that the

defendants' motion for summary judgment satisfied the requirement that the defendants "otherwise defend" against the complaint. Klock v. Cascade, 943 M 1262, 943 P2d 1262, 54 St. Rep. 829 (1997).

Reversal of Summary Judgment and Grant to Other Party: Both parties moved the District Court for summary judgment, the material facts in the case being undisputed. The motion was granted to one party. After examining the facts bearing on the resolution of the legal issues, the Supreme Court reversed the summary judgment and granted summary judgment to the other party, exercising the power to substitute summary judgment as set out in Duensing v. Traveler's Co., 257 M 376, 849 P2d 203 (1993), and In re Estate of Langendorf, 262 M 123, 863 P2d 434 (1993). Swank v. Chrysler Ins. Corp., 282 M 376, 938 P2d 631, 54 St. Rep. 390 (1997).

Burden-Shifting Analysis in Employment Discrimination Cases — Pretext for Discrimination: Under the rationale in Tex. Dept. of Community Affairs v. Burdine, 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089 (1981) (citing McDonnell Douglas Corp. v. Green, 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817 (1973)), according to the U.S. Supreme Court's burden-shifting analysis employed in discrimination cases, once a plaintiff has proved a prima facie case of employment discrimination by a preponderance of the evidence, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was not the true reason, but rather was a pretext for discrimination, and under St. Mary's Honor Ctr. v. Hicks, 509 US 502, 125 L Ed 2d 407, 113 S Ct 2742 (1993), the reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason. At this point, the burden merges with the ultimate burden of persuading the court that the plaintiff has been a victim of intentional discrimination. The plaintiff succeeds either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. The Montana Supreme Court held in Kenyon v. Stillwater County, 254 M 142, 835 P2d 742 (1992), that in order to survive a motion for summary judgment, the plaintiff has the initial burden to adduce facts that, if believed, support a reasonable inference that the plaintiff was denied an employment opportunity and, if the employer rebuts the inference of discrimination with evidence of legitimate, nondiscriminatory reasons, to demonstrate with specific facts that the employer's explanation is a pretext. This places the plaintiff, as nonmoving party in the summary judgment context, in the peculiar position of having to prove the case to survive the defendant's summary motion. The Kenyon requirements are thus overruled and the Burdine analysis adopted for employment discrimination cases. The plaintiff is required to raise an inference of pretext as opposed to proving pretext, so the burden is more aligned with the general requirement of raising a genuine issue of material fact to survive the motion for summary judgment. Heiat v. E. Mont. College, 275 M 322, 912 P2d 787, 53 St. Rep. 162 (1996), overruling Kenyon v. Stillwater County, 254 M 142, 835 P2d 742 (1992). Heiat was followed in Mysse v. Martens, 279 M 253, 926 P2d 765, 53 St. Rep. 1139 (1996), Clark v. Eagle Sys., Inc., 279 M 279, 927 P2d 995, 53 St. Rep. 1150 (1996), and Rolison v. Bozeman Deaconess Health Serv., Inc., 2005 MT 95, 326 M 491, 111 P3d 202 (2005). See also Stuart v. First Sec. Bank, Havre, 2000 MT 309, 302 M 431, 15 P3d 1198, 57 St. Rep. 1309 (2000) (the Heiat test was applied in determining that the bank's reasons for denying an agricultural loan to Native Americans were not a pretext for discrimination).

Court Required to Consider Allegations in Pleadings — Repetition in Opposition to Summary Judgment Motion Not Necessary to Preserve Claim on Appeal: Calder filed a complaint against the Andersons after falling on steps leading from an apartment rented from the Andersons. In the pleadings, Calder stated that the Andersons negligently failed to maintain the sidewalk in a safe condition in violation of 70-24-303. Summary judgment was granted for the Andersons when the court found that the injuries were not caused by a hidden or lurking danger subjecting the Andersons to liability. On appeal, the Andersons contended that Calder waived consideration of the statutory liability by failing to cite the statute in the opposition to the motion for summary judgment. The Supreme Court held that the law applicable to a case could not be waived. Once Calder alleged in District Court that the relevant statute had been violated and cited that statute to the court, it was not necessary to reargue that claim repeatedly in order to preserve the claim for appeal and to avoid waiver. The District Court erred in granting summary judgment. Calder v. Anderson, 275 M 273, 911 P2d 1157, 53 St. Rep. 139 (1996).

Lack of Property Ownership Within Proposed Annexation — No Standing to Challenge Annexation Resolution — Summary Judgment Proper Despite Lack of Notice to Parties of Intent to Convert Motion to Dismiss Into Motion for Summary Judgment: It is error for a court to fail to

give formal notice of the intent to convert a motion to dismiss into a motion for summary judgment, giving the party opposing the motion an opportunity to produce additional facts by affidavit or otherwise that would create a genuine issue of material fact to preclude summary judgment. However, in this case, plaintiffs lacked standing to challenge an annexation resolution because they did not own property within the proposed annexation. Without standing to state a claim, plaintiffs could prove no set of facts in support of their action that would entitle them to relief. Therefore, failure by the court to give the parties notice of conversion of the motion to dismiss was harmless error. Knudsen v. Ereaux, 275 M 146, 911 P2d 835, 53 St. Rep. 83 (1996), following O'Donnell Fire Serv. & Equip. v. Billings, 219 M 317, 711 P2d 822 (1985).

Determination of Constitutional Violation Necessary Element of 42 U.S.C. 1983 Claim — Summary Judgment Precluded: Talley filed a cross-complaint for summary judgment on the question of a violation of 42 U.S.C. 1983 and associated attorney fees in connection with a discharge from his employment as a part-time community college instructor. Recognizing that a free speech violation might possibly have occurred, the District Court nevertheless properly dismissed the summary judgment motion because the free speech complaint had not been resolved and a violation of constitutional rights, privileges, or immunities is attendant to a 42 U.S.C. 1983 claim. Consideration of attorney fees prior to settlement of the free speech claim was also premature. Talley v. Flathead Valley Community College, 259 M 479, 857 P2d 701, 50 St. Rep. 889 (1993), affirmed in 273 M 336, 903 P2d 789, 52 St. Rep. 1016 (1995).

Denial of Motion to Change Venue — Explanation Within Court Discretion: Under Rule 52(a), M.R.Civ.P., when a court grants a motion under Rule 12, M.R.Civ.P., or under this rule, the court shall support its order with an explanation of its reason, but there is no comparable requirement for orders denying motions to change venue. A District Court is at liberty to deny a venue motion with or without comment. Therefore, it was not error for a court to provide an explanation for why defendant's motion for change of venue was denied, nor was it error for the court to direct plaintiff to prepare an appropriate memorandum and order for the court to sign. I.S.C. Distrib., Inc. v. Trevor, 259 M 460, 856 P2d 977, 50 St. Rep. 880 (1993).

Summary Judgment Pertaining to Oil and Gas Lease Based Upon Interpretation of 30 U.S.C. 187a Upheld: The lower court awarded by summary judgment the royalties from an oil and gas lease to the plaintiff Norbeck on the basis that an assignment of the royalties to the defendants had not been approved by the U.S. Secretary of the Interior as required by 30 U.S.C. 187a. The Supreme Court held that the lower court had properly interpreted the federal statute. Norbeck v. Crawford, 254 M 256, 836 P2d 1231, 49 St. Rep. 771 (1992).

Claim Under 42 U.S.C. 1983 Not Barred by Res Judicata — Prior Summary Judgment No Bar to Consideration of Motion to Dismiss — Differing Parties: Plaintiff brought an action against the city of Great Falls to recover damages for violation of 42 U.S.C. 1983 in connection with a discharge from employment. The District Court granted the city's motion for summary judgment. Plaintiff then filed an action against her immediate supervisor, in the supervisor's official and individual capacity, making the same allegations. The supervisor moved the District Court to dismiss on the basis that the section 1983 claim was res judicata by reason of the summary judgment in the former action, and the District Court granted the motion. The Supreme Court reversed, holding that under Rule 12(b), M.R.Civ.P., the District Court's consideration of the first action was limited to consideration of the pleadings. The Supreme Court also stated that because the immediate supervisor was not a party to the first action, neither the plaintiff nor the defendant was able to present all the facts and theories in the first case that are present in the second. For these reasons, the Supreme Court held that the second action was not barred. Dagel v. Manzer, 251 M 176, 823 P2d 874, 48 St. Rep. 1166 (1991).

Foreign Judgment — Summary Judgment Proper: A New Mexico bank successfully sued New Mexico defendants in New Mexico on defaulted loans secured by mortgages on Montana property. The bank then sought foreclosure in Montana. The law of the state where a judgment is rendered controls the interpretation of the effect of the foreign judgment in any subsequent actions between the parties or those with whom there is privity. Under a collateral estoppel analysis, the bank was entitled to summary judgment in Montana. The bank is entitled to attorney fees and costs, including attorney fees on appeal. First Nat'l Bank of Albuquerque v. Quinta Land & Cattle Co., 238 M 335, 779 P2d 48, 46 St. Rep. 1313 (1989).

No Notice of Intent to Treat Dismissal Motion as Summary Judgment — Eventual Result Same: Although the District Court erred in not giving the required notice that it intended to treat the motion to dismiss as a motion for summary judgment, the matter was not reversed or remanded because the eventual result in the court would have been the same. First Fed. S&L Ass'n of Missoula v. Anderson, 238 M 296, 777 P2d 1281, 46 St. Rep. 1280 (1989).

Power to Grant Summary Judgment on Issue After Motion to Dismiss Issue Was Denied: The District Court's denial of a motion to dismiss on the res judicata issue did not bind the court as the law of the case or prevent it from granting a summary judgment based on res judicata. The denial was interlocutory, and an interlocutory order can be changed without violating the law of the case doctrine. Burgess v. St., 237 M 364, 772 P2d 1272, 46 St. Rep. 870 (1989).

Failure to File Brief Not Admission That Summary Judgment Motion Well Taken: Rule 2(b), M.U.D.C.R. (Title 25, ch. 19), provides that failure to file a brief by the moving party is considered an admission that the motion is without merit and that failure to file a reply brief an admission that the motion is well taken. The Supreme Court held that the essential question for a District Court deciding a summary judgment motion is whether a genuine issue of material fact exists that cannot be decided on a merely technical fact, such as the filing of briefs on time. Cole v. Flathead County, 236 M 412, 771 P2d 97, 46 St. Rep. 469 (1989). See also Konitz v. Claver, 1998 MT 27, 287 M 301, 954 P2d 1138, 55 St. Rep. 95 (1998).

Law of the Case Doctrine Not Applicable When Separate Issue Involved: Plaintiff argued that the District Court made findings involving disputed issues of fact, thereby precluding plaintiff from presenting certain proof at the time of trial. The court's summary dismissal of the issue of applicability of a statute of limitations did not preclude plaintiff from attempting to prove facts underlying a malpractice claim because it was an issue separate from the merits of the case. The law of the case doctrine does not apply when a separate issue is involved. Major v. N. Valley Hosp., 233 M 25, 759 P2d 153, 45 St. Rep. 1263 (1988).

Motion to Dismiss Treated as Motion for Summary Judgment: A motion to dismiss that raised the failure to state a claim as a defense and presented facts outside the pleading was properly treated as a motion for summary judgment. Am. Medical Oxygen Co. v. Mont. Deaconess Medical Center, 232 M 165, 755 P2d 37, 45 St. Rep. 962 (1988).

Motions to Dismiss Properly Converted to Motions for Summary Judgment: Defendants brought motions to dismiss under Rule 12(b), M.R.Civ.P., and in response, plaintiff attached 11 documents to his brief opposing the motions, arguing the contents of the documents throughout the brief. The District Court considered the documents, excluded nothing presented to it, converted the motions to dismiss to motions for summary judgment, and dismissed the action as barred by the statute of limitations. Plaintiff did not appear at the oral hearing, but later claimed he had no opportunity to present material pertinent to a motion for summary judgment. The Supreme Court found that by introducing the documents and inviting consideration of them, plaintiff was fairly apprised that the trial court would look beyond the pleadings and could treat the motions to dismiss as motions for summary judgment. Bretz v. Ayers, 232 M 132, 756 P2d 1115, 45 St. Rep. 936 (1988), citing Grove v. Mead School District, 753 F2d 1528 (9th Cir. 1985). Bretz was followed in Koke v. Little Shell Tribe of Chippewa Indians of Mont., Inc., 2003 MT 121, 315 M 510, 68 P3d 814 (2003).

Transcribed Negotiation Session Not Sworn Testimony — Consideration Not Required: Appellant argued that a negotiation session between the parties, transcribed by a court reporter, should have been considered by the trial court. The Supreme Court held that because it was not sworn testimony, the lower court need not consider it in proceedings for summary judgment. Wright v. St., 231 M 324, 752 P2d 748, 45 St. Rep. 652 (1988).

Existence of Duty of Good Faith as Question of Law: The breach of a duty of good faith is a question of fact not susceptible to summary judgment. However, the existence of such a duty is a question of law properly determined during summary judgment proceedings. Simmons v. Jenkins, 230 M 429, 750 P2d 1067, 45 St. Rep. 328 (1988).

Disposal of Personal Injury Case by Summary Judgment — Negligence as a Matter of Law: Summary judgment is rarely proper in personal injury cases because of the peculiarly exclusive nature of the concept of negligence. Negligence is normally a question of fact; however, in certain cases where reasonable minds cannot differ, the cause of an accident may be a question of law for the court to determine. In determining comparative negligence between a driver who passed while visibility in the left lane was obstructed and the state's obligation to provide and maintain safe highways, the only conclusion to be reached was that the driver's negligence exceeded that of the state. Summary judgment was proper in determining negligence as a matter of law. Brohman v. St., 230 M 198, 749 P2d 67, 45 St. Rep. 139 (1988), citing Hartley v. Washington, 698 P2d 77 (Wash. 1985), followed in Medders v. Joyes, 233 M 183, 758 P2d 769, 45 St. Rep. 1409 (1988), Christopherson v. White, Inc., 250 M 118, 817 P2d 1165, 48 St. Rep. 891 (1991), and Pappas v. Midwest Motor Express, Inc., 268 M 347, 886 P2d 918, 51 St. Rep. 1288 (1994), and distinguished in Dillard v. Doe, 251 M 379, 824 P2d 1016, 49 St. Rep. 85 (1992), in which there was substantial active negligence by both parties upon which reasonable minds could differ as to the degree of comparative negligence. Dillard was followed in Kolar v. Bergo, 280 M 262, 929 P2d

867, 53 St. Rep. 1395 (1996), and Craig v. Schell, 1999 MT 40, 293 M 323, 975 P2d 820, 56 St. Rep. 167 (1999).

Failure of Broker to Disclose When Commission Due: A party who contracted with a real estate broker for an exclusive listing was unaware that a transfer of title in lieu of foreclosure would constitute a conveyance entitling broker to a commission, and the broker never informed the party of that fact. Summary judgment was improper where there may have been a genuine issue of material fact as to whether the broker breached a fiduciary duty to disclose. Ellingson Agency, Inc. v. Baltrusch, 228 M 360, 742 P2d 1009, 44 St. Rep. 1598 (1987).

Promissory Estoppel Requiring Reversal of Summary Judgment — No Will Produced: The Supreme Court reversed summary judgment, finding that genuine issues of material fact existed regarding testimony that an original will had been altered, yet no changed will was ever produced, and that all parties agreed to abide by deceased's wishes, but there was some disagreement as to what those wishes were. Further, appellant's reliance on the promise to abide resulted in potential injury and invoked the doctrine of promissory estoppel, precluding summary judgment. Tope v. Taylor, 224 M 131, 728 P2d 789, 43 St. Rep. 2074 (1986).

No Breach of Implied Covenant Established — Summary Judgment Not Upheld: On an appeal from summary judgment dismissing a wrongful discharge complaint against a religious school where the teacher was dismissed without notice or hearing, the Supreme Court held that summary judgment could not be upheld on the basis that no breach of the implied covenant of good faith and fair dealing was established in the record. Miller v. Catholic Diocese of Great Falls, 224 M 113, 728 P2d 794, 43 St. Rep. 2059 (1986). Annotator's note: Summary judgment was upheld in this case on grounds that allowing the lawsuit to go forward would impermissibly interfere with the free exercise of religion.

Ambiguous Insurance Policy Provision — Summary Judgment Reversed: An insurance policy that did not clearly state whether it provided uninsured motor vehicle coverage when the driver was insured but the ownership of the vehicle was not was held to be ambiguous; therefore, under the rationale that an ambiguous provision is construed against the insurance company, the policy was interpreted to provide coverage. The District Court grant of summary judgment holding that the policy did not provide uninsured motor vehicle coverage was reversed. St. Farm Mut. Auto. Ins. Co. v. Taylor, 223 M 215, 725 P2d 821, 43 St. Rep. 1667 (1986).

Unresolved Issues Regarding Royalty Interests — Summary Judgment Precluded: Prior to 1955, McDonald & Eide, Inc. (M&E) owned the entire working interest in a lease on a producing oil well. On July 12, 1955, M&E assigned 100% of its interest in the south half and 50% of its interest in the north half to H. W. McDonald, but this assignment was not recorded until 1963. After M&E's corporate charter was repealed for failure to pay taxes, corporate officers of M&E purported to assign M&E's total working interest to V. Eide and J. Von DeLinde in 1961, but this assignment conflicted with the one previously made to McDonald, who filed a quiet title action. Thereafter, all three entered an agreement with Continental Oil Company (Continental) assigning to the company an undivided one-half interest in the lease. While the quiet title action was pending, McDonald assigned undivided interests to G. Huntley, D. Iverson, and A. Larson with the intent to convey to each the respective share "held in suspense by Continental". In 1964, final judgment quieted title in McDonald subject to the agreement with Continental. In 1965, M&E stockholders appointed F. Gunnip as receiver, and he sued M&E corporate officers to recover the lease and other property. A 1970 judgment voided the 1961 agreement, and in 1976, final judgment provided that Gunnip owned one-half interest in the north half of the lease while Eide, Von DeLinde, and Continental were held to have no interest. Shell Oil Company, responsible for disbursing the lease proceeds, continued to pay Continental one-half of the proceeds under the agreement with McDonald, and although Gunnip was owner of a 50% interest, he received only a 25% share of proceeds. In 1981, Gunnip assigned a 3.75% interest in the north half to Huntley and a 2.5% interest in the north half to R. Schwinn. Huntley became aware that Gunnip was not receiving his full share, so Gunnip, Huntley, and Schwinn sued Continental, requesting an additional one-eighth of the proceeds. The District Court granted summary judgment to Continental in 1985, but the Supreme Court reversed on appeal, holding that: (1) unresolved issues of material fact remained regarding Continental's interest; (2) a trial must be had to assess Continental's interest considering potential application of adverse possession, waiver, and estoppel; and (3) Continental's asserted 50% interest in the north half of the lease must be tested against the interest of McDonald's assignees and successors in interest. The case was remanded for further proceedings. Gunnip v. Cont. Oil Co., 223 M 141, 727 P2d 1315, 43 St. Rep. 1605 (1986). On remand, the District Court neglected to assess Continental's interest as directed. On later appeal, the Supreme Court granted supervisory control and determined that: (1) plaintiffs failed to present substantial evidence to support a theory of

adverse possession, waiver, or estoppel against Continental; (2) Continental owned an undivided one-half interest in the working interest in the north half of the lease; and (3) Gunnip and his assigns owned the remaining half of the working interest in the north half. Cont. Oil Co. v. Elks Nat'l Foundation, 235 M 438, 767 P2d 1324, 46 St. Rep. 121 (1989).

No Property Damages in Changing Golf Handicap or in Letter of Reprimand — Summary Judgment Proper: Summary judgment was proper absent any showing of property damages resulting from lowering of a golfer's handicap or from the sending of a letter of reprimand by the board of directors of a private golf corporation. District Court held, and the Supreme Court affirmed, that: (1) a golfer had no right to a specific handicap but rather must earn one in accordance with standards and procedures of the U.S. Golf Association; and (2) in the absence of a clear allegation and convincing proof of fraud or bad faith, the actions of a duly delegated board of a private social club shall not be reviewed by the courts. Johnson v. Green Meadow Country Club, Inc., 222 M 405, 721 P2d 1287, 43 St. Rep. 1368 (1986).

Failure to Respond to Requests for Admissions — Summary Judgment Proper: Defendant sought to have the Supreme Court relieve it of the effect of Rule 36, M.R.Civ.P., that considers matters in requests for admission that are not responded to as admitted and conclusively established. Defendant argued that, since it had already denied the matter in question in its answer to the complaint, it should not be required to deny the matter again. The court affirmed the order granting summary judgment, finding ample opportunity for defendant to respond to the request for admissions. Holmes & Turner v. Steer-In, 222 M 282, 721 P2d 1276, 43 St. Rep. 1266 (1986).

Issue of Whether Motion Properly Served — Not Appealable: The issue of whether there was a contested issue of fact regarding whether a motion for summary judgment was properly served is a question for the District Court and cannot be raised on appeal. Toavs v. Billings Fed. Credit Union, 221 M 473, 719 P2d 428, 43 St. Rep. 985 (1986), citing In re Marriage of Glass, 215 M 248, 697 P2d 96, 42 St. Rep. 328 (1985).

Summary Judgment — Unlawful Detainer: Appellant who refused to respond to requests for admissions thereby admitted he had no permission or legal right to reside on the property. Respondent followed proper statutory procedure in attempting to have appellant quit the property; therefore, District Court properly granted summary judgment to respondent concerning appellant's unlawful detainer. Toavs v. Billings Fed. Credit Union, 221 M 473, 719 P2d 428, 43 St. Rep. 985 (1986).

Questions of Anticipated Harm and Duty of Ordinary Care as Material Issues of Fact — Summary Judgment Improper: In reversing a summary judgment as improper, the Supreme Court found that material questions of fact for a jury existed on the issues of whether: (1) the town of Whitehall should have anticipated that harm would be caused by the condition of the sidewalk despite the knowledge and obviousness of the condition; and (2) the town of Whitehall exercised ordinary care to keep the sidewalk reasonably safe. Even if it appeared that recovery under these issues was very remote, they constituted genuine issues of material fact; therefore, summary judgment was not appropriate. Kaiser v. Whitehall, 221 M 322, 718 P2d 1341, 43 St. Rep. 846 (1986).

Reversal of Summary Judgment — Exception to Exclusiveness of Workers' Compensation Remedy: A summary judgment was granted by the District Court for the stated reason that because of the employee's application for and receipt of workers' compensation benefits, remedies were exclusive to the Workers' Compensation Act. Application and receipt of benefits resulted in an election pursuant to 39-71-411, thereby barring a common-law tort action against the employer. In reversing the summary judgment, the Supreme Court held that a narrow exception to the exclusiveness of the compensation remedy existed when the employer personally committed an assault and battery upon the employee. Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986).

Hearing on Motion for Summary Judgment — Purpose: The purpose of a hearing on a motion for summary judgment is not to resolve factual issues but to determine whether there is any genuine issue of material fact in dispute. The opposing party's facts must be material and substantial. Implications based on the opposing party's opinions are not enough. The presentation of factual issues in conclusory fashion in briefs is not an appropriate means of opposing a motion for summary judgment. Westlake v. Osborne, 220 M 91, 713 P2d 548, 43 St. Rep. 200 (1986).

Open Range — Question of Law: The plaintiff sued the defendant for injuries she suffered when she swerved to avoid defendant's horse that was standing on a secondary highway. The District Court granted the defendant's motion for summary judgment, and the Supreme Court affirmed. Neither the presence of privately constructed fences nor the lack of designation in

zoning regulations indicates an area is not open range. Open range designation is a legal determination, not a question of fact for the jury. The defendant was not obligated to keep his livestock off the secondary highway, and the order of the District Court granting summary judgment was not error. Siegfried v. Atchison, 219 M 14, 709 P2d 1006, 42 St. Rep. 1807 (1985).

Summary Judgment — Federal Boiler Inspection Act: Summary judgment on the issue of whether the presence of an obstructing object on the floor of a locomotive compartment violated the federal Boiler Inspection Act (45 U.S.C. 22, et seq.) was proper when a federal regulation (49 C.F.R. 229.119(c)) prohibited obstructions on the floors of railway cars and appellant presented nothing to counter the evidence of a Boiler Inspection Act violation. Anderson v. Burlington N., Inc., 218 M 456, 709 P2d 641, 42 St. Rep. 1738 (1985).

Summary Judgment Without Evidence or Jury — Broad Review: When a case is disposed of below on motion for summary judgment before a judge sitting without a jury and no testimony is taken as the facts are relatively uncontested, the scope of review is much broader than in other appeals. The Supreme Court is free to make its own examination of the entire case and reach a conclusion in accordance with its findings. Furthermore, the court will uphold the result below if it is correct, regardless of the reasons given below for the result. Shimsky v. Valley Credit Union, 208 M 186, 676 P2d 1308, 41 St. Rep. 258 (1984), followed in McCain v. Batson, 233 M 288, 760 P2d 725, 45 St. Rep. 1495 (1988), and in In re Estate of Pelzman, 261 M 461, 863 P2d 1019, 50 St. Rep. 1408 (1993).

Negligence Issue — Not Normally Susceptible to Summary Judgment: Plaintiff was injured when a car struck her as she was crossing a street at an intersection. Plaintiff sued the driver of the car and a beer distributing company whose truck was at least partially blocking one of four lanes of traffic and the intersection. The District Court granted summary judgment to the distributor. On appeal, the Supreme Court vacated the District Court's decision, holding that issues of negligence are not ordinarily susceptible to summary judgment. There was a material issue of fact as to whether the truck was illegally parked, and if so, whether the truck's position was a proximate cause of the accident. Hendrickson v. Neiman, 204 M 367, 665 P2d 219, 40 St. Rep. 909 (1983).

Improper to Enforce Foreign Judgment by Summary Judgment Against Defendants: A default judgment was obtained in Colorado against defendants, Montana residents, in a case which arose from defendants' participation in a reciprocal interinsurance agreement. Some of the subscribers to the agreement were Colorado residents. Plaintiffs sued on the judgment in Montana, and the District Court granted defendants' motion for summary judgment. The Supreme Court upheld the District Court's refusal to enforce the judgment in Montana, ruling that enforcement of the judgment would be a violation of the federal due process clause because the defendants had not had sufficient "minimum contacts" with the state of Colorado to warrant the exercise of personal jurisdiction over the defendants. The court stated that the provision of the Colorado long-arm statute that covered causes of action arising from "contracting to insure any person, property or risk residing or located within this state at the time of contracting" was not applicable because this was not the sort of "company" that was contemplated when the long-arm statutes were drafted. The court further stated that the defendants did not know the name of the insurance company which issued the policy and had not purposely availed themselves of the privilege of conducting activities within the state of Colorado. Benham v. Woltermann, 201 M 149, 653 P2d 135, 39 St. Rep. 2017 (1982).

Summary Judgment Proper When Statutory Language Excludes Claimant's Recovery: Logging company contracted with U.S. Forest Service to log an area. Logging company's subcontractor arranged for third company to provide equipment and operators to do actual logging. In the course of the logging, a chainsaw backfired and caused a fire. The Department of Natural Resources and Conservation (DNRC) extinguished the fire at a substantial cost and sued the contractors for the cost of the work, alleging both a violation of 50-63-103 under an absolute liability theory and common-law negligence. The District Court granted defendants' motion for summary judgment on the statutory claim, ruling that the statute applied only to the intentional setting of a fire. The jury found no negligence. DNRC appealed the summary judgment. The Supreme Court affirmed. Mont. Dept. of Natural Resources and Conservation v. Clark Fork Logging Co., Inc., 198 M 494, 646 P2d 1207, 39 St. Rep. 1146 (1982).

Denial of Defendant's Motion Reviewable Upon Judgment for Claimant: Where the purchasers of real property brought an action for breach of contract, misrepresentation, and breach of statutory and equitable obligation to maintain a county road against the sellers of the property and the county, the previous property owner, and the sellers in turn filed a cross-complaint for indemnification against the previous owner, the trial court's order denying the county's motion for summary judgment was reviewable on appeal by the county because a

final judgment was entered for the purchasers. Nonappealable interlocutory orders are reviewable on appeal from a final judgment. Riley v. Carl, 191 M 128, 622 P2d 228, 38 St. Rep. 83 (1981).

Notice of Covenants — Forfeiture — Summary Judgment: Plaintiffs purchased real property on a contract for deed from defendants subject to restrictive covenants filed after the contract was drawn but before it was signed. Some months later the sellers sent the buyers notice of default, citing the covenants. The issues on appeal related to summary judgment. Under Rule 56, M.R.Civ.P., the moving party must show he is entitled to summary judgment. The sellers were found to have met the burden inasmuch as the validity and genuineness of all the documents in question were admitted by both parties, along with the signatures and dates of the documents. The reference in the contract put all parties on constructive notice of the covenants. The buyers failed to carry their ensuing burden to show issues of material fact and, accordingly, granting of sellers' motion for partial summary judgment was upheld. The lower court's ruling denying the buyers' motion for summary judgment was reversed. The sellers' counterclaim on this motion had raised the issue of violation of the covenants by the buyers, but the buyers argued that summary judgment should have been granted because the remedy sought by the sellers (forfeiture) was improper. The Supreme Court held that when a violation of the covenants would not defeat the main objective or purpose of the contract, a remedy of forfeiture was not warranted. The case was remanded. Van Uden v. Hendrickson, 189 M 164, 615 P2d 220 (1980).

Interlocutory Summary Judgment — No Appeal Allowed: Where an order of summary judgment is interlocutory, the case is not ripe for appellate review and any appeal thereon must be dismissed without prejudice. Knight & Co. v. Ft. Belknap Indian Agency Housing Authority, 188 M 218, 612 P2d 1290 (1980).

Summary Judgment Improper Where Rights of All Parties Have Not Been Adjudicated: An order granting summary judgment is not final where the rights and liabilities of all parties have not been adjudicated. Knight & Co. v. Ft. Belknap Indian Agency Housing Authority, 188 M 218, 612 P2d 1290 (1980).

Order for Summary Judgment — Findings and Conclusions Not Required: Where the court resolved a dispute between the parties involving the respondent's right to a division of property by granting respondent's motion for summary judgment on his complaint to quiet title and for an accounting of income, but granted the motion without making findings of fact or conclusions of law, no findings or conclusions were necessary, as provided in Rule 52(2), M.R.Civ.P. This was not a case in which a dismissal was granted for failure of the plaintiff to prosecute or for violation of the court's rules under Rule 41(b), M.R.Civ.P. Downs v. Smyk, 185 M 16, 604 P2d 307 (1979).

Prior Knowledge of Condition — Summary Judgment for Adverse Party: Plaintiff rented a residence from the Bureau of Indian Affairs. The BIA replaced the front steps of the residence with steps that were not as long horizontally. Plaintiff caught her foot in the depression remaining from the old steps and fractured her ankle. Her knowledge of the condition prior to the injury precludes her recovery, and summary judgment must be rendered in favor of the defendant. Hayes v. U.S., 475 F. Supp. 681 (D.C. Mont. 1979).

Collateral References

What matters not contained in pleadings may be considered in ruling on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure or motion for judgment on the pleadings under Rule 12(c) without conversion to motion for summary judgment. 138 ALR Fed. 393.

Rule 56(a). For claimant.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule, except that the provisions for affidavits are omitted.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments — Identity With Federal Rule: The above commission note was written prior to the amendment of the rule in 1975. The amendment of December 31, 1975, inserted "with or without supporting affidavits" near the end of the rule and made this rule identical to the Federal Rule. As of May 1, 1990, this rule was still identical to the Federal Rule.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

No Violation of Pretrial Order Precluding Evidence of Negligence by Plaintiff's Employer — New Trial Properly Denied: Plaintiff was employed by a vocational day-care program that took developmentally disabled persons on day outings. Plaintiff was assaulted by a developmentally disabled person from a group home managed by defendant corporation and sued the corporation for negligence for failing to control the assailant. Before trial, the District Court granted plaintiffs' motion to exclude any evidence of negligence by plaintiff's employer and ruled that defendant had a special relationship of custody and control over the disabled person and thus had a legal duty of care to those placed within the foreseeable zone of risk created by any breach of that duty. Nevertheless, the jury found for defendant, and plaintiffs' motion for a new trial was denied. On appeal, plaintiffs contended that when defense counsel repeatedly referred to the individual planning process for the assailant, in which plaintiff's employer was a partner, blame for the injury was thereby shifted to plaintiff's employer in violation of the pretrial order and prevented plaintiffs from receiving a fair trial. The Supreme Court disagreed, pointing out that plaintiffs opened the door by presenting evidence regarding the individual planning process in questioning plaintiffs' first witness and that both parties subsequently presented evidence about the process. Further, evidence regarding the individual planning process was relevant to a limit on defendant's ability to monitor the assailant and did not equate to evidence of negligence by plaintiff's employer, nor did defense counsel ever attempt to establish that any breach of legal duty by the employer led to plaintiff's injury. Thus, the District Court did not manifestly abuse its discretion in denying plaintiffs' motion for a new trial, and the verdict was affirmed. Papich v. Quality Life Concepts, Inc., 2004 MT 116, 321 M 156, 91 P3d 553 (2004), distinguishing Cech v. St., 183 M 75, 598 P2d 584 (1979), Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160 (1998), St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103 (1998), Unmack v. Deaconess Medical Center, 1998 MT 262, 291 M 280, 967 P2d 783 (1998), and Lopez v. Josephson, 2001 MT 133, 305 M 446, 30 P3d 326 (2001).

Liability of Tortfeasors Acting in Concert: Two defendants who were passengers in a car that was involved in a chase of and subsequent accident with another vehicle claimed that because they were not in control of the vehicle and did not make any encouraging statements to the driver, they could not be held liable for a tort or for injuries resulting from the accident. However, undisputed facts showed that they voluntarily joined in the pursuit for the purpose of eventually assaulting the occupants of the other vehicle and that they helped to free their own vehicle when it became stuck on a fence, thereby substantially assisting in the chase and encouraging the driver's actions. These facts showed that they acted in concert as tortfeasors, as defined in part in Restatement (Second) of Torts 876 (1979), and were subject to liability; therefore, a partial summary judgment for plaintiff on the issue of liability was proper. Sloan v. Fauque, 239 M 383, 784 P2d 895, 46 St. Rep. 1767 (1989).

Strict Liability for Railroad Safety Under Federal Act — Contributory Negligence No Factor — Summary Judgment Proper: A motion for summary judgment was properly granted to claimant when the railroad admitted violation of portions of the federal Safety Appliance Act, 45 U.S.C. 1, et seq., since under the Act violation by a carrier of a specific safety requirement is held to constitute negligence as a matter of law regardless of a showing of negligence on an employee's part. Plouffe v. Burlington N., Inc., 224 M 467, 730 P2d 1148, 43 St. Rep. 2341 (1986).

Burden of Proof: The party moving for summary judgment has the burden of establishing the absence of any genuine issue of fact, and the party opposing the motion must supply evidence supporting the existence of a genuine fact issue. Pretty on Top v. Hardin, 182 M 311, 597 P2d 58 (1979), followed in Randolf V. Peterson, Inc. v. J.R. Simplot Co., 239 M 1, 778 P2d 879, 46 St. Rep. 1463 (1989).

Enforcement of Foreign Divorce Decree: Plaintiff in an action to enforce alimony provisions of a final, unappealed foreign divorce decree was properly granted summary judgment when no factual issues were raised by defendant but ultimate issues of law that are res judicata. Cicinia v. Cicinia, 173 M 39, 566 P2d 61 (1977).

Negligence Actions — Application of Rule: Ordinarily, issue of negligence is not susceptible of summary adjudication but should motion for summary judgment be made, burden is on moving party to establish clearly that there is no factual issue to be determined and opposing party does not have burden of showing prima facie case. Mally v. Asanovich, 149 M 99, 423 P2d 294 (1967), distinguished in Morales v. Tuomi, 214 M 419, 693 P2d 532, 42 St. Rep. 60 (1985).

Collateral References

Judgment *key* 178 through 190.

49 C.J.S. Judgments §§219 through 227.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings. 53 ALR 4th 561.

Propriety of entering summary judgment for plaintiff before defendant files or serves answer to complaint or petition. 85 ALR 2d 825.

Summary judgment in action under accident policy or accident provision of life policy as affected by pre-existing arteriosclerosis. 82 ALR 2d 634.

Power of court to grant summary judgment against less than all parties against whom relief is sought. 67 ALR 2d 1456.

Rule 56(b). For defending party.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule, except that the provisions for affidavits are omitted.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments — Identity With Federal Rule: The above commission note was written before the adoption of the 1975 amendment. The amendment of December 31, 1975, inserted "with or without supporting affidavits" near the end of the rule and made the rule identical to the Federal Rule. As of May 1, 1990, this rule was still identical to the Federal Rule.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Acceptance of Partial Payment After Demanding Full Payment — Waiver of Right to Statutory Damages — Summary Judgment Warranted for Violation of Fair Debt Collection Practices Act: Plaintiff collection agency sought to collect $148.96 for eight of defendant's bad checks, plus a $30 service charge for each check, for a total of $388.96. Defendant sent a partial payment, which plaintiff accepted, but missed two promised payments, so plaintiff filed suit for the balance due, plus statutory damages of $100 for each of the eight checks. The Supreme Court affirmed the District Court conclusion that the right of a payee on a dishonored check to pursue statutory damages is a right created solely for the payee's benefit and is subject to waiver under 1-3-204 and that by accepting a partial payment after demanding full payment, plaintiff waived the right to statutory damages under 27-1-717. In order to reinstate the right to statutory damages, plaintiff was required to make further demand for full payment and wait the requisite 10 days before filing suit. The District Court also held that by seeking statutory damages without giving the requisite demand, plaintiff had attempted to collect an amount that was not permitted by law, in violation of 15 U.S.C. 1692f(1) of the federal Fair Debt Collection Practices Act. Plaintiff contended that any mistake was a bona fide error, relieving plaintiff of liability under 15 U.S.C. 1692k(c). The Supreme Court again affirmed, accepting the majority view of Circuit Courts that the bona fide error defense is available only for clerical and factual errors and that plaintiff's mistake of law did not make its action any less intentional and was insufficient to rise to the level of a bona fide error. Summary judgment for defendant was proper. Collection Bureau Serv., Inc. v. Morrow, 2004 MT 84, 320 M 478, 87 P3d 1024 (2004). See also Baker v. G.C. Serv. Corp., 677 F2d 775 (9th Cir. 1982).

No Negligence by Architect if Professional Information Not Communicated in Absence of Contract: A tennis club filed a negligence and breach of contract action against a contractor who constructed a tennis facility for the club. The contractor in turn filed a third-party negligence action against the architect who had provided preliminary design parameters and building specifications for the facility. The District Court summarily dismissed the third-party claim, and the contractor appealed, but the Supreme Court affirmed. Applying Jim's Excavating Serv., Inc. v. HKM Associates, 265 M 494, 878 P2d 248 (1994), and Restatement (Second) of Torts 552 (1976), the court held that the architect owed no duty of care to the contractor because the contractor had no contract for the architect's services and failed to prove that the architect communicated professional information with the intention that the information be relied upon by the contractor. Absent a duty of care, there was no breach, so the third-party action failed as a matter of law, and summary judgment was proper. Glacier Tennis Club at The Summit, LLC v. Treweek Constr. Co, Inc., 2004 MT 70, 320 M 351, 87 P3d 431 (2004).

Legal Malpractice Action Not Brought Within Statutory Time Limit — Summary Dismissal Proper — Damage Rule Inapplicable: Plaintiff filed a legal malpractice action against defendant

on December 17, 1999, 3 years and 8 days after the date that plaintiff's damages occurred. The District Court dismissed the claim as untimely under 27-2-206. On appeal, plaintiff contended that under the damage rule set out in Schneider v. Leaphart, 228 M 483, 743 P2d 613 (1987), and Uhler v. Doak, 268 M 191, 885 P2d 1297 (1994), the statute of limitations should have been tolled until notice of damages was actually received on December 23, 1996, which would have allowed filing until December 23, 1999. The Supreme Court disagreed. The damage rule is not the accepted standard in Montana. Under the statute of limitations for legal malpractice actions in 27-2-206, the time for filing is not tolled by a plaintiff's failure to discover damages, but runs from the date that plaintiff discovered or should through reasonable diligence have discovered the act or omission causing the damages. The claim or cause of action accrued on December 9, 1996, and the complaint filed on December 17, 1999, was beyond the statute of limitations, so summary dismissal for defendant was proper. Spolar v. Datsopoulos, 2003 MT 54, 314 M 364, 66 P3d 284 (2003).

No Basis for Damages Absent Evidence of Wrongful Detainer — Summary Judgment Proper: Plaintiff sought damages for defendant's detention of a tractor in which plaintiff had a security interest. Defendant moved to dismiss the claims, and the District Court granted summary judgment for defendant. Plaintiff appealed, but the Supreme Court affirmed. Claim and delivery require that the claimant prove that property is wrongfully detained and that the claimant has the right to immediate possession at the time that the action is brought. However, in this case, there was insufficient evidence that defendant wrongfully detained the tractor because defendant had no contractual relationship with plaintiff regarding the tractor and owed no contractual duty to return the tractor to plaintiff. Absent evidence of wrongful detainer, there was no basis for plaintiff to recover damages, so summary judgment was proper. 1st Bank v. Winderl, 2002 MT 339, 313 M 306, 60 P3d 998 (2002).

Failure to Prove Conduct a Cause in Fact of Alleged Damage — Summary Judgment Proper: Abraham's townhouse basement flooded, so Nelson, the builder of the townhouse, was sued for negligently designing and building the residence, breaching implied warranties of quality workmanship, good construction, and habitability, and causing the basement to flood. Causation is one of four elements that must be proved in a negligence action, and except in cases of intervening cause, proof of causation is satisfied by proof that a party's conduct was a cause in fact of the damage alleged. Here, when Nelson presented Abraham's deposition testimony that Abraham did not know the cause of the flooding, Nelson met the initial burden of demonstrating that no material question of fact existed regarding the element of causation, and the burden shifted to Abraham to provide facts to prove causation. However, Abraham could not merely point to lack of evidence as the factor creating a material question, nor did Abraham's suspicions or unsupported conclusory or speculative statements raise a genuine issue of material fact. Abraham could not merely rest on evidence of Nelson's negligence, but rather was required to show that Nelson's negligence was the cause in fact of Abraham's injury. Abraham failed to submit facts to create a material question upon which the District Court could determine whether Nelson's actions in designing and building the townhouse were the cause in fact of the flooding, so summary judgment for Nelson was proper. Abraham v. Nelson, 2002 MT 94, 309 M 366, 46 P3d 628 (2002). See also Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996), and Gentry v. Douglas Hereford Ranch, Inc., 1998 MT 182, 290 M 126, 962 P2d 1205 (1998).

Summary Judgment as Final Judgment on Merits for Purposes of Collateral Estoppel: The plaintiffs, a condominium owners' association and its individual members, sued the state and an assistant state fire inspector for negligence in failing to discover construction defects in fireplaces in the Deer Lodge Condominiums at Big Sky, Montana, claiming that the inspector's negligence ultimately resulted in a fire that destroyed part of the condominiums. The District Court granted the defendants' motion for summary judgment, dismissing the state and the inspector. The Supreme Court held that the District Court correctly applied collateral estoppel against the plaintiffs based on previous litigation involving structural defects in the same property. The Supreme Court found that the District Court took judicial notice of the previous litigation, that the construction of the fireplaces was an issue in that previous litigation, and that the plaintiffs in the present case knew or should have known of the defects in the fireplaces. In order to apply collateral estoppel there must be, inter alia, a final judgment on the merits in a previous case. The summary judgment to which the plaintiffs in the present case were a party, dismissing other defendants in that previous case, was a final judgment on the merits of the case. Ass'n of Unit Owners of Deer Lodge Condominium v. Big Sky of Mont., Inc., 245 M 64, 798 P2d 1018, 47 St. Rep. 1814 (1990).

Challenge of Validity of Release on Basis of Unconscionability — Summary Judgment Improper: Plaintiff signed a release for personal injuries with an insurance company in

exchange for $8,900. Plaintiff later sued insureds, who were granted summary judgment after pleading the affirmative defense of release. However, a release is governed by contract law and may be rescinded for the same reasons that allow rescission of a contract. Therefore, the validity of a release may be challenged on the basis of unconscionability. The Supreme Court reversed the grant of summary judgment after finding the release was unconscionable based on: (1) plaintiff's dire financial situation, lack of education and legal advice, and vulnerability; (2) substantial uncertainty as to the extent of injury and future prognosis at the time of settlement; and (3) haste in executing the release. Taken together, the circumstances raised an issue of fact whether justice was done, precluding summary judgment. Kelly v. Widner, 236 M 523, 771 P2d 142, 46 St. Rep. 591 (1989).

Failure to Obtain Degree — University's Discretion — Summary Judgment Upheld: The University was entitled to summary judgment against plaintiff's claim of bad faith and breach of contract when plaintiff failed to fulfill his duties under the contract he alleged. The discretion vested in the University is the core substantive principle entitling it to summary judgment. The University did not abuse its discretion. Bindrim v. Univ. of Mont., 235 M 199, 766 P2d 861, 45 St. Rep. 2316 (1988).

National Guardsman Injured on Weekend Drill — No Right to Sue State — Summary Judgment Upheld: The Supreme Court affirmed summary judgment granted state by District Court because: (1) issues raised on appeal were not genuine issues of material fact but rather questions of law, therefore summary judgment was proper; (2) the National Guard is a military force, not a political subdivision of the state, so appellant had no right to sue under the Tort Claims Act (Title 2, ch. 9, parts 1 through 3); and (3) traditionally, the federal government and state governments have not been held liable in tort for injuries that arise in the course of activity incident to military service (Feres v. U.S., 340 US 135, 95 L Ed 152, 71 S Ct 153 (1950)). Evans v. Mont. Nat'l Guard, 223 M 482, 726 P2d 1160, 43 St. Rep. 1930 (1986), distinguished in Grove v. Mont. Army Nat'l Guard, 264 M 498, 872 P2d 791, 51 St. Rep. 366 (1994), and overruled in Trankel v. St., 282 M 348, 938 P2d 614, 54 St. Rep. 380 (1997). Trankel was followed in Lake v. St., 282 M 484, 938 P2d 698, 54 St. Rep. 442 (1997).

Summary Judgment Based on Earlier Settlement Agreement: A compromise agreement, when the basis for a final judgment, generally operates as a merger and bar of all preexisting claims and causes of action. Thus, it was proper to grant defendant's motion for summary judgment in an action when the underlying cause of action had been a preexisting and related claim to an earlier action that had been dismissed with prejudice. Webb v. First Nat'l Bank of Hinsdale, 219 M 160, 711 P2d 1352, 42 St. Rep. 1919 (1985), followed in Robinson v. First Sec. Bank of Big Timber, 224 M 138, 728 P2d 428, 43 St. Rep. 2080 (1986). See also S. Gallatin Land Corp. v. Yetter, 245 M 320, 801 P2d 575, 47 St. Rep. 2139 (1990).

Summary Judgment Proper — No Genuine Issue of Material Fact — Party Slept on Rights: Summary judgment was proper when pretrial discovery did not indicate a genuine issue of material fact and when defendant failed to appear for a pretrial conference on August 2, failed to respond to a motion for summary judgment filed on August 21, failed to appear for the hearing on the motion on September 6, and filed a motion to set aside the summary judgment 5 days after receiving notice of it, but failed to file a brief in support of that motion until after the District Court had heard oral argument on the motion. Bedford v. Jorden, 215 M 508, 698 P2d 854, 42 St. Rep. 589 (1985).

No Issue as to Defendant's Duty or Comparative Negligence: The Hair Bender, a beauty salon, had a linoleum floor in the front of the shop for washing, cutting, and styling and an elevated carpeted area towards the back of the shop with five hair dryers. The carpeted area was one step higher than the linoleum area. Plaintiff's hair was washed in the front of the shop, and defendant's employee accompanied plaintiff to the drying area. After her hair was dry, plaintiff was proceeding to the front of the shop when she tripped on the step and was injured. The District Court properly granted defendant's motion for summary judgment. Plaintiff failed to demonstrate that the step constituted a hidden danger or unsafe condition. Plaintiff failed to see and observe that which would be obvious through reasonably expected use of an ordinary person's senses. Defendant did not have a duty to warn plaintiff of an obvious danger. Plaintiff's fall was due to her own negligence, and there were no genuine issues of material fact concerning defendant's duty to warn or defendant's comparative negligence. Kronen v. Richter, 211 M 208, 683 P2d 1315, 41 St. Rep. 1312 (1984), followed in Cooper v. Sisters of Charity of Leavenworth Health Serv. Corp., 265 M 205, 875 P2d 352, 51 St. Rep. 484 (1994), and distinguished in Welton v. Lucas, 283 M 202, 940 P2d 112, 54 St. Rep. 562 (1997). Kronen was overruled, as to the standard that a property owner is absolved of liability because a dangerous condition upon the premises is open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309,

950 P2d 748, 54 St. Rep. 1422 (1997). The Richardson standard was retroactively applied in Benson v. Heritage Inn, Inc., 1998 MT 330, 292 M 268, 971 P2d 1227, 55 St. Rep. 1341 (1998).

General Release of Tortfeasor — Effect: From the date of this decision the law of Montana as to the effect of a general release of a tortfeasor on the liability of a joint tortfeasor will follow the position of the Restatement (second) of Tort. Section 885, "the release of one joint tortfeasor is not a release of any other joint tortfeasor unless the document is intended to release the other tortfeasors, or the payment is full compensation or the release expressly so provides". Unless a release specifically states otherwise, a finder of fact may consider the intent of the parties in making a release. Kussler v. Burlington N., Inc., 186 M 82, 606 P2d 520 (1980).

Summary Judgment for Nonmoving Party: No formal cross motion is necessary for a court to enter summary judgment. The invocation of the power of a court to render summary judgment in favor of the moving party gives the court power to render summary judgment for his adversary provided the case warrants that result. However, the court must be very careful that the original movant had a full and fair opportunity to meet the proposition and that there is no genuine issue of material fact, and the other party is entitled to judgment as a matter of law. Hereford v. Hereford, 183 M 104, 598 P2d 600 (1979), followed in Canal Ins. Co. v. Bunday, 249 M 100, 813 P2d 974, 48 St. Rep. 597 (1991), and In re Estate of Marson, 2005 MT 222, 328 M 348, 120 P3d 382 (2005), and distinguished in Truck Ins. Exch. v. Waller, 252 M 328, 828 P2d 1384, 49 St. Rep. 318 (1992), in which a misrepresentation counterclaim was not involved in cross-motions for summary judgment, but the initial motion for summary judgment specifically included the misrepresentation counterclaim.

Burden of Proof: The party moving for summary judgment has the burden of establishing the absence of any genuine issue of fact, and the party opposing the motion must supply evidence supporting the existence of a genuine fact issue. Pretty on Top v. Hardin, 182 M 311, 597 P2d 58 (1979), followed in Randolf V. Peterson, Inc. v. J.R. Simplot Co., 239 M 1, 778 P2d 879, 46 St. Rep. 1463 (1989).

Distinction Between Motion to Dismiss and for Summary Judgment: The District Judge did not reverse the previously disqualified District Judge's denial of defendants' motion to dismiss by granting defendants' motions for summary judgment and thereby improperly exercise appellate jurisdiction because the latter motion was a decision on the merits while the former was merely a determination of the sufficiency of the allegations in the complaint. Granger v. Time, Inc., 174 M 42, 568 P2d 535 (1977).

Purpose — Proof — Deed's Validity Upheld: The purpose of this rule is to promptly dispose of actions in which there is no genuine issue of fact. The court has no duty to anticipate possible proof that might be offered under the pleadings. Judgment against party seeking cancellation of deed and reconveyance of property was upheld. Silloway v. Jorgenson, 146 M 307, 406 P2d 167 (1965).

Law Review Articles

Hereford v. Hereford: Granting Summary Judgment to a Non-Moving Party, Dyrud, 42 Mont. L. Rev. 1 (1981).

Collateral References

Raising Statute of Limitations by motion for summary judgment. 61 ALR 2d 341.

Rule 56(c). Motion and proceedings thereon.

Commission Notes

NOTE TO ORIGINAL RULE

The rule is identical with the Federal Rule, except that the provisions for affidavits are omitted and it is provided that affidavits shall not be considered for any purpose on motion for summary judgment.

NOTE TO 1965 AMENDMENT

The amendment expressly includes "answers to interrogatories" among material which may be considered on motion for summary judgment. This conforms to an amendment to the Federal Rule adopted January 21, 1963, the Federal Rule having inadvertently omitted the phrase. The courts have generally reached by interpretation the result required by the amendment.

Compiler's Comments

Amendments — Identity With Federal Rule: The original commission note was written prior to more recent amendments. The 1965 amendment inserted "answers to interrogatories" in the first sentence.

The amendment of December 31, 1975, inserted the second sentence; inserted "answers to interrogatories" in the third sentence; inserted "together with the affidavits, if any" in the third sentence; and deleted a former third sentence which read "Affidavits shall not be considered for any purpose on motion for summary judgment." As a result of this amendment the rule is now identical to the Federal Rule. As of May 1, 1990, this rule was still identical to the Federal Rule.

Case Notes

General 971
Genuine Issue of Material Fact — Particular Cases 988
No Genuine Issue of Material Fact — Particular Cases 1017
Burden of Proof 1045
Partial Summary Judgment 1051

GENERAL

Opportunity for Opposing Parties to Present Facts Relevant to Summary Judgment Motion Required: The District Court granted summary judgment in a probate case, awarding a putative common-law spouse a portion of the estate. However, in this case, summary judgment constituted reversible error because the estate was not given notice and a full and fair opportunity to present facts relative to the summary judgment motion and to address issues of material fact regarding the claims of the putative spouse. In re Estate of Marson, 2005 MT 222, 328 M 348, 120 P3d 382 (2005), following Hereford v. Hereford, 183 M 104, 598 P2d 600 (1979).

Improper Finding That Franchise Did Not Exist — Failure to Address Nonrevenue-Based Circumstances in Determining Substantial Reliance — Summary Judgment Reversed: On the question of whether a franchise existed, the parties agreed that their relationship met the definition of franchise in 61-4-201, but disputed whether plaintiff was substantially reliant on defendant for a continued supply of new motor vehicles, parts, and accessories. The District Court applied the common meaning of the term and concluded that plaintiff did not generate 50% or more of its revenue from sales of products supplied by defendant, so plaintiff was not substantially reliant on defendant, and therefore no franchise existed. On appeal, the Supreme Court held that the District Court applied an unnecessarily restrictive and simplistic standard and failed to consider other nonrevenue-based circumstances that potentially impacted on the issue of substantial reliance. The question of whether a franchise existed was reversed and remanded for consideration of nonrevenue as well as revenue-based circumstances. Hi-Tech Motors, Inc. v. Bombardier Motor Corp. of Am., 2005 MT 187, 328 M 66, 117 P3d 159 (2005), distinguishing Kans. City Trailer Sales v. Holiday Rambler Corp., 1994 WL 49932 (W. Dist. Mo. 1994).

Corporation Considered Real Party in Interest on Claim for Lost Corporate Profits — No Exception for S. Corporations: Gullett paid $10,000 earnest money for the purchase of real property. The money was drawn on the account of Gullett's corporation. When defendants refused to return the money after the purchase agreement failed, Gullett filed a complaint for return of the money and for profits allegedly suffered by the corporation's business through lack of the funds. Although the money was ultimately repaid to Gullett, the District Court summarily dismissed the claim for lost business profits on grounds that the corporation, not Gullett, was the real party in interest. On appeal, the Supreme Court affirmed. The cause of action for recovery of lost business profits belonged to the corporation, not to a shareholder. Gullett's argument that he should not be barred from the claim because the corporation was an S. corporation also failed because even though an S. corporation is treated differently for taxation purposes, it remains a corporation in all other ways, and the corporation and its shareholders remain separate entities. Gullett v. Van Dyke Constr. Co., 2005 MT 105, 327 M 30, 111 P3d 220 (2005), following Richland Nat'l Bank & Trust v. Swenson, 249 M 410, 816 P2d 1045 (1991). See also Smith Setzer & Sons, Inc. v. S.C. Procurement Review Panel, 20 F3d 1311 (4th Cir. 1994).

Covenant Not to Compete Unlawful Restraint on Trade — No Claim for Interference With Contractual or Business Relations: Curl worked for a company that finished products for Montana Silversmiths. The company was purchased by plaintiff company, and plaintiff hired Curl to do the same work but required Curl to sign an employment contract that included a noncompetition covenant. After Curl's employment ended, a new business hired Curl to do the same work for Montana Silversmiths. Plaintiff sued the new business and Curl, claiming breach of contract and intentional interference with business relations based on the noncompetition covenant. The District Court granted summary judgment for Curl, and plaintiff appealed. The Supreme Court applied the reasonableness test outlined in O'Neil v. Ferraro, 182 M 214, 596 P2d 197 (1979), and concluded that because Curl's only option was to work in the vicinity of her residence as a subcontractor for Montana Silversmiths, the covenant prohibited Curl from

engaging in her profession and was thus unreasonable and an unlawful restraint on trade. Plaintiff's claims were based on the presumption that the covenant was valid, but because the covenant was void, summary judgment for Curl was affirmed. Mont. Mtn. Prod. v. Curl, 2005 MT 102, 327 M 7, 112 P3d 979 (2005).

Prior Ruling That Prison Escapee's Property Was Not Abandoned Not Dispositive of Later Claim That Property Was Converted: A prison escapee who was captured and returned to prison sued the prison and five prison officials for destroying the personal property that he left behind at the prison when he escaped. In a prior decision in this case, the Supreme Court ruled that there was a presumption of intent to abandon the property based on the escapee's acts, that the presumption was rebuttable, and that the escapee rebutted it, and thus his complaint was wrongly dismissed for failure to state a claim. The escapee then claimed on remand that the prison wrongfully converted his property, and defendants were granted summary judgment. The prison had a written policy that personal property left behind by an escapee was considered contraband and would be confiscated and sold or destroyed. The prior Supreme Court ruling turned on the issue of abandonment and did not control the ruling on the summary judgment motions, which turned on the issue of conversion. Defendants were entitled to raise the prison policy as a defense. It was not error to grant defendants summary judgment. Hawkins v. Mont. State Prison, 2004 MT 289, 323 M 326, 102 P3d 2 (2004).

Exhibits Properly Excluded as Inadmissible Hearsay in Summary Judgment Proceeding: During summary judgment proceedings, parties must limit affidavits to evidence that would be otherwise admissible pursuant to evidentiary rules. The first admissibility requirement in Rule 56(e), M.R.Civ.P., is that affidavits must be based on personal knowledge, and the personal knowledge requirement has been extended to attached exhibits as well. In this case, the District Court properly struck six challenged exhibits because they did not set forth facts within the affiants' personal knowledge and because a foundation was not laid for their consideration based on any exception to the rule excluding hearsay evidence. Further, the court did not err in failing to take judicial notice of one of the exhibits—a motion to dismiss in a prior criminal proceeding—because the exhibit was not a form of law cognizable under Rule 202, M.R.Ev. (Title 26, ch. 10). The exhibits were properly dismissed as inadmissible hearsay. Hiebert v. Cascade County, 2002 MT 233, 311 M 471, 56 P3d 848 (2002).

Improper Grant of Summary Judgment Without Hearing: The town of Virginia City sought to enjoin defendants from constructing a personal residence based on alleged permit violations. After a show cause hearing in District Court, a preliminary injunction was issued precluding further construction. Both parties filed cross-motions for summary judgment, which was granted to the town. Defendants moved to vacate pending completion of briefing and filing of transcripts and moved for oral argument, but the motions were denied. Defendants appealed, alleging that the District Court erred by granting summary judgment without affording defendants a hearing. The Supreme Court agreed. Summary judgment is only proper when there are no issues of material fact revealed in the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, and the moving party is entitled to judgment as a matter of law. Under this rule, a hearing is contemplated at which the District Court will consider not so much legal arguments, but rather whether there exist genuine issues of material fact, and in the ordinary case, the parties have a right to a summary judgment hearing unless the hearing is explicitly waived. In Cole v. Flathead County, 236 M 412, 771 P2d 97 (1989), the Supreme Court noted that there may be an occasion when under the law and the facts adduced, the movant would be so clearly entitled to summary judgment as a matter of law that a District Court might by order dispense with the necessity of a hearing, but there was no such order in the present case. Rather, the language in the District Court's summary judgment order failed to state with sufficient particularity the rationale underlying the ruling, particularly the defenses raised in defendants' cross-motion for summary judgment. Although the District Court stated that it considered the entire record, there was no reference to considerations of defendants' affidavits. At one point, the court acknowledged that defendants were entitled to an evidentiary hearing, but failed to grant one, instead determining substantive questions that should have been left for a trial on the merits when granting injunctive relief. The only hearing afforded the parties in this case took place before discovery was conducted or responsive pleadings were filed, in noncompliance with Rule 52(a), M.R.Civ.P., and this rule. The District Court abused its discretion in granting summary judgment without affording defendants a summary judgment hearing. Summary judgment was reversed, and the case was remanded for further proceedings. Virginia City v. Olsen, 2002 MT 176, 310 M 527, 52 P3d 383 (2002).

Failure to Show That but for Negligent Legal Advice, Deportation Could Have Been Successfully Defended — Professional Negligence Claim Properly Dismissed: Fang, a Chinese

citizen and lawful permanent United States resident employed by Montana State University-Bozeman, was involved in a domestic dispute with his wife that resulted in charges of assault. Fang consulted Bock, who worked at the university legal services offices, regarding the possibility of deportation. Bock in turn consulted Rice, an attorney who had made a presentation on immigration law at a seminar that Bock had attended, and asked if a misdemeanor domestic abuse charge was grounds for deportation. Rice informed Bock that the federal Immigration and Naturalization Service (INS) would not initiate deportation proceedings until the commission of two misdemeanors. Bock relayed that information to Fang, who relied at least in part on the information and pleaded guilty to family member assault. However, in 1996, Congress enacted a new immigration statute (see 8 U.S.C. 1227(a)(2)(E)(i)) that provides that domestic violence convictions are deportable offenses. Several weeks after pleading guilty, Fang received a notice to appear and face deportation. After hiring new counsel, Fang moved to withdraw the guilty plea. The District Court granted the motion on grounds that the failure of Bock to inform Fang of the possibility of removal to China constituted ineffective assistance of counsel, and the INS agreed to suspend further proceedings until the resolution of charges against Fang. Based on the advice of his new counsel, Fang reached a plea agreement with the Gallatin County Attorney to plead guilty to an amended charge of assault. Following conviction, the INS again moved to deport Fang, and based on the fact that assault also constitutes a crime of violence against a protected person pursuant to federal immigration law, Fang was ordered to be deported. Fang then filed a complaint against Bock, seeking damages for professional negligence and negligent supervision and treble damages under 37-61-406. The District Court applied Lorash v. Epstein, 236 M 21, 767 P2d 1335 (1989), and determined that Fang could not satisfy the last element of the test for a prima facie case of professional negligence, which requires a showing that but for such negligence, Fang would have successfully defended against the offense. The court then summarily dismissed the case. Fang appealed, contending that because of Bock's advice, he was exposed to the possibility of removal from this country and had to spend substantial amounts of money to avoid that exposure. Pursuant to Lorash, the Supreme Court had to determine whether Fang would have been exposed to the possibility of removal from this country with or without Bock's advice, in light of the offenses to which Fang pleaded guilty, the statutory basis for deportation, and the immigration judge's explanation for the deportation order. Under either charge, Fang was guilty of an offense of violence against a protected person—his wife. The title of the offense was irrelevant because for purposes of immigration law, misdemeanor assault is considered just as much a crime of violence against a spouse as family member assault. Further, Fang's argument that a different result was compelled by the fact that the assault conviction was subsequently expunged based on a deferred prosecution also failed because under federal case law, no effect is to be given to a state action that purports to remove a guilty plea or conviction by operation of a state rehabilitative statute. Thus, Fang's situation was a result of the conduct that he admitted and was the same following correct legal advice as it was following Bock's incorrect advice. Although Bock misinformed Fang, that advice did not lead to Fang's predicament, nor would the money that he spent to have the first conviction set aside have changed the result. Fang could not prove that but for negligent legal advice he could have avoided deportation, and Bock was entitled to judgment as a matter of law. Fang v. Bock, 2001 MT 116, 305 M 322, 28 P3d 456 (2001).

Negligence and Strict Liability Action for Damages by Pesticide Not Preempted by FIFRA — McAlpine Overruled: Plaintiffs brought an action for damages allegedly suffered when a pesticide was applied at the building where they worked. The District Court granted summary judgment for the pesticide manufacturer on the basis that the claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and McAlpine v. Rhone-Poulenc Ag Co., 285 M 224, 947 P2d 474 (1997), because all of the theories of liability were based on inclusions in or omissions from the pesticide labels. In particular, 7 U.S.C. 136v(b) provides that a state may not impose or continue in effect any requirement for labeling or packaging in addition to or different from those required under the federal law. On appeal, the Supreme Court overruled McAlpine and instead applied Medtronic, Inc. v. Lohr, 518 US 470 (1996), concluding that Congress, through FIFRA, intended only to preempt states from imposing positive law requirements in the form of regulations and laws and did not intend to extinguish damage remedies under state common law. The word "requirements" in section 136v(b) means enactments of positive law by legislative or administrative bodies, not state law damage actions. The case was reversed and remanded for further proceedings. Sleath v. West Mont Home Health Serv., Inc., 2000 MT 381, 304 M 1, 16 P3d 1042, 57 St. Rep. 1629 (2000).

No District Court Jurisdiction to Grant Summary Judgment When Dispute Subject to Arbitration: A condition of Burkhart's employment agreement with Semitool, Inc. (Semitool),

was that employment disputes would be subject to Montana law and the Uniform Arbitration Act. After 8 months of employment, Burkhart was terminated. He later brought suit against Semitool, alleging that: (1) he had been terminated without good cause; (2) his termination was in retaliation for his refusal to violate public policy; (3) Semitool's opposition to his application for unemployment benefits was without probable cause and motivated by malice; and (4) representations made to him prior to employment were deceptive and motivated by malice, contained misrepresentations, and included false advertisements concerning the kind or character of the employment. In its answer, Semitool demanded arbitration, and Burkhart accepted the arbitration offer on the first two issues. The parties agreed that because trade secrets were involved, the record would be sealed and hearings closed to the public to avoid disclosure of confidential information. Semitool then moved to dismiss for failure to state a claim or, alternatively, to compel arbitration of all four claims. The District Court converted the motion to dismiss into a motion for summary judgment and held a hearing to discuss both motions, after which it granted summary judgment to Semitool and dismissed all four claims. The court determined that because proof of the allegations in the complaint would require disclosure of confidential attorney-client matters and because violation of the attorney-client privilege prejudiced the public interest, that prejudice was a proper ground upon which to invalidate the arbitration agreement. Burkhart appealed. On appeal, the Supreme Court cited 39-2-914 and Ratchye v. Lucas, 1998 MT 87, 288 M 345, 957 P2d 1128 (1998), as controlling. Once an offer to arbitrate has been accepted, neither the District Court nor the parties have a right to continue the lawsuit. The exception relating to the public interest pertains to the validity of the arbitration agreement, not to the merits of the underlying dispute. Thus, the District Court erred in deciding the merits of the issues because it lacked jurisdiction to do so once the parties agreed to arbitrate. Summary judgment was reversed and the claims were remanded for arbitration. Burkhart v. Semitool, Inc., 2000 MT 201, 300 M 480, 5 P3d 1031, 57 St. Rep. 785 (2000).

Transfer of Property for Creation of Trust Not Included in General Power of Attorney: Jameison appointed her granddaughter, Bolich, as "true and lawful attorney", granting her authority to generally act in Jameison's stead "in all matters affecting my business or property". Bolich created a trust agreement naming Jameison the income beneficiary for life and Bolich as trustee and designating Jameison's two daughters as income beneficiaries during their lives in the event that they survived Jameison. The trust agreement provided for distribution of the trust principal for the health, maintenance, and welfare of the income beneficiaries at the trustee's discretion, and upon the death of the last income beneficiary, the trust was to dissolve, with the remainder distributed to Bolich or her estate. Bolich then conveyed all of Jameison's real property, including over 30 parcels, and personal property, including several certificates of deposit and promissory notes, to herself. Jameison died a few months later, and one daughter died shortly thereafter. Over 7 years later, Bolich distributed $100 in trust income to the remaining daughter, who was unhappy with the accounting and challenged the validity of the trust agreement, moving for summary judgment on grounds that Bolich did not have authority under the power of attorney to create it, citing a lack of evidence of Jameison's intent to create the trust and the fact that the trust agreement and conveyance documents were signed solely by Bolich and not by Jameison. The District Court found that Bolich's assertions regarding Jameison's intent were purely speculative and that Bolich had failed to produce any evidence that Jameison had intended to create the trust. The court concluded that the general power of attorney did not specifically authorize Bolich to create the trust and that Bolich exceeded her authority in doing so. The trust was invalidated and terminated, and the estate was distributed pursuant to the laws of intestacy. Bolich appealed. The Supreme Court affirmed. In this case, the power of attorney was broad and general but did not grant authority to create a trust, reflect Jameison's intent to create a trust, or even mention a trust, so Bolich's transfer of Jameison's property to herself as trustee was not warranted by the terms actually used in the power of attorney or as a means of executing other authority. The trust was not created by one of the methods in 72-33-201 and was invalid. Bolich's argument that the trust was ratified pursuant to 28-10-211 by Jameison's oral authorization also failed because ratification of a trust must be accomplished in writing pursuant to 72-33-208. Absent material facts regarding the validity of the trust, summary judgment invalidating the trust was proper. In re Trust of Jameison v. Bolich, 2000 MT 190, 300 M 418, 8 P3d 83, 57 St. Rep. 753 (2000), distinguishing McLaren Gold Mines Co. v. Morton, 124 M 382, 224 P2d 975 (1951).

Broad Language in Complaint as Opportunity to Litigate Unfair Claims Practices Action — Res Judicata Barring Second Action — Summary Judgment Proper: The doctrine of res judicata not only precludes a party from relitigating claims that were litigated in a previous action, but under Balyeat Law, P.C. v. Hatch, 284 M 1, 942 P2d 716, 54 St. Rep. 780 (1997), res judicata will

also bar an action for a claim that a party had an opportunity to, but did not, litigate in a previous action. In the present case, Fisher sued State Farm General Insurance Company (State Farm) and one of its agents for wrongfully denying coverage, alleging in the complaint that defendants were liable "for damages incurred as a result of the subject fire and the denial of coverage on theories of breach of contract, negligence, negligent misrepresentation, fraud, and any other applicable legal theories", and sought relief for money due under the insurance policy and "other further relief as the court may deem just and proper". One year later, Fisher filed a second action based on State Farm's denial of coverage, alleging failure to conduct a reasonable investigation of the claim and to attempt a good faith settlement. A few months later, State Farm presented a written offer of judgment on all claims in the original action, which Fisher accepted. Fisher then amended the second action to include allegations of a violation of the Unfair Claims Practices Act (UCPA) and sought punitive, special, and general damages. The District Court granted summary judgment for State Farm on grounds that the second action was barred by res judicata. The Supreme Court affirmed. Under the broad wording of the original complaint, Fisher clearly had the opportunity to litigate the UCPA claim. Had the claim been less broadly drafted, a judgment in the first action could not have barred the second action. However, the criteria of res judicata regarding identity of subject matter, issues, and relationship of the parties were met, and summary judgment on the second action was proper. Fisher's argument that the application of res judicata essentially negated statutory permissive joinder provisions and compelled mandatory joinder of otherwise independent causes of action was unpersuasive. Fisher v. St. Farm Gen. Ins. Co., 1999 MT 308, 297 M 201, 991 P2d 452, 56 St. Rep. 1236 (1999).

Error in Summary Dismissal of Improperly Pleaded Claims: Green Tree Financial Corporation (Green Tree) as "lender" and Larson, doing business as Majestic Homes, Inc. (Majestic), as "approved dealer" had an arrangement for purposes of making federal housing loans pursuant to federal Housing and Urban Development (HUD) regulations. Majestic sued for breach of contract and for noncontract tort damages. The District Court held that no contractual relationship existed and dismissed the noncontract claims as improperly pleaded. The Supreme Court reversed, holding that a contract was in force, and reinstated the underlying noncontract tort damage claims without commenting on their merit, noting that although the complaint was not a model of notice pleading, the allegations were sufficiently precise and well supported to provide Green Tree with the factual basis for the tort claims against it. The claims should not have been dismissed by summary judgment based simply on the manner in which they were pleaded. Larson v. Green Tree Financial Corp., 1999 MT 157, 295 M 110, 983 P2d 357, 56 St. Rep. 618 (1999), following Kunst v. Pass, 1998 MT 71, 288 M 264, 957 P2d 1, 55 St. Rep. 289 (1998). See also Linn v. City County Health Dept., 1999 MT 235, 296 M 145, 988 P2d 302, 56 St. Rep. 922 (1999).

Failure to Raise Conveyance Voidness Claim in Motion for Summary Judgment — Waiver of Claim on Appeal: Defendant claimed on appeal that under 70-21-304, good title had been claimed to a disputed tract of real property through first recording. Although defendant had raised the argument in principle before the District Court in one paragraph of a reply brief, defendant failed to cite any legal authority for the argument when requesting summary judgment. The District Court was not made aware of 70-21-304 and never ruled on its applicability. Defendant waived the right to any claim under that section. Old Republic Nat'l Title Ins. Co. v. Realty Title Co., 1999 MT 69, 294 M 6, 978 P2d 956, 56 St. Rep. 286 (1999).

Circumstantial Evidence Allowable to Establish Meeting of Minds Element of Civil Conspiracy — Summary Dismissal Proper Absent Genuine Issue of Material Fact: Because direct evidence of the meeting of the minds is typically in the possession and control of the alleged conspirators and thus difficult if not impossible to obtain, circumstantial evidence may be used to establish the meeting of the minds element of a civil conspiracy. However, when that circumstantial evidence does not raise a genuine issue of material fact regarding the meeting of the minds element, summary dismissal is proper. Schumacker v. Meridian Oil Co., 1998 MT 79, 288 M 217, 956 P2d 1370, 55 St. Rep. 338 (1998).

Damage to Crops by Herbicide — Extent of Preemption by FIFRA — Claims for Breach of Express and Implied Warranty Not Preempted — Negligence and Strict Liability Preempted — Remedy for Prevention of Discovery by Summary Judgment: McAlpine applied Weedone LV6, a herbicide manufactured by Rhone-Poulenc and distributed by Ben Taylor, to crops of barley and spring wheat. After several weeks of cool morning temperatures, McAlpine noticed damage to his crops, which experts from Montana State University (now Montana State University-Bozeman) and the Montana Department of Agriculture said was caused by cool temperatures after application of the herbicide. The McAlpines brought a civil action against Rhone-Poulenc, claiming damages from negligence, breach of express and implied warranty, and strict liability.

The District Court granted summary judgment for the defendants on the basis that the plaintiffs' claims were based on deficiencies in the label on Weedone LV6 and that those claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Citing Wis. Pub. Intervenor v. Mortier, 501 US 597 (1991), and Cipollone v. Liggett Group, Inc., 505 US 504 (1992), the Supreme Court interpreted the FIFRA preemption statement, 7 U.S.C. 136v(b), to preempt only claims based upon negligence in labeling and not to preempt the appellants' claims based upon either express or implied warranty or strict liability. Therefore, the Supreme Court held that the appellants must be given the opportunity to prove that Rhone-Poulenc and Ben Taylor breached their warranty by designing, manufacturing, and marketing a product that was inherently defective and that the same defendants are strictly liable for designing, manufacturing, and marketing an unreasonably dangerous product. In response to Rhone-Poulenc's argument that the McAlpines failed to offer any evidence to defeat summary judgment, the Supreme Court pointed out that because the District Court granted summary judgment, the McAlpines were prevented from conducting complete discovery and that until discovery was completed, it was premature for the Supreme Court to conclude that the McAlpines' evidence was insufficient. McAlpine v. Rhone-Poulenc Ag Co., 285 M 224, 947 P2d 474, 54 St. Rep. 1123 (1997), overruled in Sleath v. West Mont Home Health Serv., Inc., 2000 MT 381, 304 M 1, 16 P3d 1042, 57 St. Rep. 1629 (2000), holding that state common-law negligence and strict liability claims based on or implicating pesticide labels are not preempted by FIFRA. Following the 1997 remand, the McAlpines settled with Ben Taylor, Inc., and proceeded to trial against Rhone-Poulenc on a theory of strict products liability, claiming that Weedone LV6 was a defective product because its propensity to damage or destroy crops in conjunction with cold weather was a danger outside the expectations of the ordinary consumer. Rhone-Poulenc acknowledged that the crop damage was caused by the phenoxy herbicide, but argued that the damage was not unreasonably dangerous and that liability exists only when a product is sufficiently dangerous. The trial court instructed the jury that it must find that the herbicide was in a "defective condition unreasonably dangerous", rather than merely in a defective condition, and the jury returned a verdict for Rhone-Poulenc. The McAlpines appealed. The Supreme Court previously held in McJunkin v. Kaufman, 229 M 432, 748 P2d 910 (1987), that a product is defective if it is unreasonably dangerous, but a plaintiff is not required to show that a product is defective and also that it is unreasonably dangerous, because establishing that a product is unreasonably dangerous is merely a means of proving that it is defective. Thus, the "defective condition unreasonably dangerous" language creates a vague and imprecise dual test and should not have been submitted to the jury because it was not plain, clear, and concise. The jury should have been required to find merely that the product was in a defective condition, so the case was again remanded. Further, the decision in Sleath, id., also applied on remand, so evidence of the product label was admissible in further proceedings. McAlpine v. Rhone-Poulenc Ag Co., 2000 MT 383, 304 M 31, 16 P3d 1054, 57 St. Rep. 1644 (2000).

Opposition to Motion Based Upon Speculative and Conclusory Statements — "Statement of Facts" Held Insufficient — Summary Judgment Upheld: Klock brought a civil action against various county, town, and bank officials for violating his civil rights, and the defendants filed a motion for summary judgment, which was granted by the District Court. The Supreme Court upheld the grant of summary judgment, holding that Klock had the burden of responding to the motion with affidavits or other evidence proving that a genuine issue of material fact existed. The Supreme Court held that Klock had failed to meet that burden and noted as an example that in his appellate brief "statement of facts", Klock referred to arguments of his counsel in District Court on the summary judgment motion. For this reason, the Supreme Court held that Klock relied upon speculative and conclusory statements and did not meet his burden in response to the defendants' motion for summary judgment. Klock v. Cascade, 284 M 167, 943 P2d 1262, 54 St. Rep. 829 (1997), followed in McGinnis v. Hand, 1999 MT 9, 293 M 72, 972 P2d 1126, 56 St. Rep. 39 (1999).

Dispositive Facts Undisputed — Standard of Review: When the dispositive facts surrounding a case are undisputed and both parties assert entitlement to judgment as a matter of law, the decision of the trial court to grant summary judgment to one of the parties is subject to review by the Supreme Court as to whether the trial court's conclusions of law constitute a correct interpretation of the law. Ash Grove Cement Co. v. Jefferson County, 283 M 486, 943 P2d 85, 54 St. Rep. 756 (1997).

Documents Evidencing Amount of Debt Incorporated Into Complaint and Effectively Put in Issue by Answer — Summary Judgment Inappropriate — Cross-Motions Not Proof of Absence of Genuine Issues of Fact: Montana Metal Buildings, Inc. (MMB), constructed a metal building for Shapiro at the Three Forks Airport and later served a notice of claim and construction lien upon

Shapiro for $26,889.43. MMB claimed that this amount was owed by Shapiro as the balance due for labor and materials necessary for construction of the building. MMB subsequently sued Shapiro for that amount in foreclosure of the lien, attaching copies of invoices to its complaint. MMB moved for summary judgment on all issues, and Shapiro moved for summary judgment on issues concerning the defectiveness of the lien. The District Court granted summary judgment on all issues for MMB. The Supreme Court held that the District Court erred in granting summary judgment and that genuine issues of fact still existed in that when MMB attached copies of the invoices to its complaint, they became part of the complaint for all purposes. The amounts established by those invoices were effectively put into issue by Shapiro when, in his answer, he asserted that he owed no further payments to MMB. The Supreme Court held that at this point in their proceedings, MMB had the obligation, as the party moving for summary judgment on the issue of the amount owed, to come forward with other evidence in the form of affidavits, discovery documents, or otherwise to overcome Shapiro's denials and establish the absence of genuine issues of material fact. The only affidavit that was submitted by MMB, the Supreme Court noted, addressed the issue of the sufficiency of the property description for the purposes of the lien and did not present evidence as to the amounts owed by Shapiro. Citing Bozeman v. AIU Ins. Co., 262 M 370, 865 P2d 268 (1993), the Supreme Court pointed out that MMB could not rely on arguments of counsel to overcome the existence of an issue of material fact. The Supreme Court further noted, citing Gallatin Trust & Sav. Bank v. Darrah, 152 M 256, 448 P2d 734 (1968), that because the invoices were not submitted or filed by MMB as part of its motion for summary judgment, the invoices are not evidence of what was contained in the invoices but merely allegations of the complaint and were insufficient to overcome Shapiro's denials in his answer. In response to MMB's argument that Shapiro waived any right to object to MMB's evidentiary basis for its motion, the Supreme Court pointed out that there was no evidentiary basis for MMB's motion for summary judgment on the issue of the amount of the debt because the invoices were not submitted for the purposes of the motion but only for the purposes of the complaint and had been effectively addressed by Shapiro's answer. Citing Duensing v. Traveler's Co., 257 M 376, 849 P2d 203 (1993), the Supreme Court also pointed out that just because both parties have moved for summary judgment does not alone establish the absence of a genuine issue of material fact, particularly when the motions are not on precisely the same issues, and the District Court therefore apparently assumed, incorrectly, that there were no such genuine issues. Mont. Metal Bldg., Inc. v. Shapiro, 283 M 471, 942 P2d 694, 54 St. Rep. 731 (1997).

Use of Appeal Affidavit Contradicting One's Trial Testimony to Create Genuine Issue of Material Fact: Plaintiff against whom summary judgment was granted could not, on appeal, create a genuine issue of material fact as to his knowledge of his employer's personnel policy with an appeal affidavit that contradicted his testimony at trial. Fenger v. Flathead County, 277 M 507, 922 P2d 1183, 53 St. Rep. 823 (1996).

Federal Court Wrongful Discharge Case — Dismissal on Summary Judgment Held Res Judicata as to State Court Claims: Hollister brought an action under 42 U.S.C. 1983 in federal District Court, seeking damages for being wrongfully discharged from her position with Rosebud County. The federal District Court held that Hollister did not have a sufficient property interest in her job to support an action based upon a denial of substantive due process of law and section 1983. The federal District Court therefore granted the defendant's motion for summary judgment. Hollister then filed a motion for relief from judgment in the federal District Court, pointing out that the Montana Supreme Court had since noted in Boreen v. Christiansen, 267 M 405, 884 P2d 761 (1994), that the federal District Court had misapprehended the law in her wrongful discharge suit. The state District Court dismissed, holding that it was barred, but the federal court would not reverse itself. Hollister then refiled her section 1983 claim in state District Court, but that court dismissed, holding that the federal District Court opinion was res judicata as to her section 1983 claim. The Supreme Court affirmed, noting that an identical situation occurred in Mills v. Lincoln County, 262 M 283, 864 P2d 1265 (1993). In that case, the Montana Supreme Court had also held a federal District Court opinion to be res judicata as to claims in state District Court, even though the state law had changed in the meantime. Hollister v. Forsythe, 277 M 23, 918 P2d 665, 53 St. Rep. 524 (1996).

Burden-Shifting Analysis in Employment Discrimination Cases — Pretext for Discrimination: Under the rationale in Tex. Dept. of Community Affairs v. Burdine, 450 US 248, 67 L Ed 2d 207, 101 S Ct 1089 (1981) (citing McDonnell Douglas Corp. v. Green, 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817 (1973)), according to the U.S. Supreme Court's burden-shifting analysis employed in discrimination cases, once a plaintiff has proved a prima facie case of employment discrimination by a preponderance of the evidence, the burden shifts to the defendant to

articulate some legitimate, nondiscriminatory reason for the employee's rejection. Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was not the true reason, but rather was a pretext for discrimination, and under St. Mary's Honor Ctr. v. Hicks, 509 US 502, 125 L Ed 2d 407, 113 S Ct 2742 (1993), the reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason. At this point, the burden merges with the ultimate burden of persuading the court that the plaintiff has been a victim of intentional discrimination. The plaintiff succeeds either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. The Montana Supreme Court held in Kenyon v. Stillwater County, 254 M 142, 835 P2d 742 (1992), that in order to survive a motion for summary judgment, the plaintiff has the initial burden to adduce facts that, if believed, support a reasonable inference that the plaintiff was denied an employment opportunity and, if the employer rebuts the inference of discrimination with evidence of legitimate, nondiscriminatory reasons, to demonstrate with specific facts that the employer's explanation is a pretext. This places the plaintiff, as nonmoving party in the summary judgment context, in the peculiar position of having to prove the case to survive the defendant's summary motion. The Kenyon requirements are thus overruled and the Burdine analysis adopted for employment discrimination cases. The plaintiff is required to raise an inference of pretext as opposed to proving pretext, so the burden is more aligned with the general requirement of raising a genuine issue of material fact to survive the motion for summary judgment. Heiat v. E. Mont. College, 275 M 322, 912 P2d 787, 53 St. Rep. 162 (1996), overruling Kenyon v. Stillwater County, 254 M 142, 835 P2d 742 (1992). Heiat was followed in Rolison v. Bozeman Deaconess Health Serv., Inc., 2005 MT 95, 326 M 491, 111 P3d 202 (2005). See also Stuart v. First Sec. Bank, Havre, 2000 MT 309, 302 M 431, 15 P3d 1198, 57 St. Rep. 1309 (2000) (the Heiat test was applied in determining that the bank's reasons for denying an agricultural loan to Native Americans were not a pretext for discrimination).

Wrongful Discharge From Employment for Violation of Agency Rule — Suit Not Barred by Failure to Appeal Petition for Judicial Review Related to Challenge of Rule: Wadsworth, a real estate appraiser, sued the Department of Revenue for wrongful discharge from employment after being dismissed by the Department for failing to comply with the Department's conflict of interest rule. The rule prohibited Department employees from engaging in independent fee appraisals and other activities during off-duty hours. Prior to dismissal and the suit for wrongful discharge, Wadsworth had filed an administrative grievance challenging the validity of the rule. The grievance was ultimately dismissed by the District Court, and Wadsworth did not appeal. On appeal of the wrongful discharge from employment suit, the Department argued that the District Court erred in not granting the Department's motion for summary judgment based on Wadsworth's failure to appeal the petition for judicial review of the rule. The Supreme Court held that the action for wrongful discharge did not meet the criteria for application of the doctrine of res judicata. The District Court correctly denied the motion for summary judgment. Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996), distinguished in Hafner v. Dept. of Labor and Industry, 280 M 95, 929 P2d 233, 53 St. Rep. 1315 (1996).

Inconsistent Document Delivered by Defendant — Issues of Material Fact Preclude Summary Judgment: Plaintiff sued, alleging that defendant had breached an agreement to buy and sell certain mining properties and equipment. The District Court granted summary judgment for defendant. The Supreme Court reversed and remanded, holding that conflicting testimony concerning whether delivery of the stock to a third party constituted a material breach and that defendant's delivery of inconsistent documents that appeared to maintain that the contract was terminated by breach but, on the other hand, appeared to acknowledge the continuing existence of the contractual right of first refusal created material fact issues that cannot be disposed of by summary judgment. Mont. Min. Properties, Inc. v. ASARCO, Inc., 270 M 458, 893 P2d 325, 52 St. Rep. 284 (1995).

Summary Judgment — As Matter of Law: When there is no genuine issue as to any material fact, summary judgment should be granted as a matter of law. Lewis v. Nine Mile Mines, Inc., 268 M 336, 886 P2d 912, 51 St. Rep. 1283 (1994); Rucinsky v. Hentchel, 266 M 502, 881 P2d 616, 51 St. Rep. 887 (1994); Koepplin v. Zortman Min., Inc., 267 M 53, 881 P2d 1306, 51 St. Rep. 880 (1994); Toombs v. Getter Trucking, Inc., 256 M 282, 846 P2d 265, 50 St. Rep. 39 (1993); Oar Lock Land & Cattle Co. v. Crowley, 253 M 336, 833 P2d 146, 49 St. Rep. 456 (1992); Weaver v. Law Firm of Graybill, Ostrem, Warner & Crotty, 246 M 175, 803 P2d 1089, 47 St. Rep. 2316 (1990); Grenz v. Prezeau, 244 M 419, 798 P2d 112, 47 St. Rep. 1698 (1990); Bills v. Hannah, Inc., 230 M 250, 749 P2d 1076, 45 St. Rep. 179 (1988); Gebert Logging, Inc. v. Palin, 220 M 405, 716 P2d 200,

43 St. Rep. 481 (1986); Gilleard v. Draine, 159 M 167, 496 P2d 83 (1972); Calkins v. Ox Bow Ranch, Inc., 159 M 120, 495 P2d 1124 (1972); Roope v. Anaconda Co., 159 M 28, 494 P2d 922 (1972); State ex rel. J.C. Penney Co. v. District Court, 154 M 481, 465 P2d 824 (1970); Hagen v. Great N. Ry., 153 M 309, 456 P2d 51 (1969); Knowlton v. Sandaker, 150 M 438, 436 P2d 98 (1968); Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Cross-Motions for Summary Judgment — Right of Court to Deny Both Parties' Motions: Both parties in an insurance policy dispute filed motions for summary judgment. The District Court granted the motion of plaintiff's estate and denied insurer's motion. Insurer claimed that the court erred in ruling that the parties' cross-motions for summary judgment constituted an agreement that there was no dispute as to material fact. Under Heublein, Inc. v. U.S., 996 F2d 1455 (2nd Cir. 1993), neither party is barred from claiming the existence of facts sufficient to prevent entry of summary judgment against it in spite of simultaneous motions for summary judgment by opposing parties. The court found that plaintiff's death was accidental within the context of the insurance policy but that the insurer presented no evidence of any fact issues. The court's comments during the hearing on the cross-motions clearly demonstrated its understanding of its right to deny both parties' summary judgment motions absent sufficient proof of either party's case. Ike v. Jefferson Nat'l Life Ins. Co., 267 M 396, 884 P2d 471, 51 St. Rep. 1097 (1994).

Statute of Limitations in Invasion of Privacy Action — Summary Judgment Proper: In 1988, Hentchel told Rucinsky that he had tape recorded her telephone conversations. She asked to hear them, and he agreed to play them, but neither party pursued the issue further. In 1992, Hentchel's wife found the tapes and notified Rucinsky, who brought a claim for invasion of privacy. The District Court granted Hentchel's summary judgment motion on grounds that the 3-year statute of limitations for an action on a liability not founded on an instrument in writing, as set out in 27-2-204, had run. Under 27-2-102, a cause of action accrues when all of its elements exist or have occurred, the right to maintain an action is complete, and a court is authorized to accept jurisdiction. Rucinsky claimed that because a reasonable person would not have taken Hentchel seriously when he originally confessed that the taping had occurred, the statute of limitations was tolled until the tapes were discovered. The Supreme Court affirmed summary judgment. That Rucinsky chose not to believe the confession did not negate the existence of the elements of her cause of action in 1988. She had the right to the cause of action when she was put on notice that the tapes existed, and the cause of action began regardless of whether she was convinced of the success of the action. Rucinsky v. Hentchel, 266 M 502, 881 P2d 616, 51 St. Rep. 887 (1994).

Collateral Estoppel — Summary Judgment Properly Granted: The District Court's grant of summary judgment and dismissal of the complaint was proper when the plaintiff could not prove a cause of action without relitigation of factual issues that had been previously resolved in prior action between the parties. Farmers Plant Aid, Inc. v. Huggans, 266 M 249, 879 P2d 1173, 51 St. Rep. 803 (1994).

Invalidity of Default and Summary Judgments for Failure to Give Notice and Other Failures: Kenner's filing of two motions to dismiss constituted appearances in Moran's quiet title action, and Kenner was thus entitled to written notice of Moran's application for default judgment at least 3 days prior to the hearing on the application. The informal communications to Kenner's attorney by Moran's attorney, threatening to proceed with the quiet title action if Kenner did not fulfill the terms of a settlement agreement that the parties had signed, were not the equivalent of and could not substitute for the required notice. The failure to notify was compounded by failure to notify Kenner that the default judgment had been entered. Therefore, default judgment against Kenner was void, and Kenner's motion for summary judgment in Kenner's independent action to set aside the default judgment should have been granted. Furthermore, at the hearing in Kenner's action, Moran's request for summary judgment on Moran's counterclaim for specific performance of the settlement agreement should not have been granted because neither party had entered evidence on that issue, Moran had not moved for summary judgment, and Kenner had no notice of the request for summary judgment. Kenner v. Moran, 263 M 368, 868 P2d 620, 51 St. Rep. 94 (1994).

Insufficient Evidence of Causation — Summary Judgment Properly Granted: Logan was discharged from her job at Metra and later obtained employment with the Yellowstone County Sheriff's office, where she suffered a repetitive motion injury. She sued Yellowstone County, claiming that the county breached her employment contract. The county moved for summary judgment, claiming that there was insufficient evidence of causation to support the action, and the District Court dismissed the action. The Supreme Court held that there was no substantial evidence from which the trier of fact could find that Logan's discharge from her job at Metra

caused her repetitive motion injury because the injury was not foreseeable. Logan v. Yellowstone County, 263 M 218, 868 P2d 565, 51 St. Rep. 22 (1994).

Federal Court Summary Judgment Final — Subsequent State Court Action Barred as Res Judicata: Mills filed a claim in U.S. District Court against Lincoln County for negligence. The county filed a motion for summary judgment, claiming immunity under 2-9-111, and the court granted the motion. Shortly thereafter, the Legislature amended 2-9-111 to clarify that legislative immunity extended only to legislative bodies and to legislative actions taken by those bodies. Rather than filing a motion for reconsideration in federal court, Mills filed a complaint in state District Court, effectively precluding any relief from the federal system and rendering the federal court judgment final. A federal court summary judgment is a final judgment on the merits, and Mills' subsequent state action was therefore barred as res judicata. Mills v. Lincoln County, 262 M 283, 864 P2d 1265, 50 St. Rep. 1552 (1993), followed in State ex rel. Harlem Irrigation District v. District Court, 271 M 129, 894 P2d 943, 52 St. Rep. 364 (1995), and Hollister v. Forsythe, 277 M 23, 918 P2d 665, 53 St. Rep. 524 (1996).

Difference of Interpretation Not Issue of Material Fact: Kuhns argued that summary judgment was not proper because he and the defendant were in disagreement over the interpretation of a "reasonable efforts" clause in their contract. The Supreme Court held that a mere difference of interpretation does not amount to a genuine issue of material fact. Kuhns v. Scott, 259 M 68, 853 P2d 1200, 50 St. Rep. 685 (1993).

Initial Burden Met in Foreclosure Case — Remand to Consider Defense: The lower court, which found that the defendant borrowers executed notes, security agreements, and a mortgage upon which they defaulted, properly concluded that there was a prima facie case for foreclosure and that the plaintiff bank had met its initial burden on its summary judgment motion. Because the lower court concluded that res judicata barred contract-related defenses, it did not consider the question of whether those alleged defenses presented sufficient factual evidence to demonstrate a genuine issue of fact. The question remained to be decided by the lower court on remand. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993), overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996).

Affidavits Inadequate: The Supreme Court, holding that three affidavits by university employees did not prove the complete lack of a genuine issue of material fact, overturned the lower court's grant of summary judgment. Moffatt v. Univ. of Mont., 254 M 285, 837 P2d 401, 49 St. Rep. 779 (1992).

Good Faith Considerations Improperly Considered in Context of Age Discrimination Claim: The District Court granted summary judgment to employer on an age discrimination claim, concluded that immunity under 2-9-111 did not apply, and then went on to grant summary judgment to the employer on a wrongful discharge claim based on its determination that the employee was terminated for good cause, as defined in 39-2-903. The good cause discussion and conclusion followed immediately upon the court's consideration of the employer's long-term dissatisfaction with the employee's work performance in the context of the age discrimination claim. The motion for summary judgment and supporting arguments on the wrongful discharge claim differed significantly from those relating to the age discrimination claim, and the good cause issue as it related to the wrongful discharge claim was not raised or argued by either party. By granting summary judgment on an issue not before it, the court effectively denied Kenyon notice and an opportunity to be heard on the issue. The case was remanded. Kenyon v. Stillwater County, 254 M 142, 835 P2d 742, 49 St. Rep. 673 (1992), overruled, with regard to plaintiff's burden to adduce facts that, if believed, support a reasonable inference that plaintiff was denied an employment opportunity and, if the employer rebuts the inference of discrimination with evidence of legitimate, nondiscriminatory reasons, to demonstrate with specific facts that the employer's explanation is a pretext, in Heiat v. E. Mont. College, 275 M 322, 912 P2d 787, 53 St. Rep. 162 (1996).

Supreme Court Power to Order Summary Judgment for Opposing Party: The Supreme Court has the power to reverse a District Court's grant of summary judgment and order it to enter summary judgment in favor of the opposing party as a matter of law when all facts bearing on the issue are before the Supreme Court and no genuine issues of material fact exist. Johnston v. Am. Reliable Ins. Co., 253 M 253, 833 P2d 176, 49 St. Rep. 495 (1992).

Genuine Issue of Fact — No Duty of Court to Anticipate: The failure of the party opposing the motion for summary judgment to either raise or demonstrate the existence of a genuine issue of material fact or to demonstrate that the legal issue should not be determined in favor of the movant is evidence that the party's burden was not carried. Summary judgment is then proper,

the court being under no duty to anticipate proof to establish a material and substantial issue of fact. Sistok v. Kalispell Regional Hosp., 251 M 39, 823 P2d 251, 48 St. Rep. 1151 (1991); Tucker v. Trotter Treadmills, Inc., 239 M 233, 779 P2d 524, 46 St. Rep. 1646 (1989); Larry C. Iverson, Inc., v. Bouma, 195 M 351, 639 P2d 47, 38 St. Rep. 1911 (1981); State ex rel. Burlington N. v. District Court, 159 M 295, 496 P2d 1152 (1972).

Failure to Provide Electricity to Farmer With Three Years of Unpaid Bills: Farmer's contract with electric company for irrigation pump electricity provided that no electricity would be provided if past due balances were unpaid. During a severe 1985 drought, company refused electricity because of unpaid balances totaling $3,737.50 for 1982 through 1984. Farmer's crops failed for lack of water, and farmer sued company for damages. Summary judgment for company on the claim was affirmed. Company had no duty to provide water in view of the unpaid balances. The contractual instrument between farmer and company was modified by a "member service policy" that provided that company may allow installment payment in special circumstances. The court held that the member service policy applied only to residential electricity contracts and that it was not unreasonable to refuse the electricity for the irrigation pumps, particularly because farmer, at times, had the money to pay his balances but chose not to and instead gambled that he would not need to irrigate in 1985. Farmer's allegation that he had $1,914.90 in capital credits was not considered because there was no evidence that farmer offered the credits as part payment or that farmer and company discussed the credits. Ballenger v. N. Lights, Inc., 249 M 327, 815 P2d 1156, 48 St. Rep. 767 (1991).

Issues of Negligence Not Ordinarily Susceptible to Summary Judgment: The plaintiff was involved in a motor vehicle accident with the defendant. The plaintiff, driving a semitrailer, struck the back of the defendant's vehicle, a round bale feeder. The Supreme Court, recognizing that issues of negligence are not usually susceptible to summary adjudication, affirmed the lower court's dismissal of the plaintiff's case on the basis that no evidence had been introduced showing that the defendant had violated any law by being on the highway or by driving at a slow rate of speed. Henrickson v. Pocha, 245 M 217, 799 P2d 1095, 47 St. Rep. 1995 (1990).

Summary Judgment Held Improper on Issue of Bad Faith: In an earlier action between the parties, the Supreme Court had reversed the lower court and ruled that the plaintiff had made a claim against the insurance company in a timely fashion. In a second trial on the issue of bad faith, the lower court granted the insurance company's summary judgment motion on the basis that if a previous court had ruled that there was no coverage, although reversed on appeal, then as a matter of law there were good faith arguments supporting the insurance company's denial. The lower court reasoned that if one judge could find in favor of no coverage, then the defendant had demonstrated that it had denied coverage in good faith and summary judgment was proper. The Supreme Court reversed the lower court, holding that questions of fact did exist with respect to alleged lack of good faith on the part of the defendant, regardless of any earlier rulings. Walker v. St. Paul Fire & Marine Ins. Co., 241 M 256, 786 P2d 1157, 47 St. Rep. 208 (1990).

Summary Judgment Appropriate in Tort Cases: The plaintiff contended that tort actions in general are not properly disposed of by summary judgment. The Supreme Court affirmed the lower court's dismissal of the suit, stating that the court had previously upheld summary disposition of tort claims, including those involving breaches of the implied covenant of good faith and fair dealing. O'Bagy v. First Interstate Bank of Missoula, 241 M 44, 785 P2d 190, 47 St. Rep. 69 (1990).

Failure to File Brief Not Waiver of Right to Oral Argument: The Supreme Court ruled that the right to oral argument on a Rule 56, M.R.Civ.P., motion cannot be waived by failing to file a brief. In some cases, the lower court might by order dispense with the necessity of a hearing, but in the ordinary case, the right to a hearing must be specifically waived by all parties. Cole v. Flathead County, 236 M 412, 771 P2d 97, 46 St. Rep. 469 (1989). However, see Aetna Life Ins. Co. v. Jordan, 254 M 208, 835 P2d 770, 49 St. Rep. 703 (1992), in which case, after the granting of a summary judgment in favor of plaintiff, defendants hired a new attorney who filed several motions and requested a hearing but failed to raise any factual matters relevant to issuance of the summary judgment. In this case, failure to raise any genuine issue of material fact relevant to the motion for summary judgment constituted waiver of a hearing.

Accepted Work Rule Doctrine — Contractor Nonliability: The District Court properly granted summary judgment in favor of a contractor on the issue of negligence based on the accepted work rule doctrine. The doctrine, first recognized in Ulmen v. Schwieger, 92 M 331, 12 P2d 856 (1932), is based on the rule that an independent contractor is not liable to third parties for injuries that occur after the work has been completed and turned over to and accepted by the employer. Instead, the person employing the contractor is substituted as the responsible party. The Supreme Court affirmed the doctrine by refusing to extend contractor liability to foreseeable

injury caused by negligent construction. Harrington v. LaBelle's of Colo., Inc., 235 M 80, 765 P2d 732, 45 St. Rep. 2176 (1988), overruled in Pierce v. ALSC Architects, P.S., 270 M 97, 890 P2d 1254, 52 St. Rep. 93 (1995).

Contracts — Sufficient Ambiguity as Question of Law: In the interpretation of contracts, it is a question of law whether there is an ambiguity sufficient to submit the issue to a jury. Monte Vista Co. v. The Anaconda Co., 231 M 522, 755 P2d 1358, 45 St. Rep. 809 (1988), citing Nordlund v. School District, 227 M 402, 738 P2d 1299, 44 St. Rep. 1183 (1987), followed in Audit Serv., Inc. v. Systad, 252 M 62, 826 P2d 549, 49 St. Rep. 137 (1992), and, with regard to admissibility of parole evidence in determining the intent of the parties when ambiguities exist in a contract, Molerway Freight Lines, Inc. v. Rite-Line Transp. Serv., Inc., 273 M 95, 902 P2d 9, 52 St. Rep. 839 (1995). Monte Vista Co. was also followed in Doble v. Bernhard, 1998 MT 124, 289 M 80, 959 P2d 488, 55 St. Rep. 489 (1998). See also In re Estate of Hill, 281 M 142, 931 P2d 1320, 54 St. Rep. 101 (1997).

Summary Judgment Proper on Federal Question — Improper Failure to Consider Witness Depositions on State Question: A breach of employment contract action pursuant to the federal Social Security Act was properly dismissed by summary judgment because the violation did not give rise to a private civil cause of action. However, the District Court should have considered the depositions of three material witnesses before granting summary judgment on the question of whether there was a proper claim for tortious interference under state law. St. Medical Oxygen & Supply, Inc. v. Am. Medical Oxygen Co., 230 M 456, 750 P2d 1085, 45 St. Rep. 349 (1988), distinguished, on grounds that defendant rather than plaintiff scheduled and conducted witness depositions and there was no waiver of the introduction and consideration of the depositions as relevant to the summary judgment issue, in Estate of Nielsen v. Pardis, 265 M 470, 878 P2d 234, 51 St. Rep. 591 (1994). Following the St. Medical Oxygen decision, plaintiffs filed amended complaints in Cascade County and several other counties directly pleading tortious interference with a business relationship. The Cascade County case was summarily dismissed in favor of defendants on the grounds that because Medicare/Medicaid customers were free to choose any qualified oxygen supplier, plaintiffs were barred from a private cause of action as to that class of customers regardless of whether defendants acted tortiously. Defendants subsequently moved for summary dismissal in the other jurisdictions on grounds that the Cascade County decision was binding based on res judicata and collateral estoppel, and that motion was granted. However, the Cascade County decision was not a final judgment on the merits but rather a partial order. Because final judgment is a prerequisite to appeal and to the application of res judicata and collateral estoppel, the judgment was reversed and remanded for a final determination of the issues. St. Medical Oxygen & Supply, Inc. v. Am. Medical Oxygen Co., 256 M 38, 844 P2d 100, 49 St. Rep. 1126 (1992). On remand, the District Court properly granted American Medical Oxygen's motion for summary judgment because none of State Medical Oxygen's alleged factual issues were found to relate to the "without right or justifiable cause" element of State Medical Oxygen's action for tortious interference with business relations. St. Medical Oxygen & Supply, Inc. v. Am. Medical Oxygen Co., 267 M 340, 883 P2d 1241, 51 St. Rep. 1063 (1994).

Witness Credibility — Summary Judgment Improper: Where credibility, including that of defendant, is crucial, summary judgment becomes improper and a trial indispensable. Morrow v. FBS Ins. Montana-Hoiness LaBar, Inc., 230 M 262, 749 P2d 1073, 45 St. Rep. 188 (1988), following Arnstein v. Porter, 154 F2d 464 (2nd Cir. 1946).

Disposal of Personal Injury Case by Summary Judgment — Negligence as Matter of Law: Summary judgment is rarely proper in personal injury cases because of the peculiarly exclusive nature of the concept of negligence. Negligence is normally a question of fact; however, in certain cases in which reasonable minds cannot differ, the cause of an accident may be a question of law for the court to determine. In determining comparative negligence between a driver who passed while visibility in the left lane was obstructed and the state's obligation to provide and maintain safe highways, the only conclusion to be reached was that the driver's negligence exceeded that of the state. Summary judgment was proper in determining negligence as a matter of law. Brohman v. St., 230 M 198, 749 P2d 67, 45 St. Rep. 139 (1988), citing Hartley v. Wash., 698 P2d 77 (Wash. 1985), followed in Medders v. Joyes, 233 M 183, 758 P2d 769, 45 St. Rep. 1409 (1988), Christopherson v. White, Inc., 250 M 118, 817 P2d 1165, 48 St. Rep. 891 (1991), and Pappas v. Midwest Motor Express, Inc., 268 M 347, 886 P2d 918, 51 St. Rep. 1288 (1994), and distinguished in Dillard v. Doe, 251 M 379, 824 P2d 1016, 49 St. Rep. 85 (1992), in which there was substantial active negligence by both parties upon which reasonable minds could differ as to the degree of comparative negligence. Dillard was followed in Kolar v. Bergo, 280 M 262, 929 P2d 867, 53 St.

Rep. 1395 (1996), and Craig v. Schell, 1999 MT 40, 293 M 323, 975 P2d 820, 56 St. Rep. 167 (1999).

No Abuse of Discretion in Reconsideration of Denial of Summary Judgment: Appellant, disabled by muscular atrophy, entered into an agreement allowing him to live in a cabin on respondent's property in exchange for his promise to inspect and maintain the property to the "best of his abilities". When a disagreement over the terms of the agreement ensued, appellant vacated the cabin and brought an action against the respondent. The District Court denied respondent's summary judgment motion. Prior to trial, however, the judge recused himself from the case. Subsequently, the newly assigned judge granted respondent's renewed motion for partial summary judgment. On appeal, the Supreme Court ruled that the District Court did not abuse its discretion by reconsidering another judge's denial of summary judgment when additional deposition information upon which the order was based had been submitted. Rowland v. Klies, 223 M 360, 726 P2d 310, 43 St. Rep. 1788 (1986).

No Evidence of Fraud — Summary Judgment Appropriate: Since 28-2-404 does not preclude summary judgment when there is no evidence supporting a claim of fraud, under Rule 56(c), M.R.Civ.P. (Title 25, ch. 20), summary judgment was appropriate. Campbell v. Campbell, 223 M 124, 725 P2d 207, 43 St. Rep. 1584 (1986).

Summary Judgment — Failure to Show Proximate Cause: Dvorak was a welder for Beall, which repaired truck tankers used to haul commodities. Matador delivered to Beall for repairs a tanker that had hauled substances contaminated by toxic hydrogen sulfide. Despite Dvorak's discovery and report of remaining contaminants, a Beall foreman ordered him to enter the tank to complete the repairs. Dvorak subsequently collapsed and received injuries as a result of exposure to the hydrogen sulfide. Dvorak filed suit, claiming that Beall and Matador were liable under an intentional tort exception to the exclusivity provision of workers' compensation laws. The District Court granted Beall's summary judgment motion. On appeal, Dvorak argued that Matador was strictly liable for engaging in an abnormally dangerous activity and negligent for failing to warn of the protections needed against hydrogen sulfide dangers. The District Court granted Matador's summary judgment motion, concluding that Beall's conduct was the sole proximate cause of Dvorak's injuries. On appeal, the Supreme Court stated that without Beall's negligent conduct Dvorak's injuries would not have occurred. Thus, Matador's failure to warn was not the proximate cause of the accident. Accordingly, since Beall's conduct proximately caused the accident, Matador was not strictly liable. Dvorak v. Matador Serv., Inc., 223 M 98, 727 P2d 1306, 43 St. Rep. 1562 (1986), followed in Bickler v. The Racquet Club Heights Associates, 258 M 19, 850 P2d 967, 50 St. Rep. 409 (1993).

Reversal of Summary Judgment — Exception to Exclusiveness of Workers' Compensation Remedy: A summary judgment was granted by the District Court for the stated reason that because of the employee's application for and receipt of workers' compensation benefits, remedies were exclusive to the Workers' Compensation Act. Application and receipt of benefits resulted in an election pursuant to 39-71-411, thereby barring a common-law tort action against the employer. In reversing the summary judgment, the Supreme Court held that a narrow exception to the exclusiveness of the compensation remedy existed when the employer personally committed an assault and battery upon the employee. Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986). See also Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000), in which Sitzman's "narrow exception" to the exclusiveness of the compensation remedy, existing when the employer personally committed an assault and battery upon the employee, was used as precedent for the holding that although 39-71-413 provides for an action only against a fellow employee for intentional or malicious injury, such an action may be brought against an employer as well—in this case, a major oil company.

Equitable Easement — Insufficient Facts to Support Summary Judgment: In quiet title action, it was error for trial court to grant summary judgment when there were insufficient facts in the record to support the District Court's finding of an equitable easement. Penland v. Derby, 220 M 257, 714 P2d 158, 43 St. Rep. 342 (1986).

Grant of Summary Judgment to Party Not Answering Discovery Relating to Counterclaim — Matters in Requested Discovery Not Material as Res Judicata: A nonresident respondent brought an action in Montana District Court seeking the balance of an amount owing from a judgment rendered in Florida. The appellant counterclaimed, alleging fraud and other matters relating to the underlying action adjudicated in Florida. The respondent moved for summary judgment but did not answer extensive discovery submitted by the appellant. Both the District Court and the Supreme Court held that the unanswered discovery related to matters covered by res judicata; therefore, as a matter of law, it was not discovery necessary to determine material

facts of the case. Thus, the grant of summary judgment to the nonanswering party was not barred by this rule. O'Neal, Booth & Wilkes, P.A. v. Andrews, 219 M 496, 712 P2d 1327, 43 St. Rep. 120 (1986).

Subdivision Review of Four-Plex Apartments Unnecessary: Appellants brought an action to stop construction of an apartment building for failure of its builders to comply with subdivision review. The lower court granted the county's summary judgment motion based on the fact that 40 A.G. Op. 57 (1984) was rendered after construction began. During the pendency of the action, 76-3-204 was amended to clarify that new apartment buildings are exempt from subdivision review. Since an appellate court must apply the law in effect at the time it renders its decision, the Supreme Court upheld the lower court decision because the law as amended makes subdivision review unnecessary for the respondents' four-plex apartment building. Lee v. Flathead County, 217 M 370, 704 P2d 1060, 42 St. Rep. 1258 (1985), affirmed as law of the case in Paulson v. Lee, 229 M 164, 745 P2d 359, 44 St. Rep. 1864 (1987).

Negligence — Summary Judgment Appropriate When Plaintiff Cannot Recover as a Matter of Law: Summary judgment is inappropriate in negligence cases when the contested facts actually involve the issue of a negligent breach of a legal duty requiring application of the reasonable person standard. However, a "summary judgment motion in favor of defendant should be granted in those cases in which there is no genuine issue as to any fact that is crucial to plaintiff's cause of action so that as a matter of law he cannot recover". 10 A. Wright, Miller & Kane, Federal Practice & Procedure sec. 2729 (1983). Morales v. Tuomi, 214 M 419, 693 P2d 532, 42 St. Rep. 60 (1985).

Alleged Oral Modification of Written Real Estate Contract Not Sufficient to Prevent Summary Judgment: Real estate agent sued to recover remainder of his broker's commission on sale of ranch which fell through. District Court granted agent summary judgment, and the Supreme Court affirmed. The Supreme Court found there were no material issues of fact in dispute, and an allegation that the agent orally waived the remainder of the fee in return for the opportunity to relist the property was insufficient to prevent summary judgment because the alleged waiver was not in writing. Taylor v. Weingart, 214 M 282, 693 P2d 1231, 41 St. Rep. 2474 (1984).

Motion for Summary Judgment — Judge's Discretion to Allow Late Briefs and Arguments: The District Court did not err by allowing defendants to submit briefs and argue plaintiffs' summary judgment motion late upon learning why defendants' counsel originally overlooked the matter. Although there are no Montana cases on point, the Supreme Court analogized the judge's discretion to set aside judgments under Rule 60(b), M.R.Civ.P., as basis for judges' discretion to allow late briefs and arguments. Todd v. Berner, 214 M 263, 693 P2d 506, 41 St. Rep. 2462 (1984).

Summary Judgment on Compromise Settlement Note Proper Regardless of Enforceability of Underlying Contract: Parties to a real estate transaction executed a promissory note in compromise and settlement of a dispute over the property. The sellers filed a complaint to recover on the promissory note. The defendants asserted two affirmative defenses seeking rescission of the note. The District Court granted plaintiffs' motion for summary judgment. The Supreme Court affirmed and held that plaintiffs' relinquishment of their claim against defendants, even though the claim may not have been ultimately proved valid, was sufficient consideration on the promissory note. Ultimate unenforceability of the buy/sell agreement was immaterial under the circumstances. Todd v. Berner, 214 M 263, 693 P2d 506, 41 St. Rep. 2462 (1984).

Annexation Agreement — Issue of Intent One of Fact — Summary Judgment Improper: The term "Residential Purposes" in a "Waiver of Right to Protest Annexation and Agreement on Non-Conforming Use" was not so clear on its face as to preclude multifamily residential purposes. Supreme Court held that District Court erred in granting summary judgment for city based on the District Court's determination of the intention of the parties and remanded the case for trial on the issue of intent. Issue of intent is one of fact and cannot be decided on summary judgment. Derrenger v. Billings, 213 M 469, 691 P2d 1379, 41 St. Rep. 2276 (1984).

Advisory Comments on Summary Judgment Appeal: On appeal from and reversal of grant of summary judgment, it was premature for the court to advise the parties and the trial court on the possible application of Montana law. The case was not completely before the Supreme Court, and when all pertinent facts are known, the trial court is the forum for initial application of the law. Hull v. D. Irvin Transp., Ltd., 213 M 75, 690 P2d 414, 41 St. Rep. 1954 (1984).

Decision on Issues of Fact Improper: Trial court's decision on several issues of fact on a motion for summary judgment was improper. Hull v. D. Irvin Transp., Ltd., 213 M 75, 690 P2d 414, 41 St. Rep. 1954 (1984).

Motion for Summary Judgment Treated as Motion for Directed Verdict: When a defendant at the close of trial and after submission of all evidence moved under this rule for summary judgment on its counterclaim, the Supreme Court held that the proper procedure would have been to make the motion under Rule 50(b), M.R.Civ.P., but that since the questions to be answered are the same under either motion, the motion made would be considered the equivalent of a motion for a directed verdict. The Supreme Court further ruled that on the basis of the record, the defendant was entitled to judgment on its counterclaim. Doll v. Major Muffler Centers, Inc., 208 M 401, 687 P2d 48, 41 St. Rep. 429 (1984).

Depositions Not Before Court — Summary Judgment Improper: In a libel and slander action, the District Court granted summary judgment to the defendants. At the time, the court did not have before it the depositions of the four defendants. This was unknown to counsel until the record on appeal was prepared. Because the District Court possibly did not have all the facts before it, the Supreme Court returned the case for further consideration. Rasmussen v. Bennett, 207 M 33, 672 P2d 278, 40 St. Rep. 1849 (1983).

Consideration of Matters Outside Pleadings on Motion to Dismiss — Conversion to Summary Judgment: Reversible error was committed when matters outside the pleadings were considered in conjunction with defendant's motion to dismiss complaint and the court did not notify plaintiff that the effect of such consideration was conversion of the motion to dismiss into a motion for summary judgment. Plaintiff was entitled to reasonable opportunity to present all materials pertinent to a motion for summary judgment. Though plaintiff must be presumed to have knowledge of the automatic conversion requirements of the rule governing a motion to dismiss, since the court had discretion as to whether or not it would exclude extra-pleading materials, it was incumbent on the court to affirmatively notify the parties that the materials were not excluded and that the conversion of the motion to dismiss into a summary judgment motion was effected. Gebhardt v. D. A. Davidson & Co., 203 M 384, 661 P2d 855, 40 St. Rep. 521 (1983). See also Wood v. Den Herder, 277 M 147, 920 P2d 105, 53 St. Rep. 646 (1996).

Contractor Liability — Speculation Insufficient to Raise Issue of Material Fact: Plaintiff was injured when the car in which he was sleeping crashed into a concrete retaining wall at the end of a dead-end street in Helena. The alleged liability of the defendant was based on the assertion that in working on an SID, defendant's crew had removed a dead-end street sign. Defendant was granted summary judgment based on the holding of Ulmen v. Schweiger, 92 M 331, 12 P2d 856 (1932). On appeal, plaintiff contended that Ulmen no longer represented the modern view of contractor liability. The Supreme Court did not reach this issue, finding that the record indicated no genuine issue of material fact existed upon which defendant's liability could be predicated. No testimony directly connecting defendant with removal of the sign was given except for speculation. Speculation is not a sufficient basis on which to raise a genuine issue of material fact. Fauerso v. Maronick Constr. Co., 203 M 106, 661 P2d 20, 40 St. Rep. 327 (1983), followed in Gen. Ins. Co. of Am. v. Town Pump, Inc., 214 M 27, 692 P2d 427, 41 St. Rep. 2292 (1984).

Opposing Party — Speculative Statements Insufficient: A party opposing a summary judgment motion must present facts of a substantial nature, and speculative statements are insufficient to raise a genuine issue of material fact. Brothers v. Gen. Motors Corp., 202 M 477, 658 P2d 1108, 40 St. Rep. 226 (1983).

What Constitutes "Public Figure" for Purpose of Libel Defense — Summary Judgment Properly Granted: The plaintiff, a commodities broker who had some public notoriety within the state as a result of his membership in and speeches to political organizations and as a result of articles about him appearing in national publications, brought a libel action against the defendant. The Supreme Court held that the District Court did not err in granting summary judgment for the defendant, holding the plaintiff to be a public figure as a matter of law (and therefore requiring actual malice to be proven by the plaintiff), as there was no absolute prohibition in the Montana Constitution against granting summary judgment in a libel case and because the plaintiff had a general fame or notoriety in the state and exhibited pervasive involvement in the affairs of society. Williams v. Pasma, 202 M 66, 656 P2d 212, 39 St. Rep. 2332 (1982), followed in Lence v. Hagadone Inv., 258 M 433, 853 P2d 1230, 50 St. Rep. 601 (1993).

Conclusory Statements Not Sufficient in Opposition: In opposing a motion for summary judgment, the plaintiff merely made conclusory statements in support of its positions that factual issues were still unresolved. The court held that the appellant's conclusions of law would clearly not be admissible into evidence at trial and were not properly before the court. The plaintiff's opposition to the motion was not sufficient to defeat the motion. Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982).

Test for Grant of Summary Judgment: The purpose of summary judgment is to encourage judicial economy by eliminating unnecessary trials, and it is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Movant has the burden of showing a complete absence of any genuine issue as to all facts considered material in light of the substantive principles that entitle the movant to a judgment as a matter of law, and all reasonable inferences that may be drawn from the offered proof are to be drawn in favor of the opposing party. Cereck v. Albertson's, Inc., 195 M 409, 637 P2d 509, 38 St. Rep. 1986 (1981), followed in Kenyon v. Stillwater County, 254 M 142, 835 P2d 742, 49 St. Rep. 673 (1992), Nichols v. Corntassel, 258 M 173, 852 P2d 583, 50 St. Rep. 483 (1993), and in Smith v. Kerns, 281 M 114, 931 P2d 717, 54 St. Rep. 86 (1997).

Refusal to Consider Untimely Filed Affidavits — No Error Found: A seller of real property sought summary judgment in an action based on the contract of purchase, and the buyer's attorney failed to file an affidavit and brief opposing the seller's motion for summary judgment until the day of the hearing. The seller's counsel pointed out the untimeliness of the filing, and the trial court refused to consider the affidavit. On appeal, no abuse of discretion was found. The Supreme Court noted, too, the unwarranted delays previously caused by the buyer in the case and the lack of any compelling excuse for the untimely filing. Marcus Daly Mem. Hosp. v. Borkoski, 191 M 366, 624 P2d 997, 38 St. Rep. 322 (1981), followed in O'Neill v. St., 225 M 364, 732 P2d 1330, 44 St. Rep. 305 (1987), and in Wright v. St., 231 M 324, 752 P2d 748, 45 St. Rep. 652 (1988).

Denial of Defendant's Motion Reviewable Upon Judgment for Claimant: Where the purchasers of real property brought an action for breach of contract, misrepresentation, and breach of a statutory and equitable obligation to maintain a county road against the sellers of the property and the county, the previous property owner, and the sellers in turn filed a cross-complaint for indemnification against the previous owner, the trial court's order denying the county's motion for summary judgment was reviewable on appeal by the county because a final judgment was entered for the purchasers. Nonappealable interlocutory orders are reviewable on appeal from a final judgment. Riley v. Carl, 191 M 128, 622 P2d 228, 38 St. Rep. 83 (1981).

Differing Considerations for Summary Judgment and Final Judgment: The considerations which result in a grant of summary judgment are not the same considerations relevant to an order of final certification under Rule 54(b), M.R.Civ.P. Under summary judgment procedure, the essential inquiry is whether material facts are disputed. Under Rule 54(b) procedure, the inquiry is whether, after balancing the competing factors, finality of judgment should be ordered to advance the interests of sound judicial administration and public policy. Knight & Co. v. Ft. Belknap Indian Agency Housing Authority, 188 M 218, 612 P2d 1290 (1980).

Summary Judgment on Issue of Liability Alone Not Appealable: A summary judgment for plaintiff on the question of liability, reserving judgment as to the amount of damages, is interlocutory in character and hence is not appealable. Weston v. Kuntz, 187 M 453, 610 P2d 172 (1980).

Local Rule as Conflicting With Montana Rules of Civil Procedure: Local court Rule 3, Park County District Court, states in part that a party opposing a motion has 10 days after the filing and service of the moving party's brief to serve and file a reply brief. When applied to a motion for summary judgment, local Rule 3 conflicts with Rule 56(c), M.R.Civ.P. Whenever a local rule conflicts with M.R.Civ.P., the local rule must be set aside. Krusemark v. Hansen, 186 M 174, 606 P2d 1082 (1980).

Summary Judgment Based on Matters Occurring After Pleadings: Sellers, under a contract for deed, sent a notice of default to the buyers. Buyers brought an action against the sellers for a declaratory judgment that buyers were not in default. The District Court granted summary judgment in favor of the sellers. The Supreme Court found that the District Court erred in giving outside the pleadings to consider matters occurring after they were filed and in granting summary judgment based on those matters. The case was remanded for further proceedings. Hoffman v. Byrne 185 M 56, 604 P2d 328 (1979).

Findings of Fact and Conclusions of Law Unnecessary:

Since the District Court has no duty to make findings of fact and conclusions of law when it grants a summary judgment, its failure to do so as to one issue when it has done so as to others is not a factor on review by the Supreme Court. Boise Cascade Corp. v. First Sec. Bank of Anaconda, 183 M 378, 600 P2d 173 (1979), followed in Major v. N. Valley Hosp., 233 M 25, 759 P2d 153, 45 St. Rep. 1263 (1988).

Findings of fact and conclusions of law are unnecessary on decisions with respect to motions made under Rule 12, Rule 56, or any other motion except as provided in Rule 41(b). Eisemann v.

Hagel, 157 M 295, 485 P2d 703 (1971). See also Downs v. Smyk, 185 M 16, 604 P2d 307 (1979), and Lewis v. St., 207 M 361, 675 P2d 107, 41 St. Rep. 9 (1984).

Summary Judgment for Nonmoving Party: No formal cross motion is necessary for a court to enter summary judgment. The invocation of the power of a court to render summary judgment in favor of the moving party gives the court power to render summary judgment for his adversary provided the case warrants that result. However, the court must be very careful that the original movant had a full and fair opportunity to meet the proposition and that there is no genuine issue of material fact, and the other party is entitled to judgment as a matter of law. Hereford v. Hereford, 183 M 104, 598 P2d 600 (1979), followed in Canal Ins. Co. v. Bunday, 249 M 100, 813 P2d 974, 48 St. Rep. 597 (1991), and In re Estate of Marson, 2005 MT 222, 328 M 348, 120 P3d 382 (2005), and distinguished in Truck Ins. Exch. v. Waller, 252 M 328, 828 P2d 1384, 49 St. Rep. 318 (1992), in which a misrepresentation counterclaim was not involved in cross-motions for summary judgment, but the initial motion for summary judgment specifically included the misrepresentation counterclaim.

Issues of Fact — Oral Motion: The District Court erred in granting summary judgment to plaintiff since genuine issues of fact were presented by the pleadings, responses to requests for admissions, and an affidavit opposing summary judgment. However, the District Court properly rejected defendant's contention that variance between the ground asserted in plaintiff's brief and the ground asserted at the hearing on the motion allowed plaintiff to make an oral motion for summary judgment in violation of this rule. Audit Serv., Inc. v. Haugen, 181 M 9, 591 P2d 1105 (1979).

Distinction Between Motion to Dismiss and for Summary Judgment: The District Judge did not reverse the previously disqualified District Judge's denial of defendants' motion to dismiss by granting defendants' motions for summary judgment and thereby improperly exercise appellate jurisdiction because the latter motion was a decision on the merits while the former was merely a determination of the sufficiency of the allegations in the complaint. Granger v. Time, Inc., 174 M 42, 568 P2d 535 (1977).

Summary Judgment Granted on Appeal — No Motion: The Supreme Court has the power to order summary judgment for appellant although motion for summary judgment was not made by the appellant to the District Court. Treasure St. Indus., Inc. v. Welch, 173 M 403, 567 P2d 947 (1977).

Notice Requirement Waived: A party must timely object to a hearing scheduled before the required 10 days have run. Llera v. Wisner, 171 M 254, 557 P2d 805 (1976).

Summary Judgment on Motion to Dismiss for Failure to State a Claim — Notice Requirement: District Court erred in treating defendant's motion to dismiss for failure to state a claim as a motion for summary judgment without affording plaintiff notice and opportunity to oppose it because the court must give the parties notice of the changed status of the motion and a reasonable opportunity to present all material made pertinent to such motion so no one will be taken by surprise by the conversion. State ex rel. Dept. of Health & Environmental Sciences v. Livingston, 169 M 431, 548 P2d 155 (1976), followed in Hoveland v. Petaja, 252 M 268, 828 P2d 392, 49 St. Rep. 245 (1992).

Existence of Material Facts — Inconsistent Contentions: Summary judgment for donee was affirmed. A party may concede that there is no issue if his legal theory is accepted and yet maintain there is a genuine dispute as to material facts, if his opponent's theory is adopted. Faith Lutheran Retirement Home v. Veis, 156 M 38, 473 P2d 503 (1970).

Oral Testimony Proper: Oral testimony is properly within the matters which the court may consider on motions for summary judgment. Citizens St. Bank v. Duus, 154 M 18, 459 P2d 696 (1969); Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Failure to Deny Allegation of Pretrial Pleading — Summary Judgment: Court was correct in adopting uncontested statement of fact in pretrial pleading in making its findings of fact for summary judgment. Glacier St. Elec. Supply v. Hoyt, 152 M 415, 451 P2d 90 (1969); Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Pleadings Not Controlling: On a motion for summary judgment the formal issues presented by the pleadings are not controlling, and the court must consider the depositions, answers to interrogatories, admissions on file, oral testimony, and exhibits presented. Hager v. Tandy, 146 M 531, 410 P2d 447 (1965).

Demand for Admissions — No Response — Summary Judgment: Because plaintiff failed to reply to the demand for admissions within the time stated, the court was bound to grant the motion for summary judgment. Naegli v. Daniels, 145 M 323, 400 P2d 896 (1965).

Extrinsic Evidence Proving Res Judicata: The pleadings on their face did not raise the defense of res judicata and, in view of this provision as to nonuse of affidavits, the defense

seemingly is required to be specifically proved. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

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Failure to Prove Agency — Summary Judgment on Nonliability for Constructive Discharge by Alleged Agent Improper: Plaintiff sued defendant corporation American Music Co. (AMC) for constructive discharge based on individual defendant Kelman's tortious interference with plaintiff and AMC's business relationship. Kelman founded AMC and then transferred ownership to his daughters but remained a creditor of AMC and owned the building where the business was located. Plaintiff cited numerous instances of Kelman's intimidating and threatening behavior in the office, contending that Kelman's actions and AMC's failure to control Kelman impaired plaintiff's ability to function normally at work and resulted in plaintiff's constructive discharge. Kelman moved for summary judgment on grounds that Kelman was an agent of AMC and thus was privileged from claims of tortious interference. The District Court agreed and granted summary judgment to Kelman and AMC. On appeal, the Supreme Court reversed. Kelman was not employed by AMC and thus was not an actual agent, nor did ostensible agency exist because AMC never caused any third person to believe that Kelman was an AMC agent. Absent an agency relationship between Kelman and AMC, Kelman's claimed privilege from suit failed. In addition, constructive discharge is usually a question of fact for the trier of fact to decide and is not subject to summary judgment. Plaintiff presented sufficient evidence to create a question of fact whether a reasonable person would have felt forced to resign, so the grant of summary judgment to AMC was also reversible error. Bellanger v. Am. Music Co., 2004 MT 392, 325 M 221, 104 P3d 1075 (2004).

Montana Safety Act Not Limited to Workplace — Question of Employer's Duty to Protect Life and Safety Precluding Summary Judgment: Moore employed Peyatt to haul hay from North Dakota to Montana. When the hay was being loaded onto Peyatt's truck, he was seriously injured. Because there was no workers' compensation coverage for the injury, Peyatt brought a claim against Moore under the Montana Safety Act for failure to provide a safe workplace, adopt safe practices, and do anything else necessary to protect Peyatt's life, health, and safety. The District Court concluded that Peyatt's place of employment was the truck, not the loading environment at the farm, and that because Moore did not have the right to exercise control over the loading environment, Moore could not have breached the duty to provide a safe workplace. Summary judgment was granted to Moore, Peyatt appealed, and the Supreme Court reversed. As a matter of law, Moore did not violate the duty to provide Peyatt with a safe workplace absent control over the location. However, the broad language of the Montana Safety Act does not limit the Act only to the workplace. Summary judgment also precluded Peyatt's claim under 50-71-201(4) to present evidence that Moore failed to do anything else necessary to protect Peyatt's life, health, and safety. Because there was a genuine issue of material fact whether Moore breached that duty, the case was remanded for a jury determination of whether Moore was liable for breach of that duty. Peyatt v. Moore, 2004 MT 341, 324 M 249, 102 P3d 535 (2004). See also Stratemeyer v. Lincoln County, 276 M 67, 915 P2d 175 (1996).

Sufficient Evidence of City's Willful or Wanton Misconduct to Preclude Summary Judgment — Negligence Claim Against City Barred by Recreational Use Statute: Plaintiff was injured on June 20, 2001, after falling through a damaged plank on the Polson city dock, and filed suit against the city for negligently maintaining the premises and for failing to warn of the unsafe condition. The District Court granted summary judgment for the city on grounds that plaintiff failed to present evidence in support of the claim that the city was aware of the defective plank before June 20 or that the city acted willfully or wantonly. The court also concluded that plaintiff's negligence claim was precluded by 70-16-302, the recreational use statute. On appeal, the Supreme Court concluded that the facts, when considered in a light most favorable to plaintiff, were sufficient to raise a genuine issue as to whether the city's failure to timely repair the damaged plank or warn plaintiff of the danger constituted willful or wanton misconduct, precluding summary judgment and warranting a trial on the issue. However, the Supreme Court agreed that the recreational use statute barred plaintiff's negligence claim. Jobe v. Polson, 2004 MT 183, 322 M 157, 94 P3d 743 (2004).

Attorney's Duty of Care Owed to Estate Beneficiary — Standing of Estate to Bring Legal Malpractice Action: A personal representative brought a legal malpractice damage suit on behalf of the estate against an attorney who drafted a trust document and will. Before granting summary judgment to the attorney, the District Court raised the issue of whether the estate and personal representative had standing to bring the suit, based on a questionable fiduciary

relationship between the plaintiffs and the attorney. On appeal, the Supreme Court concluded that as a representative of the decedent, the estate stood in the shoes of the decedent and was thus considered to be in privity with the attorney, so the estate had standing to bring a malpractice claim. Further, the question of whether the trust and the personal representative had standing was a question of fact to be determined at trial, so summary judgment was precluded and the case remanded for further proceedings. Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Legal Malpractice Claim by Estate Not Barred by Res Judicata, Equitable Estoppel, or Judicial Estoppel: A personal representative brought a legal malpractice damage suit on behalf of the estate against an attorney who drafted a trust document and will. The trust beneficiaries brought a separate suit against the trustee. The District Court granted summary judgment for the attorney on grounds of res judicata, equitable estoppel, and judicial estoppel. On appeal, the Supreme Court reversed. Res judicata and collateral estoppel did not apply because the subject matter and parties in the beneficiaries' suit were different. Equitable estoppel did not apply because the defendants did not present any evidence to establish that they relied on an act by the personal representative or changed their position for the worse because of that act. Judicial estoppel did not apply because the judicial admission in this case referred only to plaintiffs' legal theory and not to an unequivocal statement of fact and because of the absence of any evidence that defendants were misled by a judicial admission. Thus, summary judgment was inappropriate. Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Legal Malpractice Claim Timely Filed — Summary Judgment Inappropriate When Date of Discovery and Accrual Disputed: The Watkins estate filed a legal malpractice claim against an attorney who set up the trust. The District Court found that the 3-year statute of limitations had run on filing the suit and granted summary judgment for the attorney. On appeal, the Supreme Court reversed. After concluding that the statute of limitations does not begin to run until both the discovery rule and the accrual rule have been satisfied, the court examined the applicability of both rules. The claim was filed in 1997, but the estate did not discover the attorney's negligence until 1995, which was excusable because: (1) the trustee relied on the fiduciary relationship and trusted that the attorney's assertion that the trust was revocable was correct, even though it was irrevocable; (2) of the complexity of the estate plan, which was difficult even for experts to understand and was beyond the understanding of a layperson; and (3) the attorney may have fraudulently concealed the malpractice. Further, because the trustee continued to treat the trust as revocable in reliance on the attorney's advice, the estate did not sustain any actual damages until the irrevocable nature of the trust was discovered and trust beneficiaries brought suit to remove the trustee in 1996, well within the statute of limitations. The attorney's contention that res judicata and estoppel barred the present suit because the beneficiaries also maintained a separate suit for damages also failed because neither the parties nor the issues were the same. Summary judgment was thus improper, and the case was remanded. Estate of Watkins v. Hedman, Hileman & Lacosta, 2004 MT 143, 321 M 419, 91 P3d 1264 (2004), following Uhler v. Doak, 268 M 191, 885 P2d 1297 (1994). See also Watkins Trust v. Lacosta, 2004 MT 144, 321 M 432, 92 P3d 620 (2004).

Summary Judgment on Breach of Contract Affirmed — Wrongful Discharge Claim Reversed for Determination of Whether Claimant Was Employee or Independent Contractor: Tvedt brought a claim for breach of contract, wrongful termination, and indemnification of expenses, alleging that defendant group had breached the covenant of good faith and fair dealing, waived the at-will clauses in their employment agreement, and mischaracterized Tvedt as an independent contractor, rather than an employee. Defendant group moved for summary judgment and filed a contingent counterclaim stating that in the event that Tvedt was found to be defendant group's employee, then defendant group's obligation to pay Tvedt the contract value should cease and all payments made to Tvedt should be returned. The District Court determined that Tvedt was not an employee and granted summary judgment to defendant group on all claims, and Tvedt appealed. The Supreme Court affirmed summary judgment on the breach of covenant issue because Tvedt was given adequate notice of termination, defendant group was exercising the specific language of the at-will termination provision of the contract, and Tvedt did not demonstrate that defendant group had waived the right to enforce that provision. However, the court reversed summary judgment on the wrongful discharge claim because the District Court incorrectly applied defendant group's novation argument and because genuine issues of fact remained whether Tvedt was an employee or independent contractor and whether a manager's agreement that recognized Tvedt individually was in effect at the time of termination. Remand was ordered because the District Court never considered whether Tvedt was entitled to relief for wrongful discharge as a matter of law and, if so, whether the claim for

indemnification was appropriate. Tvedt v. Farmers Ins. Group of Co., 2004 MT 125, 321 M 263, 91 P3d 1 (2004).

Improper Resolution of Disputed Issues of Material Fact Once Insurer's Duty to Defend Established — Reversible Error: A driver was injured when his vehicle struck a horse and filed a claim against Staples, who was allegedly pasturing the horse just prior to the accident. Staples then filed a third-party complaint against the horse owners, claiming that as the horse's custodian, he was an additional insured under the insurance policy of one owner and was entitled to a defense. Defendant insurer unilaterally decided that its insured was not the horse's owner and sought a declaration that it had no duty to defend or provide coverage to Staples. On cross-motions for summary judgment, the District Court found that Staples might be an insured under the policy and that defendant had a duty to defend Staples, but then went on to conclude that because the policyholder did not own the horse at the time of the accident, Staples was not a third-party insured. Therefore, summary judgment was granted to the insurer. On appeal, the Supreme Court reversed. Having correctly determined that the insurer had a duty to defend, the District Court should have ended the analysis and concluded that because the insurer breached that duty, it was estopped from denying coverage and that Staples was entitled to coverage. It was error for the District Court to then proceed to resolve disputed issues of fact in ruling on the summary judgment motion in favor of the insurer. Staples v. Farmers Union Mut. Ins. Co., 2004 MT 108, 321 M 99, 90 P3d 381 (2004), following Independent Milk & Cream Co. v. Aetna Life Ins. Co., 68 M 152, 216 P 1109 (1923), Graber v. St. Farm Fire & Cas. Co., 244 M 265, 797 P2d 214 (1990), Grindheim v. Safeco Ins. Co., 908 F. Supp. 794 (D.C. Mont. 1995), Insured Titles, Inc. v. McDonald, 275 M 111, 911 P2d 209 (1996), Farmers Union Mut. Ins. Co. v. Horton, 2003 MT 79, 315 M 43, 67 P3d 285 (2003), and Lee v. USAA Cas. Ins. Co., 2004 MT 54, 320 M 174, 86 P3d 562 (2004).

No Contemporaneous Impact Requirement for Determining Negligent Infliction of Emotional Distress — Sacco Rule Applicable: Wages' son was injured by a vehicle driven by defendant's insured. Although Wages did not witness the accident, he sued defendant insurer for severe emotional distress as a result of the insured's negligent operation of the vehicle. Both parties moved for summary judgment. The District Court cited Treichel v. St. Farm Mut. Auto. Ins. Co., 280 M 443, 930 P2d 661 (1997), for the proposition that an individual who witnesses a family member sustain injury or death states a claim for negligent infliction of emotional distress, but an individual who is not at the scene to witness the accident may state a claim for loss of consortium. The court granted summary judgment to defendant. Wages appealed, and the Supreme Court reversed. The court distinguished Treichel and held that the District Court should instead have applied the rule from Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), that an independent cause of action for infliction of emotional distress will arise in circumstances in which serious or severe emotional distress to a claimant was the reasonably foreseeable consequence of a negligent or intentional act or omission. Duty and foreseeability are inextricably linked, and both must be determined by the trial court. The case was remanded for further proceedings in light of Sacco. Wages v. First Nat'l Ins. Co. of America, 2003 MT 309, 318 M 232, 79 P3d 1095 (2003).

Advance Insurance Payment Not Required When Liability Not Reasonably Clear: Plaintiffs' child was injured when run over by a car while sledding. Plaintiffs moved for summary judgment requiring the driver's insurer to advance payment for the child's medical expenses pursuant to 33-18-201. The insurer also moved for summary judgment of the issue, contending that an advance was not required because liability had not been clearly established. The District Court granted summary judgment for the insurer, and plaintiffs appealed. The Supreme Court agreed that an advance is required when liability is reasonably clear, but in this case, there was a conflict in the evidence as to whether the driver or the child was negligent. Because genuine issues of material fact existed regarding negligence and liability, summary judgment on the question of the advance was not required. The District Court was affirmed. Giambra v. Travelers Indem. Co., 2003 MT 289, 318 M 73, 78 P3d 880 (2003), following Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997).

Error in Failing to Consider Estoppel Related to Waiver of Right to Declare Contract Forfeiture — Summary Judgment Improper: When plaintiffs began experiencing financial problems, they notified defendants that they would not be able to make the annual payment on their property. Defendants allegedly told plaintiffs that they would have whatever time they needed to come up with the money, as long as they paid any additional interest and other expenses. Defendants subsequently sent plaintiffs a default notice and terminated the contract for deed. Plaintiffs contended that defendants waived the right to terminate the contract and should be estopped from forfeiting the contract. The District Court dismissed the waiver and

estoppel arguments as an attempt to offer parol evidence to amend the contract and granted summary judgment to defendants. However, plaintiffs were not trying to amend the contract, but rather were simply trying to show that defendants waived the right to foreclose for at least a period of time, that plaintiffs relied on the waiver, and that defendants should be estopped from foreclosure. Because material questions remained as to whether a waiver occurred, summary judgment was improper and the case was remanded for further proceedings. Danelson v. Robinson, 2003 MT 271, 317 M 462, 77 P3d 1010 (2003).

Two-Month Lapse in Use of Road Insufficient to Demonstrate Intent of Abandonment — Summary Grant of Prescriptive Easement Reversed: The District Court granted defendant's motion for summary judgment on a prescriptive easement, based on the fact that plaintiffs did not continuously use a road for an entire 5-year period because they were out of state for 2 months, demonstrating an interruption or abandonment of the claimed easement. On appeal, plaintiffs contended that the District Court misinterpreted the meaning of continuous and uninterrupted use, and the Supreme Court agreed. For purposes of a prescriptive easement, continuous use is use that is made often enough to constitute notice of the claim to the potential servient owner. Further, uninterrupted use is not interrupted by the act of the owner of the land or by voluntary abandonment by the party claiming the right. During the 5-year period in question, defendant did nothing to interrupt plaintiffs' use of the roads in question. The fact that plaintiffs were in Missouri for 2 months and did not use the road during that time may have cast some doubt on whether there was continuous use of the road, but a genuine issue of material fact remained as to whether plaintiffs continuously used the road. Because a question of genuine fact remained, summary judgment was improper, and the Supreme Court reversed for further proceedings, including plaintiffs' claims for infliction of emotional distress and punitive damages. Cook v. Hartman, 2003 MT 251, 317 M 343, 77 P3d 231 (2003). See also Restatement (Third) of Property, Servitudes 2.17.

Previously Raised but Unlitigated Alter Ego Claim Not Barred by Res Judicata: Following a dispute over the sale of irrigation equipment, H-D Irrigating and Lane sued Kimble Properties and Kimble for false representation of the irrigation equipment and damages. Kimble Properties and Kimble counterclaimed for the balance due on the equipment, alleging that H-D Irrigating was a sham and the alter ego of Lane. The alter ego claim was never pursued. The Supreme Court eventually decided the case in H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95 (2000), and remanded for judgment in favor of Kimble. In an effort to collect, Kimble sought to compel Lane to testify regarding the assets of H-D Irrigating, but rather than appear, Lane filed bankruptcy and received a stay on further proceedings. Kimble then filed an action to collect from Lane personally, again raising the alter ego issue. Lane asserted that the issue had been already decided in the prior litigation and sought supervisory control on res judicata grounds. After accepting supervisory control, the Supreme Court decided that res judicata did not bar Kimble's litigation of the alter ego claim. The action to pierce the H-D Irrigating corporate veil was neither previously adjudicated in District Court nor were the facts upon which the claim was based known to Kimble at the time that the counterclaim was filed or at any other time during the course of the previous action. The case was thus remanded for further proceedings on the alter ego claim. Lane v. District Court, 2003 MT 130, 316 M 55, 68 P3d 819 (2003), applying Berlin v. Boedecker, 268 M 444, 887 P2d 1180 (1994).

Material Question Regarding Insurer's Duty to Investigate Claim Information — Summary Judgment Improper: Plaintiffs asserted that defendant insurer violated 33-18-201(4) by declining to investigate the accident or plaintiffs' injury claims and make advance payments to cover plaintiffs' medical expenses. The District Court determined that because the insurer had attempted to discover the amount of plaintiffs' outstanding medical expenses and had forwarded a check for $5,000 to cover outstanding expenses, which was rejected by plaintiffs, summary judgment for the insurer was appropriate. The Supreme Court reversed. A genuine issue of fact remained regarding whether the insurer conducted a reasonable investigation, so the issue was not properly resolved with summary judgment. Shilhanek v. D-2 Trucking, Inc., 2003 MT 122, 315 M 519, 70 P3d 721 (2003).

Question of Material Fact Regarding Law Firm's Handling of Real Estate Contract — Summary Judgment Improperly Granted: Plaintiff sued its law firm for work performed in writing a contract for a real estate transaction. Plaintiff's expert opined that the firm violated the standard of care when it: (1) had a nonattorney with no contract drafting experience draft the initial agreement and insert an inaccurate legal description of the property obtained from plaintiff's own engineering firm; (2) used the phrase "more or less" to cure defects in the property description when the legal description was clearly deficient; (3) failed to include a provision that required the seller to sign future applications for a final plat; and (4) failed to execute proper

escrow documents to prevent the seller from having veto power over any proposed development of the property. The law firm presented its own expert to refute the allegations. The District Court analyzed the allegations of negligence, applying the legal malpractice standards in Lorash v. Epstein, 236 M 21, 767 P2d 1335 (1989), and, finding no issues of material fact, granted the law firm's motion for summary judgment. Plaintiff appealed, and the Supreme Court reversed, finding that summary judgment was improper. The conflicting expert testimony itself raised a material issue of fact regarding the standard of care that required resolution by a trier of fact. Further, material questions remained concerning whether the law firm's independent failure to recognize a problem with the legal description contributed as a cause to plaintiff's damages, whether the firm followed the requisite standard of care in drafting the escrow agreement, and whether the purported terms of the escrow agreement satisfied the requisite standard of care. Babcock Place Ltd. Partnership v. Berg, Lilly, Andriolo, & Tollefsen, P.C., 2003 MT 111, 315 M 364, 69 P3d 1145 (2003).

Question of Material Fact Concerning Potential Repossession of Business Property and Potential Breach of Duty Regarding Care of Collateral — Summary Judgment Improper: Defendant pledged personal property to plaintiff as collateral for loans. Defendant failed to make payments, and plaintiff notified defendant in 1998 that the property had been repossessed. The same day, several members of defendant's company resigned and formed a new company, to which defendant then leased its personal property for $100 a month. Two other codefendants also claimed an interest in the collateral and objected to the nonjudicial foreclosure of the property. As a result of the objections, plaintiff proceeded with a judicial foreclosure and later moved for summary judgment, claiming that it was entitled to foreclose on the property. Codefendants opposed the summary judgment motion on grounds that plaintiff breached 30-9-207 (repealed 1999) by not taking reasonable care in the custody and preservation of the collateral. The District Court found that although plaintiff sent a notice of repossession, it did not actually take possession of the property and thus did not violate 30-9-207, so summary judgment was granted. On appeal, the Supreme Court reversed. Possession is the triggering factor for the duties in 30-9-207, and material facts remained in dispute regarding plaintiff's potential possession of the property and potential breach of 30-9-207, so summary judgment was improper. Mtn. W. Bank v. Mine & Mill Hydraulics, Inc., 2003 MT 35, 314 M 248, 64 P3d 1048 (2003).

Question Whether Holographic Document Intended as Codicil or List of Property to Be Dispensed — Testamentary Intent Question of Fact to Be Determined by Judge or Jury — Summary Judgment Improper: Johnson executed a formal will and also executed and signed a holographic document consisting of a handwritten list of possessions and names. The District Court concluded that the holographic document was a personal property list made pursuant to 72-2-533, rather than a codicil, and applied 72-2-523 in ordering distribution of the property because there was no intent by Johnson that the holographic document should constitute the complete will. The Supreme Court held that the District Court should have applied 72-2-522, which deals with holographic wills, rather than 72-2-523. The three requirements for a valid holographic will are: (1) individuals must be at least 18 years old and of sound mind; (2) the material provisions of the will must be in the handwriting of the testator and signed by the testator; and (3) the individual must have testamentary intent that the document will dispose of the individual's property after death. Here, the first two elements were met, but a question of fact remained concerning Johnson's intent, precluding summary judgment. The case was remanded to give the parties an opportunity to present evidence concerning Johnson's intent so that the trier of fact could decide the issue under the correct standard. In re Estate of Johnson, 2002 MT 341, 313 M 316, 60 P3d 1014 (2002).

Degrees of Comparative Negligence in Automobile Accident — Summary Judgment on Comparative Negligence Improper: Issues of comparative negligence are particularly difficult to resolve as a matter of law. Normally, the issue of contributory negligence and the degree of comparative negligence, if any, is an issue for the trier of fact to resolve even if the opposing party is negligent as a matter of law. In this case, a question of material fact remained regarding the specific facts of an automobile accident, and the District Court erred in granting summary judgment to plaintiff after finding that defendant's negligence exceeded any negligence that could be found on plaintiff's part. The question of degrees of negligence was properly left to the jury. Contreras v. Fitzgerald, 2002 MT 208, 311 M 257, 54 P3d 983 (2002), distinguishing Brohman v. St., 230 M 198, 749 P2d 67 (1988).

Material Fact Remaining Regarding Circumstances of Automobile Accident — Summary Judgment Improper: Contreras entered a highway from a side road and collided with Fitzgerald, who was passing a truck in the same lane that Contreras entered. Fitzgerald requested

summary judgment regarding Contreras's negligence as a matter of law for failure to yield the right-of-way. The District Court found that whether Contreras was negligent was a question best left to the jury and denied the motion for summary judgment. The Supreme Court affirmed. Although violation of a motor vehicle statute will not constitute negligence as a matter of law only under extremely limited circumstances, in this case, it was uncertain from the record about what occurred immediately preceding the accident. Evidence conflicted concerning when Contreras entered the highway, whether Contreras and Fitzgerald entered the same lane simultaneously, and how much time Contreras had to react and prevent the accident. These material questions of fact were for the trier of fact to decide, and summary judgment was not proper when these material fact questions remained. Contreras v. Fitzgerald, 2002 MT 208, 311 M 257, 54 P3d 983 (2002).

Ambiguity Regarding Whether Settlement Contingent on Alternate Financing — Summary Judgment Improper: Plaintiff sought to foreclose on a loan made to defendant, alleging that defendant's liabilities exceeded the value of the collateral, resulting in default pursuant to the terms of the note. The parties made several attempts to settle the issue, resulting in defendant's payoff to plaintiff, but in an amount that the plaintiff claimed was insufficient. The District Court granted summary judgment to plaintiff and ordered enforcement of the settlement agreement. However, a letter memorializing the settlement agreement, when considered with the parties' other correspondence, created an ambiguity regarding whether the settlement was contingent on alternate financing. Because there was more than one reasonable interpretation regarding the parties' intention, the parties' affidavits and testimony were admissible to determine intention and raised an issue of fact that precluded summary judgment. The case was remanded for further proceedings. Stockman Bank v. Potts, 2002 MT 178, 311 M 12, 52 P3d 920 (2002).

Wife Sued for Recovery of Medical Expenses of Estranged Husband — Material Question of Fact Whether Husband Abandoned Wife or Whether They Were Separated by Agreement as Precluding Summary Judgment: The husband moved from the family home, the wife filed for divorce, and the husband died a few weeks later after incurring $32,496 in medical expenses. The wife served as personal representative of her husband's estate and claimed the family allowance as his surviving spouse. Plaintiff was assigned the debt for medical services for purposes of collection. Citing Missoula YWCA v. Bard, 1999 MT 177, 295 M 260, 983 P2d 933 (1999), plaintiff argued that the medical expenses were necessaries of the family and that the wife was therefore responsible for the debt under 40-2-106, while the wife argued that she was not responsible because the parties were legally separated at the time that the expenses were incurred and because the husband had not supported the family during that time. The District Court concluded that because the wife acted as personal representative and received the family allowance as surviving spouse, she was estopped from arguing that she was not legally married and that because there were no factual disputes, plaintiff was entitled to summary judgment. The wife appealed, and the Supreme Court reversed. Nothing in statute precludes an abandoned or separated spouse from acting as personal representative of a deceased spouse's estate, nor does the role of personal representative preclude a spouse from arguing abandonment or separation by agreement. Section 40-2-104 provides an exception to liability imposed under 40-2-106 if a spouse has been abandoned or if spouses are living separately by agreement. Because a question of material fact existed as to whether the wife was abandoned or separated, summary judgment was inappropriate, so the case was remanded for further proceedings. Balyeat Collection Professionals v. Garland, 2002 MT 167, 310 M 464, 51 P3d 1127 (2002).

No Assumption of Risk in Purchase of Damaged Real Property — Summary Judgment Reversed: Koelzer owned an inn by a mining and power generation site near Colstrip. Koelzer discovered that mining activity had damaged the inn and filed a complaint in 1994 against the mining and power generation companies, but did not pursue the damage claim. In 1996, Dale and Shawonda Lewis approached Koelzer about purchasing the inn, and the issue of the damages and Koelzer's claim came up. The Lewises inspected the inn and discovered additional damages, which led Koelzer to reassert the damage claim, but the claim was again unresolved. Nevertheless, the Lewises offered to buy the inn, and title was eventually conveyed to Dale's parents, who were able to secure financing. Koelzer notified the companies by fax that the inn had been sold and requested that the companies work with Dale on the structural damage discussed in the past. About 1 year later, Dale received an estimate of $91,000 to repair the damages and filed a nuisance complaint and a complaint seeking compensation from the companies for damages, after the Lewises acquired title to the inn in 1998. The District Court dismissed the Lewises' claim for damages arising after title was acquired on grounds that the Lewises had assumed the risk of those damages when they purchased the property. On appeal,

the District Court was reversed on the issue of postpurchase damages. Under Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782 (1994), assumption of risk is no longer available as a separate affirmative defense in negligence cases. Instead, that defense now merges into the general liability scheme of comparative negligence in which the conduct of the parties is compared based on evidence of negligence and contributory negligence, as established by reasonable and prudent person standards. Here the questions of whether the Lewises negligently purchased an inn that they knew might be subject to future damages or whether those future damages were sufficiently foreseeable to be taken into account in the purchase price of the inn were questions of fact for a jury and should not have been dismissed by summary judgment. Lewis v. Puget Sound Power & Light Co., 2001 MT 145, 306 M 37, 29 P3d 1028 (2001).

Sufficient Evidence to Create Question of Fact Whether Employee Satisfactorily Performed Job — Summary Dismissal of Wrongful Discharge Suit in Error: The District Court granted a motion by employer Plum Creek Manufacturing, L.P. (Plum Creek), for summary judgment on employee Andrews' wrongful discharge claim, concluding that although the discharge issue was a question of fact for a jury, even if a discharge had occurred, Plum Creek had good cause for the dismissal. The court declined to use the discharge element as a basis for granting the motion for summary judgment. Andrews argued on appeal that she was either actually or constructively discharged and maintained that any inadequacy on her part was a result of Plum Creek's failure to train her, define procedures, and appropriately supervise and evaluate her in her job. Plum Creek asserted that it had reasonable job-related grounds for dismissing Andrews based on economic grounds and Andrews' failure to satisfactorily perform job duties, regardless of who was at fault for that failure. The Supreme Court noted that District Courts may not adjudicate questions of fact on motions for summary judgment. There was conflicting evidence regarding the admission of failure to perform job duties and regarding performance of job duties, and it was the function of a jury, not the court, to weigh the evidence. Andrews presented sufficient evidence to create a question of fact whether she had satisfactorily performed her job, and the District Court should have allowed the jury to decide if good cause existed to discharge Andrews. Granting of the motion for summary dismissal was erroneous, and the Supreme Court remanded for further proceedings. Andrews v. Plum Creek Mfg., L.P., 2001 MT 94, 305 M 194, 27 P3d 426 (2001).

Liability Exemption Distinguished From Contractual Indemnification: Liss had a homeowner's policy with Safeco Insurance Co. (Safeco) that covered personal liability and medical payments to others. Liss shot Bruthers and claimed that it was an accident and that she was involuntarily intoxicated, but she was nevertheless convicted of aggravated assault after pleading nolo contendere. Bruthers was a nonresident and filed a federal action for compensation for physical injuries, emotional distress, and punitive damages, but eventually dropped the intentional tort claim. Liss gave Safeco a copy of the complaint, and Safeco provided Liss a defense under the personal liability provisions of the homeowner's policy. Safeco then filed a declaratory action, claiming that it had no duty to defend Liss in federal court or to indemnify Liss, based on its theory that: (1) Montana policy and 28-2-702 forbid the contractual indemnification of an individual for intentional and illegal acts; (2) the shooting did not constitute an occurrence as defined in the policy; (3) the intentional act and illegal act exclusions barred coverage; and (4) Liss was collaterally estopped to contest the issue based on the guilty plea. Safeco's motion was granted by summary judgment based on policy provisions excluding intentional and illegal acts from personal liability coverage and the undisputed fact that Liss pleaded guilty to aggravated assault. Both Liss and Bruthers appealed. The Supreme Court noted that a contract whose object is to exempt a person from future potential liability is clearly distinguishable from an insurance contract that indemnifies a person for another party's damages once liability is imposed. Therefore, Safeco's duty to defend and indemnify Liss could not be excused by a declaratory judgment based on public policy in 28-2-702. The question of whether the shooting incident constituted an insurable occurrence or accident remained shrouded in material facts and was inappropriate grounds for summary judgment. The shooting did not fall within the nexus of the per se intentional act case law, absent an admission or substantial evidence establishing the intent of the insured. Lastly, Safeco presented no evidence other than Liss's guilty plea to satisfy its burden of proof that Liss either intentionally shot Bruthers or that the shooting was an illegal act, so the Supreme Court addressed whether a nolo contendere guilty plea in a criminal matter is conclusive proof of intent or illegality and precludes relitigation of the issues in a subsequent civil proceeding. The court applied the three-part collateral estoppel rule in Teitelbaum Furs, Inc. v. Dominion Ins. Co., 375 P2d 439 (Calif. 1962), and Aetna Life & Cas. Ins. Co. v. Johnson, 207 M 409, 673 P2d 1277 (1984), the second prong of which requires a final judgment on the merits. A guilty plea as a matter of law

fails the test because a guilty plea does not constitute a final judgment, so in this case, the plea to aggravated assault carried no collateral estoppel effect in the subsequent civil proceedings. Summary judgment was improper, and the case was remanded. Safeco Ins. Co. of America v. Liss, 2000 MT 380, 303 M 519, 16 P3d 399, 57 St. Rep. 1621 (2000).

Forman Defense — Issues of Material Fact Regarding Whether Insurance Company Breached Duty to Inform Agent of Litigation Risks in Sale of Policy — Summary Judgment Inappropriate: An insured brought an action against Deonier, an insurance agent, and Paul Revere Life Insurance Company (Revere) to recover benefits and damages after the insured's claim was denied on grounds of a preexisting condition, despite the incontestability clause in the policy. The agent cross-claimed against the company for indemnity and breach of fiduciary duty, contending that there was a significant amount of evidence that Revere planned to assert the Forman defense in Montana (see Mass. Cas. Ins. Co. v. Forman, 516 F2d 425 (5th Cir. 1975), in which an insurer asserts a legal defense to the incontestability clause based on its definition of sickness as excluding disabilities that manifested themselves prior to the date of issue of the policy) and that Revere's failure to inform Deonier of its intention to invoke the defense was a clear breach of Revere's duty to inform its agents of a risk of pecuniary loss from potential lawsuits. Revere asserted that, pursuant to Doettl v. Colonial Life & Accident Ins. Co., 505 F. Supp. 127 (D.C. Mont. 1981), in which a Montana federal District Court endorsed the Forman defense, it had no reason to believe that its policy interpretation might be in violation of Montana law and therefore did not breach its duty to inform its agents of risk of pecuniary loss. The District Court found that Revere owed Deonier a fiduciary duty pursuant to Restatement (Second) of Agency 435 (1958), but, apparently applying 33-18-242, determined that Revere did not breach that duty, and dismissed the breach of fiduciary duty action by summary judgment. On appeal, the Supreme Court found the application of 33-18-242 to be misplaced, the proper analysis being simply whether Revere breached Restatement (Second) of Agency 435 (1958). The Supreme Court agreed that a principal has no duty to inform its agent of unknown future legal positions, but in this case, the potential consequences of applying the Forman defense were not unknown, having been the subject of a Revere corporate counsel paper published in 1987, years before the disability policy at issue in this case was issued. The court also found Revere's argument based on Doettl to be without merit. Although Doettl applied some Montana law, it was not binding on the Montana Supreme Court. Because the issue was still one of first impression in Montana, Revere could not rely on Doettl to support its position that as a matter of uncontroverted fact and law, it had no knowledge of risk to its agents. Thus, the question of whether Revere breached its duty to inform Deonier of the risks of litigation involved issues of material fact, so the District Court's award of summary judgment to Revere was reversible error. Deonier & Associates v. Paul Revere Life Ins. Co., 2000 MT 238, 301 M 347, 9 P3d 622, 57 St. Rep. 989 (2000).

Duty of City to Inspect City Property for Hazards: Plaintiff was injured after tripping on a fence wire while walking her dog at night in an unmaintained grassy area on city right-of-way next to a city street. Plaintiff contended that the city was negligent in allowing a dangerous and hazardous condition to exist on a public right-of-way and guilty of negligence per se under 81-4-105 for allowing a public nuisance. The District Court granted summary judgment, determining as a matter of law that the city owed plaintiff no duty of care because: (1) she was not walking on a sidewalk, street, or path of any kind; (2) the city did not invite her to travel in that area; and (3) there were no city lights or signs in the vicinity. On appeal, plaintiff cited Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748 (1997), contending that the city ignored its duty to maintain the public streets, sidewalks, and rights-of-way within corporate limits in a reasonably safe condition for public travel by never going onto the premises, mowing it, raking it, or removing debris and that if routine maintenance had been done, the wire would have been found and removed. The Supreme Court agreed. The city's contention that it did not owe a duty of care in this case, because there was nothing in the area suggesting that it was a walkway or inviting the public to use it as such, failed under the Richardson test because of the city's neglect in exercising ordinary care or skill in the management of its property. Reasonable minds could differ on whether the city should have taken some action to inspect or maintain the property, so summary judgment was improper and thus reversed for a jury determination of negligence, including possible contributory negligence. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000).

Summary Judgment Based on Recreational Use Statute Inappropriate: Plaintiff was injured after tripping on a fence wire while walking her dog at night in an unmaintained grassy area on city right-of-way next to a city street. The District Court allowed the city to assert an affirmative defense based on 70-16-302, which restricts the liability of a landowner when a person is injured

while using the landowner's property for recreational purposes. Because plaintiff submitted no facts, arguments, or evidence to rebut the inference that she was on city property for recreational purposes, the District Court ruled that the city was immune from liability pursuant to the recreational use statute. Notwithstanding that plaintiff was precluded from arguing on appeal what was not raised at trial, the Supreme Court nevertheless considered the argument as part of its de novo review and disagreed that the city was entitled to judgment as a matter of law or that summary judgment was appropriate in this case. The court noted that although walking may in some circumstances be considered a recreational purpose, walking to and from one's home in a residential area of a city may not. Rather than a recreational purpose, walking to and from one's home is an everyday, ordinary, and expected use of city property by one of its citizens, and the District Court erred in applying the recreational use statute in these circumstances when granting summary judgment. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000).

Double Analysis of Foreseeability in Dispute Over Intervening Act of Third Party — Duty of Police to Protect Hospital Worker From Intoxicated Person in Voluntary Custody: Havre police received a report of two girls fighting downtown. They responded and found two intoxicated women fighting, one of whom appeared to require medical treatment. LaTray was working as a nurse at a hospital emergency room when police officers delivered the woman for treatment, accompanied by her sister. The injured woman was placed in protective custody, but neither woman was arrested. When attempting to administer medical care to the injured woman, LaTray was intentionally assaulted and injured by the sister, and LaTray filed an action against the city police officers for negligently failing to exercise proper control over the sister. The District Court found that because the intentional assault was not reasonably foreseeable as a matter of law, there was no duty owed LaTray by the city, and summary judgment was granted to the city. The Supreme Court held that intervening criminal acts of third persons are not automatically unforeseeable as a matter of law, but rather must be addressed in the foreseeability context on a case-by-case basis (see Starkenburg v. St., 282 M 1, 934 P2d 1018 (1997)). Although foreseeability is ordinarily analyzed only under the duty element of negligence, in a dispute over intervening criminal acts of a third party, foreseeability must be analyzed twice: first with regard to the existence of a legal duty and, second, with regard to proximate causation (see Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999)). The city relied on Phillips v. Billings, 233 M 249, 758 P2d 772 (1988), arguing that because LaTray did not claim the existence of a special relationship or otherwise show that the officers owed LaTray a greater duty of care than that owed to the general public, the city owed LaTray no duty of care. The Supreme Court noted that Phillips has been clarified in Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972 (1999), which stated that a duty to protect third persons arises only when a police officer actually makes an arrest or otherwise takes possession or custody of an individual. Although the officers did not actually arrest the sister or otherwise have a basis for taking her into custody in this case, the officers voluntarily undertook possession or custody in transporting her to the hospital and consequently harbored the ability to control her actions and prevent an unreasonable risk of harm to third persons like LaTray, who falls within the scope of the risk that negligent supervision would foreseeably entail. Thus, the Supreme Court held that, as a matter of law, the city owed a duty of reasonable care to adequately supervise the sister so as to prevent harm to a third person who would foreseeably be placed within the scope of risk arising from negligent supervision. Whether the city breached that duty is an issue for the jury because the causal issue of intervening acts of third parties normally involves questions of fact. Viewed in the light most favorable to LaTray, there was sufficient evidence of the sister's irascible conduct to raise a jury question as to whether she posed a danger to those around her on the day in question, and reasonable jurors could differ as to whether she presented a foreseeable risk of injury to persons in her immediate vicinity. These contested issues of material fact precluded a grant of summary judgment as a matter of law, and the case was reversed and remanded for a new trial. LaTray v. Havre, 2000 MT 119, 299 M 449, 999 P2d 1010, 57 St. Rep. 497 (2000). See also Morrow v. FBS Ins. Montana-Hoiness LaBar, Inc., 230 M 262, 749 P2d 1073 (1988), and Estate of Strever v. Cline, 278 M 165, 924 P2d 666 (1996).

Inherent Danger of Trenching Activity — Vicarious Liability of Employer for Injuries Caused by Subcontractor's Failure to Reduce Risks: Beckman was working to replace a waterline in a trench in Butte when the trench collapsed. At the time, Beckman was an employee of an independent contractor who had been hired by a developer to replace the city waterline as part of the upgrade to another project that the developer was constructing, as required by Butte-Silver Bow. Beckman filed a complaint against Butte-Silver Bow, seeking damages for personal

injuries sustained in the collapse. Under Umbs v. Sherrodd, Inc., 246 M 373, 805 P2d 519 (1991), employers are generally not liable for the torts of their independent contractors, except when: (1) there is a nondelegable duty based on a contract; (2) the activity is inherently or intrinsically dangerous; and (3) the general contractor negligently exercises control reserved over a subcontractor's work. The District Court found that trenching activity was not inherently or intrinsically dangerous and granted Butte-Silver Bow's motion for summary judgment. The court, citing Kemp v. Bechtel Constr. Co., 221 M 519, 720 P2d 270 (1986), ruled as a matter of law that trenching activities did not fall under the inherently dangerous exception because Beckman's injury could have been avoided through standard precautions. On appeal, the Supreme Court decided that the analysis of the inherently dangerous activity exception in Kemp was manifestly wrong, and overruled that case and its progeny. Instead, the court reaffirmed the holding in Ulmen v. Schwieger, 92 M 331, 12 P2d 856 (1932), in which it was determined that the vicarious liability of an employer of a subcontractor was contingent on the nature of the work performed and not on the existence of standard precautions. An employer is therefore vicariously liable for injuries to others caused by a subcontractor's failure to take precautions to reduce unreasonable risks associated with engaging in an inherently dangerous activity. Risks associated with people working in trenches where a cave-in can cause death or serious bodily injury are well recognized in the construction industry as intrinsically or inherently dangerous and are recognized as such as a matter of law. Beckman v. Butte-Silver Bow County, 2000 MT 112, 299 M 389, 1 P3d 348, 57 St. Rep. 466 (2000), overruling Micheletto v. St., 244 M 483, 798 P2d 989 (1990), and Kemp v. Big Horn County Elec. Co-op, Inc., 244 M 437, 798 P2d 999 (1990).

Material Question Whether County Negligently Exercised Control Over Subcontractor as Precluding Summary Judgment: Beckman was working to replace a waterline in a trench in Butte when the trench collapsed. At the time, Beckman was an employee of an independent contractor who had been hired by a developer to replace the city waterline as part of the upgrade to another project that the developer was constructing, as required by Butte-Silver Bow. Beckman filed a complaint against Butte-Silver Bow, seeking damages for personal injuries sustained in the collapse. Under Umbs v. Sherrodd, Inc., 246 M 373, 805 P2d 519 (1991), employers are generally not liable for the torts of their independent contractors, except when: (1) there is a nondelegable duty based on a contract; (2) the activity is inherently or intrinsically dangerous; and (3) the general contractor negligently exercises control reserved over a subcontractor's work. The District Court cited Micheletto v. St., 244 M 483, 798 P2d 989 (1990), and Kemp v. Big Horn County Elec. Co-op, Inc., 244 M 437, 798 P2d 999 (1990), in holding that the county did not assume a nondelegable duty of safety by contract, finding that Butte-Silver Bow never agreed to supervise the safety of the trenching operations and therefore did not assume a nondelegable duty based on contract that extended to Beckman. Thus, summary judgment was granted to Butte-Silver Bow. On appeal, the Supreme Court noted that the District Court correctly recognized the distinction between a nondelegable contractual duty and a duty based on the negligent exercise of retained control. However, Micheletto and Kemp provide an incorrect statement of the doctrine of retained control. Here, despite the lack of a written contract, the county retained the means with which to both discover and cure any unreasonably dangerous conditions. The terms of the water mains extension document, which provided that the county may supervise the water extension project, required the county to furnish a qualified construction inspector to monitor work performed during the installation of the water supply system and required that the materials and methods of construction conform to county requirements. The terms, combined with the fact that county employees were present during the trenching operation, constituted sufficient facts to preclude summary judgment for the county. The case was reversed and remanded. Beckman v. Butte-Silver Bow County, 2000 MT 112, 299 M 389, 1 P3d 348, 57 St. Rep. 466 (2000). See also Stepanek v. Kober Constr., 191 M 430, 625 P2d 51 (1981).

New Standard for Determining Whether Intentional or Malicious Act by Employer Constitutes Tortious Conduct — Summary Judgment Improper: Sherner was injured on the job and sued his employer, Conoco, Inc. (Conoco), for damages on grounds that Conoco was guilty of malicious acts or omissions that caused the injuries. The District Court ruled that the tort claim against Conoco was barred by the exclusivity provision in 39-71-411. Citing Calcaterra v. Mont. Resources, 1998 MT 187, 289 M 424, 962 P2d 590 (1998), the court concluded that Sherner was required to allege and establish that Conoco had actual knowledge that Sherner was being harmed in order to establish that Conoco's acts were malicious and, absent sufficient facts to raise a genuine issue of material fact that Conoco directed intentional harm at Sherner, granted summary judgment for Conoco. In District Court, Sherner sufficiently raised the issue of the proper standard for determining whether Conoco's act was malicious to allow the Supreme Court

to address the issue on appeal, so the court proceeded to create a new standard, applying the plain meaning of the statutory definitions, by which to judge whether an act or omission is intentional or malicious. Applying common definitions of "intentional" and "act" and the appropriate definition of "malice" for use in 39-71-413—the one provided in 27-1-221, rather than the one in 1-1-204—the Supreme Court reversed, finding that genuine issues of material facts existed, regarding whether Conoco acted maliciously, as to preclude summary judgment. A worker need show only that an employer's act or omission, which caused the injury, was intentional or malicious to bring a tort action against the employer under 39-71-413. Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990, 57 St. Rep. 241 (2000), following Sitzman v. Schumaker, 221 M 304, 718 P2d 657, 43 St. Rep. 831 (1986). See also Enberg v. Anaconda Co., 158 M 135, 489 P2d 1036 (1971), and Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004), in which summary judgment was held to be proper under the Sherner standard absent evidence that an employer knew that an employee would actually be injured by a routine that was usually performed without incident.

Determination of Whether Publication of "Most-Wanted" List Considered Privileged — Abuse of Conditional Privilege as Jury Question: Hale brought defamation and negligence claims against the Billings Police Department for publishing Hale's photograph and personal information and broadcasting the information on a cable television most-wanted fugitive program. The District Court summarily dismissed Hale's claims on grounds that the communication between the police and the media was privileged, either as a proper discharge of an official duty or as part of a judicial proceeding pursuant to 27-1-804. However, the court neglected to determine as a matter of law whether the privilege was an absolute or conditional privilege. Absent a mandate by law that the police provide information regarding arrest warrants to crime prevention programs, the privilege was, at best, conditional. Thus, it was a matter for the jury to determine whether the discharge of the official duty exercised by the police in providing criminal information was proper to the extent that the police did not abuse the privilege. Further, under Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411, 52 St. Rep. 407 (1995), statements made by the police as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceeding and are not privileged. Summary judgment was improper. Hale v. Billings Police Dept., 1999 MT 213, 295 M 495, 986 P2d 413, 56 St. Rep. 830 (1999), distinguishing Cox v. Lee Enterprises, Inc., 222 M 527, 723 P2d 238, 43 St. Rep. 1476 (1986).

Public Airing of County's Most-Wanted Fugitive List — Material Facts as to Falsity of Statements Precluding Summary Judgment: Hale brought defamation and negligence claims against the Billings Police Department for publishing Hale's photograph and personal information and broadcasting the information on a cable television most-wanted fugitive program and for failing to pull the information from the program after Hale's arrest. The District Court summarily dismissed Hale's claims on grounds that the information was truthful or, if not truthful, then constitutionally protected and therefore not defamatory. Hale was depicted on the program as a potentially armed and dangerous fugitive. However, Hale's warrant for domestic abuse was chosen randomly from 3,000 to 5,000 outstanding warrants on file, and his whereabouts was known at all times by the police, suggesting that under the plain meaning of the terms, Hale was not accused of using a weapon and thus could not be considered "armed and dangerous", and was not a "most-wanted" suspect or a "fugitive" from justice. Clarifying Roots v. Mont. Human Rights Network, 275 M 408, 913 P2d 638, 53 St. Rep. 205 (1996), the Supreme Court held that it was improper for the District Court to create an artificial dichotomy by distinguishing statements of opinion from statements of fact, thereby granting unqualified immunity to the former. Citing Restatement (Second) of Torts 617 (1965), the court held that if an opinion is not based on disclosed facts and, as a result, creates the reasonable inference that the opinion is based on undisclosed defamatory facts, that opinion is not afforded constitutional protection. Without that protection, genuine issues of fact regarding the falsity of the statements made during the broadcast remained, making summary judgment improper. Further, the issue remained as to what constituted timely notification of Hale's arrest to the media by the police to avoid breach of their duty not to infringe on Hale's rights. Summary judgment was reversed, and the case was remanded. Hale v. Billings Police Dept., 1999 MT 213, 295 M 495, 986 P2d 413, 56 St. Rep. 830 (1999), following Milkovich v. Lorain Journal Co., 497 US 1, 111 L Ed 2d 1, 100 S Ct 2695 (1990).

Special Relationship of Custody or Control by Prerelease Center — Responsibility for Public Safety Within Zone of Risk — Foreseeability: A prerelease center entered into a contract with the Department of Corrections to supervise residents like Gardipee, who walked away from the center and subsequently injured Lopez. The District Court granted summary judgment for the

center on grounds that the attack on Lopez was unforeseeable. Generally, there is no duty to protect others against harm by third persons, but in this case, the contract created a special relationship of custody or control, in turn creating a special responsibility upon the center to protect those members of the public who would be placed within the foreseeable zone of risk created by negligent supervision of a prerelease resident. As a matter of law, the center owed a duty of reasonable care to all persons present within the zone of danger created by the center's failure to exercise reasonable care in supervising Gardipee. Here, reasonable minds could differ as to whether it was reasonably foreseeable by the center that a failure to supervise Gardipee could pose an unreasonable risk of harm to Lopez in particular. There was a genuine issue of material fact as to whether the center knew or should have known that there was enmity between Gardipee and Lopez and a possibility of violence if Gardipee escaped, as well as whether Gardipee's attack was a superseding cause of the harm to Lopez. Both questions were suitable for resolution by a trier of fact, precluding summary judgment. The Supreme Court reversed and remanded for a trial on the merits. Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081, 56 St. Rep. 771 (1999).

Actionable Section 1983 Claim Under State-Created Danger Theory: A government official who, while acting under color of state law, deprives an individual of constitutionally protected rights may be subject to personal liability for civil damages pursuant to 42 U.S.C. 1983. Generally, a government official's failure to protect an individual from harm does not constitute a due process violation. Inaction by the state, even when a danger is known, does not trigger a due process obligation except under the "state-created danger" theory, derived from DeShaney v. Winnebago County Dept. of Social Services, 489 US 189, 103 L Ed 2d 249, 109 S Ct 998 (1989), which provides that a constitutional duty to protect may be imposed when state actors have affirmatively acted to create plaintiff's danger or to render plaintiff more vulnerable to it. Adopting the test in Huffman v. County of Los Angeles, 147 F3d 1054 (9th Cir. 1998), the Supreme Court held that to assert an actionable 42 U.S.C. 1983 claim under the state-created danger theory, plaintiff must demonstrate that the state acted affirmatively, with deliberate indifference, in creating a foreseeable danger to plaintiff, leading to deprivation of plaintiff's constitutional rights. In the present case, material facts existed as to whether an officer affirmatively and with deliberate indifference placed a woman in danger, increased her vulnerability to danger, or deprived her of her right to life; thus, summary dismissal of her husband's personal liability claim against the officer was reversible error. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999). See also Wood v. Ostrander, 879 F2d 583 (9th Cir. 1989), and Kneipp v. Tedder, 95 F3d 1199 (3rd Cir. 1996).

Public Duty Doctrine as Applied to Law Enforcement Personnel — Exception in Cases of Special Relationship: Trina admitted that she had been drinking when stopped in her vehicle by Officer Driscoll, who nevertheless believed that sufficient probable cause did not exist to arrest the woman. Instead, thinking Trina might be impaired, the officer suggested a ride home or that Trina walk the 2-mile distance and warned Trina about returning to the vehicle. Trina decided instead to walk to a phone and call for a ride and was killed in traffic. Trina's husband brought suit for civil damages under 42 U.S.C. 1983, claiming that the officer breached the duty to protect, in violation of Trina's due process rights. The District Court summarily dismissed the claim, holding that because no probable cause existed for Trina's arrest, the officer had no duty to protect Trina from harm and that without a duty, the action failed. The public duty doctrine provides that a police officer's duty to protect and preserve the peace is owed to the public at large rather than to a particular person, unless a special relationship exists, thus giving rise to a special duty that is more particular than that owed to the public. A special relationship is established: (1) by a statute intended to protect a specific class of persons, of which the plaintiff is a member, from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances when the agency has actual custody of the plaintiff or of a third person who harms the plaintiff. Relying on Stewart v. Standard Publishing Co., 102 M 43, 55 P2d 694 (1936), the Supreme Court agreed that although the officer may not have initially owed Trina a duty to protect, that duty was assumed as a matter of law when the officer prevented the woman from driving her car and ensured that she did not attempt to drive. The question of whether the duty to protect was breached is a question of fact for the jury, so summary dismissal was improper. Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999), clarifying and distinguishing Phillips v. Billings, 233 M 249, 758 P2d 772 (1988). Nelson was followed in Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004), as to elements of exception to the public duty doctrine (nonlaw enforcement case), in Orr v. St., 2004 MT 354, 324 M 391, 106

P3d 100 (2004). See also Krieg v. Massey, 239 M 469, 781 P2d 277, 46 St. Rep. 1839 (1989), Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996), and Eves v. Anaconda-Deer Lodge County, 2005 MT 157, 327 M 437, 114 P3d 1037 (2005).

Extrinsic Evidence on Testamentary Intent Raising Genuine Issue of Material Fact — Summary Judgment Improper: Kuralt gifted Shannon with 20 acres along the Big Hole River, disguising the transaction as a sale. Shortly before he died, he sent Shannon a letter, which constituted a holographic will, suggesting that he intended to do the same with another 90 acres. The District Court allowed introduction of the letter as extrinsic evidence regarding testamentary intent, then granted summary judgment to the estate after finding that the letter contemplated a separate testamentary instrument not yet in existence to accomplish the transfer of the Montana property. Nevertheless, the letter raised a fundamental disagreement as to a genuine material fact—namely, whether Kuralt intended that the letter effect a posthumous disposition of the property. Regardless of whether the court admitted the evidence because it considered the letter ambiguous or because it agreed with Shannon that extrinsic evidence may be discretionarily admitted in holographic will disputes, the court nevertheless improperly resolved contested issues by granting summary judgment. The Supreme Court reversed and remanded the case for trial. In re Estate of Kuralt, 1999 MT 111, 294 M 354, 981 P2d 771, 56 St. Rep. 460 (1999).

Burden on County to Show Material Fact Regarding Height of Hedge — Nonconforming Use Not Proved — Summary Judgment Improper: A municipal code provision, passed in 1978, regulated, for traffic safety purposes, the height of hedges that could be grown on corners of intersections at 3 feet, but also permitted the existence of nonconforming uses prior to 1978. Ramirez was injured in a vehicle accident at an intersection where the hedge was taller than 5 feet and sought to hold the county accountable for failing its duty to enforce the ordinance. In granting summary judgment to the county, the District Court held the hedge to be a prior nonconforming use, noting that the hedge had been there since at least 1959. The Supreme Court reversed, finding that the county had offered no proof that the hedge was either taller than 3 feet in 1978 or had not been trimmed since 1978. The county did not meet its burden of showing the absence of this genuine issue of material fact; thus, summary judgment was improper. Ramirez v. Hatch, 1999 MT 107, 294 M 316, 979 P2d 1281, 56 St. Rep. 441 (1999).

Genuine Issues of Fact Raised by Newly Discovered Evidence — Summary Judgment Precluded: Ranch Recovery Limited Liability Company (Ranch Recovery) was the assignee of the vendor's interest in real property that was subjected to a mortgage foreclosure brought by First Security Bank of Missoula (First Security). Upon the vendee's default, the District Court awarded summary judgment to First Security. Ranch Recovery moved for reconsideration and for permission to amend its counterclaim based on newly discovered evidence. The evidence consisted of financing authorization documents allegedly incorporated by reference into the contract for deed, as well as privileged bank account information that had been unobtainable prior to the hearing. The newly discovered evidence, which Ranch Recovery should have been allowed to present in support of the amended counterclaim, raised genuine issues of material fact regarding First Security's compliance with a standby agreement upon which First Security relied for foreclosure against Ranch Recovery's interest. The existence of these issues of fact made summary judgment inappropriate, and the District Court was reversed. First Sec. Bank of Missoula v. Ranch Recovery Ltd. Liab. Co., 1999 MT 43, 293 M 363, 976 P2d 956, 56 St. Rep. 188 (1999).

Question of Duty of Highway Contractors to Maintain Road Construction Site in Reasonably Safe Condition — Summary Judgment Precluded: Schmidt was injured on his motorcycle in a road construction area. He sued the contractor, Washington Contractors Group, and the subcontractor, Alpine Construction, for personal injuries. The District Court entered summary judgment for Washington and Alpine, concluding that significant uncontroverted evidence supported the theory that neither breached its standard of care. On appeal, the Supreme Court noted that both Washington and Alpine had a duty of ordinary care in maintaining the road construction site in a reasonably safe condition, not the duty of a possessor of premises as in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997), but rather the duty of acting as a reasonable, prudent person would under the circumstances. Questions of fact remained as to: (1) whether the contractors complied with the Manual of Uniform Traffic Control Devices (MUTCD) and, if so, whether mere compliance equated with the exercise of due care, given the condition of the exit ramp; (2) where warning road signs were placed and whether the placement complied with the MUTCD; (3) whether the pavement height differential was unreasonably dangerous to motorcycles; and (4) whether evidence of three other motorcycle accidents that happened at the same spot within 72 hours of

Schmidt's accident was sufficient to raise a genuine issue of material fact regarding whether the contractors were on notice of an unreasonably dangerous condition that required remediation and possibly warnings over and above the requirements of the MUTCD. Reasonable minds could differ regarding whether a breach of the contractors' duty of ordinary care caused Schmidt's accident and subsequent damages; therefore, summary judgment was precluded, and the case was reversed and remanded for further proceedings. Schmidt v. Washington Contractors Group, Inc., 1998 MT 194, 290 M 276, 964 P2d 34, 55 St. Rep. 814 (1998), distinguishing Wiley v. Glendive, 272 M 213, 900 P2d 310 (1995).

Question of Whether Contract Was Orally Modified Sufficient to Preclude Summary Judgment: For an oral contract to effectively alter the terms of a written contract, the oral agreement must be fully executed on both sides of the agreement. Whether Bernhard and his attorney agreed to permit Doble to continue logging Bernhard's property until all harvestable timber was removed, thereby agreeing to effectively extend the terms of the logging contract, was a question of material fact that precluded an award of summary judgment in Bernhard's favor. Doble v. Bernhard, 1998 MT 124, 289 M 80, 959 P2d 488, 55 St. Rep. 489 (1998).

Reasonableness of Investigating Officers' Use of Deadly Force — Summary Judgment Precluded: The trial court granted the police officers' motion for summary judgment in a case involving the officers' use of deadly force, concluding that, as a matter of law, the officers reasonably feared the imminent use of deadly force against them and were thus justified in responding with deadly force. However, when presented with expert testimony and circumstantial evidence regarding the officers' veracity, jurors could differ as to whether the officers acted reasonably on the day of the shooting. These genuine issues of material fact precluded summary judgment. Scott v. Henrich, 1998 MT 118, 288 M 489, 958 P2d 709, 55 St. Rep. 457 (1998).

Weak Possibility of Manufacturing Defect and Product Liability — Summary Judgment Improper: The District Court granted defendants' request for summary judgment on a manufacturing defect claim when the key piece of evidence was unavailable and the expert testimony was conflicting on whether or when a defect existed, concluding that plaintiffs' evidence suggested only a weak possibility that a manufacturing defect was present when the product was shipped from the manufacturer 30 years earlier. Nevertheless, the Supreme Court, considering the evidence in a light most favorable to plaintiffs, concluded that a jury could reasonably find that a defect existed before the product left the manufacturer and that as long as a material issue of fact was in dispute, summary judgment was improper. Wood v. Old Trapper Taxi, 286 M 18, 952 P2d 1375, 54 St. Rep. 1263 (1997).

Documents Evidencing Amount of Debt Incorporated Into Complaint and Effectively Put in Issue by Answer — Summary Judgment Inappropriate — Cross-Motions Not Proof of Absence of Genuine Issues of Fact: Montana Metal Buildings, Inc. (MMB), constructed a metal building for Shapiro at the Three Forks Airport and later served a notice of claim and construction lien upon Shapiro for $26,889.43. MMB claimed that this amount was owed by Shapiro as the balance due for labor and materials necessary for construction of the building. MMB subsequently sued Shapiro for that amount in foreclosure of the lien, attaching copies of invoices to its complaint. MMB moved for summary judgment on all issues, and Shapiro moved for summary judgment on issues concerning the defectiveness of the lien. The District Court granted summary judgment on all issues for MMB. The Supreme Court held that the District Court erred in granting summary judgment and that genuine issues of fact still existed in that when MMB attached copies of the invoices to its complaint, they became part of the complaint for all purposes. The amounts established by those invoices were effectively put into issue by Shapiro when, in his answer, he asserted that he owed no further payments to MMB. The Supreme Court held that at this point in their proceedings, MMB had the obligation, as the party moving for summary judgment on the issue of the amount owed, to come forward with other evidence in the form of affidavits, discovery documents, or otherwise to overcome Shapiro's denials and establish the absence of genuine issues of material fact. The only affidavit that was submitted by MMB, the Supreme Court noted, addressed the issue of the sufficiency of the property description for the purposes of the lien and did not present evidence as to the amounts owed by Shapiro. Citing Bozeman v. AIU Ins. Co., 262 M 370, 865 P2d 268 (1993), the Supreme Court pointed out that MMB could not rely on arguments of counsel to overcome the existence of an issue of material fact. The Supreme Court further noted, citing Gallatin Trust & Sav. Bank v. Darrah, 152 M 256, 448 P2d 734 (1968), that because the invoices were not submitted or filed by MMB as part of its motion for summary judgment, the invoices are not evidence of what was contained in the invoices but merely allegations of the complaint and were insufficient to overcome Shapiro's denials in his answer. In response to MMB's argument that Shapiro waived any right to object to

MMB's evidentiary basis for its motion, the Supreme Court pointed out that there was no evidentiary basis for MMB's motion for summary judgment on the issue of the amount of the debt because the invoices were not submitted for the purposes of the motion but only for the purposes of the complaint and had been effectively addressed by Shapiro's answer. Citing Duensing v. Traveler's Co., 257 M 376, 849 P2d 203 (1993), the Supreme Court also pointed out that just because both parties have moved for summary judgment does not alone establish the absence of a genuine issue of material fact, particularly when the motions are not on precisely the same issues, and the District Court therefore apparently assumed, incorrectly, that there were no such genuine issues. Mont. Metal Bldg., Inc. v. Shapiro, 283 M 471, 942 P2d 694, 54 St. Rep. 731 (1997).

Question Over Existence of Links Between Feline and Plaintiff's Catapulting Down Stairs: Smith argued that Kerns was negligent in letting his cat have the run of his veterinary office because as she was leaving the office, she looked behind her to make sure that the cat was not going to run outside and fell down the stairs. The Supreme Court reversed the lower court's grant of summary judgment dismissing Smith's claim, ruling that there was a question as to whether the cat moved, thereby distracting Smith and causing her to fall. Smith v. Kerns, 281 M 114, 931 P2d 717, 54 St. Rep. 86 (1997).

Foreseeability of Results of Practical Joke — Substantial Factor Test of Causation — Defense of Superseding Intervening Cause Unavailable: Codefendants Linda and David played an April Fools' Day joke on their friend Dennis by calling him at another friend's residence and feigning distress. In his rush to assist, Dennis was in a car accident and injured plaintiff Kolar. The District Court summarily dismissed Kolar's claim against Linda and David, holding that reasonable minds could not differ as to the issue of foreseeability and that although the results of the practical joke were tragic, they were not in any way foreseeable by Linda and David. The Supreme Court reversed the grant of summary judgment, holding that Dennis's state of mind when he left the friend's residence and the extent to which Kolar's injuries should have been foreseeable by Linda and David were questions of fact for the jury, not susceptible to summary judgment. Because the case involved allegations of contributory negligence, multiple causes, and multiple defendants, the use of the substantial factor test of causation was appropriate. The affirmative defense of superseding intervening cause was not available to defendants involved in a practical joke. Kolar v. Bergo, 280 M 262, 929 P2d 867, 53 St. Rep. 1395 (1996).

Questions as to Buyer's Intent and Seller's Impossibility of Performance — Summary Judgment Improper: Seller sold 20 acres with a separate option agreement to reacquire 15 of the acres. The option agreement stated that if the option was not exercised within a year, buyer was to retain the 15 acres and the option was void. The buyer's affidavit stated that it was his intent to purchase 20 acres, subject to the option, and to retain all 20 acres if the option was not exercised in accordance with its terms. Because of a conflict between the local government master plan (now growth policy) and the zoning map for the area, which was not resolved within the year of the option, the option could not be exercised. The District Court granted seller summary judgment in the seller's action for declaratory relief, ruling that it was impossible for seller to comply with the option because of the conflict between the master plan (now growth policy) and the zoning map and that equity and good conscience required that seller be given reasonable additional time to comply with the option conditions. The language of the option agreement and the buyer's affidavit showed a genuine issue of material fact with regard to the parties' intent. In addition, the buyer's contention that seller was dilatory in exercising the option and that the delay caused the option to expire raised a genuine issue of material fact as to the question of impossibility of performance. Therefore, the grant of summary judgment was error. Furthermore, the District Court exceeded its authority in granting equitable modification of the express terms of the option contract to give seller additional time to perform. 360 Ranch Corp. v. R&D Holding, 278 M 487, 926 P2d 260, 53 St. Rep. 1038 (1996).

Negligent Failure to Illuminate Sidewalk as Question of Fact — Resolution by Jury Rather Than Summary Judgment: Brown was injured on Demaree's unlit sidewalk stepdown landing while delivering a newspaper. The trial court granted Demaree's motion for summary judgment, holding that while a property owner has a duty to maintain sidewalks in a reasonably safe condition and to warn of hidden and lurking dangers, Demaree had done all that society could reasonably ask in this regard. The court noted that Brown had carried a flashlight but chose not to use it and that requiring a home owner to constantly illuminate property would place an unreasonable burden on the home owner that the law did not contemplate. Ordinarily, negligence actions involve questions of fact and are not susceptible to summary judgment. In this case, reasonable minds could differ on whether Demaree should have illuminated the sidewalk or warned of the sidewalk stepdown landing and the question should have been resolved by a

jury. The test to be applied by the jury is not whether some other landowner under different factual circumstances is or is not required to illuminate property, but rather whether the landowner keeps a premises reasonably safe and warns of hidden dangers while taking into consideration the use to which the property is put and its setting, location, and other physical characteristics, along with the type of person who would foreseeably visit the premises and the type of hazard or unsafe condition alleged. Summary judgment was reversed, and the case was remanded for further proceedings. Brown v. Demaree, 272 M 579, 901 P2d 567, 52 St. Rep. 819 (1995), following Limberhand v. Big Ditch Co., 218 M 132, 706 P2d 491 (1985), and distinguishing Fuchs v. Huether, 154 M 11, 459 P2d 689 (1969). See also Welton v. Lucas, 283 M 202, 940 P2d 112, 54 St. Rep. 562 (1997).

Dismissal of Action for Tortious Interference With Business Relationship Improper: Farrington sued Buttrey for tortious interference with a business relationship because Buttrey's refusal to allow him to enter its stores for any purpose resulted in his being fired by a company that supplied food products to Buttrey. The lower court granted Buttrey's motion for summary judgment, ruling that because of previous dealings with Farrington when he had been employed by a different supplier, Buttrey was justified in excluding him from Buttrey store premises. The Supreme Court reversed, holding that Farrington's duties with the new supplier were different from the duties that he had with the first supplier and that a question of fact existed as to whether or not Buttrey was justified in excluding Farrington from store premises. Farrington v. Buttrey Food & Drug Stores Co., 272 M 140, 900 P2d 277, 52 St. Rep. 667 (1995).

Evidence by Both Parties Regarding Elements of Liability — Summary Judgment Improper: When both parties produced evidence and testimony to support their arguments concerning the elements of negligence in contention, a summary or directed verdict was inappropriate. Because the determinative question was one of fact and both sides presented facts in support of their positions, the conflicting evidence on questions regarding duty, breach of duty, and causation precluded summary judgment in light of genuine issues of material fact. Contreras v. Vannoy Heating & Air Conditioning, Inc., 270 M 393, 892 P2d 557, 52 St. Rep. 246 (1995).

Standard of Care for Nonemergency Dental Care: Burlinghams sued dentist Mintz, alleging that Mintz's negligence caused Candance Burlingham's injury. Applying the standard of care set out in Negaard v. Feda, 152 M 47, 446 P2d 436 (1968), the District Court excluded two of Burlinghams' standard of care experts, one a suburban dentist from St. Louis and the other an oral surgeon from Albany, Oregon, on grounds that the experts had no idea of the standard of care in Eureka, Montana, or a similar community, and lacking expert testimony, the court summarily dismissed plaintiffs' case. On appeal, the Supreme Court held that the standard of care enunciated in Negaard was no longer appropriate for nonemergency dental care in Montana. The Supreme Court noted that the foundation for testimony must necessarily include evidence that the witness is familiar with the standard of care at the time when and the place where the alleged act of negligence occurred. Expert testimony may consist of direct or indirect knowledge of the standard of care in the community where the act occurred or in a similar community and may be based on evidence that the standard of care for a procedure at issue is the same in all communities, regardless of size or location. If the basis of the witness's familiarity with the applicable standard of care is that the standard is uniform throughout the country and evidence to the contrary is presented, then the issue raised by the contrary evidence goes to the weight of the witness's testimony but does not preclude its admission. In the case at hand, Burlinghams presented two appropriate experts who were familiar with the applicable nonemergency standard of care for dentists in the community, by either direct or indirect knowledge, thereby meeting their burden of establishing a prima facie case. The District Court erred by excluding the experts and granting summary judgment. Burlingham v. Mintz, 270 M 277, 891 P2d 527, 52 St. Rep. 181 (1995), overruling, to the extent in conflict, Negaard v. Feda, 152 M 47, 446 P2d 436 (1968).

Questions Regarding Proper Settlement of Estate — Summary Judgment Precluded: An attorney employed to settle an estate contended that pleadings and supporting documents established that he had a right to funds he retained, based on the parties' agreement and the fact that he settled the case as requested. He also contended that plaintiffs could not establish the elements of ownership and damage essential to a claim for conversion and that he was thus entitled to summary judgment on the issue of conversion of funds from an estate settlement. Plaintiffs offered evidence that there was no such agreement and thus there was a factual issue regarding ownership and that the attorney's withdrawal of funds without consent was sufficient to establish damages. The Supreme Court found that sufficient genuine issues of material fact existed to preclude summary judgment. Eatinger v. Johnson, 269 M 99, 887 P2d 231, 51 St. Rep. 1484 (1994).

Question Regarding Water Hookups and Conformance With Water Users' Bylaws — Summary Judgment Improper: In granting summary judgment, the trial court found that a water users' association had complied with its bylaws in restricting simultaneous use and transfer of memberships. However, there were disputed issues of fact regarding application of the bylaws that precluded summary judgment as a matter of law, and the Supreme Court reversed for further proceedings. Roe v. Corbin Water Users' Ass'n, 267 M 503, 885 P2d 419, 51 St. Rep. 1134 (1994), citing Edgewater Townhouse Homeowner's Ass'n v. Holtman, 256 M 182, 845 P2d 1224 (1993).

Alleged Invalidity of Promissory Notes — Summary Judgment Improper — Stockholder Status Not Prerequisite for RICO Claim: In a suit seeking payment on promissory notes, the first of which was executed in exchange for 1,500 shares of stock, the validity of the note was challenged on the grounds that it was in violation of 35-1-606 (now repealed), which provided that neither promissory notes nor future services constitute payment for shares of a corporation. The Supreme Court held that it was error for the lower court to grant summary judgment when the record did not contain sufficient facts to allow a determination of the invalidity of the promissory notes at issue and that it was further error to dismiss defendant's RICO counterclaims because stockholder status is not a prerequisite for standing to bring a RICO claim. Kuhns v. Koessler, 266 M 339, 880 P2d 1293, 51 St. Rep. 800 (1994).

Failure to Comply With Provisions of Federal Act Incorporated by Reference Into Contract — Affirmative Defense: The Farm Credit Bank instituted suit to foreclose on a loan agreement with the Graveleys and filed for summary judgment. The Graveleys argued that the bank was estopped from foreclosing because it had not complied with the restructuring provisions of the Agricultural Credit Act of 1987, which had been incorporated by reference into the parties' agreement. The Supreme Court held that the Graveleys were entitled to assert as an affirmative defense the failure of the bank to follow the provisions of the Act and that allowing the defense was not synonymous with allowing a foreclosure court to substitute its judgment for that of the bank's loan officers. The Supreme Court also held that the lower court had correctly denied the motion for summary judgment on the basis that factual issues existed with respect to the merits of the Graveleys' affirmative defense. State ex rel. Farm Credit Bank of Spokane v. District Court, 267 M 1, 881 P2d 594, 51 St. Rep. 709 (1994), following Farm Credit Bank of Spokane v. Parsons, 758 F. Supp. 1368 (D.C. Mont. 1990), followed in AgAmerica, FCB v. Robson, 272 M 413, 901 P2d 100, 52 St. Rep. 800 (1995).

Act Within Scope of Employment and Authority — Summary Judgment Improper: Cloutier arranged to have a pickup truck owned by State Medical Oxygen & Supply, a company of which he was an officer and director, used to haul mattresses and employees of Cay Enterprises, a company of which he was also an officer and director. A Cay Enterprises employee who was injured in the move sought damages from State Medical Oxygen & Supply, alleging negligence in supplying the vehicle. The District Court dismissed the claim by summary judgment, improperly applying Restatement (Second) of Torts 390 (1965), which deals with supplying a chattel to a person incompetent to use it safely. The more proper application was Restatement (Second) of Torts 308 (1965), which deals with the use of a thing or engaging in an activity under the control of an actor if the actor knows that the use or activity might create an unreasonable risk of harm to others. Cloutier was operating within the course and scope of his employment with both companies, thus his knowledge as agent was imputed to the company as principal. That knowledge was a question of fact to be determined by a trier of fact. Summary judgment was improper given that issues of negligence remained to be decided. Williams v. St. Medical Oxygen & Supply, Inc., 265 M 111, 874 P2d 1225, 51 St. Rep. 458 (1994).

Skier Responsibility Law — Questionable Skiing Conditions as Precluding Summary Judgment: Mead was injured in a skiing accident, but the District Court summarily dismissed his damages claim because the injury resulted from inherent risks of skiing, as set forth in 23-2-736. However, disputed questions of fact existed as to whether the injury was a result of variations in skiing terrain and whether Mead was skiing beyond the designated trail. Those questions were issues to be decided by the finder of fact after consideration of all the evidence; therefore, summary judgment was inappropriate. Mead v. M.S.B., Inc., 264 M 465, 872 P2d 782, 51 St. Rep. 348 (1994).

Factual Issues Involving Loaned Title and Adverse Possession — Summary Judgment Precluded: Johnson agreed to loan Anderson the title to several lots that Johnson owned on Flathead Lake so that Anderson could mortgage the lots and use the proceeds for a business venture. Johnson and Anderson both executed deeds to the property, and Anderson occupied the property pursuant to a lease agreement. Later, the agreement was breached when Anderson conveyed his interest to a third party and cut trees from the property. Both parties sought a

declaration of ownership in a quiet title action. The Supreme Court held that the District Court properly denied Anderson's motion for summary judgment because there were genuine issues of material fact as to the parties' oral agreement, as to the conditions under which Anderson occupied the property, and as to which of the two deeds controlled the transaction. Anderson v. Johnson, 264 M 66, 870 P2d 59, 51 St. Rep. 149 (1994).

Part-Time Employee Fired After Taking Second, Full-Time Job — Mitigation of Damages: It was error to find that a part-time Burger King employee fired shortly after she took a second job at the Black Angus mitigated any wrongful discharge damages by working full-time at the Black Angus and earning more than she earned at Burger King. It was also error to find that defendant was entitled to summary judgment because employee suffered no damages. The work hours at the two places were presumably compatible, so she could have worked both jobs. Therefore, she suffered the loss of her Burger King earnings. Morton v. M-W-M, Inc., 263 M 245, 868 P2d 576, 51 St. Rep. 39 (1994).

Restaurant Employee Fired After Taking Second Job at Another Restaurant While on Vacation: A Burger King assistant manager was fired. Defendant's motion for summary judgment in the wrongful discharge proceeding claimed that plaintiff requested vacation to tend to her family and used it to work at the Black Angus, that she was thus dishonest, and that the Black Angus was a Burger King competitor. Burger King permitted moonlighting with a noncompetitor. Summary judgment for defendant was reversed because plaintiff raised issues as to whether her vacation request was made according to Burger King policy, whether she had misled Burger King to obtain vacation time to work at a second, new job, and whether her two employers were competitors. Morton v. M-W-M, Inc., 263 M 245, 868 P2d 576, 51 St. Rep. 39 (1994).

Question of Potentially Defective and Dangerous Marshmallows — Summary Judgment Improper: After a small child aspirated a piece of marshmallow and suffered brain damage, the family sued the manufacturer and attending physician, contending that the marshmallows were defective and unreasonably dangerous because they lacked an effective warning. In summarily dismissing the issue, the trial court relied on Comment j, Restatement (Second) of Torts 402A, for the proposition that a seller is not required to warn with respect to products that are only dangerous when consumed in excessive quantities if that danger is generally known and recognized. The Supreme Court held that the trial court erroneously resolved questions of fact regarding the chemical properties of marshmallows, the foreseeability of the danger of aspiration in children, and causation. Summary judgment was therefore improper, and the case was remanded for trial. Emery v. Federated Foods, Inc., 262 M 83, 863 P2d 426, 50 St. Rep. 1454 (1993).

Issues of Fact Regarding Damages From Fish Kill — Summary Judgment Improper: Hagens sought damages when over 8,000 pounds of trout in their fish farm died after the county weed management district applied a weed poison adjacent to the ditch that supplied water to the farm. The District Court granted summary judgment in favor of the district and the chemical manufacturer, concluding that Hagens had failed to submit sufficient evidence to establish that exposure to the weed poison caused the death of the fish. The Supreme Court reversed and remanded, holding that although a plaintiff does not meet the burden of proof by merely establishing that an incident occurred, in actions dealing with product liability, sufficient evidence to make a prima facie case may consist of establishing the circumstances of the incident, similar occurrences under similar circumstances, and elimination of alternative causes. Substantial questions of fact existed as to the cause of death, including contrasting expert testimony, to preclude summary judgment on the issues of liability and punitive damages. Hagen v. Dow Chem. Co., 261 M 487, 863 P2d 413, 50 St. Rep. 1421 (1993).

Genuine Issue Whether Employee Fired for Cause or for Reporting Crimes at Workplace: An auto dealer employee reported apparent illegal drug activities by several dealership employees to state authorities and at their request agreed to continue to provide such information and to attempt to purchase illegal drugs. There was no evidence that he was to be paid for this. He was fired 6 days later, allegedly because, as stated in a recorded phone call he made to his boss, he was "a [expletive deleted] snitch and we don't want you around here . . . . Every time we make a move, you call the [expletive deleted] FBI." Several weeks later, he was paid $40 for the information provided. Summary judgment for the employer in a wrongful discharge action thwarted the very purpose of the statute, which provides that a discharge in retaliation for reporting a violation of public policy is a wrongful discharge, and was reversed, although denial of employee's motion for summary judgment was affirmed because employer alleged reasons that if proved would support employee's dismissal. The case was remanded to determine whether the discharge was for good cause or for reporting a violation of public policy. Krebs v.

Ryan Oldsmobile, 255 M 291, 843 P2d 312, 49 St. Rep. 1016 (1992), followed in Motarie v. N. Mont. Joint Refuse Disposal District, 274 M 239, 907 P2d 154, 52 St. Rep. 1209 (1995).

Material Question of Value of Profit Share Granted Employee as Element of Termination Agreement — Summary Judgment Improper: Employee signed an employment termination agreement that provided in part for a distribution to him of a share of company profits, both prior to and after the termination of employment. Any issue of profit distributions prior to termination was barred by a waiver of claims. However, a question of material fact regarding the calculation of and disproportionate nature of the profit sharing distribution after termination was sufficient to preclude summary judgment because the amount to be paid was unknown to both parties at the time of termination. Somersille v. Columbia Falls Aluminum Co., 255 M 101, 841 P2d 483, 49 St. Rep. 904 (1992).

Questions of Proper Adherence to Personnel Policies as Precluding Summary Judgment on Issue of Wrongful Discharge: The existence of a genuine issue of material fact regarding personnel policies in effect at the time of an employee's alleged wrongful discharge, coupled with denial of the employee's opportunity to enter into evidence written personnel policies purported to be in effect at the time of discharge, effectively denied the employee a hearing on the issue and precluded summary dismissal of the employee's wrongful discharge claim. Kenyon v. Stillwater County, 254 M 142, 835 P2d 742, 49 St. Rep. 673 (1992).

Issues of Fact Arising From Separation Agreement — Summary Judgment Inappropriate: A separation agreement provided that the husband's partnership interests be liquidated and the proceeds be placed in trust for the payment of child support. When the interests had not been liquidated or child support paid in full 37 months after dissolution, the District Court granted summary judgment, holding husband responsible for $52,200 in support. Reversing and remanding, the Supreme Court found summary judgment inappropriate when issues of fact remained as to the value of the partnership, reasons for failure to liquidate, and husband's capacity to pay the support obligations. In re Marriage of Wilsey, 253 M 85, 831 P2d 590, 49 St. Rep. 406 (1992).

Failure to Consider Affidavit of Expert on Value of Farm Equipment — Question of Whether Sales Were Commercially Reasonable as Precluding Summary Judgment: The District Court granted summary judgment to creditor who sold farm equipment to satisfy deficiencies, finding that the sales were commercially reasonable because the creditor properly notified debtor Michels of the pending sales pursuant to 30-9-504 (now repealed). In opposing summary judgment, Michels submitted the affidavit of a former farm implement dealer who was familiar with the equipment and who testified that the amount sought through the sales was far below the value of the equipment. The affidavit raised a genuine issue of material fact concerning whether the sales were commercially reasonable that was sufficient to constitute error in the grant of summary judgment. Agricredit Acceptance Corp. v. Michels, 250 M 23, 817 P2d 704, 48 St. Rep. 874 (1991).

Summary Judgment Improper — Terms of Purchase Agreement Unclear: The defendant had entered into an agreement with the bank to purchase certain real estate from the bank and had placed $50,000 in escrow as earnest money. The buyer refused to go through with the sale on the basis that the mortgage presented by the bank at the time of sale differed from terms agreed to in the buy-sell agreement. The lower court granted the bank's motion for summary judgment and awarded the bank the earnest money and attorney fees. The Supreme Court reversed, holding that the terms of the mortgage were different from the terms set out in the buy-sell agreement and that therefore the summary judgment was improper. Payne Realty & Housing, Inc. v. First Sec. Bank of Livingston, 247 M 374, 807 P2d 177, 48 St. Rep. 234 (1991). On remand, the District Court reasoned that the bank, as both lender and seller, did not offer the buyer financing terms consistent with the buy-sell agreement and that because there was no meeting of the minds, summary judgment was proper and the buyer was entitled to return of the earnest money, together with interest and attorney fees. The bank appealed, contending that genuine issues existed precluding summary judgment. The Supreme Court agreed, concluding that the buyer had not established an absence of factual issues with regard to his allegation that the buy-sell agreement was not binding or that if the contract was binding, the bank was the breaching party. Further, contradictory evidence showing the possibility of issues of prevention of contract performance, breach of the covenant of good faith and fair dealing, promissory estoppel, and negligent misrepresentation also made summary judgment improper. The case was remanded again for resolution of the factual issues. Payne Realty & Housing, Inc. v. First Sec. Bank of Livingston, 256 M 19, 844 P2d 90, 49 St. Rep. 1098 (1992).

Dispute as to Existence of Oral Contract: When there was a dispute as to the existence of an oral contract and as to whether, if there was such a contract, it was capable of performance

within a year, it was error to grant summary judgment. Beaverhead Bar Supply, Inc. v. Harrington, 247 M 117, 805 P2d 560, 48 St. Rep. 117 (1991).

Control by General Contractor With Subcontractor Consent: It was error to grant summary judgment in an action for a work-related accident when the employee alleged that the general contractor had exercised direct control of the employee with the consent of the employee's employer, the subcontractor. Umbs v. Sherrodd, Inc., 246 M 373, 805 P2d 519, 48 St. Rep. 59 (1991).

Refusal to Grant Defendant's Motion for Ruling of No Liability — Plaintiff's Motion for Ruling of Liability Not Automatically Granted: In a wrongful discharge case, the defendant brought a summary judgment motion seeking a ruling that it was not liable as a matter of law. The lower court refused to grant the motion. The plaintiff then moved the court for a ruling that the defendant was liable as a matter of law, and the lower court granted the motion, stating that it was compelled to grant the motion because it had denied the defendant's motion for a ruling of no liability. The Supreme Court reversed, ruling that the denial of the defendant's motion only meant that the defendant's nonliability could not be determined as a matter of law but that the defendant could still argue its case during trial. The ruling against the defendant did not mean that the lower court had to grant the plaintiff's motion on the opposite side of the question. State ex rel. First Bank System v. District Court, 240 M 77, 782 P2d 1260, 46 St. Rep. 1956 (1989).

Ambiguity of Draft Purporting to Be Release That Is Also Receipt — Summary Judgment Improper: The District Court improperly granted summary judgment for an insurance company after finding plaintiff had signed a release from suit. The Supreme Court found a contractual ambiguity existed because the release language was contained in a $1,500 draft that purported to be a release but was also a receipt in certain situations. The District Court adopted verbatim the proposed findings and conclusions presented by the insurer, which put it in the position of a trier of factual issues rather than determining whether genuine issues of material fact existed on the motion for summary judgment. Existence of ambiguity precluded summary judgment. Buskirk v. Nelson, 237 M 455, 774 P2d 398, 46 St. Rep. 964 (1989).

Challenge of Validity of Release on Basis of Unconscionability — Summary Judgment Improper: Plaintiff signed a release for personal injuries with an insurance company in exchange for $8,900. Plaintiff later sued insureds, who were granted summary judgment after pleading the affirmative defense of release. However, a release is governed by contract law and may be rescinded for the same reasons that allow rescission of a contract. Therefore, the validity of a release may be challenged on the basis of unconscionability. The Supreme Court reversed the grant of summary judgment after finding the release was unconscionable based on: (1) plaintiff's dire financial situation, lack of education and legal advice, and vulnerability; (2) substantial uncertainty as to the extent of injury and future prognosis at the time of settlement; and (3) haste in executing the release. Taken together, the circumstances raised an issue of fact whether justice was done, precluding summary judgment. Kelly v. Widner, 236 M 523, 771 P2d 142, 46 St. Rep. 591 (1989).

Nonstatutory Exceptions to At-Will Termination of Employment — Reversal of Summary Judgment: The Supreme Court reversed summary judgment dismissing employee's suit, holding that factual questions existed on whether the termination fell under one of the four nonstatutory exceptions to the right of the at-will employer to discharge an employee. The court stated that the exceptions were: (1) the discharge violates public policy; (2) the discharge breaches an express or implied promise of job security; (3) the discharge breaches the implied covenant of good faith and fair dealing; and (4) negligent discharge. Prout v. Sears, Roebuck & Co., 236 M 152, 772 P2d 288, 46 St. Rep. 257 (1989).

Issue of Material Facts as to Plaintiff's Mental Illness — Tolling of Statute of Limitations: Nearly 8 years after the plaintiff was discharged from his employment, his guardian ad litem filed a complaint against his former employer alleging wrongful discharge and claiming that the 3-year statute of limitation was tolled due to the plaintiff's mental illness. Upon the employer's motion for summary judgment, the trial court dismissed the complaint as untimely filed. In response to the employer's contention that the plaintiff's pursuit of other benefit claims demonstrates an absence of mental illness, the Supreme Court held that that is an issue to be decided at trial, not on a motion for summary judgment, because it is not an issue that is susceptible to resolution based on written affidavits without the benefit of cross-examination in court. Therefore, the matter was remanded because there is a material issue of fact concerning the plaintiff's mental condition that precludes summary judgment. Bestwina v. Village Bank, 235 M 329, 767 P2d 338, 46 St. Rep. 27 (1989).

Question of Encroachment in Sale of Property — Summary Judgment Improper: A grant of summary judgment was improper on a claim for breach of contract for sale of real property

because neither party submitted proof as to whether there was a legal right of encroachment, and this fact question was material to the outcome. D'Agostino v. Schapp, 230 M 59, 748 P2d 466, 45 St. Rep. 14 (1988).

Responsibility of Defendant or Third Party — Issue of Fact: Defendant city contracted with third party consultant to provide engineering services for a pumphouse project. The pumphouse was allegedly built on the land of another property owner. The trial court adopted the city's contention that, as engineer, the consultant was responsible for the error. Summary judgment was granted. The Supreme Court vacated the judgment, finding a contested question of fact concerning whether the city or the consultant had the responsibility to locate and actually did locate the pumphouse site. Stidham v. Whitefish, 229 M 170, 746 P2d 591, 44 St. Rep. 1869 (1987).

Parol Evidence Necessary to Determine Intention When Latent Ambiguity Exists: A party transferred property back to sellers in lieu of foreclosure. The transfer arguably constituted a technical conveyance. "Conveyance" had different meanings for the parties and therefore was to be interpreted in accord with the manifest intent of the parties. Parol evidence was necessarily admissible to demonstrate and explain this latent ambiguity, and summary judgment on the issue was improper. Ellingson Agency, Inc. v. Baltrusch, 228 M 360, 742 P2d 1009, 44 St. Rep. 1598 (1987), followed in Fox Grain & Cattle Co. v. Maxwell, 267 M 528, 885 P2d 432, 51 St. Rep. 1136 (1994).

Agency Relationship of National Realty Organization With Locally Owned Franchisee as Question of Fact: Summary judgment was improper where a genuine issue as to a material fact existed regarding home buyers' reliance on the name and reputation of a national realty organization despite an "independently owned and operated" disclaimer displayed on materials furnished by the local franchisee. Burkland v. Electronic Realty Associates, Inc., 228 M 113, 740 P2d 1142, 44 St. Rep. 1384 (1987).

Question Whether Checks Cashed Without Authorization — Summary Judgment Improper: The District Court improperly granted summary judgment to bank when it assumed, absent evidence in the record, that checks were cashed by an unauthorized signer. The determination that the signature was unauthorized could not be made without dealing with the rights and liabilities between the signer and the person to whom the checks were originally made out. First Nat'l Bank in Eureka v. Giles, 225 M 467, 733 P2d 357, 44 St. Rep. 407 (1987).

Nonapplicability of North Dakota Dram Shop Law to Montana Bar — Liability Under Montana Law Not Litigated in North Dakota: In a wrongful death action, the personal representative filed suit in North Dakota and Montana. The North Dakota Supreme Court dismissed the action with prejudice, narrowly holding that a Montana bar could not be liable under the North Dakota Dram Shop Act; however, the issue of liability under Montana law was never litigated. The Montana Supreme Court held that, under the Full Faith and Credit Clause, Art. IV, sec. 1, U.S. Const., and under 26-3-203, relitigation of the issue of extraterritorial effect of the North Dakota Dram Shop Act was barred by res judicata. However, factual questions precluded summary judgment in Montana, and as the liability issue was not litigated, Montana courts were free to examine the issue. Thoring v. LaCounte, 225 M 77, 733 P2d 340, 44 St. Rep. 264 (1987). See also Nehring v. LaCounte, 219 M 462, 712 P2d 1329, 43 St. Rep. 93 (1986), and Thoring v. Bottensek, 350 NW 2d 586 (N.D. 1984).

Questions of Anticipated Harm and Duty of Ordinary Care as Material Issues of Fact — Summary Judgment Improper: In reversing a summary judgment as improper, the Supreme Court found that material questions of fact for a jury existed on the issues of whether: (1) the town of Whitehall should have anticipated that harm would be caused by the condition of the sidewalk despite the knowledge and obviousness of the condition; and (2) the town of Whitehall exercised ordinary care to keep the sidewalk reasonably safe. Even if it appeared that recovery under these issues was very remote, they constituted genuine issues of material fact; therefore, summary judgment was not appropriate. Kaiser v. Whitehall, 221 M 322, 718 P2d 1341, 43 St. Rep. 846 (1986).

Interpretation of Deed Reservation — Summary Judgment Improper: When a royalty reservation in a deed was ambiguous and the true intent of the parties was discernible only with reference to extrinsic evidence and not from the deed alone, it was error for the trial court to grant summary judgment in favor of the mineral owners against the royalty owners. Proctor v. Werk, 220 M 246, 714 P2d 171, 43 St. Rep. 333 (1986), distinguished in Ferriter v. Bartmess, 281 M 100, 931 P2d 709, 54 St. Rep. 79 (1997).

Summary Judgment Erroneous on Damage Issue — Affidavit Not Considered: Appellants requested the lower court to wait until an engineer's affidavit was submitted before ruling on the county's motion for summary judgment on a road damage issue. The court ruled on the motion

without waiting for the affidavit. The Supreme Court remanded for consideration of the affidavit by the court. Lee v. Flathead County, 217 M 370, 704 P2d 1060, 42 St. Rep. 1258 (1985), distinguished in Carelli v. Hall, 279 M 202, 926 P2d 756, 53 St. Rep. 1116 (1996).

Issue of Fact — Capacity in Which Promissory Note Signed: Summary judgment was not proper in an action on a promissory note when defendants had been sued individually but claimed, despite the appearance of the note, to have executed the note in their capacity as officers of a landscaping company. Although generally an unambiguous note cannot be varied by parol evidence, 30-4-403 specifically allows proof beyond the provisions of the note itself; thus, defendants' contentions established the existence of an issue of material fact. Clarks Fork Nat'l Bank v. Papp, 215 M 494, 698 P2d 851, 42 St. Rep. 577 (1985).

Insurance Coverage — Family Relationship — Implied Consent — Issue of Material Fact: The son ran away from home with his parents' vehicle and subsequently was involved in a one-car accident. The trial court erred in granting summary judgment, holding that there was no liability insurance coverage for the insureds' minor son under the parents' policy. Because a family relationship exists between the insureds and the vehicle's driver, the parents' implied consent to their son's use of the vehicle remains a genuine issue of material fact. Farmers Ins. Exch. v. Janzer, 215 M 260, 697 P2d 460, 42 St. Rep. 337 (1985).

Attorney's Obligation to Deal in Good Faith: Because of the inequality that exists between attorney and client in bargaining over a fee, attorney has an obligation to deal fairly and in good faith when negotiating, charging, and collecting a fee. In a fee dispute over handling of dissolution, client pleaded sufficient facts to raise question whether there was a breach of the obligation owed to deal fairly and in good faith. District Court erred in granting summary judgment for attorney. Supreme Court reversed and remanded for trial, giving client leave to amend counterclaim to specifically describe a breach of the implied covenant. Morse v. Espeland, 215 M 148, 696 P2d 428, 42 St. Rep. 251 (1985).

Effect of Guaranty on Promissory Note — Issue of Material Fact: The District Court erred in granting summary judgment because material issues of fact emerged at the hearing on motion for summary judgment. The parties to a loan guaranty both had a different idea concerning the amount of the loan proceeds being guaranteed by plaintiffs. Summary judgment is usually inappropriate where the intent of the contracting parties is an important consideration. Twite v. First Bank, 214 M 348, 692 P2d 471, 41 St. Rep. 2518 (1984), followed in Ellingson Agency, Inc. v. Baltrusch, 228 M 360, 742 P2d 1009, 44 St. Rep. 1598 (1987).

Priority of Interests in Receivership Property: In proceeding relating to the priority of interests in the property of entity in receivership, summary judgment for plaintiffs was improper where several important issues of fact remained, especially concerning the validity of the security interests held by certain creditors. The judgment was reversed and the case remanded for further proceedings. Hull v. D. Irvin Transp., Ltd., 213 M 75, 690 P2d 414, 41 St. Rep. 1954 (1984).

Doubt Resolved in Favor of Party Opposing: Reagan's predecessor in interest converted his "net proceeds interest" in certain oil and gas leases into a "general obligation and liability" of Union Oil and Montana Power. Reagan brought suit alleging that Union Oil and Montana Power had improperly withheld portions of Reagan's annual payment for payment of taxes. The District Court erred in granting Reagan's motion for summary judgment as there was a genuine issue of material fact concerning whether the conversion to a general obligation and liability created an "economic interest". In addition, the conduct of the parties in the execution and acquiescence to the terms of the division orders created a genuine issue of fact. The party opposing a motion for summary judgment must be afforded the benefit of all reasonable inference which may be drawn from the offered proof. Reagan v. Union Oil Co., 208 M 1, 675 P2d 953, 41 St. Rep. 131 (1984). See also Dare v. Mont. Petroleum Marketing Co., 212 M 274, 687 P2d 1015, 41 St. Rep. 1735 (1984), and Whitehawk v. Clark, 238 M 14, 776 P2d 484, 46 St. Rep. 1053 (1989).

Negligence — Judgment Based on Facts Deemed Admitted Due to Failure to Respond to Request for Admission: On June 29, 1979, plaintiff filed a complaint alleging that in July 1977, defendants negligently caused herbicides to be sprayed in a springwater ditch leading to plaintiff's pond and that the herbicides killed 32,411 rainbow trout which plaintiff was raising in his pond for commercial resale. On June 3, 1981, plaintiff filed a request for admission of facts and genuineness of documents under Rule 36(a), M.R.Civ.P. Defendants failed to respond within 30 days of service. Defendants did not answer the complaint until July 29, 1981, 1 day after plaintiff moved for a default judgment. On June 15, 1982, plaintiff moved for summary judgment, alleging that no genuine issue of material fact existed since each of the matters set forth in his request for admission was deemed admitted and that plaintiff was entitled to judgment as a matter of law. The court gave defendants 1 week from June 30, 1982, to file a brief

in opposition to the motion for summary judgment. No brief was filed until the day before a hearing scheduled by the court in February 1983. In opposition to the motion, defendants argued that summary judgment was improper because plaintiff had not established each of the elements of negligence and that genuine issues of material fact existed. The District Court ruled in favor of plaintiff, and the Supreme Court affirmed. Because defendants had admitted each fact necessary to sustain plaintiff's negligence claim against them, plaintiff was entitled to judgment as a matter of law. Further, defendants had not properly raised any additional material factual issues. The initial burden of proof in summary judgment matters rests with the moving party, but that burden shifts when the record discloses no genuine issue of material fact. Detert v. Lake County, 207 M 460, 674 P2d 1097, 41 St. Rep. 76 (1984).

Issue of Fact as to Whether Promissory Note Procured by Fraud: In 1978, plaintiff had leased a number of mink to defendants in return for payment by defendants of a portion of the annual kit crop. At the time of the lease, plaintiff strongly suspected that a small percentage of the mink were infected with Aleutian Disease (AD), a disease impairing mink productivity and resistance to other diseases. In December 1980, after 2 years of greater than normal losses among the leased mink, the parties replaced the lease with a promissory note containing a clause releasing plaintiff from any liability arising out of the lease. After the promissory note had been made, plaintiff informed defendants that tests of his mink in November 1980 indicated that 30% were infected with AD. Subsequent testing of defendants' mink revealed that 70% had AD. Defendants made no payments on the note. In a suit on the note, defendants counterclaimed, alleging that the note had been procured by fraud. The District Court granted plaintiff's motion for summary judgment. The Supreme Court reversed, ruling that defendants' affidavit indicated an issue of material fact, i.e., whether defendants learned that the mink had AD before or after the note was signed, and that the plaintiff had not met the burden of establishing that there was no issue of material fact. Rogers v. Swingley, 206 M 306, 670 P2d 1386, 40 St. Rep. 1676 (1983).

Negligence Issue — Not Normally Susceptible to Summary Judgment: Plaintiff was injured when a car struck her as she was crossing a street at an intersection. Plaintiff sued the driver of the car and a beer distributing company whose truck was at least partially blocking one of four lanes of traffic and the intersection. The District Court granted summary judgment to the distributor. On appeal, the Supreme Court vacated the District Court's decision, holding that issues of negligence are not ordinarily susceptible to summary judgment. There was a material issue of fact as to whether the truck was illegally parked, and if so, whether the truck's position was a proximate cause of the accident. Hendrickson v. Neiman, 204 M 367, 665 P2d 219, 40 St. Rep. 909 (1983).

Insurance Coverage — Accidental Death Benefits: It was error to grant summary judgment to the insurers when material issues of fact remain regarding the policy, premiums, coverage, and the insured's knowledge of such matters. Darrah v. Milbank Mut. Ins. Co., 202 M 323, 658 P2d 374, 40 St. Rep. 117 (1983).

Failure to Hear Liability Issue — Summary Judgment Denial of Due Process: A complaint for an injunction was filed, and a temporary restraining order was granted. On defendant's appeal of denial of his motion to quash, the order was upheld and the case remanded "with directions to expedite the trial of the cause for damages". Plaintiffs' motion for summary judgment based on the Supreme Court opinion was granted, the court stating that the Supreme Court had affirmed its judgment and directed the District Court to have a hearing on damages following remand. There was in fact never a hearing or trial on the merits of the issue of liability, and it is clear that the District Court misconstrued the language of the Supreme Court opinion, which had not decided the issue of liability but had merely decided it was proper to continue the temporary restraining order and had remanded for an expedited trial. The foreclosure of defendant's opportunity for a hearing denied him due process, and the summary judgment was reversed and the case remanded for a trial on the merits. Boyer v. Kargacin, 202 M 54, 656 P2d 197, 39 St. Rep. 2323 (1982).

Swimming Pool Accident — Negligence of Pool Owner: A father suing for alleged injury to his son found submerged in defendant's swimming pool was properly denied summary judgment where defendant presented a number of genuine issues of material fact, including the question of whether defendant provided a sufficient ratio of lifeguards to pool users, the question of how long the son was under the water, and the question of whether defendant had properly instructed its patrons in pool use. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982), distinguished in Schwabe v. Custer's Inn Associates, 2000 MT 325, 303 M 15, 15 P3d 903, 57 St. Rep. 1370 (2000).

Construction of Terms of Agreement — Factual Issue Precluding Summary Judgment: A June 1976 agreement between the parties provided that plaintiff would advance money for the

downpayment in the purchase of real property in Billings and would receive certain benefits, including a 50% interest in the property, in return. Plaintiff was to control any contractual arrangements until defendant had contributed, by payment of the monthly installments, a sum equal to the downpayment. In 1977, prior to the equalization of contributions, plaintiff entered negotiations to sell the property. No agreement between plaintiff and defendant was reached regarding the sale, and plaintiff filed suit seeking specific performance of the agreement. Plaintiff was granted summary judgment allowing him exclusive control of contract negotiations concerning the land for 1 year. Defendant contended on appeal that summary judgment was improper as there were factual controversies as to whether he had ever received an offer to sell the property and whether "control of any contractual arrangements" contemplated selling the property. Where, as here, the written agreement was imprecise and not artfully drawn, reference to extrinsic evidence indicating the intention of the parties would be proper, particularly since the same attorney represented both parties. Factual issues existed, and the case was remanded for trial on the merits. Downs v. Smyk, 200 M 334, 651 P2d 1238, 39 St. Rep. 1786 (1982).

Issue of Fact as to Existence of Grantor Support Agreement: Over a period of years, grantor, a 95-year-old woman, had deeded various parcels of land near her home to several relatives. She filed a complaint against grantees, alleging that the land had been conveyed in return for their promise to support her and that they had failed to live up to their agreement. As relief, grantor sought either damages or, in the event that the agreement was determined to be unenforceable under the Statute of Frauds, return of the land. Grantees denied the existence of any agreement and pleaded the Statute of Limitations as a defense. The District Court granted grantees' motion for summary judgment and further ruled that grantor's claims were barred by the Statute of Limitations. The Supreme Court reversed in part, ruling that grantor was entitled to present evidence on two of her claims because Montana law provides for the enforcement of a grantor support agreement, that there was a genuine issue of fact as to whether or not such an agreement had been made, and that the trial court's ruling on the Statute of Limitations was premature. Additionally, the court ruled that grantor had no claim for return of the land since, if an agreement existed, grantor's partial performance of that agreement rendered the Statute of Frauds inapplicable, and if no agreement existed, grantor was not entitled to any relief. Sands v. Nestegard, 198 M 421, 646 P2d 1189, 39 St. Rep. 1101 (1982).

Breach of Stockbroker's Duty: A customer of a stock brokerage firm brought a negligence action alleging the firm's failure to disclose the true risks involved in a commodity straddle. Summary judgment was inappropriate, there being issues of material fact regarding breach of duty by the broker and proximate cause of the customer's injuries. Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 197 M 1, 640 P2d 453, 39 St. Rep. 305 (1982).

Negligent Misrepresentation: A stockbroker testified that what he told a customer regarding the risk of a transaction was what he believed to be true. The customer testified that he did not believe he had been deliberately misinformed by the broker. A prima facie case of negligent misrepresentation having been made, summary judgment was improper. Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 197 M 1, 640 P2d 453, 39 St. Rep. 305 (1982).

Stockbroker's Duty to Execute Order: Because of a deteriorating commodity spread position, a customer instructed his stockbroker to "lift a leg". The broker would not immediately execute this order until the risk could be explained to the customer. Whether or not the broker's duty to execute an order within a reasonable time was breached was a genuine issue of material fact for which summary judgment should not have been granted. Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 197 M 1, 640 P2d 453, 39 St. Rep. 305 (1982).

Property Settlement Agreement: The intent of the parties as to the finality of their property settlement agreement, the effect of the husband's failure to disclose an insurance policy, and the intent of the husband's beneficiary designation on the life insurance policy in light of the property settlement agreement were factual issues making the trial court's entry of summary judgment premature. Soha v. West, 196 M 95, 637 P2d 1185, 38 St. Rep. 2153 (1981), distinguished in Eschler v. Eschler, 257 M 360, 849 P2d 196, 50 St. Rep. 308 (1993).

Summary Judgment Improper if Proven Allegations Would Show Breach of Duty: When a duty is imposed upon defendant and plaintiff's allegations, if proven, would support a finding of breach of the duty, summary judgment for the defendant is improper. Cereck v. Albertson's, Inc., 195 M 409, 637 P2d 509, 38 St. Rep. 1986 (1981). See also Abell v. Reno, 204 M 156, 663 P2d 335, 40 St. Rep. 738 (1983).

Issue of Conspiracy of Government Officials Not Resolvable by Summary Judgment: Where the defendant state and federal livestock officials revoked the right of the plaintiffs to carry on a portion of their veterinary practice, the court refused to grant the defendants' motion for summary judgment on the issue of the conspiracy to deny the plaintiffs their constitutional

rights. Questions of material fact remain as to certain conversations between and actions by the defendants that cannot be resolved by summary judgment. Doran v. Houle, 516 F. Supp. 1231, 38 St. Rep. 1086 (D.C. Mont. 1981).

Issue of Qualified Immunity of Government Official Not Resolvable by Summary Judgment: Where the defendant state and federal livestock officials revoked the right of the plaintiffs to carry on a portion of their veterinary practice, the court could not, on the basis of the affidavits submitted by one defendant, find that he was entitled to qualified immunity. That immunity is available to executive officers who act within the scope of their discretion and who have a good faith belief of that fact. In this case, material issues of fact remained in question and summary judgment was therefore inappropriate. Doran v. Houle, 516 F. Supp. 1231, 38 St. Rep. 1086 (D.C. Mont. 1981).

Abuse of Deposition Process — Basis for Tort of Abuse of Process: The plaintiff and his wife were divorced in 1976. The plaintiff sought to have the property agreement set aside as unconscionable and failed. In 1979, he filed a fraud action against his ex-wife and her attorney in conjunction with the dissolution. The ex-wife petitioned the court to hold plaintiff in contempt for failure to comply with the dissolution decree. Plaintiff, residing in Idaho, was served, failed to appear, and was held in contempt. The judge issued a bench warrant for his arrest. Defendants, counsel for the ex-wife in the fraud case, set a time to take plaintiff's deposition in Bozeman. Subsequent to noticing the deposition, defendants notified the District Court Judge that plaintiff would be in Bozeman that day. After taking plaintiff's deposition, defendants notified the judge, who had plaintiff arrested. Plaintiff filed suit against defendants for the tort of malicious abuse of process, and defendants moved for summary judgment. The federal court held that abuse of the power granted under Rule 30, M.R.Civ.P., relating to depositions can serve as the basis for the tort of abuse of process. Factual issues existed, so that the summary judgment motion was denied. Hopper v. Drysdale, 524 F. Supp. 1039, 38 St. Rep. 1970 (D.C. Mont. 1981).

Cost of Overrun — Material Issue of Reliance on Plans: Kalispell argued that contract documents plainly advised all bidders to make their own determination as to the amount of material to be moved and not to rely on the figures on the city's plans and specifications. By entering into the contract, allegedly the bidders bound themselves to do the rough grading at the price bid and should get no additional compensation for overrun. However, the District Court rejected the city's argument that the plaintiffs' complaint, therefore, failed to state a claim and that there could be no issues of material fact before the District Court. Based on a recent line of cases from the Supreme Court, the District Judge determined that the factfinder had to hear the evidence in order to find whether or not the contractors justifiably relied on the plans. Stenerson v. Kalispell, 193 M 8, 629 P2d 773, 38 St. Rep. 938 (1981).

Livestock on Roadway — Persons Protected by Statute — Summary Judgment Properly Denied: Plaintiff sued defendant, alleging the injuries he sustained in a motorcycle accident were caused by the presence of defendant's goats on the road. Defendant contended that 81-4-201 and 81-4-202, enacted in 1895, were enacted to protect the property of landowners, and therefore motorists were not a protected class under the statutes. Defendant moved for summary judgment. The court found that the continuing in effect of these statutes and their amendment in 1945 were part of the historical process of conforming the open-range law to the needs of the modern world. The court held that the complaint stated a cause of action and denied the motion for summary judgment. Read v. Buckner, 514 F. Supp. 281, 38 St. Rep. 735 (D.C. Mont. 1981).

Materiality of Facts in Negligence Action — Summary Judgment Improperly Granted: In an action for damages caused by the wrongful death of the plaintiff's son as a result of the negligent operation of the defendant's automobile, the trial court erred in granting the defendant's motion for summary judgment. The affidavits submitted by the parties show discrepancies in whether there were other children on the highway where the decedent was struck and as to the location where the decedent, a 5-year-old boy, ran onto the highway. Contrary to defendant's assertions, these facts are material to the case as they bear upon the defendant's ability and duty to exercise due care. Because material facts are in dispute, the motion was improperly granted. Big Man v. St., 192 M 29, 626 P2d 235, 38 St. Rep. 362 (1981).

Piercing Corporate Veil — Fraud — Agency — Factual Issues: In an action on a promissory note given on a contract for deed involving multiple corporate identities of defendant Ming, who was the real estate agent for seller and who was the purchaser of the property, denial of the defendant's motion for summary judgment was entirely proper where the following factual issues were in dispute and could only be resolved by a trial on the merits: (1) whether defendant operated certain corporations as his personal businesses; (2) whether defendant fraudulently represented to plaintiffs that he would be liable on the contract and notes; (3) whether defendant acted as an agent for the defendant corporations; and (4) whether the corporate veils should be

pierced so as to hold defendant liable on the notes. Flemmer v. Ming, 190 M 403, 621 P2d 1038, 37 St. Rep. 1916 (1980).

Obligation to Insure and Defend Under Ambiguous Contract — Genuine Issue: In an action based on the obligation to insure and defend in a lawsuit by a subcontractor's employee for injury caused by the plaintiff's employees, the Supreme Court found a genuine issue of material fact in the question of whether the work being performed by the plaintiff's employees at the time of the accident was undertaken pursuant to Contract No. 2081, whose language "risks of any kind relating to construction" was the focal point of the duty to insure and defend. Determination of the intent of the parties regarding such ambiguous or uncertain language was precluded by the erroneous grant of plaintiff's motion for summary judgment. Anaconda Co. v. Gen. Accident Fire & Life Assurance Corp., 189 M 447, 616 P2d 363, 37 St. Rep. 1589 (1980).

Issue of Fact as to the Existence of an Oral Contract: Defendant/respondent contends on appeal that evidence defendant submitted in trial court to prove existence of an oral contract was sufficient to exclude any real doubt as to the existence of an issue of fact regarding the existence of an oral contract. The Supreme Court held where defendant submitted as evidence an affidavit alleging existence of a contract, a letter from plaintiff to defendant referring to an agreement, on admission from plaintiff with confused information and where the two parties disagree as to the existence of the contract, defendant had not met his burden of establishing the absence of an issue of fact as to the existence of the oral contract as alleged. Reaves v. Reinbold, 189 M 284, 615 P2d 896 (1980).

Issue of Fact as to Whether a Written Agreement Supersedes an Oral Agreement: Plaintiff's motion for summary judgment was properly denied where there was some question of fact as to whether one written agreement, signed by plaintiff as agent for his company by the company vice president, and by defendant entitling defendant to a salary advance supersedes a prior oral agreement allegedly made between plaintiff and defendant in which plaintiff personally guaranteed a salary to defendant. Reviewing the relationship of the two agreements in the light most favorable to the defendant, the alleged oral agreement is collateral to the written contract is distinct, involves a different party, and is able to stand independent of the other. Reaves v. Reinbold, 189 M 284, 615 P2d 896 (1980).

Petition for Real Estate Commission — Broker/Buyer's Duty to Disclose: Plaintiff employed defendant, a real estate broker, to sell his ranch. Defendant produced some willing buyers who were rejected by the plaintiff. Defendant then found a purchaser willing to buy the machinery and cattle but not the land. Defendant contacted several neighbors, each of whom were willing to buy a portion of the ranch. Defendant did not disclose this to plaintiff. Defendant then made an offer in conjunction with the buyer of the machinery and cattle in anticipation of selling the ranch in parcels to the neighbors. Defendant did not disclose that he was one of the offerors or that he had made contacts with other potential buyers after his offer was made. The court held that defendant had a duty of full disclosure until he was legally bound to buy the property, the day on which the buy/sell agreement was signed. It was improper to grant defendant summary judgment in this situation. First Trust Co. of Mont. v. McKenna, 188 M 534, 614 P2d 1027 (1980).

Consumer Protection Act Violation Alleged as Cause of Accident — Agency Rule Not in Conflict With Federal Law — Causation for Jury: The District Court properly denied summary judgment on plaintiff's count which claimed misrepresentation as to the odometer reading on a used car sold to her by defendant corporation as the proximate cause of her accident and subsequent injury. A state agency rule adopted pursuant to 30-14-104 was not inconsistent with the rules and decisions of the FTC and the federal courts, although the rule deals with sales and the main purpose of the federal law is to prevent unlawful restraint of trade. Whether the alleged violation was a cause of plaintiff's damages was a jury issue. Kopischke v. First Cont. Corp., 187 M 471, 610 P2d 668 (1980).

Requirement for Payment of Insurance — Summary Judgment Improperly Granted: The contract for the retail installment purchase of a mobile home contained a clause stating that credit life and disability insurance was not required by the seller. The buyer, now deceased, applied for the insurance and paid the first premium. The retail installment sale contract was assigned to the First National Bank, making it a creditor. An employee of the seller decided the buyer was not eligible for insurance and never forwarded his application to the parent company. Buyer's premium payment was not returned to him until the attorney for his estate requested payment on the insurance. If the payment by the buyer was required, 33-21-206(3) applies, and the seller was required to give written notice to the buyer which was not done. If no payment was required, 33-21-206(3) does not apply. This is a genuine issue of material fact and therefore summary judgment was improperly granted. Cameron v. First Nat'l Bank, 186 M 345, 607 P2d 1113 (1980).

Uncontroverted Issues Not Established by Invalid Collateral Judgment: When a contempt citation was issued in a separate, but related action, because of defendant's violation of Writs of Attachment and Execution, it was proper in a collateral attack to show that plaintiff had failed to comply with statutory requirements for attachment of property and hence void the underlying judgment upon which the contempt was based. As a result of the error in finding the defendant in contempt, the contempt order had no preclusive effect on the present case and it was error to strike defendant's defenses and grant plaintiff summary judgment upon the theories of res judicata, collateral estoppel, and collateral attack. Phillips v. Loberg, 186 M 331, 607 P2d 561 (1980).

Fact Issue as to Boundary Line Agreement in Adverse Possession Case — Summary Judgment Improper: In a case involving a contention of adverse possession, a genuine issue of material fact existed, namely whether an agreement existed between the parties which extended the boundary line between their properties to include the disputed portion of land. Therefore, the motion for a summary judgment was granted in error. Nott v. Booke, 183 M 260, 598 P2d 1137 (1979).

Facts Showing Laches Not Contained in Record: Laches means negligence to the assertion of a right and exists where there has been a delay of such duration as to render enforcement of an asserted right unenforceable. A complainant can be charged with laches if, but only if, he was either actually or presumptively aware of his rights. A complainant is presumptively aware of his rights where the circumstances of which he is cognizant are such as to put a man of ordinary prudence on inquiry. Here, summary judgment is not supported by the record because the record does not contain facts establishing that the appellant had knowledge of his rights. Hereford v. Hereford, 183 M 104, 598 P2d 600 (1979).

Issue of Fact as to Applicability of Insurance Coverage Exclusion: In this case the District Court failed to determine the factual issue of whether the insured, Phalen, expected or intended Thu Duc Vo's injuries. The applicability of coverage provision of the insurance policy excluded those cases where the insured's deliberate acts or assaults resulted in injuries that would be expected or intended by him to result from his deliberate acts. The applicability of Northwestern National's coverage could not be determined until the factual issues concerning the intention and expectation of Phalen as to Vo's injuries was decided in the tort action. Therefore, summary judgment in favor of Northwestern in the declaratory judgment case at bar was improper. NW. Nat'l Cas. Co. v. Phalen, 182 M 448, 597 P2d 720 (1979), distinguished under the rationale of USF&G v. Rae Volunteer Fire Co., 212 M 450, 688 P2d 1246, 41 St. Rep. 1857 (1984), in Burns v. Underwriters Adjusting Co., 234 M 508, 765 P2d 712, 45 St. Rep. 2089 (1988).

Removal of Impediment — Common-Law Marriage — Fact Question: Ralph, the deceased, married Fern and then married Elsie while married to Fern. Fern died in 1973 and Ralph died in 1976. Ralph's will, executed in 1975, failed to mention Elsie or the two children he had by her. Elsie filed a petition for spouse's elective share. Summary judgment against Elsie was reversed and remanded because factual issues existed regarding whether Fern's death removed the impediment to Ralph's second marriage resulting in common-law marriage and whether the two children were issue of the decedent. Estate of Schanbacher, 182 M 176, 595 P2d 1171 (1979).

Question of Fraud — No Summary Judgment: When a lessee alleged fraud in the termination of his lease, he was not entitled to a summary judgment since fraud is always a question of fact. Chamberlain v. Evans, 180 M 511, 591 P2d 237 (1979).

Proximate Cause at Issue: In a wrongful death action in which plaintiff's husband struck a stalled truck and trailer, the trial court erroneously granted defendants' motions for summary judgment since there existed a genuine issue of fact as to proximate cause. McAlpine v. Dahl, 179 M 23, 585 P2d 1307 (1978).

Notice of Intent to Withdraw From Bargaining: The court erred when it granted the employer's motion for summary judgment in an action for employer contributions to Montana Laborers' Trust Fund because the employer, during collective bargaining negotiations, failed to communicate an unambiguous or unequivocal notice of intent to withdraw from collective bargaining. Audit Serv., Inc. v. Brasel & Sims Constr. Co., 176 M 1, 575 P2d 908 (1978).

Interest in Insurance Proceeds — Issue of Law: Summary judgment was improperly granted when the record disclosed, as a matter of law, that plaintiff had a possessory interest in a building on the property in dispute at time of destruction by fire, giving plaintiff a corresponding right to the insurance proceeds less the unpaid balance of the purchase price. This result was based on an implied waiver of a contract default provision by defendant county's failure to timely repossess. Hansen v. Transamerica Ins. Co., 175 M 273, 573 P2d 663 (1978).

Injured Workman — Third-Party Action: The Supreme Court vacated a lower court grant of summary judgment to a third-party defendant who was joined in an action for personal injuries

sustained by an employee whose immediate employer elected to be covered by the Workers' Compensation Act. Piper v. Lockwood Water Users Ass'n, 175 M 242, 573 P2d 646 (1978), overruling Fiscus v. Beartooth Elec., 164 M 319, 522 P2d 87 (1974).

Intent of Contracting Parties: Because the intent of the parties and other questions remained at issue, summary judgment was improperly granted. Engebretson v. Putnam, 174 M 409, 571 P2d 368 (1977).

Ambiguous Insurance Policy: Summary judgment on a claim for loss by theft of a commercial carpet cleaner was improperly granted defendant insurer when the policy of insurance was ambiguous as to exclusions from coverage. The particular exclusionary clause was subordinate to the general intent of the contract. Alpha Real Estate Dev., Inc. v. Aetna Life & Cas. Co., 174 M 301, 570 P2d 585 (1977).

Negligence Action: The court improperly granted a motion for summary judgment made by the defendant in a negligence action because the conclusions of law were based upon determinations of fact involving the character of the instrumentality which caused the injury and plaintiff's ability to observe, understand, appreciate, and avoid the danger. Mascarena v. Booth, 174 M 11, 568 P2d 182 (1977).

Specific Performance of Lease Option — Conditions Precedent: The court properly denied plaintiff's motion for summary judgment on an action for specific performance of a lease option agreement when he failed to show that he fully and fairly performed conditions precedent. Seifert v. Seifert, 173 M 501, 568 P2d 155 (1977).

Contract — Ambiguous Language: The disputed language in a contract reflecting intent of the parties was held ambiguous. Hence, there were material facts in dispute and summary judgment was improper. S-W Co. v. Schwenk, 173 M 481, 568 P2d 145 (1977).

Third-Party Complaint: Third-party defendants to an action under 50-77-101 through 50-77-106 (50-77-106 now repealed) were not entitled to summary judgment as a matter of law because issues of material fact remained unresolved. Bonawitz v. Bourke, 173 M 179, 567 P2d 32 (1977).

Error in Awarding: The court erred in granting summary judgment because the record was replete with fact questions. Equity Co-op Ass'n v. Bechtold, 173 M 103, 566 P2d 793 (1977).

Competency of Expert Medical Witness: The testimony of an expert medical witness concerning the required standard of care of treatment in a locality and its breach by defendant are matters to be decided by the jury and cannot be resolved by summary judgment since they involve genuine issues of material fact. Tallbull v. Whitney, 172 M 326, 564 P2d 356 (1977), locality rule modified in Chapel v. Allison, 241 M 83, 785 P2d 204, 47 St. Rep. 101 (1990).

Determination of Rights and Reasonable Costs: Entry of summary judgment for plaintiffs constituted error because genuine issues of fact had not been resolved. Guthrie v. Dept. of Social & Rehabilitation Services, 172 M 257, 563 P2d 555 (1977).

Fraud — Summary Judgment Not Proper: Conflicting contentions regarding a brochure allegedly misrepresenting land indicate issues of fact precluding summary judgment. Bails v. Wheeler, 171 M 524, 559 P2d 1180 (1977).

Summary Judgment — Fraud: Summary judgment for defendant in fraud case was reversed. Defendants were not entitled to summary judgment because there were fact issues to be resolved. Bails v. Gar, 171 M 342, 558 P2d 458 (1976).

Genuine Issue of Material Fact — Determination — Record: When in a medical malpractice action a deposition of defendant disclosed his opinion that it was not advisable for a patient, described hypothetically, to walk on a healing leg but plaintiff alleged that defendant said to use the leg, there was an issue of material fact. Summary judgment is not a substitute for trial and it is error for a court to determine that contributory negligence exists when issues of material fact are raised. However, when counsel filed amended answers to interrogatories after summary judgment was entered, the court could not be held in error due to documents not before it at the time of its ruling. Baylor v. Jacobson, 170 M 234, 552 P2d 55 (1976).

Loaned Servant Doctrine: Court erred in granting summary judgment because defendant failed to meet the burden of proving his employee was the borrowed servant of plaintiff. Storrusten v. Harrison, 169 M 525, 549 P2d 464 (1976).

Theory of Recovery Determinative of Factual Issues: Negligent entrustment by defendant does not create factual issues where defendant did not have a superior legal right to the object entrusted. Bahm v. Dormanen, 168 M 408, 543 P2d 379 (1975), followed in Williams v. St. Medical Oxygen & Supply, Inc., 265 M 111, 874 P2d 1225, 51 St. Rep. 458 (1994), applying Restatement (Second) of Torts 308 (1965). Williams was followed in McGinnis v. Hand, 1999 MT 9, 293 M 72, 972 P2d 1126, 56 St. Rep. 39 (1999).

Genuine Issues as to Damages: Where plaintiff sought damages against railroad under Federal Employers' Liability Act, it was error for District Court to deny railroad's introduction of evidence to establish plaintiff's possible contributory negligence in diminution of damages where court granted partial summary judgment as to railroad's liability so that the only triable issue was damages. Dissent by Justices Daly and John C. Harrison asserting summary judgment is not appealable. McGee v. Burlington N., Inc., 167 M 485, 540 P2d 298 (1975).

Genuine Issues Not to Be Determined: On summary judgment the question to be decided is whether there is a genuine issue of material fact, not how such issue should be determined. Where police officer allegedly wounded plaintiff, it was error for trial court to grant summary judgment in favor of police officer based on sovereign immunity as plaintiff was not seeking to impose liability on county or state for conduct of police officer, neither being named as a defendant, but on police officer as an individual, therefore creating genuine issues of material fact concerning whether police officer wounded plaintiff; whether such action was reasonable under the circumstances; and whether his actions were done in good faith. Rickard v. Paradis, 167 M 450, 539 P2d 718 (1975).

Intent of Contracting Parties Important — Summary Judgment Improperly Granted: Trial court erred in granting summary judgment to limited partners' declaratory judgment action, as to management fees charged by general partners for long-range renovation and improvement, where written partnership agreement was silent as to such fees and limited partners claimed an alleged oral agreement and that conduct of the parties modified the written agreement to a maximum fee, because a court considering the motion for summary judgment cannot go outside the written agreement to determine the intent of the contracting parties as this involves disputed questions of material fact which renders summary judgment inappropriate. Fulton v. Clark, 167 M 399, 538 P2d 1371 (1975).

Burden of Establishing Absence of Issue: The burden of establishing the absence of any issue of material fact is on the party seeking summary judgment, and when the ultimate legal issue of substantial compliance with the Tort Claims Act turned on the resolution of the factual issues of actual knowledge of an injury and claim by a city, there was a substantial issue of material fact barring summary judgment. State ex rel. Bozeman v. District Court, 166 M 234, 531 P2d 1343 (1975).

Prior Knowledge of Injury — Summary Judgment Precluded: Although plaintiff had not filed formal claim against city within the time limits prescribed, issues of fact as to the fact and extent of knowledge by city that plaintiff had been injured precluded summary judgment. State ex rel. Bozeman v. District Court, 166 M 234, 531 P2d 1343 (1975).

Sufficiency of Evidence: When the record contained insufficient evidence to support a finding that an 8-year-old boy had the capacity for contributory negligence, it was an error to grant summary judgment for the defendant. Ranard v. O'Neil, 166 M 177, 531 P2d 1000 (1975).

Negligence — Causation — Summary Judgment Improper: Liability cannot be adjudicated upon motion for summary judgment where factual issues concerning negligence and causation are presented. Duchesneau v. Silver Bow County, 158 M 369, 492 P2d 926 (1971), followed in Vincelette v. Metropolitan Life Ins. Co., 273 M 408, 903 P2d 1374, 52 St. Rep. 1035 (1995). Duchesneau was followed, with regard to applicability of liability for involuntary action rule, in Craig v. Schell, 1999 MT 40, 293 M 323, 975 P2d 820, 56 St. Rep. 167 (1999).

Summary Judgment Improper — Negligence: Summary judgment was improper because, among other issues, negligence is a jury question and not subject to determination by the judge on a motion for summary judgment. Duchesneau v. Mack Trucks, 158 M 369, 492 P2d 926 (1971); Kober v. Stewart, 148 M 117, 417 P2d 476 (1966). Duchesneau was followed, with regard to applicability of liability for involuntary action rule, in Craig v. Schell, 1999 MT 40, 293 M 323, 975 P2d 820, 56 St. Rep. 167 (1999).

Third-Party Defendant — Negligence — When Dismissal Proper: Court erred in dismissing seller and manufacturer of truck as party defendants when many issues of material fact remained to be determined. Duchesneau v. Mack Trucks, 158 M 369, 492 P2d 926 (1971).

Municipal Vacation of Streets: Summary judgment was not proper where pleadings in declaratory judgment action to invalidate municipal vacation of streets left triable issues of fact as to whether plaintiffs' easements would be impaired by vacation. Kemmer v. Bozeman, 158 M 354, 492 P2d 211 (1971).

Genuine Issue of Fact Found: Summary judgment was reversed because cognizance was not taken of amended allegation raising a genuine issue of fact. Eisemann v. Hagel, 157 M 295, 485 P2d 703 (1971).

No Duty to Anticipate Proof: Although fact that both parties moved for summary judgment does not establish that all factual questions have been answered, trial court need only consider

evidence and issues presented and has no duty to anticipate possible proof that might be offered under the pleadings. Faith Lutheran Retirement Home v. Veis, 156 M 38, 473 P2d 503 (1970).

Summary Judgment Dismissing Third-Party Complaint Reversed: Supreme Court rejected proposition that Workers' Compensation Act is exclusive liability of employer and reversed summary judgment dismissing third-party complaint. DeShaw v. Johnson, 155 M 355, 472 P2d 298 (1970).

Consideration of Oral Testimony: Where trial court was present during taking of depositions, facts heard by court were properly considered on motion for summary judgment pursuant to this section since oral testimony is properly within matters which court may consider under such motion. Citizens St. Bank v. Duus, 154 M 18, 459 P2d 696 (1969).

Action on a Lease — Summary Judgment Improperly Granted: Trial court, in action on farm lease construing lessor's motion for dismissal as motion for summary judgment, improperly granted summary judgment where lessor failed to sustain burden of showing absence of any genuine issue as to material facts; record on appeal was replete with issues of fact determinable by jury. Byrne v. Plante, 154 M 6, 459 P2d 266 (1969).

Negligence — Third-Party Complaint: Summary judgment should not have been granted in favor of third-party defendant on third-party complaint initiated by hospital, sued for negligence by minor patient burned by defective television switch while in hospital, where third-party complaint raised genuine issue of material fact as to whether minor patient was injured solely through negligence of third-party defendant who had leased television equipment to hospital. Crosby v. Billings Deaconess Hosp., 149 M 314, 426 P2d 217 (1967), distinguished in Auto. Club Ins. Co. v. Toyota Motor Sales, U.S.A., Inc., 166 M 221, 531 P2d 1337 (1975).

Agent or Independent Contractor: In suit by guardians of patient for personal injuries sustained when patient was being X-rayed, District Court erred in granting defendant-hospital's motion for summary judgment where there was an issue of fact as to whether radiologist was an independent contractor rather than an agent of the hospital. Kober v. Stewart, 148 M 117, 417 P2d 476 (1966).

Summary Judgment Reversed — Taxation: Summary judgment for county and others was reversed, and summary judgment for taxpayer was ordered. Chicago, Milwaukee, St. Paul & Pac. R.R. v. Bennett, 145 M 191, 399 P2d 986 (1965).

NO GENUINE ISSUE OF MATERIAL FACT
PARTICULAR CASES

Dismissal of Complaint as Sanction for Discovery Abuses: Although Xu received timely notice of the need to respond in writing to defendants' discovery requests within 30 days, Xu filed incomplete, inappropriate, and unacceptable responses, and ultimately defendants sought an order compelling Xu's responses. Then, after defendants' unsuccessful attempts to schedule a deposition, defendants timely notified Xu of their intent to take Xu's deposition on May 11, 2004. Without response or explanation, Xu did not attend the deposition, so defendants sought an order compelling Xu's deposition and requesting sanctions, including dismissal of Xu's claims for failure to attend the May deposition. At a hearing, the District Court carefully explained to Xu the obligation to answer discovery and attend depositions. The court gave Xu an additional 3 weeks to provide discovery answers and be deposed. In response, Xu filed a pleading to reschedule the deposition, but failed to complete discovery or to attend the court-ordered deposition. On defendants' motion, the court then dismissed Xu's action with prejudice for failing to attend the depositions. Xu appealed, but the Supreme Court affirmed, concluding from the record that Xu knowingly and repeatedly refused to cooperate with discovery request, and that the District Court did not abuse its discretion in dismissing Xu's claim as a sanction. Xu v. McLaughlin Research Institute for Biomedical Science, Inc., 2005 MT 209, 328 M 232, 119 P3d 100 (2005).

Second Suit Based on Same Facts as Case Dismissed With Prejudice Properly Dismissed as Res Judicata: While a first employment termination claim was pending, Xu filed another claim based on the same facts. The first claim was ultimately dismissed with prejudice for Xu's failure to comply with discovery, and the District Court then summarily dismissed the second case based on res judicata and collateral estoppel. Xu appealed on grounds that it was an abuse of discretion for the District Court to dismiss the second case because the second case contained a new claim of defamation and because there was no final adjudication on the merits of the first claim. The Supreme Court disagreed. Res judicata applied not only to the issues that were raised in the first claim, but also to issues that could or should have been raised in the first litigation. Collateral estoppel applied because a dismissal with prejudice constituted an adjudication on

the merits. Summary dismissal of the second case was therefore affirmed. Xu v. McLaughlin Research Institute for Biomedical Science, Inc., 2005 MT 209, 328 M 232, 119 P3d 100 (2005).

Clause in Insurance Policy Excluding Coverage for Transported Property Valid: Plaintiffs were transporting snowmobiles on a trailer when they were involved in a multiple vehicle accident that resulted in damage to their vehicle and the destruction of the trailer and snowmobiles. The insurer covered the loss of the trailer, but declined to compensate for the loss of the snowmobiles on grounds that they were excluded from policy coverage, and plaintiffs filed suit to recover damages. The District Court held that the policy exclusion for damage to property being transported was valid and granted the insurer summary judgment. On appeal, plaintiffs contended that the policy provision violated 61-6-301, which mandates motor vehicle insurance. The Supreme Court agreed that an exclusion to mandatory coverage is void and unenforceable absent a statutory exclusion, but then noted that the statutory exclusion in 61-6-103 allows a policy exclusion for damage to property transported by the insured. The court held that the exclusion in 61-6-103 is not inconsistent with the purpose and intent of 61-6-301 and that because the policy provision was not void, there was no genuine issue of material fact and summary judgment was proper. Grimsrud v. Hagel, 2005 MT 194, 328 M 142, 119 P3d 47 (2005). See also Bain v. Gleason, 223 M 442, 726 P2d 1153 (1986), and Stutzman v. Safeco Ins. Co. of America, 284 M 372, 945 P2d 32 (1997).

Summary Judgment on Negligence Claim Affirmed Absent Showing of Breach of Duty of Care: Bonilla claimed that the University of Montana was negligent in providing a chair at a concert that Bonilla attended when the chair broke and Bonilla was injured. Ordinarily, the determination of whether a defendant breached a legal duty is not susceptible to summary judgment unless the evidence is undisputed or susceptible to only one conclusion by reasonable people. However, Bonilla failed to produce any evidence explaining how or why the chair broke and whether it was due to the breach of any duty by the University. Bonilla never reported the incident, so the University had no record of the incident. The only evidence offered to support a negligence claim was Bonilla's own testimony that the chair would not have broken unless there was a problem with it. University officials explained their policy of assuring the safety of their chairs and of selecting chairs for durability and quality. The University met its burden of demonstrating the absence of material fact regarding any breach of a duty of care, while Bonilla did not meet the burden of showing that the University breached a duty of care. Summary judgment for the University was affirmed. Bonilla v. Univ. of Mont., 2005 MT 183, 328 M 41, 116 P3d 823 (2005).

No Montana Personal Jurisdiction Over Regional Out-of-State Insurer: Carter, a part-time "snow bird" resident of Montana, was injured in an automobile accident in Montana shortly after moving from Mississippi. Carter filed a declaratory judgment action against the defendant, a regional out-of-state insurer that did not do business in Montana, requesting interpretation of an insurance contract issued on Carter's vehicles in Mississippi. The insurer contested Montana's exercise of personal jurisdiction and moved for summary judgment. The District Court concluded that it did not have personal jurisdiction and granted summary judgment. Carter appealed, but the Supreme Court affirmed. The court cited Bahn v. Chicago Motor Club, 634 A2d 63 (Md. 1993), for the holding that although an insurer's promise to provide nationwide coverage may establish that the insurer has agreed to submit to jurisdiction in any forum that has jurisdiction to adjudicate claims against its insured, this agreement does not imply a further agreement to allow the insured to bring suit against the insurer in any state. Even though the insurer could reasonably anticipate that the insured could suffer an injury within the insurer's 50-state coverage, that foreseeability, without more, was not sufficient to subject the insurer to personal jurisdiction in Montana courts. The underlying dispute related to coverage and had nothing to do with the fact that the accident occurred in Montana or that Carter was living in this state at the time. Thus, although Carter had every right to sue the insurer over its coverage issues, in this case, Montana courts did not have personal jurisdiction over the insurer that was required as a predicate to maintenance of an action in Montana. Summary dismissal was proper. Carter v. Miss. Farm Bureau Cas. Ins. Co., 2005 MT 74, 326 M 350, 109 P3d 735 (2005). See also Bi-Lo Foods, Inc. v. Alpine Bank, 1998 MT 40, 287 M 367, 955 P2d 154 (1998).

Landowner Subdivision Rights Precluded by Restrictive Covenants — No Oral Contract Without Consideration — Statute of Frauds Applied: Plaintiffs subdivided about 80 acres into a 40-acre water ski lake and five residential lots. Restrictive covenants provided that no more than six landowners would be allowed to use the lake, that five landowners would be owners of lots in the subdivision, and that one landowner would be the owner of a single family dwelling built on property immediately west of the lake. Plaintiffs initially intended to build on the west side of the lake and become the sixth landowner but changed their minds, sold the west side property,

and decided to build on the south side instead. Four of the five landowners filed an affidavit that when they purchased their lots, they understood that plaintiffs would be the sixth landowner and that they had orally approved the relocation of plaintiffs' residence to the south shore. After plaintiffs' home was built on the south side, they sought a declaratory judgment that they were the sixth landowner under the restrictive covenants and thus had the right to use the lake. One dissenting landowner opposed the declaratory judgment and moved for summary judgment on grounds that the restrictive covenants prohibited plaintiffs from use of the lake. The District Court agreed and granted summary judgment. On appeal, the Supreme Court agreed that there was no evidence of consideration given to the landowners for modification of the covenants and that as a result, the modification benefited plaintiffs only. The right to use the lake ran with the land and was therefore a real property interest, and under the statute of frauds, any transfer of the right from one parcel to another had to be in writing or altered by an executed oral agreement. However, without consideration, there could be no oral contract, and without an oral contract, there could be no executed oral contract. Plaintiffs' argument that because they relied on oral agreements, equitable estoppel should prohibit defendants from denying plaintiffs' use of the lake also failed because equitable estoppel does not apply under the statute of frauds except when the statute would operate to perpetuate a fraud. The District Court was affirmed. Hanson v. Water Ski Mania Estates, 2005 MT 47, 326 M 154, 108 P3d 481 (2005).

No Federal Civil Rights Privacy Claim Against State or Municipal Entities: Barr sued the state and a municipal airport authority for violating his civil rights under 42 U.S.C. 1983 and 42 U.S.C. 1985 when the airport failed to hire him as a permanent security officer after discovering Barr's past public criminal record. The District Court summarily dismissed the claims, and the Supreme Court affirmed. In order for the municipality to be liable under the federal statutes, it was necessary for Barr to show that the municipality had a policy or custom that inflicted the injury of which Barr complained, which Barr could not show. Further, Barr's civil rights claims stemmed from a privacy invasion that did not occur, so he was unable to establish a federal privacy violation. Barr's claim against the state was also barred because states are not persons for purposes of the federal statutes. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005). See also Monell v. Dept. of Social Services, 436 US 658 (1978), and Will v. Mich. Dept. of State Police, 491 US 58 (1989).

No Right to Expectation of Privacy in Public Criminal Records or Negligence in Use of Records: In 1998, Barr applied for a part-time airport security officer position and consented to a background check. A 10-year check revealed no arrests, and Barr was hired. About 1 month later, another security officer requested a criminal background check on Barr, which revealed a 1968 arrest in Alaska for criminal nonsupport. Prior to the end of Barr's probationary period, his employment was terminated, and he sued the airport authority. Barr's claim was summarily dismissed. On appeal, the Supreme Court held that under 44-5-103, Barr's Alaska arrest was public information that anyone could access and its dissemination was not improper and that coupled with Barr's consent to the background check, Barr had no constitutional expectation of privacy in the criminal record. Barr's negligence claims also failed because he failed to offer proof of all elements of common-law negligence. Summary judgment for defendants was affirmed. Barr v. Great Falls Int'l Airport Authority, 2005 MT 36, 326 M 93, 107 P3d 471 (2005).

Possible Deferred Prosecution Agreement Not Considered Confidential Criminal Justice Information — Discussion by Prosecutor With Newspaper of Possible Deferred Prosecution Agreement Not Privacy Violation or Breach of Duty: Plaintiff alleged that the County Attorney negligently breached a legal duty and violated the Montana Criminal Justice Information Act of 1979 when the County Attorney told a local newspaper that plaintiff was considering a deferred criminal prosecution agreement. Plaintiff asserted that the information was confidential and that dissemination of the information was tortious. The District Court granted summary judgment to defendant. On appeal, the Supreme Court noted that criminal justice information is defined as information relating to criminal justice that is collected, processed, or preserved by a criminal justice agency and held that mere discussion of a possible deferred criminal prosecution agreement does not constitute a discussion of criminal justice information. Although there may be circumstances in which a person suspected of having committed a crime has a reasonable expectation that the person's privacy will not be violated by the release of details of an investigation, plaintiff here could not seriously claim a privacy violation when it was already public knowledge that the allegations were against her, what the allegations were, who was involved as complainants, that she was the subject of a school board investigation concerning the allegations, and that her intended retirement from teaching was connected to the allegations. There was no material issue of fact concerning whether the County Attorney negligently breached a duty owed to plaintiff by discussing a possible deferred criminal prosecution

agreement with the newspaper or by releasing a copy of the initial offense report, and summary judgment was affirmed. Svaldi v. Anaconda-Deer Lodge County, 2005 MT 17, 325 M 365, 106 P3d 548 (2005), following Great Falls Tribune Co., Inc. v. Sheriff, 238 M 103, 775 P2d 1267(1989), and Citizens to Recall Mayor James Whitlock v. Whitlock, 255 M 517, 844 P2d 74 (1992).

Relitigating Issues Raised in Bankruptcy Proceeding Barred by Res Judicata: In defendants' bankruptcy proceeding, they contended that notes issued by plaintiff contained a usurious interest rate and were prompted by fraud. The Bankruptcy Court determined that the notes were valid, enforceable, and unaffected by usury or fraud. During plaintiff's subsequent collection proceeding in District Court, defendants sought to amend their answer to allege usury, but the District Court held that the Bankruptcy Court's judgment barred defendants' claim under res judicata and granted summary judgment for plaintiff. On appeal, the Supreme Court affirmed. The Bankruptcy Court's judgment was accorded finality as to the issues raised or that could fairly have been raised in the adversary proceeding. Defendants were not precluded from litigating any of their defenses to the notes in the bankruptcy proceeding and thus were barred from relitigating the usury issue in District Court. Absent a genuine issue of material fact relating to defendants' default on the notes, summary judgment for plaintiff was proper. Olympic Coast Inv., Inc. v. Wright, 2005 MT 4, 325 M 307, 105 P3d 743 (2005), following Fox v. 7L Bar Ranch Co., 198 M 201, 645 P2d 929 (1982), and distinguishing Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604 (1993).

No Factual Issue of Waiver Under Contractual Consent to Assignment Clause — Summary Judgment Proper: The Nicholsons entered a contract option with J.G.L. Distributing (JGL) that gave JGL 5 years to purchase the Nicholsons' property. The option contained a consent to assignment clause that required JGL to obtain the Nicholsons' written consent before assignment to a third party. JGL subsequently assigned an interest in the property to plaintiff but did not notify the Nicholsons. Plaintiff spent money improving the property but missed a payment. The Nicholsons then notified JGL that the option expired and that they intended to sell the property to someone else. Plaintiff sued JGL and the Nicholsons, JGL counterclaimed against plaintiff and filed cross-claims against the Nicholsons, the Nicholsons counterclaimed against JGL, and all three parties moved for summary judgment. The District Court dismissed plaintiff's claim because plaintiff was not a party to the contract. The court also held that the consent to assignment clause was valid and enforceable, but that even though JGL breached the agreement by not notifying the Nicholsons of the assignment and by missing a payment, the breach was not material and did not serve to terminate JGL's right to exercise the option. The court then concluded that forfeiture would be too harsh a remedy, excused the forfeiture, and granted JGL 20 days to pay the Nicholsons the full purchase price. On appeal, the Supreme Court affirmed. Plaintiff failed to show a genuine issue of material fact that the Nicholsons waived their rights under the consent to assignment clause. The breach of contract by JGL was incidental rather than material, so the District Court's holding that forfeiture would be too harsh was not erroneous. Thus, the District Court correctly applied the antiforfeiture statute when it granted JGL equitable relief under 28-1-104 because JGL's breach was not grossly negligent, willful, or fraudulent. It was only when the Nicholsons discovered that they could sell the property at a greater profit that they acted to strictly enforce the timely payment provision of the contract, so application of the antiforfeiture statute was appropriate to avoid an unjust result. R.C. Hobbs Enterprises, LLC v. J.G.L. Distrib., Inc., 2004 MT 396, 325 M 277, 104 P3d 503 (2004). See also Erban v. Monforton, 227 M 531, 740 P2d 677 (1987), Norwood v. Serv. Distrib., Inc., 2000 MT 4, 297 M 473, 994 P2d 25 (2000), and VanDyke Constr. Co., Inc. v. Stillwater Min. Co., 2003 MT 279, 317 M 519, 78 P3d 844 (2003).

Mere Denial of Public Nature of Road Insufficient to Raise Genuine Issue of Material Fact — Public Prescriptive Easement Affirmed: The District Court found that the elements of a prescriptive easement over a road on defendants' property were satisfied and granted summary judgment to plaintiff county. Defendants contended that disputed issues of fact existed regarding proof of a prescriptive easement, but the Supreme Court affirmed. The county proved that use of the road was open, notorious, exclusive, adverse, continuous, and uninterrupted for the statutorily required period. The only evidence in support of defendants' position was a conclusory hearsay statement claiming that the previous owners had indicated that the road was not public. Defendants' mere denial of the public nature of the road was insufficient to raise a genuine issue of material fact sufficient to withstand summary judgment. Powell County v. 5 Rockin' MS Angus Ranch, Inc., 2004 MT 337, 324 M 204, 102 P3d 1210 (2004), following Heller v. Gremaux, 2002 MT 199, 311 M 178, 53 P3d 1259 (2002).

Failure to Notify Current Occupant That Tax Deed May Issue — Quiet Title Deed Properly Voided: Under 15-18-212, notice that a tax deed will be issued unless a property tax lien is redeemed must be made to each interested party and to the current occupant. In this case, defendant knew that plaintiff was the current occupant and knew where plaintiff was located but simply did not provide the requisite notice. Additionally, because plaintiff did not receive adequate notice, the county was without jurisdiction to issue defendant a quiet title decree. Every essential and material step of the tax deed statutes must be strictly followed. Thus, the District Court correctly voided defendant's quiet title decree and granted summary judgment to plaintiff because no genuine issue of material fact existed. Gentry Mont. Enterprises, Inc. v. McDonald, 2004 MT 322, 324 M 67, 101 P3d 767 (2004), following Moran v. Robbin, 261 M 478, 863 P2d 395 (1993).

Employer Unaware That Employee Would Be Injured During Routine Job Activity — No Showing of Employer Malice Under Sherner Standard: Olszewski was seriously injured while loading building trusses onto a flatbed truck. Olszewski recovered workers' compensation benefits but also brought an action alleging that the injury was covered under the 1999 intentional act exception in 39-71-413, which was in effect when the injury occurred. The District Court found no showing of malicious action on the part of the employer or foreman and granted summary judgment to the employer and foreman. On appeal, the Supreme Court applied the malicious intent standard in Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), and affirmed. Olszewski was unable to provide evidence that the employer knew that employees would actually be injured by a routine that was usually performed without incident, and absent a showing of that material fact, the statutory exception did not apply and summary judgment was proper. Olszewski v. BMC W. Corp., 2004 MT 187, 322 M 192, 94 P3d 739 (2004).

Sledding in City Park Considered Recreational Purpose for Which City Immune From Liability: Plaintiff was injured on a sledding hill at a city park. The trial court held that the city was immune from liability pursuant to 70-16-302. Citing Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71 (2000), plaintiff contended that because city parks are freely available to the public, it was unnecessary for the law to encourage availability by limiting a city's tort liability. The Supreme Court disagreed and distinguished Dobrocke, holding that the use of city parks is discretionary, unlike the use of city streets and boulevards that was at issue in Dobrocke, so the legislative rationale behind 70-16-302 to encourage the availability of recreational areas applied. Winter sports, such as sledding, are explicitly listed in the statute as a recreational purpose, so summary judgment for the city was affirmed. Weinert v. Great Falls, 2004 MT 168, 322 M 38, 97 P3d 1079 (2004).

No Showing of Malicious Act or Omission by Coworker in Death of Employee — Workers' Compensation Exclusivity Doctrine Applicable under 1999 Statute: Under the 1999 version of 39-71-413 and Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), a plaintiff was required to show both an intentional and malicious act or omission in order to avoid the workers' compensation exclusivity doctrine (revised in 2001 to require only the showing of an intentional act or omission). Here Everhard, a mine worker, was killed by a train driven by Aafedt after signaling that Aafedt could proceed. Everhard's estate sued Aafedt and the mining company. The District Court concluded that Aafedt's conduct was intentional when he moved the train without seeing Everhard, but there was no showing that Everhard suffered an injury caused by actual malice by Aafedt or the company, so summary judgment was granted to defendants. The Supreme Court affirmed. As a matter of law, it could not be said that Aafedt deliberately proceeded to act in conscious or intentional disregard or even indifference to the high probability of injury to Everhard under the definition of actual malice, so the estate failed to overcome the workers' compensation exclusive remedy rule, and summary judgment was proper. Blain v. Stillwater Min. Co., 2004 MT 141, 321 M 403, 92 P3d 4 (2004).

Speculation That Subcontractor's Work Caused Building Defect — Summary Judgment Proper: A contractor filed a third-party negligence and breach of contract action against a subcontractor who prepared the ground surface and laid the asphalt for some tennis courts. The District Court granted summary judgment for the subcontractor, and the contractor appealed. The Supreme Court affirmed. The contractor failed to present a genuine issue of material fact that the subcontractor's work was the cause of a purported bulge in the tennis court. Because implicating the subcontractor's work as the cause of the defect required speculation, summary judgment was proper because causation is a material element in sustaining a cause for negligence or breach. Glacier Tennis Club at The Summit, LLC v. Treweek Constr. Co, Inc., 2004 MT 70, 320 M 351, 87 P3d 431 (2004).

Wage Claims Precluded by Separation and Release Agreement — Summary Judgment Proper: Plaintiffs were terminated from employment with defendant and signed a separation and

release agreement that released defendant from all claims related to the employment and termination. Plaintiffs then sued defendant for wrongful discharge, breach of contract, breach of the implied covenant of good faith and fair dealing, contract interference, and tortious conduct. Defendant requested and was granted summary judgment based on relinquishment of claims in the separation and release agreement, and plaintiffs appealed, asserting that the agreement was void under 39-3-208. The Supreme Court affirmed. Plaintiffs' affidavit in response to defendant's summary judgment motion made general allegations regarding both wage and hour violations and insufficient consideration, but despite the fact that plaintiffs had over 2 years to do so, the affidavit did not set forth specific facts to support either claim. Absent proof of the existence of any genuine issue of material fact regarding the validity of the agreement, summary judgment was proper. Old Elk v. Healthy Mothers, Healthy Babies, Inc., 2003 MT 167, 316 M 320, 73 P3d 795 (2003), following Morales v. Tuomi, 214 M 419, 693 P2d 532 (1985).

No Genuine Issue of Fact Regarding State Land Lessee's Rental of Property in Contravention of Zoning Regulations — Summary Judgment Proper: Stewart leased a parcel of state land for a residence in an area that was zoned for single-family dwellings. The state commenced a civil action challenging Stewart's use of a single-family unit as a multiple-family unit and seeking injunctive relief. The District Court granted the state's motion for summary judgment and issued an injunction against Stewart, and Stewart appealed. Stewart maintained that the residence had not been modified in any way following approval of architectural plans, so the residence was still in compliance with zoning restrictions. The state responded that it was not the structure itself but Stewart's use of the structure that violated zoning regulations. The Supreme Court agreed with the state. Testimony of former residents confirmed that Stewart's home was being used as a multiple-family residence, and Stewart offered no proof other than mere denial and speculation that a material question of fact existed regarding use of the structure as a multiple-family residence. Thus, summary judgment for the state was proper, and the grant of injunctive relief against Stewart was affirmed. St. v. Stewart, 2003 MT 108, 315 M 335, 68 P3d 712 (2003).

Duty of Railroad to Construct and Maintain Safe Railroad Crossing — Summary Dismissal of Liability Case Against County for Road Construction Proper: The North Alaska road crossing was built in the early 1920s through the cooperative efforts of the county and the railroad. The crossing was entirely on railroad property, and the railroad allowed access to the county over the years to maintain the road and to erect signs on the railroad's right-of-way. Fisch was injured in 1998 when his dump truck was struck by a train at the crossing. The railroad sought to ascribe liability to the county for negligent design and construction of the crossing. The county denied all allegations of negligence, and the District Court granted summary judgment to the county on the issue of liability. The railroad appealed on grounds that ARM 18.6.311 required the county to construct and maintain the roadway through the crossing in a safe manner. The Supreme Court disagreed. The clear intent of the administrative rule was to limit application of the rule to projects arising from the state's allocation of federal funds made available to improve the safety of railroad crossings and did not address road-rail alignment or crossing design. The historical ambiguity of whether the railroad or the county chose the exact location for the crossing raised no genuine issue of material fact and was irrelevant to the question of which entity had the duty to construct and maintain the crossing. Rather, under 69-14-602, that duty was statutorily assigned to and rested clearly with the railroad. Thus, summary dismissal of the liability claim against the county was proper. Fisch v. Mont. Rail Link, Inc., 2003 MT 76, 315 M 13, 67 P3d 267 (2003).

Disclosure of Building Leakage and Source of Water Not Material Fact: Plaintiffs purchased a building in Philipsburg for use as a residence. Water began seeping into the basement a couple of years later, and plaintiffs sued the sellers for breach of the warranty of habitability and the city because the source of the water may have been from a broken water line nearby. The District Court summarily dismissed the claim against the sellers because the sellers' knowledge of prior leakage was not a material fact and because the question of the source of the water was not material to the transaction between the parties. Plaintiffs appealed, but the Supreme Court affirmed. Plaintiffs all but conceded that the prior leakage was not important when they did not disclose the leakage to the bank when they refinanced the property. Further, plaintiffs' initial claim against the sellers was for nondisclosure of the leakage without regard to the source, so summary judgment was not precluded because the source was not essential to the case against the sellers. Bond v. Philipsburg, 2003 MT 74, 315 M 7, 67 P3d 255 (2003).

Breach of Subordination Agreement — Failure to Respond — Summary Judgment Proper: After submitting evidence in support of its motion, defendant moved for summary judgment because plaintiff breached a subordination agreement. The burden shifted to plaintiff to

respond, but instead of filing a response brief, plaintiff filed two depositions and a set of discovery answers at the hearing and relied on oral argument. After consideration, the District Court granted summary judgment. Plaintiff appealed, contending that summary judgment was improper because the depositions and discovery answers proved the existence of an intercreditor agreement between defendant and a codefendant, establishing a question of fact whether defendant received all funds to which it was entitled and thus whether defendant had any claim against plaintiff. The Supreme Court disagreed. Breach of the subordination agreement occurred before the intercreditor agreement existed, so the facts presented by plaintiff did not establish a material fact regarding the subordination agreement, and summary judgment was appropriate. Mtn. W. Bank v. Mine & Mill Hydraulics, Inc., 2003 MT 35, 314 M 248, 64 P3d 1048 (2003).

No Requirement That Private Property Be Available for Public Use Before Landowner Liability Shield Applies — Landowner Immune From Suit Absent Consideration or Evidence of Misconduct: Saari went inner tube sledding with a church group on a hill at a ski resort after the resort was closed for the day. The group paid no fees to use the hill and did not rent or purchase equipment from the resort operator. During that evening, Saari lost control and crashed in a creek bed, suffering injuries which subsequently caused Saari's death. Saari's estate sued the resort operator on six negligence counts, including survival action, wrongful death, negligence, premises liability, attractive nuisance, and infliction of emotional distress. The District Court held that 70-16-302 precluded liability by the operator because there was no duty of care owed to Saari and granted summary judgment to the operator on all counts. The estate appealed, but the Supreme Court affirmed. By its terms, 70-16-302 provides for landowner liability when a recreational user gives valuable consideration to the landowner in exchange for using the property or when the landowner acts with willful or wanton misconduct. While conceding that Saari paid no consideration for use of the ski hill, the estate nevertheless argued that the operator generally benefited from after-hours sledders, which constituted consideration. However, no legal authority was advanced for the proposition that economic benefits received at a different point in time constituted valuable consideration given by Saari on the night in question, and these speculative statements did not give rise to a genuine issue of material fact. Moreover, the operator's failure to prevent or supervise after-hours sledding did not constitute willful or wanton misconduct. An absence of evidence cannot establish the existence of a genuine issue of material fact. Finally, the estate cited Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158 (1992), for the proposition that a question of fact existed regarding whether the property was open to the public. Under Simchuk, if the land upon which an injury occurs is not available for public use, the landowner does not enjoy the limited liability afforded by 70-16-302. However, a public use requirement would essentially negate the "without permission" language of the statute and exceed the parameters of the statute, and because the statute contains no express language that property be open for public use before the liability shield applies, the Supreme Court overruled Simchuk to that extent. Summary judgment on all counts was proper. Saari v. Winter Sports, Inc., 2003 MT 31, 314 M 212, 64 P3d 1038 (2003).

Development and Use Agreement Not Precluding City From Entering Agreement for Construction Project on Public Property — Franchise Agreement Outside Scope of Citizen Group's Agreement With City: A citizen's group entered a franchise agreement with a professional baseball organization to bring a team to Missoula. After two potential sites were rejected, the city of Missoula accepted a gift of property upon which to construct a baseball facility and granted the citizen group the right to finance and construct the stadium on the property and to convey the completed facility to the city. The citizen group moved to enjoin the city from development of the proposed civic baseball stadium because of the city's failure to comply with statutory requirements for planning, funding, and managing the facility. All claims were dismissed on summary judgment, and the citizen group appealed, but the Supreme Court affirmed. The development and use agreements in this case did not preclude the city from executing an agreement with another entity for the construction of a similar facility on public property or from leasing a city-owned facility for baseball games or any other purpose. Any franchise agreement between the baseball organization and the citizen group was outside the scope of the group's agreement with the city, so the voter-approval provisions of 7-5-4321 did not apply. The citizen group's argument that the city was required to comply with urban renewal laws also failed. The decision whether to proceed with development under the urban renewal statutes was up to the city, and the fact that the city designated the capital improvements associated with the stadium construction as an urban renewal project did not require that the citizen group's building project come under the same purview. Rather, under 7-16-4106, the city is permitted to obtain an athletic field and civic stadium through purchase, donation, or condemnation and to regulate its

use, but nothing in the statute prohibits the city from designating a stadium project as an urban renewal project or mandates that the project be designated as an urban renewal project. The District Court properly found that the city appropriately exercised its administrative authority in accepting the gift property and then leasing the site to the citizen group for purposes of constructing a stadium using private financial resources. The citizen group failed to raise a genuine issue of material fact that would preclude summary judgment. Fair Play Missoula, Inc. v. Missoula, 2002 MT 179, 311 M 22, 52 P3d 926 (2002).

Statute of Limitations Tolled Until Discovery of Self-Concealing Injury — Exposure to Farm Chemicals and Injection: While assisting her former husband with farm duties in 1989, Elizabeth Nelson was exposed to farm chemicals and pesticides and was accidentally injected with bovine ecthyma vaccine. She lost consciousness briefly following the injection but recovered and continued assisting with sheep inoculations the rest of the day. From 1989 through 1998, Elizabeth received extensive medical evaluations and treatments for numerous physical ailments that either surfaced or worsened subsequent to the exposure to chemicals and the vaccine, but doctors were unable to pinpoint the cause and effect relationship between the ailments and the exposure until 1996. Elizabeth filed a complaint in 1998, but her former husband moved for summary judgment because Elizabeth allegedly knew of her injuries for more than 3 years before the action was filed. The District Court agreed that the claim was barred by the 3-year statute of limitations in 27-2-204. Elizabeth appealed. In Hando v. PPG Indus., Inc., 236 M 493, 771 P2d 956 (1989), the Supreme Court held that the onset of the statute of limitations is determined by applying the discovery rule and establishing when the injured person knew, or in the exercise of due diligence should have known, of the facts constituting the cause of action. However, the District Court distinguished Hando because Elizabeth's injuries following the injection were obvious and immediate, unlike the self-concealing injuries in Hando that developed over time. The Supreme Court disagreed. Although Elizabeth suspected the cause of the injuries and diligently sought medical treatment and diagnosis, there was no genuine issue of material fact that the actual causal connection was not discovered until 1996, well within the 3-year period prior to the filing of the claim. Thus, the complaint was timely filed as a matter of law, and summary judgment was improper, so the case was reversed for trial on the merits. Nelson v. Nelson, 2002 MT 151, 310 M 329, 50 P3d 139 (2002).

Failure to Prove Conduct a Cause in Fact of Alleged Damage — Summary Judgment Proper: Abraham's townhouse basement flooded, so Nelson, the builder of the townhouse, was sued for negligently designing and building the residence, breaching implied warranties of quality workmanship, good construction, and habitability, and causing the basement to flood. Causation is one of four elements that must be proved in a negligence action, and except in cases of intervening cause, proof of causation is satisfied by proof that a party's conduct was a cause in fact of the damage alleged. Here, when Nelson presented Abraham's deposition testimony that Abraham did not know the cause of the flooding, Nelson met the initial burden of demonstrating that no material question of fact existed regarding the element of causation, and the burden shifted to Abraham to provide facts to prove causation. However, Abraham could not merely point to lack of evidence as the factor creating a material question, nor did Abraham's suspicions or unsupported conclusory or speculative statements raise a genuine issue of material fact. Abraham could not merely rest on evidence of Nelson's negligence, but rather was required to show that Nelson's negligence was the cause in fact of Abraham's injury. Abraham failed to submit facts to create a material question upon which the District Court could determine whether Nelson's actions in designing and building the townhouse were the cause in fact of the flooding, so summary judgment for Nelson was proper. Abraham v. Nelson, 2002 MT 94, 309 M 366, 46 P3d 628 (2002). See also Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996), and Gentry v. Douglas Hereford Ranch, Inc., 1998 MT 182, 290 M 126, 962 P2d 1205 (1998).

Dismissal of Counterclaims by Summary Judgment Proper When All Prior Claims Resolved by Memorandum of Understanding: Defendant filed several counterclaims stemming from an agricultural lease. The District Court held that the underlying dispute regarding the parties' obligations applicable to the lease was settled by a valid and enforceable memorandum of understanding (MOU), and dismissed the counterclaims as a matter of law. Defendant appealed, but the Supreme Court affirmed. The MOU was a valid unconditional resolution of the parties' claims that effectively released any claims of the signatories, and the District Court did not err in summarily dismissing the counterclaims. Bar OK Ranch, Co. v. Ehlert, 2002 MT 12, 308 M 140, 40 P3d 378 (2002).

Statements of Intent to File Grievance Not Considered Formal Grievance — Failure to Exhaust Administrative Remedies Warranting Summary Judgment: Offerdahl was notified by a supervisor that, based on complaints of inappropriate behavior toward a subordinate employee

and the Department's investigation of the complaints, Offerdahl's employment would be terminated. Following a pretermination hearing that Offerdahl did not attend, his employment was terminated on September 15. He was notified of his right to respond or pursue a grievance in accordance with the state's grievance policy, which required that a formal grievance be filed within 15 working days after the grievable event. On September 19, Offerdahl sent the Department a letter indicating that he would not attend any other termination hearings and that he intended to follow the grievance procedure as directed in the September 15 letter. Offerdahl eventually mailed a written grievance on October 7 that was filed on October 8, but the grievance was denied as untimely. Offerdahl appealed to the District Court, but the court granted the state's motion for summary judgment on grounds that Offerdahl had failed to exhaust administrative remedies. Offerdahl appealed, but the Supreme Court affirmed. Neither Offerdahl's oral statement to another Department employee that he intended to file a grievance, nor the September 19 letter of intent to file a grievance, met the requirements of a formal grievance. Offerdahl was required by the policy to file a formal grievance by October 6, but his grievance was not filed until October 8. Thus, Offerdahl's failure to timely pursue administrative remedies for termination of his employment barred pursuit of the claim, and the motion for summary judgment was properly granted. Offerdahl v. Dept. of Natural Resources and Conservation, 2002 MT 5, 308 M 94, 43 P3d 275 (2002).

Mortgage Against Party's Interest in Property Granted Pursuant to Dissolution — No Tortious Interference With Business, Prima Facie Tort, or Intentional Infliction of Emotional Distress: When George and Joyce were divorced, the District Court granted George exclusive possession of the ranch until it could be sold and the proceeds divided between the parties. During the course of the dissolution proceedings, Joyce took out several loans for living expenses. After the dissolution, Joyce consolidated the $150,000 in loans, and the bank executed a mortgage on Joyce's interest in the ranch to secure the loan. When George found out about the mortgage and security interest, he became distraught because he believed that he would not be able to obtain loans on the property to enable him to conduct ranch obligations and meet his operations. George subsequently filed suit against Joyce, the bank, and the bank president, who was Joyce's son-in-law, alleging tortious interference with business relationships, prima facie tort, and intentional infliction of emotional distress. The District Court granted the defendants' motion for summary judgment, and George appealed. The Supreme Court affirmed. Applying Farrington v. Buttrey Food & Drug Stores Co., 272 M 140, 900 P2d 277 (1995), the court concluded that the acts of Joyce and the bank were legal and that, standing alone, the acts did not give rise to any presumption or inference that the acts were done to harm George. The court also declined to recognize a separate cause of action for prima facie tort under the facts of this case. Applying Sacco v. High Country Independent Press, Inc., 271 M 209, 896 P2d 411 (1995), the court further concluded that because the defendants' acts were legal, no claim for emotional distress could arise from those acts. Absent material facts evidencing malicious intent or damages, summary judgment was proper. Pospisil v. First Nat'l Bank of Lewistown, 2001 MT 286, 307 M 392, 37 37 P3d 704 (2001).

Sale of Property Contingent on Financing — Financing Contingent on Grant of Contract — Oral Agreement to Purchase Additional Property Contingent on Initial Sale — Summary Judgment Proper Absent Genuine Issue of Fact: Community, Counseling, and Correctional Services, Inc. (Community), agreed to purchase Albright's property for a prerelease center. An additional oral agreement provided that Community would also purchase furnishings on the property when the sale was completed. The sale was contingent on Community's ability to obtain financing, and financing was contingent upon a grant for the prerelease center to Community from the Department of Corrections. Ultimately, the Department declined to issue the contract for prerelease services, Community was unable to obtain financing, and Albright was unable to sell the property or furnishings. Albright sued Community for breach of contract. The District Court granted summary judgment to Community, holding that under the plain language of the contract, the offer terminated when the Department did not issue the contract. Albright appealed, but the Supreme Court affirmed. No question of fact existed with respect to the conditions for the agreement because the agreement conditioned formation of any contract to buy the real property on Community's ability to obtain financing and Community could not obtain financing without the Department contract. Further, Albright's own affidavit stated that the oral agreement to purchase the furnishings was contingent on purchase of the property, so no issue of fact existed regarding the sale of the furnishings either, and that issue was also properly disposed of by summary judgment. Albright v. Community, Counseling, & Correctional Serv., Inc., 2001 MT 272, 307 M 289, 37 P3d 675 (2001).

Denial of General Liability Coverage Based on Liquor Liability Exclusion — Failure to Raise Alternative Negligence Theory — Summary Judgment Proper: Cusenbary was injured when a bar patron drove a car through the wall of Mortensen's tavern. Mortensen was covered by USF&G Co. under a general liability policy, but the insurance included a liquor liability exclusion. When Mortensen tendered the claim to USF&G Co. for defense, the company denied coverage and refused to defend based on the exclusion, so Cusenbary's claim was tried to a jury and Mortensen was found guilty of negligence (see Cusenbary v. Mortensen, 1999 MT 221, 296 M 25, 987 P2d 351 (1999)). Mortensen then assigned all rights to coverage under the general liability policy to Cusenbary. Cusenbary then sued USF&G Co., contending that the company had a duty to indemnify Mortensen for negligent behavior in management of the bar, separate from the negligent conduct of serving alcohol to an intoxicated patron, because the separate conduct was not excluded by the liquor liability exclusion. The District Court granted summary judgment for USF&G Co., holding that the separate conduct related directly to the improper service or sale of alcohol and that Mortensen failed to set forth evidence supporting an alternative negligence theory, so as a matter of law, Mortensen's judgment was excluded by the express language of the policy. The Supreme Court affirmed, citing Sheffield Ins. Co. v. Lighthouse Properties, Inc., 234 M 395, 763 P2d 669 (1988). All claims and arguments at trial were related to Mortensen's negligence in serving alcohol, and no assertion was ever made that the proposed evidence was relevant to any other theory of negligence or to any other theory. All of the claims arose from serving alcohol and were thus excluded from coverage. Cusenbary v. USF&G Co., 2001 MT 261, 307 M 238, 37 P3d 67 (2001).

Absence of Genuine Issue of Material Fact Regarding Negligent Installation of Septic System — Summary Judgment Proper: Prior to the Sherrards' purchase of property for building a home and horse arena, they had the county sanitarian issue a resite evaluation that addressed ground water levels and designated appropriate septic systems to service each building. The sanitarian approved a permit for a shallow cap system for the horse arena. The system was subject to state regulations requiring minimum 12-inch trenches and prohibiting installation where the water table reached within 5 feet of the natural ground surface. The Sherrards contracted with Prewett to install the system. Prewett dug a hole for the septic tank, dug 36-inch deep trenches for lateral pipes in the drain field, placed washed gravel and pipes in the trenches, and prepared the system for inspection. The next day, the new county sanitarian inspected the system, found standing ground water in the septic tank and observed water in the lateral trenches, fixed the ground water level at 27 inches below the natural surface, and because the ground water level was too high to meet county and state requirements, revoked the Sherrards' permit. The Sherrards then sued Prewett for negligent installation of the system. The District Court determined that because the ground water depth was less than 5 feet and the shallow cap system could not meet regulations, the object of the contract between the parties was illegal and the Sherrards could not proceed with their contract-based claim. Therefore, the court concluded that no genuine issue of material fact existed and granted summary judgment for Prewett, and the Supreme Court affirmed. The Sherrards' bare denial of the 27-inch ground water level and their speculation about the ground water level at the time that the original permit was issued, were insufficient to raise a genuine issue of material fact because they constituted mere denial, speculation, or conclusory statements. The material fact was not whether the ground water level was precisely 27 inches below the surface, but whether it was 5 feet or more below the surface as required by state regulations. To prevail, the Sherrards needed to come forward with substantial and material evidence with regard to the ground water level at the horse arena, but they failed to do so, so summary judgment was proper. Sherrard v. Prewett, 2001 MT 228, 306 M 511, 36 P3d 378 (2001).

Failure to Produce Evidence in Contradiction of Investigating Officer's Conclusions Regarding Cause of Accident — Summary Judgment Proper: Ten-year-old Vivier was riding her bicycle and, turning unexpectedly in front of a vehicle, was struck and injured. Vivier's parents sued the state Department of Transportation and Lewis and Clark County for negligently failing to make the road safe. The District Court granted summary judgment to the county on grounds that the county did not have a duty with respect to the design and construction of the road and granted summary judgment to the Department on grounds that the Department did not have a duty to undertake road reconstruction simply because standards of construction had changed since the road was originally constructed. The court also determined that the Viviers failed to submit evidence tending to show that the accident was caused by a design or construction problem. The Viviers appealed, but the Supreme Court affirmed. A cause of action for negligence has four elements, including duty, breach, causation, and damages, and summary judgment is proper if the moving party establishes that one element lacks any genuine issue of material fact

and the nonmoving party does not come forward with proof that a genuine issue exists. In this case, regardless of whether the county or the Department had a duty to improve the road, the evidence showed that the accident occurred because the child turned in front of the vehicle before the driver had a chance to react, not because the condition of the road prevented the driver from maneuvering to avoid the accident. The Viviers failed to produce any facts to contradict the investigating officer's conclusions with regard to the cause of the accident, and the District Court's grant of summary judgment to the county and Department was correct. Vivier v. Dept. of Transportation, 2001 MT 221, 306 M 454, 35 P3d 958 (2001).

No Standing to Recover Damages by Party Not Owner of Property — Fax Not Considered Valid Assignment of Damage Claim: Koelzer owned an inn by a mining and power generation site near Colstrip. Koelzer discovered that mining activity had damaged the inn and filed a complaint in 1994 against the mining and power generation companies, but did not pursue the damage claim. In 1996, Dale and Shawonda Lewis approached Koelzer about purchasing the inn, and the issue of the damages and Koelzer's claim came up. The Lewises inspected the inn and discovered additional damages, which led Koelzer to reassert the damage claim, but the claim was again unresolved. Nevertheless, the Lewises offered to buy the inn, and title was eventually conveyed to Dale's parents, who were able to secure financing. Koelzer notified the companies by fax that the inn had been sold and requested that the companies work with Dale on the structural damage discussed in the past. About 1 year later, Dale received an estimate of $91,000 to repair the damages and filed a complaint seeking compensation from the companies. Dale's parents eventually filed for bankruptcy, and the Lewises finally became the owners of record in 1998. When the companies discovered that the Lewises were not the owners of the inn at the time that the suit was filed, they moved for summary judgment, which was granted by the District Court on grounds that the Lewises had no standing to assert a claim for damages arising before they acquired title. On appeal, the Supreme Court cited the general rule that persons cannot recover for damages to property that they do not own. Further, even though property damage claims have long been recognized as assignable, the fax did not meet the statutory requirements of a valid assignment and was unenforceable. Thus, on the issue of prepurchase damages, no material question of fact existed regarding ownership or assignment, so the Lewises had no standing to bring a claim for damages prior to their ownership of the inn. Summary judgment was affirmed. Lewis v. Puget Sound Power & Light Co., 2001 MT 145, 306 M 37, 29 P3d 1028 (2001).

Claim of Omitted Child Summarily Dismissed — Failure to Present Evidence of Mistaken Belief of Death of Child: Scotty Prescott married Howard Putman in 1946, and they had a son, William, in 1949. Scotty later found out that Howard's previous marriage had not been dissolved when they married, and Scotty was granted an annulment in 1954. She remained in Montana, attending Montana State College, and Howard moved to California with William. Aside from two letters in 1954, there was no evidence of any contact among Scotty, Howard, and William. William had no independent recollection of his mother and never attempted to contact her during the remaining 42 years of her life. Scotty executed a will in 1985, bequeathing the profits from the sale of her ranch to the college, the remainder of her estate to the Museum of the Rockies, and nothing to William, who later asserted that he was entitled to a share of the estate pursuant to 72-2-332 because Scotty mistakenly believed that he was dead. In a nonsubstantial revision of the will in 1991, Scotty had stated that "the line of succession for this branch of the Prescott family ends with me", which William contended raised a question of material fact as to whether his mother believed him to be dead. However, the statement was not made until 6 years after the will was executed and was consistent with the separate way that they lived their lives. Further, the record was replete with uncontroverted proof that the disposition of Scotty's estate was consistent with her intention stated as early as 1964 to endow the college and did not indicate that William was omitted from the will solely because Scotty believed him to be dead. In the absence of sufficient evidence required by 72-2-332(3) proving that William was an omitted child, the District Court correctly dismissed William's claim by summary judgment. In re Estate of Prescott, 2000 MT 200, 300 M 469, 8 P3d 88, 57 St. Rep. 779 (2000).

Lack of Meritorious Argument on Appeal of Summary Judgment: Kinsey-Cartwright and Burleson had a dispute over an easement across Kinsey-Cartwright's property. Burleson took his attorney, Brower, to investigate the disputed easement, during which time a confrontation occurred, resulting in a complaint against Brower for assault and trespass. The District Court granted Brower's request for summary judgment, and Kinsey-Cartwright appealed. With the exception of four sentences in her reply brief, Kinsey-Cartwright's entire argument was devoted to arguing that no easement burdened her land. However, the appeal was related to the complaint of assault and trespass, not the validity of an easement. The four sentences were

simply a collection of conclusions and contained no discussion of the law relating to trespass or assault, no citation to legal authority or to the record, and no application of the law to the facts. It is not the obligation of the Supreme Court to formulate arguments or locate authorities for parties who appeal. Thus, absent any meritorious argument to consider on appeal, the Supreme Court affirmed the District Court award of summary judgment. Kinsey-Cartwright v. Brower, 2000 MT 198, 300 M 450, 5 P3d 1026, 57 St. Rep. 769 (2000). See also St. v. Blackcrow, 1999 MT 44, 293 M 374, 975 P2d 1253 (1999).

Error in Denial of Opportunity to Respond to Amended Requests for Admission — Late Discovery Responses Properly Denied: Defendant neglected to respond to requests for admission within 30 days. On defendant's motion for summary judgment, the District Court amended two requests for admission, which nullified the matter contained in the requests as being conclusively established. Plaintiff should have been given an opportunity to respond to the amended requests and the District Court abused its discretion in not allowing plaintiff the chance to respond. The Supreme Court reversed the portions of the summary judgment that corresponded to the amended requests for admission, but, in accord with Easton v. Cowie, 247 M 181, 805 P2d 573 (1991), the portions of the summary judgment based on admissions demonstrating no genuine issue of material fact were affirmed because plaintiff did not respond in a timely manner to the discovery requests. Spooner Constr. & Tree Serv., Inc. v. Maner, 2000 MT 161, 300 M 268, 3 P3d 641, 57 St. Rep. 674 (2000).

No Duty Constituting Negligence When Danger or Risk Unforeseeable — Summary Judgment Proper Absent Material Fact Regarding Legal Duty: The father could not reasonably foresee that, by giving his child permission to go to a friend's house to play, the child would go to the house of a different friend, participate along with other children in burning a photograph using gasoline, and be burned when another friend accidentally kicked the container of flaming gasoline onto his child. The duty element of negligence turns primarily on foreseeability, and if a reasonably prudent defendant can foresee neither any danger of direct injury nor any risk from an intervening cause, there is no negligence. Ordinarily, negligence actions involve questions of fact and are not susceptible to summary judgment, but in this case, reasonable minds could not differ regarding the absence of material fact regarding any duty owed by the father, so summary judgment was proper as a matter of law. Poole v. Poole, 2000 MT 117, 299 M 435, 1 P3d 936, 57 St. Rep. 489 (2000), following Busta v. Columbus Hosp. Corp., 276 M 342, 916 P2d 122 (1996). See also Lopez v. Great Falls Pre-Release Serv., Inc., 1999 MT 199, 295 M 416, 986 P2d 1081 (1999).

Doctrine of Reasonable Expectations Inapplicable When Policy Language Excludes Coverage — Liability Coverage on Borrowed Horse Trailer Limited to Policy Terms: Babcock borrowed a horse trailer from her neighbor, and even though the trailer ball on Babcock's truck was too small for the trailer hitch, she attempted to tow the trailer anyway. The trailer came unhooked, left the road, and struck a fence. Farmers Insurance Exchange (Farmers) paid Babcock the full cost of the fence repair. Babcock requested that Farmers also pay for damages to the trailer. Farmers paid $500 toward the trailer, which constituted Babcock's policy limit for collision and comprehensive coverage. Babcock sued, claiming that Farmers was required to pay for the trailer damage under the liability coverage. The District Court granted summary judgment for Farmers, concluding that the plain policy language limited coverage to $500. Babcock appealed, asserting that the policy language was ambiguous but nevertheless created a reasonable expectation that a trailer was covered and that the exclusion for damage "to property owned or being transported by an insured person" did not apply because the trailer was not being "transported" when it was damaged, having separated from the truck. Farmers argued that, under Babcock's interpretation, a passenger ejected from a car would have no claim for medical payments because the passenger did not "occupy" the vehicle at the time of injury. The Supreme Court agreed. The doctrine of reasonable expectations does not apply to create coverage when the terms of the policy clearly demonstrate an intent to exclude particular coverage. In this case, the policy language clearly excluded liability coverage for the borrowed trailer because it was in Babcock's charge and she was transporting it at the time of the accident. Babcock v. Farmers Ins. Exch., 2000 MT 114, 299 M 407, 999 P2d 347, 57 St. Rep. 479 (2000).

Failure to Timely File Discrimination Complaint With Commission — Prosecution in District Court Precluded: Skites filed a claim against her employer with the Montana Human Rights Commission 225 days after the most recent or continuing act of employment discrimination. Under 49-2-501, a complaint must be filed within 180 days after the unlawful discriminatory practice occurred or was discovered, and if the complaint is not timely filed, it may not be considered by the Commission. Further, pursuant to Hash v. U.S. W. Communications Serv., 268 M 326, 886 P2d 442 (1994), timely filing before the Commission is a prerequisite to filing an

employment discrimination complaint in District Court because Title 49, ch. 2, commonly known as the Montana Human Rights Act, is the exclusive remedy for employment discrimination under Montana law. Skites' complaint was not timely filed with the Commission, thus her ability to prosecute the discrimination complaint in District Court was precluded. The District Court did not err in determining that no genuine issue of material fact existed that would preclude summary judgment for the employer. Skites v. Blue Cross Blue Shield of Mont., 1999 MT 301, 297 M 156, 991 P2d 955, 56 St. Rep. 1213 (1999).

Existence of Promissory Notes Creating Rebuttable Presumption of Sufficient Consideration — Speculative Statements Insufficient to Demonstrate Genuine Issue of Material Fact: Defendant Moon contended that the District Court erred in granting summary judgment to plaintiff on promissory notes because there was a genuine issue of material fact regarding whether the notes were unenforceable for lack of consideration. However, 26-1-602 creates a rebuttable presumption arising from the fact of the promissory note itself that the note was given for sufficient consideration. Under Rule 301(b)(2), M.R.Ev. (Title 26, ch. 10), Moon was required to show a preponderance of evidence contrary to the presumption in order to overcome it, otherwise the court was bound to find the assumed fact in accordance with the presumption. Moon's conclusory and speculative statements in the pleadings, briefs, and affidavits did not constitute sufficient factual evidence to demonstrate that a genuine issue of material fact existed contrary to the presumption of valid consideration, so the grant of summary judgment was proper. Envtl. Contractors, LLC v. Moon, 1999 MT 178, 295 M 268, 983 P2d 390, 56 St. Rep. 696 (1999).

No Requirement That Adulterated Food Poses Danger to Human Health — Embargo Justified — Summary Judgment Proper: The dairy filed a complaint against the state, challenging the state's embargo of the dairy's milk products following the discovery of a black substance in the milk. The dairy claimed that in order for milk to be contaminated, and thus adulterated, it must be dangerous to human health. The Supreme Court held that under the plain meaning of 50-31-509, there is no requirement that adulterated food be adulterated so as to be dangerous or fraudulent in order for it to be embargoed or detained. It is sufficient that the food is adulterated. When there was no evidence raising genuine issues of material fact concerning the scope of the embargo or the quantity and identity of the black substance, the District Court did not err when it granted summary judgment to the state on these issues. Clover Leaf Dairy v. St., 285 M 380, 948 P2d 1164, 54 St. Rep. 1203 (1997).

Grant of Equitable Relief From Forfeiture — Conditions: Defendant defaulted on a contract to operate a coal mine. The District Court granted summary judgment, finding no genuine issue of material fact regarding defendant's unlawful detainer. Defendant sought equitable relief pursuant to 28-1-104. The Supreme Court may, under appropriate circumstances, equitably relieve a party from the harsh effects of a forfeiture. Circumstances warranting equitable relief must not only meet the statutory requirements of tendering full compensation within a reasonable time after service of notice of default and not acting in a grossly negligent, willful, or fraudulent manner, but the party seeking relief must also assert facts that appeal to the conscience of the court of equity. Mere financial inability is not sufficient to appeal to the court's conscience. In this case, defendant's request for equitable relief was deficient because it did not meet statutory and common-law criteria, so the grant of summary judgment was affirmed. Glacier Park Co. v. Mtn., Inc., 285 M 420, 949 P2d 229, 54 St. Rep. 1222 (1997), following Kovacich v. Metals Bank & Trust Co., 139 M 449, 365 P2d 639 (1961), distinguishing Parrott v. Heller, 171 M 212, 557 P2d 819 (1976), and followed in Weter v. Archambault, 2002 MT 336, 313 M 284, 61 P3d 771 (2002).

Attorney Duty of Care — Facts Indicate No Breach of Duty: Seeley argued that the lower court erred in dismissing his suit against a law firm because the facts showed that the attorneys should have known that he wanted them to deliver the earnest money on certain real property on his behalf before the result of the title search was known. The Supreme Court held that common sense dictated that the facts could only be interpreted that the earnest money was to be delivered if there was no problem with the title, otherwise Seeley could have delivered the money himself prior to the results of the title search. Seeley v. Davis, 284 M 517, 946 P2d 119, 54 St. Rep. 1006 (1997).

Partial Summary Judgment on Issue of Liability Properly Granted: After examining the facts regarding Walker's undisputed breach of contract in the purchase and renovation of a house, the District Court granted Gierkes a partial summary judgment on the issue of liability. During a subsequent trial on the issue of damages, Walker alleged as an affirmative defense that Gierkes failed to adequately mitigate their damages. The Supreme Court found no genuine issue of material fact and affirmed the summary judgment as a matter of law. Further, the court also

affirmed the trial court finding that Gierkes took reasonable and appropriate steps to mitigate their damages in requiring that Walker cease the renovation work and in denying him access to the property. Gierke v. Walker, 279 M 349, 927 P2d 524, 53 St. Rep. 1181 (1996).

Vehicle Owner Not Liable for Adult Daughter's Accident — Speculative and Conclusory Statements Insufficient to Raise Genuine Issue of Material Fact: The plaintiff sued the owner of a vehicle driven by the owner's adult daughter. The District Court granted the owner's motion for summary judgment. The Supreme Court held that summary judgment was proper because the plaintiff failed in the burden to raise any genuine issue of material fact that the daughter was the owner's agent at the time of the accident or that the owner negligently entrusted the vehicle to the daughter. As a matter of law, the owner was not liable for the daughter's alleged negligence merely by being the owner of the vehicle. Ulrigg v. Jones, 274 M 215, 907 P2d 937, 52 St. Rep. 1198 (1995).

Retaliatory Employment Requirement — Not Relevant to Requirement's Constitutionality: The date on which the state began to require that its firefighters protecting civilian and National Guard aircraft be members of the National Guard was not a material issue of fact precluding a summary judgment that the requirement was unconstitutional. The date was relevant to the petitioner firefighter's claim that the requirement was in retaliation for a firefighters' wage and hours suit against the state, but whether the requirement was in retaliation for the suit was not relevant to the issue of whether the requirement was constitutional. McKamey v. St., 268 M 137, 885 P2d 515, 51 St. Rep. 1218 (1994).

Land Lease Provisions Regarding Volunteer Crop: The provisions of an agricultural lease provided that defendant would lease the premises during the 1989, 1990, and 1991 crop seasons and deliver to plaintiff one-fourth of all crops produced on the land, except defendant was to receive the entire 1989 crop. A volunteer crop was harvested in 1989. Plaintiff contended that the crop was actually planted in 1987 for harvest in 1988, but due to a hail storm in 1988, the volunteer crop sprouted in 1989. Nevertheless, the agreement was clear on its face that defendant was to receive the 1989 crop, and the District Court properly granted summary judgment to defendant on the issue of ownership of the volunteer crop. Fox Grain & Cattle Co. v. Maxwell, 267 M 528, 885 P2d 432, 51 St. Rep. 1136 (1994).

Collision With Moose Not Itself Evidence of Negligence: Lynds's motor home collided with a moose, leaving the animal on the highway. The moose was then struck by another vehicle driven by Murdock. White, a passenger in the Murdock vehicle, brought a negligence action against Lynds, Murdock, and the state, alleging negligence in Lynds's failure to remove the injured moose from the highway, in Murdock's failure to see the injured moose before striking it, and in the state's failure to sign the area as a moose crossing. The District Court granted the defendants' motions for summary judgment. The Supreme Court held that according to the trial evidence, there was insufficient time for Lynds to remove the moose from the highway before it was struck by Murdock, that there was nothing in the evidence produced by White in opposition to the motions upon which a jury could conclude that Murdock failed to act reasonably, and that posting of moose crossing signs would not have prevented the accident. Therefore, the Supreme Court concluded that the District Court did not err in ruling that White failed to establish a material question of fact. White v. Murdock, 265 M 386, 877 P2d 474, 51 St. Rep. 547 (1994).

Enforcement of Bond Covering Sale of Horses — Summary Judgment Proper: Parks contracted with Michael to purchase 96 thoroughbred horses, paying $1,000 down, executing a promissory note for the remaining $1,749,000, and securing the note through a bond issued by Glacier General Assurance Company (Glacier). The bond required Michael to assign his security interest in the horses to Glacier in the event that performance on the bond was required. Parks failed to make the first installment payment, so Michael sent notice of default and acceleration to Parks. Michael also notified Glacier of the default, requested performance, and indicated the expectation that Glacier take possession of the horses or reimburse the costs of holding them. Glacier agreed that the horses would be sold at private auction. Michael subsequently received an opinion from a Kentucky court that he was entitled to summary judgment and liquidated damages against Glacier in the amount of $2,220,484.86, of which $1,749,000 represented Glacier's liability on the bond and the remainder reflected Michael's expenses for the maintenance, upkeep, and sale of the horses, less the sale proceeds. While Michael's litigation was proceeding in Kentucky, Glacier filed a petition for liquidation in Montana. The State Auditor was appointed liquidator. Michael filed a proof of claim with the liquidator, but the claim was denied. Michael died, but the estate filed a complaint requesting a Class 3 payment priority and an order that the liquidator proceed with payment. The liquidator appealed, asserting nine affirmative defenses, including allegations that enforcement of the sales agreement was unconscionable, that the claim should be assigned Class 4 priority as a general creditor's claim,

and that the amount of the claim on the bond should be offset by the proceeds from the sale of the horses. The District Court granted summary judgment to the estate, holding that the claim was valid in the amount of the bond and assigning the claim Class 3 priority in the distribution of Glacier's assets. On appeal, the Supreme Court found that a disparity between the horses' market value and the purchase price was immaterial to the conscionability of enforcing the sales contract. The liquidator raised no issues of material fact, and the estate was properly entitled to summary judgment as a matter of law. In re Estate of Michael v. Glacier Gen. Assurance Co., 264 M 261, 871 P2d 272, 51 St. Rep. 252 (1994), distinguishing Morrow v. FBS Ins., 230 M 262, 749 P2d 1073 (1988).

Complete Absence of Evidence of Sexual Assault — Summary Judgment Proper: Plaintiffs alleged that their 4-year-old daughter was sexually assaulted during gym class at preschool by R.B., an aide in another class at the school. There was no clear physical evidence that a sexual assault occurred because the examining physician testified that the child could have been injured by other means, both innocent and accidental. The child's verbal and cognitive skills were insufficiently developed to allow a conscious and knowing identification of R.B. as the perpetrator. There was no testimony from anyone present during the gym class that the child showed any outward signs of injury, pain, or trauma. The direct, uncontradicted testimony of the child's teacher was that R.B. had no contact with the child whatsoever. Because the allegations against R.B. were based on conclusory and speculative statements insufficient to demonstrate a genuine issue of material fact, summary dismissal was proper. S.M. v. R.B., 261 M 522, 862 P2d 1166, 50 St. Rep. 1437 (1993).

Speculative and Conclusory Statements Not Basis for Issue of Fact: Nelson sued Montana Power Company for negligence in shutting off a gas valve at the scene of a fire in Nelson's store, which Nelson claimed resulted in more extensive fire damage than would otherwise have been caused. Nelson based his theory upon statements by fire personnel made during discovery that it was "possible" that the fire was being fed by another fuel source other than the building itself. The Supreme Court noted that a suspicion and speculative and conclusory statements are not sufficient evidence to defeat a motion for summary judgment. Nelson v. Mont. Power Co., 256 M 409, 847 P2d 284, 50 St. Rep. 126 (1993).

Employment Termination Agreement Constituting Relinquishment of Potential Claims — Summary Judgment Proper: Employee signed an employment termination agreement that provided in part for termination, compensation, medical insurance for himself and his wife, and a waiver of claims wherein both parties voluntarily waived and relinquished future employment-related claims and released one another from "all actions, suits, debts, agreements, obligations, costs, expenses and other liabilities" related to the employment relationship. Summary judgment on an employment-related claim brought 1 year after the agreement was entered was proper in light of employee's failure to raise any issue of material fact with regard to execution of the valid and enforceable termination agreement. Somersille v. Columbia Falls Aluminum Co., 255 M 101, 841 P2d 483, 49 St. Rep. 904 (1992).

Inference of Age Discrimination — Failure to Present Facts Indicating Dismissal a Pretext — Summary Judgment Proper: In the context of a summary judgment motion in an age discrimination action under 29 U.S.C. 621, et seq., the plaintiff need only adduce facts that, if believed, support a reasonable inference of the denial of an employment opportunity because of discriminatory age criteria. If that burden is met, the employer must rebut the inference of discrimination with evidence of legitimate, nondiscriminatory reasons that the plaintiff was not hired or was terminated. Upon such a showing, the burden shifts back to the employee to demonstrate with specific facts that the employer's explanation is a pretext. In this case, Kenyon was in the protected age class, met the minimum job qualifications, and was discharged and replaced by a younger woman, which was sufficient to support a reasonable inference of age discrimination. The employer then established that there were problems with Kenyon's work performance, number of absences, and time spent on nonprofessional duties over a long period of time and that there was a documented probation for poor work performance. Kenyon admitted by deposition that her employer's dissatisfaction with her work performance was apparent by his yelling at her on an almost daily basis. This evidence was sufficient to rebut the inference of discrimination. Kenyon subsequently failed to present specific facts that indicated that the employer's explanation for her dismissal was a pretext, relying only on conclusory assertions of discrimination raised in her affidavit. Kenyon therefore failed to raise a genuine issue of material fact as to her age discrimination claim, and summary dismissal in favor of the employer was proper. Kenyon v. Stillwater County, 254 M 142, 835 P2d 742, 49 St. Rep. 673 (1992), following Foster v. Arcata Assoc., Inc., 772 F2d 1453 (9th Cir. 1985).

Conclusory Statements Not Considered Material Facts: Mere disagreement about the interpretation of a fact does not amount to a genuine issue of material fact. When appellant recited facts with his own interpretations and conclusions that only carried the title of disputed issues of material fact, such conclusory statements, amounting to mischaracterization and selective quotation, were only his rendition of the facts and did not rise to the level of genuine issues of material facts. Sprunk v. First Bank Sys., 252 M 463, 830 P2d 103, 49 St. Rep. 369 (1992), followed in State ex rel. Scanlon v. Nat'l Ass'n of Ins. Comm'rs, 265 M 184, 875 P2d 340, 51 St. Rep. 480 (1994), Koepplin v. Zortman Min., Inc., 267 M 53, 881 P2d 1306, 51 St. Rep. 880 (1994), and Stanley v. Holms, 1999 MT 41, 293 M 343, 975 P2d 1242, 56 St. Rep. 178 (1999).

Fatal Flaw in Amended Complaint — Summary Judgment Affirmed: Summary judgment was proper as a matter of law because plaintiff's amended complaint was fatally flawed by: (1) seeking to retroactively apply a workers' compensation statute that was previously held inapplicable to accidents occurring prior to its enactment; and (2) failing to allege that job-related accidents were proximately caused by negligence of defendant employer. Donahue v. Convenience Disposal, Inc., 250 M 261, 818 P2d 839, 48 St. Rep. 916 (1991).

Conspiracy, Fraud, and Bad Faith — Summary Judgment Proper: The plaintiff sued a medical company and various employees on the basis that they had conspired to complete a medical evaluation of him that would result in his losing his workers' compensation benefits. The Supreme Court held that absolutely no evidence had been introduced to support the plaintiff's claims. Grenz v. Medical Management NW., Inc., 250 M 58, 817 P2d 1151, 48 St. Rep. 855 (1991) (Grenz III). See also Grenz v. Fire & Cas. of Conn., 2001 MT 8, 304 M 83, 18 P3d 994 (2001), in which the court enjoined the claimant from filing further civil appeals until the sanction was paid.

Prior Oral Agreement Extinguished by Doctrine of Merger: The plaintiff, Eiselein, argued that the lower court had erred in granting the bank's motion for summary judgment. The lower court ruled that even if the bank had made an oral promise to lend Eiselein $150,000, that agreement was extinguished by a subsequent written agreement under which the bank lent the plaintiff only $35,000. The Supreme Court affirmed the lower court's decision on the basis that even if there had been a prior oral agreement, the subsequent writing between the parties would extinguish the oral agreement pursuant to the doctrine of merger. Eiselein v. Mont. Bank of Roundup, 250 M 71, 818 P2d 365, 48 St. Rep. 826 (1991).

No Retaliation in Discharge of Company President — Summary Judgment Proper: Mannix, terminated as president of Butte Water Company, appealed a District Court order granting summary judgment to defendant. Mannix alleged that facts supported his claim that his discharge was against the best interests of the water company and was in retaliation for refusing to sign a note. However, Mannix failed to present facts supporting his argument that his termination was against the best interests of the company or that defendant acted in retaliation in removing him as president of the water company. Mannix v. Butte Water Co., 249 M 372, 816 P2d 441, 48 St. Rep. 782 (1991).

Parked Trailers Unattached to Insured Tractors — No Coverage Under Unambiguous Policy Provisions: The District Court found an insurance policy to be ambiguous regarding coverage for trailers that had been used to haul beer but that were parked and used for storage at the time they were accidentally run into and granted summary judgment for insurer based on that ambiguity. The Supreme Court found no ambiguity in policy language that clearly covered only trailers that were attached to an insured tractor. Citing its authority in Hereford v. Hereford, 183 M 104, 598 P2d 600 (1979), the Supreme Court reversed and granted summary judgment to the nonmoving party based on the fact that the unambiguous policy language created no genuine issue of material fact. Canal Ins. Co. v. Bunday, 249 M 100, 813 P2d 974, 48 St. Rep. 597 (1991).

Allegations of Constructive Fraud and Visitation Interference Unsubstantiated by Fact — Summary Judgment Proper: Appellant alleged that a counselor's testimony at a dissolution hearing was a misrepresentation constituting constructive fraud and that her observations and professional opinions affected the outcome of the visitation order to the point of visitation interference. However, the allegations were based on appellant's own speculation and opinion rather than substantial objective evidence contained in the record. Absent any genuine issue of material fact, summary judgment on both questions was proper. Thomas v. Hale, 246 M 64, 802 P2d 1255, 47 St. Rep. 2261 (1990), followed in Thornton v. Songstad, 263 M 390, 868 P2d 633, 51 St. Rep. 104 (1994).

Creation of Issue of Fact by Contradiction of Previous Testimony Not Allowed: The Supreme Court affirmed the lower court's finding that the plaintiff's contradiction between his deposition testimony and his subsequent affidavit did not create a genuine issue of material fact. The Supreme Court stated that to allow such a practice would permit any party to head off a

summary judgment by supplementing previous depositions with a new affidavit. Stott v. Fox, 246 M 301, 805 P2d 1305, 47 St. Rep. 2040 (1990), followed in Kaseta v. NW. Agency of Great Falls, 252 M 135, 827 P2d 804, 49 St. Rep. 183 (1992), Karlen v. Evans, 276 M 181, 915 P2d 232, 53 St. Rep. 337 (1996), and Wood v. Old Trapper Taxi, 286 M 18, 952 P2d 1375, 54 St. Rep. 1263 (1997).

Wobbly Fence Not Hidden or Lurking Hazard: The plaintiff argued that the defendant's wooden fence constituted a hidden hazard because it wobbled when he put his hand on the top of it and he injured himself attempting to jump over it. The Supreme Court held that it was not persuaded by the plaintiff's erroneous if not completely arcane reasoning that a wooden fence is a hidden or lurking hazard merely because it wobbles when one jumps over it. Berens v. Wilson, 246 M 269, 806 P2d 14, 47 St. Rep. 2009 (1990).

General Liability Umbrella Policies Precluding Coverage for Sexual Molestation: Defendant sexually molested his daughter over a period of 10 years. His daughter brought a civil action seeking damages for economic loss, medical treatment, and emotional distress. Defendant tendered the suit to his insurer to defend and indemnify in the event the daughter recovered damages. Policies in effect were: (1) a farm-ranch comprehensive general liability umbrella policy, limited to accidental injury; and (2) a commercial umbrella policy, limited to damages for personal injury caused by an occurrence that was neither expected nor intended from the standpoint of the insured. Based on these clear and unambiguous policy exclusions, the District Court properly granted summary judgment to the insurer because both policies were clearly intended to deny coverage for intentional misconduct, such as that resulting from intentional and ongoing sexual molestation. N. H. Ins. Group v. Strecker, 244 M 478, 798 P2d 130, 47 St. Rep. 1736 (1990). The two-pronged Strecker test was applied in Am. States Ins. Co. v. Willoughby, 254 M 218, 836 P2d 37, 49 St. Rep. 708 (1992), in which case it was held that when the insured's acts were intentional and evinced an intent to injure by their very nature, an insurance policy exclusion clause precluded coverage for intentional bodily injury.

Slip and Fall — No Breach of Duty by Landowner: The plaintiff did not dispute the facts as presented by the defendant in its summary judgment motion. The Supreme Court affirmed the lower court's finding that the undisputed facts indicated that as a matter of law, the defendant did not breach its reasonable duty of care in maintaining its parking lot and was not liable for the injuries suffered when the plaintiff slipped on ice in the lot. Blaskovich v. Noreast Dev. Corp., 242 M 326, 790 P2d 977, 47 St. Rep. 740 (1990), overruled, as to the distinction between liability based upon natural versus altered accumulations of ice or snow that are open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997). The Richardson standard was retroactively applied in Benson v. Heritage Inn, Inc., 1998 MT 330, 292 M 268, 971 P2d 1227, 55 St. Rep. 1341 (1998).

No Material Fact to Support Fraud Claims:

When a lender brought suit to foreclose on a promissory note, defendant filed counterclaims, alleging fraud and economic duress. Summary judgment in favor of the lender was proper because the defendant did not make an issue of material fact for fraud. The lender's alleged withdrawal of a promise to add delinquent payments to the end of the contract does not amount to fraud. Avco Financial Serv. v. Foreman-Donovan, 237 M 260, 772 P2d 862, 46 St. Rep. 785 (1989).

Plaintiff brought action for fraud, both actual and constructive, as well as undue influence, arising out of a promise by his mother to compensate plaintiff, upon sale of the family corporation's assets, for a portion of value attributable to plaintiff's stock and partnership interest conveyed to corporation for cancellation of promissory note executed by plaintiff for a loan from the corporation. The respondent mother was granted summary judgment. The Supreme Court held that plaintiff failed to establish a fraud claim because of admissions that his mother did not intend to deceive him and that he never relied on his mother's promise to compensate. His claims were also barred by the Statute of Limitations. Fleming v. Fleming Farms, Inc., 221 M 237, 717 P2d 1103, 43 St. Rep. 776 (1986).

Ostensible Agency Not to Be Based on Agent's Statements Alone: A manufacturing company received a federal contract to produce combat helmets. Farmers State Bank supplied a letter to the Department of Defense stating that Farmers Bank and First National Bank of Missoula would provide the necessary financing. Neither bank funded the project, and the company sued under tort and contract law. The Supreme Court affirmed a summary judgment in favor of First National, ruling that Farmers Bank could not be held to be First National's agent based solely on statements made by Farmers Bank in its letter to the Department of Defense. NW. Polymeric, Inc. v. Farmers St. Bank, 236 M 175, 768 P2d 873, 46 St. Rep. 275 (1989).

Promissory Note — Foreclosure of First Trust Indenture: A second lienholder whose lien is extinguished by the foreclosure of a first lien may maintain a direct action on the note. The bank, which held a promissory note secured by a junior trust indenture, was entitled to sue directly on the note after foreclosure by the holder of the senior trust indenture. Summary judgment for the bank was proper when there was no genuine issue of any material fact and when the bank was entitled to judgment as a matter of law. First Interstate Bank of Kalispell v. Wann, 235 M 111, 765 P2d 749, 45 St. Rep. 2232 (1988).

Wrongful Discharge — No Genuine Issue of Material Fact: Plaintiff in a wrongful discharge action alleged a public policy violation by employer in not adhering to the employee discipline procedure outlined in its personnel policy. However, plaintiff failed to show that employer had violated its alternative discipline procedure, and summary judgment for employer was proper because there was no genuine issue of material fact indicating a public policy violation by employer. Rupnow v. Polson, 234 M 66, 761 P2d 802, 45 St. Rep. 1734 (1988).

No Duty to Protect Absent Probable Cause to Arrest — No Police Negligence: A car driven by Buffalohorn entered an intersection against a red light and collided with a car occupied by Phillips and Hake, who suffered injuries. Buffalohorn was intoxicated at the time of the accident. About 2 hours prior to the accident, police detained and questioned Buffalohorn in connection with another accident, but at that time it was determined that Buffalohorn was not involved or extremely intoxicated. The Supreme Court rejected Phillips' argument that under Restatement (Second) of Torts, sec. 319 (1965), the officers had a duty to control Buffalohorn's potentially dangerous actions because imposition of a duty under sec. 319 depends on the ability to control the third person. Absent probable cause to arrest, no duty flowed from the officers to Phillips to protect Phillips from later actions of Buffalohorn, and Phillips' claim of police negligence was summarily dismissed. Phillips v. Billings, 233 M 249, 758 P2d 772, 45 St. Rep. 1463 (1988), followed in Estate of Strever v. Cline, 278 M 165, 924 P2d 666, 53 St. Rep. 576 (1996). Phillips was distinguished in Nelson v. Driscoll, 1999 MT 193, 295 M 363, 983 P2d 972, 56 St. Rep. 744 (1999), clarifying that the imposition of a duty to protect under Restatement (Second) of Torts 319 (1965) depends on whether the officer takes charge of the alleged dangerous person and that the officer's duty to protect is owed to third persons, not to the person with whom the officer has a custodial relationship.

Summary Judgment Proper on Question of Existence of Employment Relationship: A quarrel developed between a store employee and the prospective new store owner over dress policy. The employee walked out and later filed wrongful discharge allegations. The charges were summarily dismissed on the grounds that no employment relationship existed at the time of termination after it was determined that: (1) the prospective owner did not own or control the store on the day of termination; (2) the employee's wages were paid for that day by the former owner; and (3) the employee refused to give the store keys to the prospective owner, claiming they still belonged to the former owner. Janz v. Quenzer, 232 M 439, 756 P2d 1174, 45 St. Rep. 1178 (1988).

Extrinsic Evidence Unnecessary When Devise Clear: The language of a devise bequeathed property, if any, left in a partnership at the time of testator's demise. The District Court found the partnership to be a conduit through which the partners conducted their tenancy-in-common business and reported income for tax purposes; however, absent any partnership interest in real property, the court determined no property should pass and properly granted summary judgment. Because the testator's intention could be ascertained from the plain language of the devise alone, it was not necessary or proper for the court to receive extrinsic evidence in making its determination. In re Estate of Greenfield, 232 M 357, 757 P2d 1297, 45 St. Rep. 1112 (1988).

Summary Judgment Proper on Unsupported Claims of Economic Advantage, Bad Faith, Civil Conspiracy, and Punitive Damages: Plaintiff mining company by amended complaint brought claims of economic advantage, bad faith, civil conspiracy, and punitive damages. Defendant mining company filed a motion for a more definitive statement. In response, plaintiff filed a 35-page brief with 43 attached exhibits but again neglected to address defendant's request for specificity or counter defendant's legal arguments. Summary judgment was proper after a finding that plaintiff: (1) repeatedly failed to provide, with particularity, factual support for its allegations of fraud; (2) repeatedly failed to provide the District Court with a simple, concise, and direct pleading; and (3) failed to demonstrate a genuine issue of material fact, relying instead on lengthy but unsupported allegations. Monte Vista Co. v. The Anaconda Co., 231 M 522, 755 P2d 1358, 45 St. Rep. 809 (1988).

Conclusory or Speculative Statements Concerning Mental Intricacies Insufficient to Raise Material Fact: Conclusory or speculative statements concerning the psychological intricacies of

the mind in general were not sufficient to raise a genuine issue of material fact. E. & D.W. v. D.C.H., 231 M 481, 754 P2d 817, 45 St. Rep. 778 (1988).

Undisputed Facts Surrounding Arrest — Question of Law: Defendant argued that the question of whether probable cause existed for his arrest was a question of fact entitling him to a jury trial and precluding summary judgment. However, where facts were undisputed, the question of whether an arrest was legal or illegal became a question of law for the court. Wright v. St., 231 M 324, 752 P2d 748, 45 St. Rep. 652 (1988).

Animal on Highway — Failure to Establish Duty of Highway Employee: Summary judgment was properly granted to the state in a wrongful death action where a motorist was killed after striking a horse on the highway. Plaintiffs cited no authority that a highway maintenance employee had a duty to remove live animals from the roadway or to ensure that animals did not come back onto the highway. Whitfield v. Therriault Corp., 229 M 195, 745 P2d 1126, 44 St. Rep. 1896 (1987), followed in Lindey's Inc. v. Goodover, 264 M 449, 872 P2d 764, 51 St. Rep. 317 (1994).

No Fraud in Representation of Debt: Debtor alleged that he signed a release in favor of the bank in total ignorance of his liabilities and defended his ignorance on the grounds that the bank misrepresented his debt to it. However, the record disclosed that the language of the release agreement, debtor's participation in a conference call in which reaffirmation of a loan was discussed, notice to debtor's attorney regarding the nature of indebtedness, and financial statements estimating debtor's liabilities all indicated debtor's knowledge of his debt load. There was no material question of fraudulent misrepresentation, and summary judgment was proper. Sprunk v. First Bank W. Mont. Missoula, 228 M 168, 741 P2d 766, 44 St. Rep. 1429 (1987), affirmed on separate grounds in Sprunk v. First Bank Sys., 252 M 463, 830 P2d 103, 49 St. Rep. 369 (1992), and followed in Stanley v. Holms, 1999 MT 41, 293 M 343, 975 P2d 1242, 56 St. Rep. 178 (1999).

Ranch Owner Not "Keeper" of Dog — Summary Judgment Proper: A meter reader bitten by a dog while delivering a company calendar sued both the ranch foreman who owned the dog and the ranch owner, contending the ranch owner was jointly responsible as "keeper" of the dog. The District Court found that the ranch owner was not the "keeper" of the dog, as described in 3A C.J.S. Animals 205(b), since he did not own, have possession of, manage, control, or care for the animal as owners are accustomed to do. Since the ranch owner had provided materials to the foreman to build a fence and dog pen and an agreement was made to keep the dog in the pen unless accompanied by the foreman, the ranch owner clearly met the duty of reasonable and ordinary care required of Montana landowners. There being no factual question whether the ranch owner was the animal's "keeper", summary judgment was proper. Criswell v. Brewer, 228 M 143, 741 P2d 418, 44 St. Rep. 1408 (1987).

Summary Judgment Granted Before Discovery Complete: Summary judgment was granted before plaintiff received answers to two sets of interrogatories, two requests for production, and a request for an admission. The Supreme Court concluded that the trial court had sufficient information before it to determine that plaintiff had presented no factual situation that would allow him to pursue a separate claim against a parent company and that nothing in the discovery requests was aimed at bringing forth information regarding the critical question of whether plaintiff was entitled to be provided a safe workplace by the parent company rather than the subsidiary by which he was employed. Thornock v. Pack River Management Co., 227 M 524, 740 P2d 1119, 44 St. Rep. 1284 (1987).

Libel Action — Communications Made in Proper Discharge of Official Duties — Summary Judgment Proper: Plaintiffs filed a libel action against the state of Montana, its agencies, and its agents for alleged libelous statements published in various Montana newspapers. The newspaper reports were based on a letter written by a state employee and submitted into evidence in a relicensure hearing. The District Court granted defendants an order for summary judgment. The Supreme Court affirmed. The Supreme Court held that all statements made by defendants were communications made in the proper discharge of their official duties. Plaintiffs did not sustain their burden of proof that genuine issues of material fact existed to be tried, and therefore defendants were entitled to judgment as a matter of law. Denny Driscoll Boys Home v. St., 227 M 177, 737 P2d 1150, 44 St. Rep. 991 (1987), followed in Wolf v. Williamson, 269 M 397, 889 P2d 1177, 52 St. Rep. 51 (1995).

Wrongful Death Action — No Issue of Material Fact: When a helicopter pilot died in a crash while picking up members of a survey crew on a steep hillside, the District Court did not err in granting defendant's summary judgment motion after plaintiffs failed to show the existence of any material fact that defendants' negligence proximately caused or was a substantial factor in the helicopter crash. Schellinger v. Marschall, 225 M 400, 733 P2d 346, 44 St. Rep. 349 (1987).

Summary Judgment Proper Upon Failure to Show Evidence of Due Care: When a fire, caused by a floating power line, burned plaintiff's house and property, the District Court granted partial summary judgment, ruling that Montana Power Company (MPC) negligently failed to exercise the proper duty of care in the inspection and maintenance of its utility lines. On appeal, the Supreme Court affirmed the grant of summary judgment, ruling that when the defendant has a high standard of care and the plaintiff provides clear evidence of negligence, it becomes incumbent upon the defendant to provide evidence to show due care was exercised. If the defendant fails to provide such evidence, summary judgment is proper. Ogden v. Mont. Power Co., 44 St. Rep. 330 (1987); on reconsideration, opinion withdrawn and replaced by Ogden v. Mont. Power Co., 229 M 387, 747 P2d 201, 44 St. Rep. 2068 (1987).

Representation of Mentally Ill Person on Criminal Charges — Civil Procedural Rights Inapplicable — Summary Judgment Proper: A $30 million damage suit brought against court-appointed attorneys after defendant was found not guilty of intimidation and criminal mischief by reason of mental disease or defect was properly dismissed by summary judgment after the District Court found the attorneys had not violated defendant's rights under 53-21-115 through 53-21-119, since those statutes involve civil commitments and do not apply to criminal proceedings. Kerr v. Wilcox, 225 M 313, 731 P2d 1326, 44 St. Rep. 260 (1987).

No Property Damages in Changing Golf Handicap or in Letter of Reprimand — Summary Judgment Proper: Summary judgment was proper absent any showing of property damages resulting from lowering of a golfer's handicap or from the sending of a letter of reprimand by the board of directors of a private golf corporation. District Court held, and the Supreme Court affirmed, that: (1) a golfer had no right to a specific handicap but rather must earn one in accordance with standards and procedures of the U.S. Golf Association; and (2) in the absence of a clear allegation and convincing proof of fraud or bad faith, the actions of a duly delegated board of a private social club shall not be reviewed by the courts. Johnson v. Green Meadow Country Club, Inc., 222 M 405, 721 P2d 1287, 43 St. Rep. 1368 (1986).

Valid Security Agreement — Subjective Intent Immaterial: A security agreement which was valid and unambiguous, which set forth a description of the collateral, and which clearly covered future indebtedness whether joint or several was held to clearly show the obligations and rights arising from the agreement; therefore, evidence of the subjective intent of the parties was not a material fact issue, and summary judgment was properly granted. Wagner v. Glasgow Livestock Sales Co., 222 M 385, 722 P2d 1165, 43 St. Rep. 1352 (1986).

Issue of Whether Motion Properly Served — Not Appealable: The issue of whether there was a contested issue of fact regarding whether a motion for summary judgment was properly served is a question for the District Court and cannot be raised on appeal. Toavs v. Billings Fed. Credit Union, 221 M 473, 719 P2d 428, 43 St. Rep. 985 (1986), citing In re Marriage of Glass, 215 M 248, 697 P2d 96, 42 St. Rep. 328 (1985).

Summary Judgment — Unlawful Detainer: Appellant who refused to respond to requests for admissions thereby admitted he had no permission or legal right to reside on the property. Respondent followed proper statutory procedure in attempting to have appellant quit the property; therefore, District Court properly granted summary judgment to respondent concerning appellant's unlawful detainer. Toavs v. Billings Fed. Credit Union, 221 M 473, 719 P2d 428, 43 St. Rep. 985 (1986).

Business Pursuits — Steer-Roping Contest: Insured's policy on his ranch excluded business pursuits other than, among other things, farming. For 3 years he held three or four steer-roping contests a year in an arena he built. Nonprofessionals paid a fee and there was prize money, with insured keeping some of the fee money. Insured's own testimony showed he was regularly engaged in the contests for profit and thus was engaged in a business pursuit excluded from policy coverage. A summary judgment for insurer was therefore proper in insured's suit for failure to defend insured and pay an injured steer roper because there was no issue of material fact. Heggen v. Mtn. W. Farm Bureau Mut. Ins. Co., 220 M 398, 715 P2d 1060, 43 St. Rep. 475 (1986).

Obligation to Refund Payment for Gas Field Option: Plaintiff corporation rescinded a gas field option upon which it had paid $50,000 to defendant. After defendant failed to refund money due, plaintiff filed suit and was granted summary judgment for $71,320.55. On appeal, the Supreme Court held that, based upon the exhibits, affidavits, and briefs before the lower court, there was no evidence of a genuine issue of material fact. The escrow agreement and release based upon plaintiff's rescission were supported by adequate consideration since release from contract obligations and forbearance to sue are both adequate consideration. Ayers Oil and Gas, Inc., was a party to both the option and the release agreements as evidenced by Ayers' signature as president. Devon Oil & Gas Co., Inc. v. Ayers, 218 M 223, 707 P2d 523, 42 St. Rep. 1536 (1985).

Summary Judgment Granting Attorneys Amount Billed Under Retainer Agreement: On appeal from summary judgment granting attorneys amount billed under retainer agreement, the Supreme Court held that when an attorney entered into a contingent fee arrangement based on a percentage of the judgment or award recovered by the client, there was no genuine issue of material fact as to the amount owing. The total amount recovered properly included interest, and the attorney was entitled not only to a percentage of the actual damages recovered but also to a percentage of the prejudgment and postjudgment interest recovered. Although the court agreed to treat appellants' counterclaim as an affirmative defense, it held that the affirmative defense did not foreclose a summary judgment determination of attorney fees. Smith v. Howery, 217 M 23, 701 P2d 1381, 42 St. Rep. 995 (1985).

Contract for Deed — Forfeiture Clause — Failure to Make Timely Payment: The purchasers of real estate assumed a contract for deed containing a forfeiture clause. They failed to make one of the payments under the contract. The sellers complied with the notice provisions required to enforce the forfeiture clause. The purchasers failed to tender the overdue installment within the grace period set forth in the default clause. Under these facts there existed no genuine issue of material fact on whether a forfeiture should be granted. Summary judgment was properly entered. Massar Cattle Co. v. Reese, 216 M 22, 699 P2d 87, 42 St. Rep. 609 (1985).

Implied Warranty of Habitability — Privity of Contract Not Required: Sale of a lot to plaintiffs was contingent upon plaintiffs' agreement to allow seller to contract with Mora Bros., Inc., for the construction of their home. When the land beneath their new home began to slide downhill, plaintiffs sued for damages. District Court granted plaintiffs' motion for summary judgment against seller and Mora Bros., Inc., as builder-vendors on the theory of breach of implied warranty of habitability, but denied plaintiffs' motion against Mora Bros., Inc., on the issue of negligence. Supreme Court affirmed District Court's finding that Mora Bros., Inc., is liable to plaintiffs under theory of implied warranty of habitability. The warranty does not depend on a contract for its existence, therefore privity of contract is not required. Once plaintiffs showed that house moved, defendant had to provide an explanation to create a genuine issue of fact. Defendant failed to provide an explanation, so summary judgment was proper. Degnan v. Executive Homes, Inc., 215 M 162, 696 P2d 431, 42 St. Rep. 262 (1985).

Certainty as to Terms of Contract Required — Summary Judgment: In suit for breach of alleged oral contract between law partners to find "a place" in the law firm for any of their children who might wish to become lawyers, District Court granted defendant's motion for summary judgment. Supreme Court affirmed and held that the contract was unenforceable for lack of certainty as to its terms. Defendant's daughter's work for the firm as a law clerk did not perfect the alleged agreement. Plaintiff failed to raise a genuine issue of material fact to preclude entry of summary judgment. Bishop v. Hendrickson, 215 M 158, 695 P2d 1313, 42 St. Rep. 259 (1985). See also Janz v. Quenzer, 232 M 439, 756 P2d 1174, 45 St. Rep. 1178 (1988).

Summary Judgment Proper — No Substantial Evidence Provided: Following an automobile accident in which Morales was killed when a vehicle went off the road into an irrigation ditch, his parents and personal representatives filed a wrongful death and survivorship action against Sally Tuomi, the alleged operator of the vehicle, and her father, the owner of the vehicle. Plaintiffs alleged that Sally Tuomi had negligently caused the death of Morales through her careless operation of the vehicle at the time of the accident. Defendants moved for summary judgment and filed five affidavits in support of the motion. The affidavits, including an affidavit from Sally Tuomi, supported defendants' claim that Morales, not Tuomi, had been the driver of the vehicle. Plaintiffs subsequently submitted an affidavit of their attorney and supplementary answers to interrogatories that indicated that testimony of a forensic pathologist and two deep-sea divers would support plaintiffs' assertion that Tuomi, not Morales, was the driver. Defendants then filed an affidavit from the pathologist, in which he stated that he was unable to form an opinion as to whether Morales was a driver or a passenger, and an affidavit from a diver, in which he stated that the physical evidence at the scene was not inconsistent with Morales being the driver of the vehicle. The District Court granted defendants' summary judgment motion and the Supreme Court affirmed, ruling that with the final two affidavits defendants had discharged their burden under Rule 56(c), M.R.Civ.P., and that plaintiffs had failed to come forward with substantial evidence raising a genuine issue of material fact. Morales v. Tuomi, 214 M 419, 693 P2d 532, 42 St. Rep. 60 (1985). See also Carl v. Chilcote, 226 M 260, 735 P2d 266, 44 St. Rep. 638 (1987).

Navigability for Title Purposes — Summary Judgment — Dearborn River: The District Court properly granted the coalition for stream access and two state departments summary judgment on the issue of navigability of the Dearborn River in 1889 for title purposes. The affidavits and depositions of plaintiffs' two competent historians were admissible because the historians were

qualified experts who provided evidence of the history of the river, their affidavits and depositions disclosed circumstantial guarantees of trustworthiness, and the facts and data they relied on were of a type reasonably relied on by experts in their field; the facts and data did not themselves have to be admissible. The affidavits of defendant landowner's witnesses were worthless, were not admissible, and did not create any genuine issue of material fact concerning the navigability of the river at the time Montana became a state in 1889. Mont. Coalition for Stream Access, Inc. v. Curran, 210 M 38, 682 P2d 163, 41 St. Rep. 906 (1984).

Summary Judgment — Failure to Set Forth Specific Fact Issue: Fourteen months after the case was remanded for trial and after appellants had failed to respond to the District Court's two requests for submission of a triable issue and to respondents' motion for summary judgment on the ground that there was no triable issue of material fact, the District Court found that the underlying issue was moot and ordered summary judgment in favor of respondents. The Supreme Court upheld the District Court, noting that the appellants had failed to set forth specific facts showing a genuine issue for trial, as is required by this rule. Dreyer v. Bd. of Trustees of Mid-Rivers Tel. Co-op, Inc., 204 M 75, 666 P2d 1214, 40 St. Rep. 673 (1983).

Contractor Liability — Speculation Insufficient to Raise Issue of Material Fact: Plaintiff was injured when the car in which he was sleeping crashed into a concrete retaining wall at the end of a dead-end street in Helena. The alleged liability of the defendant was based on the assertion that in working on an SID, defendant's crew had removed a dead-end street sign. Defendant was granted summary judgment based on the holding of Ulmen v. Schweiger, 92 M 331, 12 P2d 856 (1932). On appeal, plaintiff contended that Ulmen no longer represented the modern view of contractor liability. The Supreme Court did not reach this issue, finding that the record indicated no genuine issue of material fact existed upon which defendant's liability could be predicated. No testimony directly connecting defendant with removal of the sign was given except for speculation. Speculation is not a sufficient basis on which to raise a genuine issue of material fact. Fauerso v. Maronick Constr. Co., 203 M 106, 661 P2d 20, 40 St. Rep. 327 (1983), followed in Miller v. Herbert, 272 M 132, 900 P2d 273, 52 St. Rep. 655 (1995), and distinguished in Vincelette v. Metropolitan Life Ins. Co., 273 M 408, 903 P2d 1374, 52 St. Rep. 1035 (1995).

Opposing Party — Speculative Statements Insufficient: A party opposing a summary judgment motion must present facts of a substantial nature, and speculative statements are insufficient to raise a genuine issue of material fact. Brothers v. Gen. Motors Corp., 202 M 477, 658 P2d 1108, 40 St. Rep. 226 (1983).

Lack of Actual Malice Toward Public Figure — Summary Judgment Upheld: Where the defendant issued a press release claiming that the plaintiff had been "indicted" for violations of federal securities laws when in fact he had only been "charged" with such violations and the District Court held the plaintiff to be a public figure as a matter of law, the District Court was correct in awarding summary judgment for the defendant, holding that there was no actual malice by the defendant. The difference between the legal words "indicted" and "charged" is relatively minor in the minds of the average Montana citizen, and the defendant stated that he did not know the difference. There was simply no evidence that the defendant's statement was made with actual malice. Williams v. Pasma, 202 M 66, 656 P2d 212, 39 St. Rep. 2332 (1982).

What Constitutes "Public Figure" for Purpose of Libel Defense — Summary Judgment Properly Granted: The plaintiff, a commodities broker who had some public notoriety within the state as a result of his membership in and speeches to political organizations and as a result of articles about him appearing in national publications, brought a libel action against the defendant. The Supreme Court held that the District Court did not err in granting summary judgment for the defendant, holding the plaintiff to be a public figure as a matter of law (and therefore requiring actual malice to be proven by the plaintiff), as there was no absolute prohibition in the Montana Constitution against granting summary judgment in a libel case and because the plaintiff had a general fame or notoriety in the state and exhibited pervasive involvement in the affairs of society. Williams v. Pasma, 202 M 66, 656 P2d 212, 39 St. Rep. 2332 (1982).

Waiver of Provision in Collective Bargaining Agreement Not Affirmatively Pleaded: A declaratory judgment action was brought to construe a collective bargaining agreement. The plaintiff filed a motion for summary judgment. The defendant opposed the motion and filed an affidavit in support of its opposition. The plaintiff argued that the affidavit submitted by defendant was inadmissible as a violation of the parol evidence rule. The trial court concluded that no material factual issue existed but denied the motion because of waiver by the plaintiff. The waiver issue was addressed in the affidavit but not in any of the other pleadings. The Supreme Court held that the waiver issue was not properly before the trial court and ordered the trial court to reconsider its denial of the motion for summary judgment. The Supreme Court also

said that the defendant could amend its answer to affirmatively plead waiver. Butte Teachers' Union v. Bd. of Trustees, 201 M 482, 655 P2d 146, 39 St. Rep. 2248 (1982).

Retention of Passport Execution Fees by Clerk of District Court: Because the execution of passport applications is not an official duty imposed upon a Clerk of District Court by state statute and since the Legislature has not enacted a specific statute with regard to the disposition of execution fees, the Clerk has no duty to remit the fees to the county general fund. The Supreme Court therefore reversed the summary judgment granted by the District Court. Platz v. Hamilton, 201 M 184, 653 P2d 144, 39 St. Rep. 2041 (1982).

Conclusory Statements Not Sufficient in Opposition: In opposing a motion for summary judgment, the plaintiff merely made conclusory statements in support of its positions that factual issues were still unresolved. The court held that the appellant's conclusions of law would clearly not be admissible into evidence at trial and were not properly before the court. The plaintiff's opposition to the motion was not sufficient to defeat the motion. Small v. McRae, 200 M 497, 651 P2d 982, 39 St. Rep. 1896 (1982).

Summary Judgment Proper — Improperly Endorsed Check Admittedly Negotiated by Bank: Plaintiff drew a check on her account at defendant bank payable to a building supply store to be used for supplies specifically listed on the face of the check and gave it to a contractor who was working for her. Contractor, unknown to plaintiff, endorsed the check "for exchange only" to the supply store. Based on this endorsement, defendant bank issued a new check payable to the supply store but without restriction on its face. Contractor applied the check to his own account with the supply store, rather than using it to buy materials for plaintiff. Several weeks later, the same thing was done with a check made payable to another building supply store. Plaintiff sued defendant bank for conversion. The Supreme Court reversed the District Court's denial of plaintiff's motion for summary judgment because the undisputed evidence showed that the defendant bank accepted and negotiated two checks that were not endorsed by the payees or by anyone clothed with apparent or actual authority to act for them. Eatinger v. First Nat'l Bank of Lewistown, 199 M 377, 649 P2d 1253, 39 St. Rep. 1465 (1982).

Requests for Admissions Deemed True for Failure to Answer — Basis for Summary Judgment: Summary judgment was properly granted plaintiff suing for delinquent payments under lease of bar and lounge equipment where all issues of material fact were resolved when a request for admissions relating to those facts was sent defendants by plaintiff and was not answered for 15 months and the trial court deemed the facts in the request for admissions as true for failure to answer the request within the required 30-day period after service of the request and where defendants did not give any evidence to raise an issue of material fact. All-States Leasing Co. v. Top Hat Lounge, 198 M 1, 649 P2d 1250, 39 St. Rep. 425 (1982).

Fire Damage — No Negligence as a Matter of Law: A slag pile started burning prior to 1950. For several years red embers were visible, but in later years the embers disappeared. In 1961, when a highway was built through a portion of the pile, the fire was apparently dead. In 1979, during a windstorm, a fire started near the slag pile and spread onto the plaintiff's land. Plaintiff sued defendant for the negligent use of its land. Based on the pleadings, depositions, answers to interrogatories, and admissions on file, the court concluded that the defendant's conduct in leaving the slag pile untouched until 1979 was reasonable, prudent, and did not create an unreasonable hazard. The court properly granted summary judgment to the defendant. Belue v. St., 199 M 451, 649 P2d 752, 39 St. Rep. 1516 (1982).

Intention of Deceased Maker of Life Insurance Policy — No Genuine Issue of Fact of Intent: The plaintiffs brought an action against their stepmother to recover the proceeds of their deceased father's life insurance policy which had been paid to the defendant in accordance with the terms of the policy but contrary to a divorce decree. The District Court relied upon attorney Sternhagen's file in the prior divorce proceeding to determine the intent of the deceased with respect to his children. The District Court properly granted summary judgment for the plaintiff children as there was no genuine issue of fact as to the deceased's intention to maintain the children as beneficiaries of the policy until their majority. The divorce file is replete with evidence that the attorneys in the divorce proceeding and the court simply incorporated the deceased's agreement with his former wife into the terms of the divorce decree. Herrig v. Herrig, 199 M 174, 648 P2d 758, 39 St. Rep. 1274 (1982).

Canceled Airline Flight — Summary Judgment Properly Issued: Where defendant airline canceled flight, causing plaintiff to arrive 8 hours late at his destination and allegedly causing loss of earnings, summary judgment in defendant's favor was properly granted as a matter of law where weather prevented landing at destination point and Civil Aeronautics Board regulations clearly permit flight cancellation under such conditions. Johnson v. NW. Orient Airlines, 197 M 318, 642 P2d 1067, 39 St. Rep. 594 (1982).

Consent to Withdraw Funds From Joint Account: A stock brokerage firm obtained consent from the husband to withdraw funds from a joint ready asset account established by the husband and his wife. Because the firm could not be held liable by the wife for failing to obtain her consent to withdraw the funds, summary judgment was properly granted. Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 197 M 1, 640 P2d 453, 39 St. Rep. 305 (1982).

Specific Performance of Contract for Deed — Summary Judgment Held Proper: Plaintiffs, purchasers under contract for deed, tendered the balance due under the contract. Sellers were unable to provide clear and merchantable title. The Supreme Court held plaintiffs entitled to summary judgment granting specific performance against assignee of original buyer. Pond v. Lindell, 194 M 240, 632 P2d 1107, 38 St. Rep. 1276 (1981).

Real Estate Sale Including Subordination Agreement — No Genuine Issue of Material Fact Found: Where the plaintiff sold her house and adjoining lot to the developers of a housing project, agreeing under the terms of the sale to subordinate her interest in the lot to the interest of the bank financing the construction of the project, the District Court did not err in granting the plaintiff's motion for summary judgment to force the developers to make the final contract payment to the plaintiff. Summary judgment is to be granted where there is no genuine issue of material fact. The fact that certain questions remained as to payment of advanced construction costs would not bar the issuance of summary judgment, for sufficient money appears from affidavits to be available to pay the plaintiff and other construction creditors. Byrd v. Bennet, 193 M 237, 631 P2d 695, 38 St. Rep. 1083 (1981).

State Easement for Fishing Access — Summary Judgment Properly Granted: A landowner brought an action to prevent the state from opening a fishing access site and from paving a road to the site, based on a claimed fee title to the roadway. The District Court granted the state a summary judgment as a matter of law. The Supreme Court found the landowner's interest was an ordinary easement. The words "private road" did not clearly indicate intent to create in him an "exclusive" easement. The state's use of the road cannot be declared inconsistent with the landowner's on the basis of speculation. Furthermore, under various statutory provisions, the state obtained the land lawfully. The plaintiff had not yet been deprived of his property interest. Any damages remained speculative at the time of the decision. The summary judgment was, accordingly, affirmed. Titeca v. St., 194 M 209, 634 P2d 1156, 38 St. Rep. 1533 (1981).

Illegal Receipt of Fee by Official — Factual Issue Not Material: In a case in which a Sheriff was charged with receiving a fee in violation of law, the State urged on appeal that a summary judgment was precluded by the existence of a genuine issue of material fact. The Supreme Court agreed there were factual issues involved in the case, but because the reward money received by the Sheriff was not a fee under the statute with which the Sheriff was charged, the factual issues were not material to the case since their resolution could not affect the result of the case. The Sheriff was entitled to summary judgment as a matter of law. St. v. DeMers, 192 M 367, 628 P2d 676, 38 St. Rep. 877 (1981).

Summary Judgment Granted on Basis of a Signed Release: The District Court acted properly in granting defendant's motion for summary judgment based on defendant's contention that a release entered into between plaintiff and defendant bank bars any action by plaintiff in attempting to recover trust fund money from defendant. Krusemark v. Hansen, 186 M 174, 627 P2d 1202, 38 St. Rep. 594 (1981).

Mechanics' Lien (Now Construction Lien) — Sufficient Property Description in Affidavits — Summary Judgments: In this case on a mechanics' lien (now construction lien), the issue on appeal was whether the description of the subject property in the notice of the lien filed with the County Clerk and Recorder was legally sufficient to identify the property for purposes of enforcing the lien. The appeal was taken on cross-motions for summary judgment. The Supreme Court found error in granting summary judgment to the property owners and held that the supplier seeking the lien was entitled to summary judgment as a matter of law. Noting that the procedural requirements of 71-3-511 (since repealed) have been held strictly enforceable, the court held that the statutes are to be construed liberally so as to give effect to their remedial character once the procedure has been fulfilled. Although the land on which the structure stood was covered by the lien on the structure, the land did not need to be described. When, as here, the land was described, the erroneous part of the description was to be rejected. If a sufficient description remained to identify the particular property sought to be charged, the lien would be upheld. Other documents filed with the notice of lien could be used to identify the building. In this case, those documents and photographs of the property in question sufficed to form a proper basis for summary judgment against the property owners. Gen. Elec. Supply v. Bennett, 192 M 110, 626 P2d 844, 38 St. Rep. 553 (1981), followed in Swain v. Battershell, 1999 MT 101, 294 M 282, 983 P2d 873, 56 St. Rep. 424 (1999).

Summary Judgment for Prescriptive Public Easement — Estoppel From Denying County Ownership: Where the purchasers of real property brought an action for breach of contract, misrepresentation, and breach of a statutory and equitable obligation to maintain a county road against the sellers of the property and the county, the previous property owner, and the sellers in turn filed a cross-complaint for indemnity against the previous owner, the trial court did not err in denying the county's motion for summary judgment and granting the motions of the plaintiffs and sellers for summary judgment. On a motion for summary judgment the movant has the burden of establishing prima facie the absence of any genuine issue of material fact, and when the movant does so, the party opposing the motion must come forward with substantial evidence raising a genuine issue of material fact. The sellers presented evidence in support of their motion showing a prescriptive public easement and estoppel against the county and former owner. The county failed to present evidence to meet its burden. Riley v. Carl, 191 M 128, 622 P2d 228, 38 St. Rep. 83 (1981).

No Error Where Claim of When Action Accrued Not Before Court: In an action for compensatory and exemplary damages for wrongful conversion of plaintiff's merchandise stored in defendant's warehouse, the District Court properly granted defendant's motion for summary judgment on the basis that the action was barred by the Statute of Limitations. Plaintiff's claims for recovery accrued 4 years previously, when the defendant warehouse sold plaintiff's merchandise, not, as plaintiff claimed, when plaintiff discovered upon demand that defendant sold the merchandise. In this instance the allegation of knowledge, demand, and then refusal to return the goods was not raised in the complaint, the answer, the interrogatories, or in any affidavit properly before the District Court at the time summary judgment was granted, and thus plaintiff's allegations as to when the action accrued will not be considered on appeal. Seven Seas Import-Export & Mercantile, Inc. v. Hardee Foods, 190 M 508, 621 P2d 1097, 38 St. Rep. 60 (1981).

Motion Granted — Preclusion of Child Custody Challenge by Estoppel and Laches: The mother of the child over whom a custody dispute arose was precluded from having set aside the child custody provision in the default marriage dissolution decree awarding custody to the respondent. The mother was barred by estoppel, laches, and res judicata from asserting that the respondent was not the child's natural parent. Morrell v. Giesick, 188 M 89, 610 P2d 1189 (1980).

Construction of Instruments — Not a Factual Issue: When a summary judgment was granted plaintiff in an action for conversion based upon corporate documents, bank loan contracts, and security agreements, defendants could not prevail an appeal on the theory that questions regarding the content of these documents were questions of material fact because under 1-4-101 the construction of instruments is a matter of law. Therefore, the granting of the summary judgment under this rule was correct. Farmers St. Bank v. Johnson, 188 M 55, 610 P2d 1172 (1980).

Employment Contract Controls — No Genuine Issue of Material Fact: There was no need for further interpretation or parol evidence of an employment contract which expressly exempted appellant from recovering overtime compensation. There was no need for construction of any implied contract since there can be no express and implied contract for the same thing existing at the same time. Thus, summary judgment was appropriate. Weston v. Mont. Highway Comm'n, 186 M 46, 606 P2d 150 (1980).

Interpretation of Contract — Motion Properly Granted: Where appellant and respondent entered into an agreement in which the contract provided that in consideration for making the downpayment on certain property, respondent would receive a 50% interest in the property, the court properly granted respondent's motion for summary judgment since the language of the contract itself shows that there was no genuine issue of fact and because appellant failed to come forward with substantial evidence showing the existence of such a genuine issue. Downs v. Smyk, 185 M 16, 604 P2d 307 (1979).

Plumbing Regulation — No Genuine Issue: Plaintiff's claim that since the Board of Plumbers allegedly could not have inspected every plumbing installation during a set period of time, there remained a genuine issue of material fact that precluded entry of judgment on the pleadings. The claim was unfounded since inspections were not mandatory and were intended to be selective. Billings Associated Plumbing, Heating, & Cooling Contractors v. Bd. of Plumbers, 184 M 249, 602 P2d 597 (1979).

Insufficient Showing of Fact Issue — Existence of Joint Venture: Plaintiff's allegation that the defendant was liable for money owed to plaintiff by a corporation because the defendant and the corporation were engaged in a joint venture, was not sufficient to defeat a motion for summary judgment. Plaintiff's allegations were supported only by the fact that the defendant and the corporation had been issued a joint venture license from the State of California and that the

plaintiff would rely on the testimony of certain contractors. The mere issuance of such a license is insufficient to indicate that it was actually used or that a joint venture existed, and the statement that certain contractors would testify is an unsupported conclusion. Nat'l Gypsum Co. v. Johnson, 182 M 209, 595 P2d 1188 (1979).

Prior Knowledge of Condition: Plaintiff rented a residence from the Bureau of Indian Affairs. The BIA replaced the front steps of the residence with steps that were not as long horizontally. Plaintiff caught her foot in the depression remaining from the old steps and fractured her ankle. Her knowledge of the condition prior to the injury precludes her recovery, and summary judgment must be rendered in favor of the defendant. Hayes v. U.S., 475 F. Supp. 681 (D.C. Mont. 1979).

Issue of Fact — Real Estate Transaction: In view of the record indicating that a real estate transaction did not close until between July 28 and July 30, appellant's simple assertion that the transaction closed on July 20 will not serve to create an issue of fact merely to avoid summary judgment. Van Ettinger v. Pappin, 180 M 1, 588 P2d 988 (1978).

Issue of a Substantial Nature: The trial court properly granted plaintiff's motion for summary judgment since defendants failed to present a genuine issue of material fact and of a substantial nature, not fanciful, frivolous, gauzy, or merely suspicious. Cheyenne W. Bank v. Young v. Zastrow, 179 M 492, 587 P2d 401 (1978). See also Kimble Properties, Inc. v. St., 231 M 54, 750 P2d 1095, 45 St. Rep. 425 (1988).

Injury by Coemployee Covered by Workers' Compensation: In an action for damages for personal injuries in which defendants were coemployees of plaintiff and plaintiff's injury arose out of an industrial accident for which he received workers' compensation, the defendants carried the burden of showing a complete absence of any genuine issue as to material facts. Forrester v. Kuck, 177 M 44, 579 P2d 756 (1978).

Modification of Listing Agreement and Failure to Provide Copy: A seller's alleged verbal consent to a broker's unsubscribed and unexecuted modification of a listing agreement was not a factual issue precluding summary judgment in light of the statutory and decisional law which is uniformly suspicious of such modifications. As a matter of law, the broker's failure to provide the seller with a copy of the listing agreement also supported the granting of summary judgment. Carnell v. Watson, 176 M 344, 578 P2d 308 (1978).

Withdrawal From Hospital District: Because uncontradicted testimony before the Board of County Commissioners showed a petitioning area would not be benefited by remaining in the county's hospital district, the District Court properly ruled the Board had abused its discretion in denying the withdrawal petition and summary judgment was proper. Sorenson v. Bd. of County Comm'rs, 176 M 232, 577 P2d 394 (1978).

Claim Against Estate — Statutory Period: In action to recover from an estate for services performed for decedent, the court did not err in denying plaintiffs' motion to amend and supplement a complaint based on contract to include gift theory because the services were performed without expectation of payment and the claim sued upon (gift theory) was not filed within the statutory period. Summary judgment was proper. Zeigler v. Kramer, 175 M 236, 573 P2d 644 (1978).

Lack of Consideration or Setoff: There was no issue of material fact precluding summary judgment, either of lack of consideration or of setoff, because the express language of the note sued on stated that consideration existed, and the second action was a personal claim unrelated to the note. Keller v. Llewellyn, 175 M 164, 573 P2d 166 (1977).

Easement by Prescription — Not Triable Issue: The evidence established existence of an easement by prescription and defendant failed to meet his burden of showing that a triable issue of fact remained. Yecny v. Day, 174 M 442, 571 P2d 386 (1977).

Laches and Statute of Limitations Adequately Plead: Plaintiffs' suit for rescission was barred by laches and their action for damages for breach of contract was barred by the 4-year Statute of Limitations. Since defendant's affirmative defenses revealed that plaintiffs had adequate notice of the defenses of laches and Statute of Limitations, although not specifically denominated as such, summary judgment was properly granted to defendants. Brabender v. Kit Mfg. Co., 174 M 63, 568 P2d 547 (1977).

Group Libel Rule: The court did not err in granting defendants' motions for summary judgment in a libel action because the allegedly defamatory statements could not reasonably be interpreted as applying specifically to plaintiffs. The common-law group libel rule precluded their recovering in a defamation action. Granger v. Time, Inc., 174 M 42, 568 P2d 535 (1977).

Specific Performance of Lease Option — Laches: As a result of plaintiff's negligence in asserting his rights and the change in defendant's circumstances, the ends of justice were served

by granting defendant's motion for summary judgment. Seifert v. Seifert, 173 M 501, 568 P2d 155 (1977).

Misrepresentation Action in Real Estate Sale: The court properly awarded summary judgment to defendants in a misrepresentation action under 37-51-321 when the record indicated that no fraudulent representations were made by defendants and the Statute of Limitations had expired, notwithstanding the "discovery" exception. Anderson v. Applebury, 173 M 411, 567 P2d 951 (1977).

Products Liability Action: Summary judgment was properly granted defendants in a products liability action when plaintiff failed to demonstrate that the alleged defect existed when the product left the hands of the manufacturer. Duncan v. Rockwell Mfg. Co., 173 M 382, 567 P2d 936 (1977).

Statute of Limitations Bars Tort Claims: A review of the pleadings, depositions, answers to interrogatories, and admissions show there was no genuine issue of material fact and defendants were entitled to summary judgment on claims sounding in tort because the Statute of Limitations was a bar. Kearns v. McIntyre Constr. Co., 173 M 239, 567 P2d 433 (1977).

Laches: Summary judgment was proper when laches was established as a defense to the enforcement of a trust. Johnson v. Johnson, 172 M 150, 561 P2d 917 (1977).

Intent Irrelevant if Agreement Clear and Specific — Subordination: Summary judgment is correct when subordination agreement does not present an issue of fact. The plain and clear meaning of the instrument controls and the intent of the parties is ascertained from the instrument. Batey Land & Livestock Co. v. Nixon, 172 M 94, 560 P2d 1334 (1977).

Summary Judgment for Defendant in Malpractice Action: Summary judgment for dental malpractice was affirmed. Llera v. Wisner, 171 M 254, 557 P2d 805 (1976).

Products Liability — Burden of Proof: Summary judgment for defendant was proper when plaintiff failed to prove that product was defective at the time it left manufacturer's hands. Barich v. Ottenstror, 170 M 38, 550 P2d 395 (1976).

Burden — Motion for Summary Judgment: Court properly granted defendant's motion for summary judgment because plaintiff presented no evidence of a material and substantial nature raising a genuine issue of fact. Taylor v. Anaconda Fed. Credit Union, 170 M 51, 550 P2d 151 (1976), followed in Thornton v. Songstad, 263 M 390, 868 P2d 633, 51 St. Rep. 104 (1994).

Presence of Gates — Presumption of Permissive Use: Summary judgment for defendant was proper because plaintiff failed to establish an easement by prescription to a road crossed at several points by fences with closed gates owned and controlled by defendant. The presence of gates that must be opened by the user was strong evidence of permissive rather than adverse use since it tended to establish "total dominion" over the roadway by defendant. Harland v. Anderson, 169 M 447, 548 P2d 613 (1976).

Purpose of Rule: The general purpose of this rule is to dispose promptly of actions in which there is no genuine issue of fact, thereby eliminating unnecessary trial, delay, and expense. Harland v. Anderson, 169 M 447, 548 P2d 613 (1976), followed in Westmont Tractor Co. v. Continental I, Inc., 224 M 516, 731 P2d 327, 43 St. Rep. 2380 (1986).

Medical Malpractice Case — Standard of Care: The defendants, hospital and doctors, are entitled to summary judgment as a matter of law because plaintiff failed to carry burden of initial evidentiary obligation of establishing standard of care against which the acts or omissions of defendants can be measured to establish negligence on their part. Mont. Deaconess Hosp. v. Gratton, 169 M 185, 545 P2d 670 (1976), followed in Estate of Nielson v. Pardis, 265 M 470, 878 P2d 234, 51 St. Rep. 591 (1994), and Seal v. Woodrows Pharmacy, 1999 MT 247, 296 M 197, 988 P2d 1230, 56 St. Rep. 959 (1999). See also Butler v. Domin, 2000 MT 312, 302 M 452, 15 P3d 1189, 57 St. Rep. 1320 (2000).

Finding of Permissive Use — Summary Judgment Properly Granted in Easement by Prescription Action: Where plaintiff's use of trail was a matter of neighborly cooperation between friendly ranchers, trial court's granting of defendant's motion for summary judgment was proper as the accrual of a right-of-way easement by prescription requires that the usage made of the claimed right-of-way be adverse and hostile, not permissive. Ewan v. Stenberg, 168 M 63, 541 P2d 60 (1975).

Conduct Amounting to Contributory Negligence as a Matter of Law: Trial court erred in not granting defendant's motion for summary judgment where plaintiff testified he was looking straight ahead, rather than where he was walking, when he slipped and fractured an ankle and twisted his back on oil spot approximately 6 feet long. State ex rel. NW. Airlines v. District Court, 167 M 464, 539 P2d 714 (1975).

Negligent Wounding of Bystander: It was proper for trial court to grant summary judgment to defendant where plaintiff, a bystander, was wounded while observing a disturbance and claimed

defendant, a police officer, negligently and carelessly shot him, as the ballistics report established that the plaintiff was wounded by a bullet fired from a Colt revolver and defendant was carrying a .357 Smith & Wesson pistol. Plaintiff failed to present any evidence of a material and substantial nature raising a genuine issue of fact that defendant wounded him. Rickard v. Paradis, 167 M 450, 539 P2d 718 (1975).

Summary Judgment — Depositions — Exhibits: The depositions of witnesses as well as exhibits introduced for the purposes of deposition were a sufficient basis for the court to conclude that there was no genuine issue of material fact regarding the lack of control of the city over an intersection. The court should have granted the city's motion for summary judgment. State ex rel. Helena v. District Court, 167 M 157, 536 P2d 1182 (1975).

No Violation of Safety Code — No Issue of Negligence: Defendant, whose electrical powerlines were installed in compliance with the minimum safety requirements of the national safety code, was entitled to summary judgment in negligence action brought by plaintiff who, although aware of overhead powerlines, was severely shocked when he hoisted a long metal pole into contact with the lines while drilling a well. Sprankle v. DeCock, 165 M 274, 530 P2d 457 (1974).

Oral Contract for Broker's Commission: Where it was agreed that there was no written agreement to pay the broker's commission, but only an oral promise by the administrator of estate to petition court for allowance of commission, summary judgment was proper; nor did the plaintiff's presentation of various legal theories on which relief might be granted raise any genuine issue of fact. Meech v. Cure, 165 M 49, 525 P2d 546 (1974).

Action to Rescind Contract: No genuine issue of fact was raised in action for rescission of contract to purchase motel, where seller had represented that motel was "capable" of producing a certain income; and although seller had failed to deliver bill of sale for motel furnishings, there was no resulting damage upon which rescission could be based. Beierle v. Taylor, 164 M 436, 524 P2d 783 (1974), followed in Norwood v. Serv. Distrib., Inc., 2000 MT 4, 297 M 473, 994 P2d 25, 57 St. Rep. 8 (2000).

Statute of Frauds — Listing Agreement: Potential buyer was properly granted summary judgment for return of earnest money when defendant realtor could produce no written documents to support his claims relative to listing property for sale and acting as real estate agent for property owners. Pack River Co. v. Young, 162 M 271, 511 P2d 12 (1973).

Contract Prohibiting Competing Businesses: Summary judgment for defendant was proper where contract clearly prohibited competing activities only on specific premises, and plaintiff admitted in his answers to interrogatories that the activities he sought to prevent were outside the premises. Matteucci's Super Save Drug v. Hustad Corp., 158 M 311, 491 P2d 705 (1971).

Summary Judgment Upheld — Bank Charter — Use of Affidavits: Summary judgment was proper for proponents of new bank charter and superintendent of banks against bank seeking to prevent proponents from receiving charter. Motion to strike affidavit of superintendent contained in appellate record was granted because it was not before lower court and this rule specifically prohibits the use of affidavits. Miners & Merchants Bank v. Dowdall, 158 M 142, 489 P2d 1274 (1971).

Negligence — Causation — Summary Judgment Proper: In an action for injuries allegedly caused by negligence of contractor and his agents, trial court properly granted summary judgment pursuant to this section where record revealed total absence of negligence on part of defendant or its employees, and record revealed that nothing defendant did or failed to do was proximate cause of plaintiff's injuries. Flansberg v. Mont. Power Co., 154 M 53, 460 P2d 263 (1969).

Summary Judgment for Defendants — Mechanics' Liens (Now Construction Liens): Because lien was not filed within 90 days after last item in open account was delivered, summary judgment for defendant was proper. Am. Homes v. Broadmoor Corp., 153 M 184, 455 P2d 334 (1969).

Insurance Agreements: When an insurer is obligated to defend, refuses to do so after notice, makes no protest to a settlement agreement, and fails to show that the settlement was unreasonable, the insured is entitled to summary judgment as a matter of law. Wash. Water Power Co. v. Morgan Elec. Co., 152 M 126, 448 P2d 683 (1968).

Summary Judgment for Defendant — Failure to Pay Corporate License Taxes — Effect on Contract's Enforcement: Summary judgment for defendant was proper when assignee of accounts receivable and assignor/corporation which failed to pay corporate license taxes were barred from claiming rights under contractual provisions which were unenforceable due to failure to pay taxes notwithstanding subsequent payment. Mfr. Acceptance Corp. v. Krsul, 151 M 28, 438 P2d 667 (1968).

Negligence — Principal and Agent: Purported agent and principal were entitled to summary judgment where plaintiff wholly failed to establish prima facie case of negligence on the part of either, even though evidence raised question of fact as to existence of agency, since it would be impossible to impute negligence to principal where negligence had not been established against supposed agent. Knowlton v. Sandaker, 150 M 438, 436 P2d 98 (1968).

Appellate Review — Proof of Issue of Fact Required at Trial: Motion for summary judgment was properly granted where it was apparent from record that there was no genuine issue as to any material fact, notwithstanding aggrieved party's argument on appeal that had he been allowed to go to trial he would have presented proofs establishing genuine issue of fact, since aggrieved party presented no such proofs at hearing on original motion nor at hearing on motion to vacate judgment. Brown v. Thornton, 150 M 150, 432 P2d 386 (1967).

Support Proceedings: Defendant was properly granted motion for summary judgment in action to enforce amount agreed upon for support in separation agreement which had been reduced by subsequent court modifications. Gessell v. Jones, 149 M 418, 427 P2d 295 (1967).

Summary Judgment Upheld for Taxpayer: Summary judgment for taxpayer based upon statutory assessment scheme for motor vehicle taxation was upheld. Swartz v. Berg, 147 M 178, 411 P2d 736 (1966).

Summary Judgment for Plaintiff Upheld — Unlawful Trespass: Defendants committed a naked and unlawful trespass on property belonging to plaintiffs, and summary judgment for plaintiff was correct. Schell v. Peters, 147 M 21, 410 P2d 152 (1966).

Purpose — Proof — Deed's Validity Upheld: The purpose of this rule is to promptly dispose of actions in which there is no genuine issue of fact. The court has no duty to anticipate possible proof that might be offered under the pleadings. Judgment against party seeking cancellation of deed and reconveyance of property was upheld. Silloway v. Jorgenson, 146 M 307, 406 P2d 167 (1965).

Summary Judgment Reversed — Taxation: Summary judgment for county and others was reversed, and summary judgment for taxpayer was ordered. Chicago, Milwaukee, St. Paul & Pac. R.R., v. Bennett, 145 M 191, 399 P2d 986 (1965).

BURDEN OF PROOF

No Showing That Defendants' Actions in School Bus Incident More Than Likely Caused Student's Physical and Mental Injuries — Factors in Judicial Determination of Duty of Care — Summary Dismissal of School District Liability Proper: A student returning home on a school bus from a performance with the school pep band asked the director to stop the bus so that the student could use the restroom, but the director refused. The student was subsequently disciplined by the school for various actions related to the incident and soon after became seriously ill. The student and his parents filed an action against the school district, the director, and the bus driver, alleging that various breaches of the duty of care triggered or accelerated the student's development of diabetes and caused his posttraumatic stress disorder. The District Court granted summary judgment for defendants, and on appeal, the Supreme Court affirmed. The existence of a duty of care depends on the foreseeability of the risk and on a weighing of the policy considerations for and against the imposition of liability, including: (1) moral blame attributable to defendant's conduct; (2) prevention of future harm; (3) extent of the burden placed on defendant; (4) consequences to the public of imposing a duty; and (5) availability of insurance for the risk involved. Further, the law of torts holds a defendant liable only for injuries to others that were to the defendant at the time reasonably foreseeable. A defendant owes a duty with respect to risks and hazards whose likelihood made the conduct unreasonably dangerous and hence negligent in the first instance. The specific injury need not be foreseeable, rather the question is whether defendant could have foreseen that the conduct would result in injury to plaintiff. The District Court here concluded that defendants owed no duty of care because the student's injuries were not foreseeable, which was an erroneous focus on the particular injury rather than on the foreseeability that defendants' conduct could result in the injury. However, if a plaintiff fails to offer proof of any one of the elements of negligence—duty, breach, causation, and damages—then summary judgment in favor of defendant is proper. The question remained whether plaintiffs' experts adequately established causation, and the Supreme Court held that they did not. The experts testified that defendants' conduct could have caused or accelerated the student's injuries, but under Butler v. Domin, 2000 MT 312, 302 M 452, 15 P3d 1189 (2000), the testimony did not meet the threshold of establishing that defendants' actions more than likely caused the injuries. Absent a causal connection between defendants' actions and the student's injuries, summary judgment for defendants was proper. Hinkle v. Shepherd School District No.

37, 2004 MT 175, 322 M 80, 93 P3d 1239 (2004), distinguishing Kolar v. Bergo, 280 M 262, 929 P2d 867 (1996).

Failure to Provide Expert Testimony Regarding Adequacy of Swimming Pool Depth for Diving — Summary Judgment Proper: Plaintiff was injured diving into a municipal swimming pool and sued the city for negligence and strict liability. Administrative rules adopted in 1985 set standards articulating board lengths for various pool depths, but the rules apply only to pools constructed or remodeled after June 28, 1985, and the pool in question was constructed in 1972, so the rules did not apply. Further, 50-53-107 does not define a particular standard of conduct to which public pool operators must conform, but rather imposes a general duty on a city to keep a pool safe. Absent an applicable standard, plaintiff was required to present expert testimony to assist jurors in determining whether the pool depth was unreasonably dangerous for the diving board length. Plaintiff offered no expert testimony on the subject, thus failing to establish a prima facie case of liability, so the District Court properly granted summary judgment to the city. Dayberry v. E. Helena, 2003 MT 321, 318 M 301, 80 P3d 1218 (2003).

No Common-Law Duty of County to Notify Tenant of Release of Detainee: Leanne Miller obtained a protective order prohibiting her husband, Tommy, from contacting Leanne, her property, or her children. When Tommy was arrested following multiple violations of the restraining order, Leanne requested that the Gallatin County detention center notify her upon Tommy's release. However, the center did not contact Leanne when Tommy was released. Tommy then went to Leanne's rental home, killed her, and set fire to the home. The landlord filed a negligence action against the county for damages to the property resulting from the county's failure to notify Leanne, asserting that the county had a common-law duty to the landlord. The District Court granted summary judgment to the county, and the landlord appealed, but the Supreme Court affirmed. The complaint was couched in terms of the county's duty to Leanne, but cited no independent common-law duty extending to the landlord. Without a prevailing common-law theory, the cause of action derived solely from 46-24-104 and 46-24-203, regardless of whether those sections were cited or not. Therefore, under 46-24-105, the landlord was precluded from recovering against the county based on the failure to notify Leanne of Tommy's release, and summary judgment was proper. Bos v. Gallatin County, 2003 MT 162, 316 M 292, 71 P3d 1209 (2003).

Voluntary Dismissal of Injunction Not Per Se Equivalent to Wrongful Issue of Injunction: The Osmolaks were granted a temporary restraining order against the Olsons in connection with a land deal, but before the show cause hearing, the Osmolaks were assured that the Olsons intended to perform as agreed in the buy-sell agreement, so the Osmolaks, convinced that there was no need to continue litigation, dismissed the action. The Olsons then sought attorney fees and costs for wrongful injunction, arguing that the voluntary dismissal had the same effect as a court decision finding that the Osmolaks were not entitled to the injunction. In defense, the Osmolaks sought to introduce into evidence the reasons why they had voluntarily dismissed the suit, but the District Court disallowed the evidence, holding that dismissal prior to an adjudication on the propriety of the injunction was an admission that the restraining order was without merit, entitling the Olsons to summary judgment and damages. The Osmolaks appealed, and the Supreme Court reversed. An order of dissolution in such cases is not per se equivalent to a court determination of wrongful injunction, but is only prima facie evidence that the injunction was improperly issued and may be rebutted by the party against whom damages are sought. The District Court erred in resolving the case on summary judgment because the Osmolaks should have been allowed to introduce evidence that their voluntary dismissal was justified, so the case was remanded for further proceedings. Olson v. Osmolak, 2003 MT 151, 316 M 216, 70 P3d 1242 (2003), following Stewart v. Miller, 1 M 301 (1871), and distinguishing Hatch v. Nat'l Sur. Corp., 105 M 245, 72 P2d 107 (1937), and Sheridan County Elec. Co-op, Inc. v. Ferguson, 124 M 543, 227 P2d 597 (1951).

Absence of Evidence Cannot Establish Existence of Material Fact: An absence of evidence cannot, under law or common sense, establish the existence of a genuine issue of material fact. Saari v. Winter Sports, Inc., 2003 MT 31, 314 M 212, 64 P3d 1038 (2003), followed in Weinert v. Great Falls, 2004 MT 168, 322 M 38, 97 P3d 1079 (2004).

Payment for Attorney Who Voluntarily Withdraws From Contingent Fee Case Before Occurrence of Contingency Based on Good Cause for Withdrawal — Modern Majority Rule: Sullivan retained plaintiff Bell & Marra, pllc, to represent him in an employment termination case, entering a contingent fee agreement for payment. Plaintiff represented Sullivan through two trials and settlement negotiations, after which it sent Sullivan a letter stating that it could not continue under the written 40% contingent arrangement and demanding that, in order to continue representation, Sullivan deposit $2,000 to cover costs of appeal transcripts and agree to

pay plaintiff a percentage of all settlement proceeds, judgment damages, and other consideration recovered from the employer in the amount of 50% for appeal and subsequent trial for discrimination or wrongful discharge and an additional 5% for each appeal thereafter. Sullivan declined the ultimatum and hired new counsel. Upon settlement of Sullivan's employment claim, plaintiff filed: (1) a lien foreclosure action for payment of fees involving the employment claim, including advanced costs plus 40% of the recovery or the quantum meruit value of the legal services performed computed on an hourly basis; (2) a contract action related to fees incurred during representation of Sullivan's dissolution proceedings; and (3) a claim against Sullivan's employer requesting that settlement proceeds be held or paid to plaintiff according to the lien against Sullivan. Sullivan asserted affirmative defenses, including fraud, unavailability of quantum meruit damages because of plaintiff's repudiation of the fee agreement, and breach of fiduciary duty, as well as counterclaims for breach of contract, conversion, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty. The District Court concluded that whether plaintiff withdrew or was fired was irrelevant and that the parties simply terminated the attorney-client relationship. The court then denied Sullivan's motions and counterclaims and granted summary judgment to plaintiff on all issues, awarding plaintiff attorney fees for the employment-related litigation at the contract rate of 40% minus the amount in the fee arrangement with Sullivan's subsequent attorney; fees and costs incurred during Sullivan's dissolution action; outstanding costs for the employment litigation; prejudgment interest on the damage awards; and plaintiff's attorney fees and costs incurred in pursuing the foreclosure action. Sullivan appealed the summary judgment. In a case of first impression, the Supreme Court adopted the modern majority rule, which holds that an attorney who voluntarily withdraws from a contingency fee case without good cause forfeits recovery of compensation for services performed, but if withdrawal was for good cause or was justified, the attorney may recover based on quantum meruit. Whether good cause exists depends on the facts and circumstances of each case. Good cause exists when a client has engaged in culpable conduct, when continued representation would violate an attorney's ethical obligations, or when an attorney lacks the resources to pursue litigation. However, a client's refusal to accept a settlement offer does not constitute good cause, nor is it justifiable for an attorney to withdraw if the attorney does not believe that the negotiated contract is sufficiently compensatory. In the present case, plaintiff withdrew because continued representation had become a financial burden, which is a good cause for withdrawal under the Montana Rules of Professional Conduct, but not necessarily one entitling an attorney to compensation. Faced with being forced to enter into a new and unacceptable fee agreement when the time for pursuing an appeal was running, Sullivan's decision to reject plaintiff's ultimatum resulted in plaintiff's voluntary withdrawal. In light of the modern majority rule, plaintiff did not have good cause to withdraw that would justify compensation, so the District Court's summary judgment was reversed. Bell & Marra, pllc v. Sullivan, 2000 MT 206, 300 M 530, 6 P3d 965, 57 St. Rep. 810 (2000), following Ausler v. Ramsey, 868 P2d 877 (Wash. Ct. App. 1994). See also Augustson v. Linea Aerea Nacional-Chile S.A., 76 F3d 658 (5th Cir. 1996).

Failure to Disclose Experts by Scheduled Date — Inadequate Testimony to Establish Prima Facie Case: Romans was required by the original and amended scheduling orders to disclose experts by certain dates. Romans failed to do so, and the District Court twice ordered him to disclose. Expert disclosure was ultimately filed after the final date set by the court and was of record but not noticed when the District Court summarily dismissed the case for failure to produce the expert testimony needed to establish a prima facie case. Even though filing was not timely, the Supreme Court considered whether the filing was sufficient to avoid summary judgment, agreeing that because the testimony failed to address the standard of care applicable to the administration of a functional capacities evaluation, which was the basis of the suit, a prima facie case was not established by the expert testimony and summary judgment was proper. Romans v. Lusin, 2000 MT 84, 299 M 182, 997 P2d 114, 57 St. Rep. 363 (2000).

Plaintiff's Burden to Establish Prima Facie Case Not Relieved by Res Ipsa Loquitur: In order for the doctrine of res ipsa loquitur to apply, permitting an inference of negligence on the part of one in control of an instrumentality that causes injury, not only must the elements of the doctrine be met, but plaintiff also has the burden of making a prima facie case that defendant breached a duty of care. Here, plaintiff did not establish the standard of care applicable to administration of a functional capacities evaluation through expert testimony, nor did plaintiff establish a breach of the standard by the person who administered the test. Absent a prima facie case, res ipsa loquitur did not apply and summary judgment for defendant was proper. Romans v. Lusin, 2000 MT 84, 299 M 182, 997 P2d 114, 57 St. Rep. 363 (2000). See also Clark v. Norris, 226 M 43, 734 P2d 182, 44 St. Rep. 444 (1987).

Burden on County to Show Material Fact Regarding Height of Hedge — Nonconforming Use Not Proved — Summary Judgment Improper: A municipal code provision, passed in 1978, regulated, for traffic safety purposes, the height of hedges that could be grown on corners of intersections at 3 feet, but also permitted the existence of nonconforming uses prior to 1978. Ramirez was injured in a vehicle accident at an intersection where the hedge was taller than 5 feet and sought to hold the county accountable for failing its duty to enforce the ordinance. In granting summary judgment to the county, the District Court held the hedge to be a prior nonconforming use, noting that the hedge had been there since at least 1959. The Supreme Court reversed, finding that the county had offered no proof that the hedge was either taller than 3 feet in 1978 or had not been trimmed since 1978. The county did not meet its burden of showing the absence of this genuine issue of material fact; thus, summary judgment was improper. Ramirez v. Hatch, 1999 MT 107, 294 M 316, 979 P2d 1281, 56 St. Rep. 441 (1999).

Deliberate Indifference Element Not Met in Section 1983 Liability Claim Against Government Entity — Summary Judgment Proper: Police officers searched Dorwart's home pursuant to writs of execution and seized his personal property, but without Dorwart's permission or a search warrant. Dorwart brought a claim, pursuant to 42 U.S.C. 1983, against the county and the Sheriff. Generally, claims under that section are brought against public officials in their individual capacities for their actions taken under color of state law, but municipalities and local government entities may also be sued as persons under the section. As set out in Buhr v. Flathead County, 268 M 223, 886 P2d 381 (1994), a local government entity may be held liable under section 1983 only when it is shown that the entity itself caused the constitutional violation through implementation of a policy or custom of that entity that amounts to deliberate indifference to plaintiff's constitutional rights. A supervisor cannot be held liable unless the supervisor approved of or authorized the policy. Deliberate indifference occurs only when the need for different action is so obvious and when the inadequacy of the procedure used is so likely to result in violations of constitutional rights that it is reasonable to say that the policymakers were deliberately indifferent to the need to change the policy. In this case, the constitutional inadequacy of the county's customary procedures for executing a writ of execution was not obvious, so the county and the Sheriff could not be held to be deliberately indifferent to the need to remedy the policy inadequacies. Summary judgment was proper in light of Dorwart's failure to establish deliberate indifference. Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121, 55 St. Rep. 777 (1998).

Direct Evidence of Discriminatory Intent — Standard of Proof — Heiat Criteria Applicable to Cases Involving Circumstantial Evidence: The summary judgment burdens of proof discussed in Heiat v. E. Mont. College, 275 M 322, 912 P2d 787 (1996), are not limited only to cases of sex discrimination brought under federal law, but rather apply in all types of discrimination cases whether based on federal or state law. However, the Heiat test is confined to use in cases in which discriminatory intent can only be proved by circumstantial evidence. In a direct evidence case, one in which the parties do not dispute the reason for the employer's action but only whether that action is illegal discrimination, the standard is that the employer must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. That method of proof, as set out in ARM 24.9.610(5), is the proper test in cases in which the plaintiff presents direct evidence of discrimination. Traditional summary judgment principles apply to direct evidence discrimination cases, requiring the moving party to establish that no material issues of fact exist and that the movant is entitled to judgment as a matter of law. If the employer is the moving party, the employer has the burden of showing that no issues of material fact remain and that plaintiff cannot prove a prima facie case of discrimination as a matter of law. Reeves v. Dairy Queen, Inc., 1998 MT 13, 287 M 196, 953 P2d 703, 55 St. Rep. 44 (1998), clarified and followed in Hafner v. Conoco, Inc., 1999 MT 68, 293 M 542, 977 P2d 330, 56 St. Rep. 277 (1999). See also Stuart v. First Sec. Bank, Havre, 2000 MT 309, 302 M 431, 15 P3d 1198, 57 St. Rep. 1309 (2000) (the Heiat test was applied in determining that the bank's reasons for denying an agricultural loan to Native Americans were not a pretext for discrimination).

Failure to Prove Illegal Voting — Summary Judgment Proper: Walker claimed that illegal votes were cast by five voters who were not residents of the town of Darby. Higgins established that they were each registered to vote in Darby and that their names appeared on the precinct voting register, which constitutes prima facie evidence of the right to vote. Despite residency questions, Walker failed to produce material and substantial evidence that votes were illegally cast, and summary judgment for Higgins was proper. Walker v. Higgins, 277 M 443, 922 P2d 1154, 53 St. Rep. 719 (1996).

Speculative, Conclusory Allegations of Fraud — Summary Judgment Proper: Berglee claimed that fraud in the making of Lien's will resulted in Berglee's exclusion from the will's provisions. However, the fraud allegations were speculative, conclusory, and in the nature of suspicious statements supported only by the allegations in the complaint repeated in Berglee's deposition. Absent affirmative evidence to defeat the testator's motion for summary judgment, the motion was properly granted. In re Estate of Lien, 270 M 295, 892 P2d 530, 52 St. Rep. 190 (1995), followed in Carelli v. Hall, 279 M 202, 926 P2d 756, 53 St. Rep. 1116 (1996).

Burden of Producing Evidence on Opposing Party: When record discloses no genuine issue as to any material fact, burden is upon party opposing entry of summary judgment to present evidence of a material and substantial nature raising a genuine issue of material fact. Estate of Nielsen v. Pardis, 265 M 470, 878 P2d 234, 51 St. Rep. 591 (1994); State ex rel. Scanlon v. Nat'l Ass'n of Ins. Comm'rs, 265 M 184, 875 P2d 340, 51 St. Rep. 480 (1994); Sprunk v. First Bank Sys., 252 M 463, 830 P2d 103, 49 St. Rep. 369 (1992); Mayer Bros. v. Daniel Richard Jewelers, Inc., 223 M 397, 726 P2d 815, 43 St. Rep. 1821 (1986), cited in Wangen v. Kecskes, 256 M 165, 845 P2d 721, 50 St. Rep. 6 (1993); Kaiser v. Whitehall, 221 M 322, 718 P2d 1341, 43 St. Rep. 846 (1986); Barich v. Ottenstror, 170 M 38, 550 P2d 395 (1976); Harland v. Anderson, 169 M 447, 548 P2d 613 (1976); Mont. Deaconess Hosp. v. Gratton, 169 M 185, 545 P2d 670 (1976); Rickard v. Paradis, 167 M 450, 539 P2d 718 (1975); Home Ins. Co. v. Pinski Bros., Inc., 160 M 219, 500 P2d 945 (1972).

Failure to Give Notice of Deficient Performance — Summary Judgment Burdens: Plaintiff alleged it had performed and was entitled to payment under a contract. Defendant answered that plaintiff had performed deficiently and that defendant had not breached the contract and owed no money under it. Since the contract required defendant to notify plaintiff of deficient performance, whether notice was given was crucial to each party's case. Defendant's answer raised the genuine issue of material fact as to whether defendant gave notice of deficiency, so that when plaintiff moved for summary judgment, plaintiff had the initial burden of offering evidence establishing the absence of notice. Statements of plaintiff's attorney that no notice had been given did not meet this burden; therefore, the burden to show that notice had been given did not shift to defendant and the court committed reversible error when it: (1) placed that burden on defendant; (2) granted plaintiff summary judgment for failure of defendant to carry the burden; and (3) refused defendant's motion for alteration or amendment of the judgment. However, defendant could have avoided an unnecessary appeal by filing affidavits or other evidence showing that defendant had given notice and that a genuine issue of material fact thus existed. Brinkman & Lenon v. P&D Land Enterprises, 263 M 238, 867 P2d 1112, 51 St. Rep. 36 (1994).

Burden of Proof:

Conclusory or speculative statements are insufficient to raise a genuine issue of material fact. Farm Credit Bank of Spokane v. Hill, 266 M 258, 879 P2d 1158, 50 St. Rep. 726 (1993).

The party moving for summary judgment has the burden of establishing the absence of any genuine issue of fact, and the party opposing the motion must supply evidence supporting the existence of a genuine fact issue. Eitel v. Ryan, 231 M 174, 751 P2d 682, 45 St. Rep. 521 (1988); Pretty on Top v. Hardin, 182 M 311, 597 P2d 58 (1979); Mustang Beverage Co. v. Schlitz Brewing Co., 162 M 243, 511 P2d 1 (1973). See also Singleton v. L.P. Anderson Supply Co., Inc., 284 M 40, 943 P2d 968, 54 St. Rep. 738 (1997).

Defendant's motion for summary judgment was granted because the record before the District Court did not show a breach of duty owed to the plaintiff. Plaintiff had the burden of coming forward with evidence that would place a genuine issue of fact before the court. Kronen v. Richter, 211 M 208, 683 P2d 1315, 41 St. Rep. 1312 (1984), followed in Cooper v. Sisters of Charity of Leavenworth Health Serv. Corp., 265 M 205, 875 P2d 352, 51 St. Rep. 484 (1994), and Wiley v. Glendive, 272 M 213, 900 P2d 310, 52 St. Rep. 714 (1995).

Motion Supported by Unanswered Request for Admissions and Failure to Oppose Motion: Grant of plaintiff's summary judgment motion was affirmed because facts that sufficiently supported the motion were considered admitted and true when defendant failed to make a timely reply to plaintiff's request for admissions. At the hearing on the motion, defendant did not appear but merely filed a pro se brief opposing the motion. Defendant's brief was not accompanied by affidavits or controverting evidence in any admissible form. Defendant received notice of the motion 15 days before the scheduled hearing, although only 10 days' notice is required. Defendant's claim that the motion was granted without adequate opportunity for him to be heard was denied. Wight v. Gonzales, 249 M 268, 815 P2d 598, 48 St. Rep. 745 (1991).

Mere Denial or Speculation Insufficient: A person who moves for summary judgment must demonstrate that there is no genuine issue as to all facts considered material in light of the substantive principles entitling the movant to judgment as a matter of law. If that burden is met,

the other party must demonstrate a genuine issue of material fact. Mere denial or speculation by the other party does not suffice. Richland Nat'l Bank & Trust v. Swenson, 249 M 410, 816 P2d 1045, 48 St. Rep. 730 (1991).

Contested Trust — Summary Judgment Appropriate: Summary judgment in a case contesting a trust agreement was proper when Taylor failed to demonstrate a material fact issue regarding the naturalness of the disposition. Mere allegation that because her brother was acting as the decedent's fiduciary and that because of alleged animosity between her and her brother, he exercised undue influence over the decedent to have her left out of the will was insufficient to meet her burden of showing disputed material facts regarding whether the disposition was unnatural. Taylor v. Koslosky, 249 M 215, 814 P2d 985, 48 St. Rep. 649 (1991), overruled, to the extent that a court is not required to but may consider the criteria in Cameron v. Cameron, 179 M 219, 587 P2d 939 (1978), in determining the existence of undue influence, but the five criteria need not all be proved to show undue influence in any given case, in In re Estate of Bradshaw, 2001 MT 92, 305 M 178, 24 P3d 211 (2001).

Substantial Showing by Defendants of No Material Issue of Fact — Burden of Proof Shifts to Plaintiff: The defendants brought a summary judgment motion for dismissal on the grounds that no material fact issues existed. The motion was supported by briefs, exhibits, and affidavits. The plaintiffs merely reiterated the factual allegations in their complaint, arguing that the burden was on the defendants to disprove the plaintiffs' case. The Supreme Court affirmed the lower court's decision in favor of the defendants, holding that once the defendants make a sufficient showing of no material fact issues, then the burden shifts to the plaintiffs to show that the summary judgment is not warranted. Thelen v. Billings, 238 M 82, 776 P2d 520, 46 St. Rep. 1108 (1989), followed in Lachenmaier v. First Bank Sys., Inc., 246 M 26, 803 P2d 614, 47 St. Rep. 2244 (1990), and in Alexander v. McCauley, 250 M 216, 819 P2d 176, 48 St. Rep. 798 (1991). The Richardson standard was retroactively applied in Benson v. Heritage Inn, Inc., 1998 MT 330, 292 M 268, 971 P2d 1227, 55 St. Rep. 1341 (1998).

Burden of Proof on Moving Party: The moving party for a summary judgment has the burden of showing the absence of any genuine factual issue. Mogan v. Harlem, 238 M 1, 775 P2d 686, 46 St. Rep. 1043 (1989); Tope v. Taylor, 224 M 131, 728 P2d 789, 43 St. Rep. 2074 (1986); Baylor v. Jacobson, 170 M 234, 552 P2d 55 (1976); Storrusten v. Harrison, 169 M 525, 549 P2d 464 (1976); Rickard v. Paradis, 167 M 450, 539 P2d 718 (1975); Uhl v. Abrahams, 160 M 426, 503 P2d 26 (1972); Kober v. Stewart, 148 M 117, 417 P2d 476 (1966). Uhl was overruled, as to the distinction between liability based upon natural versus altered accumulations of ice or snow that are open and obvious, in Richardson v. Corvallis Pub. School District No. 1, 286 M 309, 950 P2d 748, 54 St. Rep. 1422 (1997). The Richardson standard was retroactively applied in Benson v. Heritage Inn, Inc., 1998 MT 330, 292 M 268, 971 P2d 1227, 55 St. Rep. 1341 (1998).

Implied Warranty of Habitability — Privity of Contract Not Required: Sale of a lot to plaintiffs was contingent upon plaintiffs' agreement to allow seller to contract with Mora Bros., Inc., for the construction of their home. When the land beneath their new home began to slide downhill, plaintiffs sued for damages. District Court granted plaintiffs' motion for summary judgment against seller and Mora Bros., Inc., as builder-vendors on the theory of breach of implied warranty of habitability, but denied plaintiffs' motion against Mora Bros., Inc., on the issue of negligence. Supreme Court affirmed District Court's finding that Mora Bros., Inc., is liable to plaintiffs under theory of implied warranty of habitability. The warranty does not depend on a contract for its existence, therefore privity of contract is not required. Once plaintiffs showed that house moved, defendant had to provide an explanation to create a genuine issue of fact. Defendant failed to provide an explanation, so summary judgment was proper. Degnan v. Executive Homes, Inc., 215 M 162, 696 P2d 431, 42 St. Rep. 262 (1985).

Test for Grant of Summary Judgment: The purpose of summary judgment is to encourage judicial economy by eliminating unnecessary trials, and it is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Movant has the burden of showing a complete absence of any genuine issue as to all facts considered material in light of the substantive principles that entitle the movant to a judgment as a matter of law, and all reasonable inferences that may be drawn from the offered proof are to be drawn in favor of the opposing party. Cereck v. Albertson's, Inc., 195 M 409, 637 P2d 509, 38 St. Rep. 1986 (1981).

Genuine Issue of Fact — No Duty of Court to Anticipate: The failure of the party opposing the motion for summary judgment to either raise or demonstrate the existence of a genuine issue of material fact or to demonstrate that the legal issue should not be determined in favor of the movant is evidence that the party's burden was not carried. Summary judgment is then proper, the court being under no duty to anticipate proof to establish a material and substantial issue of

fact. Larry C. Iverson, Inc., v. Bouma, 195 M 351, 639 P2d 47, 38 St. Rep. 1911 (1981); State ex rel. Burlington N. v. District Court, 159 M 295, 496 P2d 1152 (1972).

Summary Judgment for Prescriptive Public Easement — Estoppel From Denying County Ownership: Where the purchasers of real property brought an action for breach of contract, misrepresentation, and breach of a statutory and equitable obligation to maintain a county road against the sellers of the property and the county, the previous property owner, and the sellers in turn filed a cross-complaint for indemnity against the previous owner, the trial court did not err in denying the county's motion for summary judgment and granting the motions of the plaintiffs and sellers for summary judgment. On a motion for summary judgment the movant has the burden of establishing prima facie the absence of any genuine issue of material fact, and when the movant does so, the party opposing the motion must come forward with substantial evidence raising a genuine issue of material fact. The sellers presented evidence in support of their motion showing a prescriptive public easement and estoppel against the county and former owner. The county failed to present evidence to meet its burden. Riley v. Carl, 191 M 128, 622 P2d 228, 38 St. Rep. 83 (1981).

Burden of Proving Nonexistence of Genuine Issue: It is clear in this case that because plaintiff did not initially demonstrate with appropriate proof an absence of a genuine issue of material fact with regard to the defendant's affirmative defense, the latter was not compelled to produce counterproof to avoid a grant of summary judgment. Mathews v. Glacier Gen. Assurance Co., 184 M 368, 603 P2d 232 (1979), followed in Minnie v. Roundup, 257 M 429, 849 P2d 212, 50 St. Rep. 342 (1993).

Burden Shifts to Opposing Party: Summary judgment is appropriate when the moving party shows a complete absence of any genuine issue of fact. The initial burden attaches to the moving party, but the burden shifts where the record discloses no genuine issue of fact. Once the burden has shifted, the party opposing the motion is held to a standard of proof which is as substantial as that initially imposed on the moving party. Rumph v. Dale Edwards, Inc., 183 M 359, 600 P2d 163 (1979).

Material and Substantial Facts: An order granting summary judgment will be upheld in those cases in which the complaining party fails to demonstrate the existence of material and substantial facts that would alter the decision made below. W. Sign, Inc. v. St., 180 M 278, 590 P2d 141 (1979), following Harland v. Anderson, 169 M 447, 548 P2d 613 (1976).

Burden of Plaintiff: Where defendant satisfied burden by placing sufficient facts before the court which vitiated plaintiffs' contentions, it was incumbent on the plaintiffs to come forward with proof of contentions to show that a genuine material fact issue existed. Roberts v. Burlington N. R.R., 171 M 143, 556 P2d 1243 (1976).

Defendant's Burden of Proof — Shift of Burden: Defendant, in seeking summary judgment, had initial burden of showing absence of any issue of material fact remaining, but burden then passed to carpenter to raise such material issue of fact. DeWinter v. Capp Homes, Inc., 162 M 19, 507 P2d 1061 (1973).

PARTIAL SUMMARY JUDGMENT

Landlord Who Fails to Provide Safe Rental Property Negligent Per Se — Summary Judgment on Liability Proper: Plaintiff was injured in a fall in the staircase of a rental home because the stairwell light was not functional. Plaintiff claimed that the defendant landlord was negligent for failing to provide a safe and habitable premises and moved for partial summary judgment on the liability issue. The trial court denied the motion, and the jury found for defendant. On appeal, the Supreme Court reversed. Under 70-24-303, a landlord is required to keep rental premises in a fit and habitable condition and to maintain electrical facilities in good and safe working order. Defendant could have avoided liability by entering a separate written agreement signed by all parties in which plaintiff agreed to repair the light, but no such agreement existed, so defendant was negligent per se, and summary judgment for plaintiff was proper. Defendant's attempt to shift responsibility to plaintiff for failing to notify defendant of the inoperative light was misplaced because the duty of repair is on the landlord and there is no duty of the tenant to notify. Edie v. Gray, 2005 MT 224, 328 M 354, __P3d__ (2005).

Discretion of District Court Whether to Void School Board Decision: Motta filed a pro se lawsuit against a school district board, contending that the district did not have an appropriate procedure in place for public participation in the decisionmaking process and that because the school board did not adequately publicize a series of negotiation sessions and a special meeting to approve a negotiated agreement between the board and the teachers' union, results of the meeting should be void. The District Court found that the board violated state open meeting laws, granted partial summary judgment for Motta, and ordered that the district submit copies

of its public participation procedures and maintain minutes consistent with applicable statutes, but the court did not void the agreement. On appeal, Motta argues that the District Court erred and moved the Supreme Court to void the agreement. The Supreme Court declined. Under 2-3-213, the decision whether to void any decisions reached at a meeting held in violation of state open meeting laws is clearly within the discretion of the District Court, and because that discretion was not abused, the partial summary judgment was affirmed. Motta v. Philipsburg School Bd. Trustees, District No. 1, 2004 MT 256, 323 M 72, 98 P3d 673 (2004).

No Award of Attorney Fees on Partial Summary Judgment in Pro Se Case Proper — Remand for Determination of Costs: The District Court awarded Motta partial summary judgment in an action to determine whether a school board violated state open meeting laws. Even though he was the prevailing party, Motta was not entitled to attorney fees because Motta acted pro se throughout the proceeding. However, the District Court failed to address whether Motta was entitled to costs. Although it is within the District Court's discretion whether costs are awarded, an outright denial of costs without a sufficient rationale is an abuse of that discretion. The Supreme Court remanded so that the District Court could consider costs and set forth a rationale if costs were denied. Motta v. Philipsburg School Bd. Trustees, District No. 1, 2004 MT 256, 323 M 72, 98 P3d 673 (2004). See also Gaustad v. Columbus, 265 M 379, 877 P2d 470 (1994).

Duty of State to Maintain University Library in Safe Condition: Plaintiff's child fell through the second story railing at the Montana State University-Bozeman library and suffered brain injuries. Just weeks before, another child fell thorough the same stairway. In determining negligence, the District Court granted plaintiff partial summary judgment on the issue of duty of care and breach of the duty. The state appealed. The Supreme Court affirmed, holding that the state had a duty of ordinary care to prevent children from falling through the railing at the public building and that the state breached that duty because the state had notice from the previous accident that there was a defect, yet the state did not cure, remove, or warn of the defect. Foreseeability was established at the time of the previous accident, so the state was liable despite a relatively accident-free history at the library and the fact that the building was grandfathered in under an older version of the building code in effect when the building was constructed. Henricksen v. St., 2004 MT 20, 319 M 307, 84 P3d 38 (2004), following Wiley v. Glendive, 272 M 213, 900 P2d 310 (1995).

Question of Validity of Offset Moot — Dismissal of Counterclaim and Motion for Partial Summary Judgment Proper: A promissory note related to a stock sale provided for acceleration upon notice of default. Following defendants' default, plaintiff paid an escrow agent an amount that satisfied plaintiff's obligation under the sale agreement, and the agent then deducted from that payment the amount owed by defendants under the promissory note, transferred the balance back to plaintiff in satisfaction of the note, and forwarded the balance of plaintiff's payment to defendants. Defendants filed a counterclaim and moved for partial summary judgment based on the validity of the offset. The District Court dismissed both, and defendants appealed, but the Supreme Court affirmed. Because both parties received the money owed to them, and because the acceleration and offset were appropriate, the issues raised by defendants lost any practical purpose. The issue of the validity of the offset was moot, and the Supreme Court declined to address the issue further. Lewistown Propane Co. v. Moncur, 2002 MT 349, 313 M 368, 61 P3d 780 (2002).

Improper Grant of Partial Summary Judgment on Issue of Whether Train Crew Gave Adequate Auditory Warning at Railroad Crossing: Mickelson was injured when the fire truck that he was driving was struck by a Montana Rail Link (MRL) train and sought damages. In its order granting partial summary judgment to MRL, the District Court ruled, as a matter of law, that the MRL train crew had properly sounded the train whistle and bell, in accordance with 69-14-562, and that because Mickelson had no memory of the accident, he could not produce any specific facts that presented a genuine issue worthy of trial. In the brief opposing summary judgment, Mickelson pointed out several inconsistencies in the testimony of the train crew that raised factual and credibility issues concerning the crew's story about how the accident occurred, particularly with regard to Mickelson's prior common practice of loading the fire truck in a particular manner, which conflicted with the crew's story. The Supreme Court held that the trial court committed reversible error by preventing the jury from deciding crucial factual and credibility issues regarding adequate auditory warnings, citing several cases that precluded summary judgment on whistle issues because of disputed facts. Mickelson v. Mont. Rail Link, Inc., 2000 MT 111, 299 M 348, 999 P2d 985, 57 St. Rep. 446 (2000). See also Easterwood v. CSX Transp., Inc., 933 F2d 1548 (11th Cir. 1991), Bowman v. Norfolk S. Ry. Co., 832 F. Supp. 1014 (D. S.C. 1993), and Borden v. CSX Transp., Inc., 843 F. Supp. 1410 (M.D. Ala. 1993).

Element of Identity of Issues Not Present on Question of Collateral Estoppel — Partial Summary Judgment Properly Denied: Anderson sought judicial review of the seizure and suspension of his driver's license pursuant to 61-8-403, which limits review to three underlying issues. The District Court's findings on these issues served as the bases for making the ultimate determination of whether Anderson was entitled to a license or whether his license was subject to suspension. After the District Court found that Anderson was entitled to a license, Anderson moved for partial summary judgment on the issue of the state's civil liability based on the doctrine of collateral estoppel. However, the question of liability was never considered as part of the judicial review proceeding, so denial of the partial summary judgment motion was proper on the grounds that the crucial estoppel element of identity of issues did not exist. Anderson v. St., 250 M 18, 817 P2d 699, 48 St. Rep. 871 (1991), distinguished in Farmers Plant Aid, Inc. v. Huggans, 266 M 249, 879 P2d 1173, 51 St. Rep. 803 (1994).

Summary Judgment Motion Taken Under Advisement — Constitutes Hearing: Defendant in a mechanics' lien foreclosure moved for partial summary judgment that the lien was invalid because it was not verified by affidavit. Through a series of delays and transfer of the case to a new judge, no hearing was held on the motion. At the beginning of trial, plaintiff moved to set aside summary judgment, contending that no proper motion was before the court and that a hearing on the motion was necessary. The trial court heard arguments, took the issue under advisement, and in its findings and conclusions reaffirmed the partial summary judgment. The Supreme Court found no reversible error in this procedure since the trial court's reconsideration prior to trial constituted a hearing on the motion. A.A. Quality Constr. v. Thomas, 224 M 108, 728 P2d 416, 43 St. Rep. 2055 (1986).

Construction of Insurance Contract: In construction of an automobile insurance contract, an ambiguity regarding nonowned vehicles was construed in favor of the insured. Thus, partial summary judgment for the insured was proper. Fitzgerald v. Aetna Ins. Co., 176 M 186, 577 P2d 370 (1978).

Appealability and Appropriateness of Partial Summary Judgment: Although a partial summary judgment granting specific performance of an option contract was designated as interlocutory, it was a final and appealable transfer of property. Furthermore, the summary judgment was improperly granted when based upon a determination in a hearing on motion to dismiss that there were no issues of material fact, depriving defendant the opportunity to effectively resist the summary judgment motion. Graveley v. MacLeod, 175 M 338, 573 P2d 1166 (1978).

Partial Summary Judgment Order Nonappealable: An order granting partial summary judgment on the issue of liability alone, being interlocutory in nature, will not become final and appealable until damages are assessed. Link v. Dept. of Fish & Game, 173 M 127, 566 P2d 806 (1977).

Genuine Issues as to Damages: Where plaintiff sought damages against railroad under Federal Employers' Liability Act, it was error for District Court to deny railroad's introduction of evidence to establish plaintiff's possible contributory negligence in diminution of damages where court granted partial summary judgment as to railroad's liability so that the only triable issue was damages. Dissent by Justices Daly and John C. Harrison asserting summary judgment is not appealable. McGee v. Burlington N., Inc., 167 M 485, 540 P2d 298 (1975).

Appeal of Judgment on Liability: Summary judgment on issue of liability only was "interlocutory in character" and not appealable until damage issue had been resolved. Time for taking appeal did not run from entry of summary judgment on liability, but would commence upon entry of final order. Schultz v. Adams, 161 M 463, 507 P2d 530 (1973).

Law Review Articles

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).

Hereford v. Hereford: Granting Summary Judgment to a Non-Moving Party, Dyrud, 42 Mont. L. Rev. 1 (1981).

Collateral References

49 C.J.S. Judgments §§224, 226.

Sufficiency of evidence to support grant of summary judgment in will probate or contest proceedings. 53 ALR 4th 561.

Proceeding for summary judgment as affected by presentation of counterclaim. 8 ALR 3d 1361.

Propriety of entering summary judgment for plaintiff before defendant files or serves answer to complaint or petition. 85 ALR 2d 825.

Raising constitutionality of legislation by motion for summary judgment. 83 ALR 2d 838.

Propriety of considering answers to interrogatories in determining motion for summary judgment. 74 ALR 2d 984.

Court's power, on motion for summary judgment, to enter judgment against movant. 48 ALR 2d 1188.

Proper procedure and course of action by trial court where both parties move for summary judgment. 36 ALR 2d 881.

Rule 56(d). Case not fully adjudicated on motion.

Compiler's Comments

Amendment — Identity With Federal Rule: The amendment of December 31, 1975, made no change in this rule. As of May 1, 1990, this rule was still identical to the Federal Rule.

Case Notes

Element of Identity of Issues Not Present on Question of Collateral Estoppel — Partial Summary Judgment Properly Denied: Anderson sought judicial review of the seizure and suspension of his driver's license pursuant to 61-8-403, which limits review to three underlying issues. The District Court's findings on these issues served as the bases for making the ultimate determination of whether Anderson was entitled to a license or whether his license was subject to suspension. After the District Court found that Anderson was entitled to a license, Anderson moved for partial summary judgment on the issue of the state's civil liability based on the doctrine of collateral estoppel. However, the question of liability was never considered as part of the judicial review proceeding, so denial of the partial summary judgment motion was proper on the grounds that the crucial estoppel element of identity of issues did not exist. Anderson v. St., 250 M 18, 817 P2d 699, 48 St. Rep. 871 (1991), distinguished in Farmers Plant Aid, Inc. v. Huggans, 266 M 249, 879 P2d 1173, 51 St. Rep. 803 (1994).

Differing Considerations for Summary Judgment and Final Judgment: The considerations which result in a grant of summary judgment are not the same considerations relevant to an order of final certification under Rule 54(b), M.R.Civ.P. Under summary judgment procedure, the essential inquiry is whether material facts are disputed. Under Rule 54(b) procedure, the inquiry is whether, after balancing the competing factors, finality of judgment should be ordered to advance the interests of sound judicial administration and public policy. Knight & Co. v. Ft. Belknap Indian Agency Housing Authority, 188 M 218, 612 P2d 1290 (1980).

Summary Judgment Improper Where Rights of All Parties Have Not Been Adjudicated: An order granting summary judgment is not final where the rights and liabilities of all parties have not been adjudicated. Knight & Co. v. Ft. Belknap Indian Agency Housing Authority, 188 M 218, 612 P2d 1290 (1980).

Partial Summary Judgment Order Nonappealable: An order granting partial summary judgment on the issue of liability alone, being interlocutory in nature, will not become final and appealable until damages are assessed. Link v. Dept. of Fish & Game, 173 M 127, 566 P2d 806 (1977).

Declaratory Judgment — All Issues Not Considered: In declaratory judgment action in which notice of reclassification was found not to comply with statutory requirements, District Court did not abuse its discretion in granting plaintiff-landowners' motion for summary judgment without considering further issues on the power to reclassify since plaintiffs lacked standing as to those issues. Mittelstadt v. Buckingham, 156 M 407, 480 P2d 831 (1971).

Retrial of Summary Judgment: Propriety of motion for a new trial in a summary judgment proceeding was not questioned on appeal. Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Collateral References

Right to appellate review of decisions refusing motion for summary judgment. 15 ALR 3d 899.

Propriety of summary judgment on part of single claim of multiple claims. 75 ALR 2d 1201.

Rule 56(e). Form of affidavits — further testimony — defense required.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, this rule was still identical to the Federal Rule.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Breach of Subordination Agreement — Failure to Respond — Summary Judgment Proper: After submitting evidence in support of its motion, defendant moved for summary judgment because plaintiff breached a subordination agreement. The burden shifted to plaintiff to respond, but instead of filing a response brief, plaintiff filed two depositions and a set of discovery answers at the hearing and relied on oral argument. After consideration, the District Court granted summary judgment. Plaintiff appealed, contending that summary judgment was improper because the depositions and discovery answers proved the existence of an intercreditor agreement between defendant and a codefendant, establishing a question of fact whether defendant received all funds to which it was entitled and thus whether defendant had any claim against plaintiff. The Supreme Court disagreed. Breach of the subordination agreement occurred before the intercreditor agreement existed, so the facts presented by plaintiff did not establish a material fact regarding the subordination agreement, and summary judgment was appropriate. Mtn. W. Bank v. Mine & Mill Hydraulics, Inc., 2003 MT 35, 314 M 248, 64 P3d 1048 (2003).

Exhibits Properly Excluded as Inadmissible Hearsay in Summary Judgment Proceeding: During summary judgment proceedings, parties must limit affidavits to evidence that would be otherwise admissible pursuant to evidentiary rules. The first admissibility requirement in this rule is that affidavits must be based on personal knowledge, and the personal knowledge requirement has been extended to attached exhibits as well. In this case, the District Court properly struck six challenged exhibits because they did not set forth facts within the affiants' personal knowledge and because a foundation was not laid for their consideration based on any exception to the rule excluding hearsay evidence. Further, the court did not err in failing to take judicial notice of one of the exhibits—a motion to dismiss in a prior criminal proceeding—because the exhibit was not a form of law cognizable under Rule 202, M.R.Ev. (Title 26, ch. 10). The exhibits were properly dismissed as inadmissible hearsay. Hiebert v. Cascade County, 2002 MT 233, 311 M 471, 56 P3d 848 (2002).

Premises Liability — Conflict Between Deposition and Affidavit of Same Witness — Affidavit Not Based Upon Personal Knowledge: Herron sued Columbus Hospital, alleging that he had been injured by a malfunctioning automatic door in the hospital's professional building and that the hospital had knowledge of the defective condition of the door. The hospital moved for summary judgment, and Herron opposed the motion. In support of his opposition to the hospital's motion, Herron filed an affidavit of Lyle Skinner, a maintenance employee, alleging that the hospital knew of the defective condition of the doors. The hospital then deposed Skinner and filed parts of his deposition in further support of its motion for summary judgment. The Supreme Court pointed out that Skinner's affidavit and his deposition conflicted as to what doors in which building Skinner had performed maintenance on and also conflicted as to which doors Skinner had discussed with his superiors. Skinner's affidavit also stated that the doors would frequently malfunction, but his deposition showed that Skinner had not worked on the doors in question. Citing In re Estate of Michael v. Glacier Gen. Assurance Co., 264 M 261, 871 P2d 272 (1994), the Supreme Court held that when there is a conflict between an affidavit and the same witness's deposition, the affidavit statements do not raise a genuine issue of material fact for the purposes of summary judgment proceedings. Regarding those portions of the affidavit that did not conflict with the deposition, the Supreme Court, relying upon Cooper v. Sisters of Charity, 265 M 205, 875 P2d 352 (1994), held that an affidavit submitted for the purpose of summary judgment must be based upon personal knowledge of the affiant and that if the affidavit does not meet that requirement, it does not raise a genuine issue of material fact. Because Herron provided no evidence to resist the hospital's motion for summary judgment other than Skinner's affidavit, the Supreme Court held that Herron had not met his burden in the summary judgment proceeding and held that the District Court had properly granted the hospital's motion. Herron v. Columbus Hosp., 284 M 190, 943 P2d 1272, 54 St. Rep. 840 (1997).

Failure of Insufficient Affidavit to Raise Issue of Material Fact: Cooper, in support of her contention that an issue of material fact existed, submitted a compound affidavit signed by herself and her ex-husband. The Supreme Court found the affidavit did not contain the elements necessary to conform to this rule, noting: (1) the affidavit was signed by both Cooper and her ex-husband; (2) the affidavit did not specify which statements were based on her personal knowledge and which were based on the ex-husband's knowledge; (3) most of the alleged facts set out in the affidavit were only opinions; and (4) neither Cooper nor her ex-husband could offer testimony on the issue in question because neither was an expert in the field, rendering the testimony inadmissible. As a matter of law, the affidavit failed to raise an issue of material fact. Cooper v. Sisters of Charity of Leavenworth Health Serv. Corp., 265 M 205, 875 P2d 352, 51 St.

Rep. 484 (1994), followed in Herron v. Columbus Hosp., 284 M 190, 943 P2d 1272, 54 St. Rep. 840 (1997).

Failure to Lay Foundation for Hearsay Affidavit — Failure to Carry Burden Proving Material Facts: Thornton offered to purchase certain real property by executing a buy/sell agreement. The evidence showed that Thornton knew that half of the property was held in trust by Norwest and half was owned by Songstad and her sisters. Thornton obtained the signature of Songstad (representing her sisters) on the buy/sell agreement, but not that of Norwest. In response to Norwest's motion for summary judgment, Thornton submitted an affidavit containing his own hearsay statements that an unidentified trust manager at Norwest had agreed to be bound by the desire of Songstad to sell her half of the property. Citing Eberl v. Scofield, 244 M 515, 798 P2d 536 (1990), and Passovoy v. Nordstrom, Inc., 758 P2d 524 (Wash. 1988), the Supreme Court held that because Thornton's affidavit failed to lay a foundation for the use of the trust manager's statements, the affidavit did not qualify as a statement of a party opponent, an exception from the hearsay rule, and therefore did not meet the requirements of this rule by putting into dispute issues of material fact. The Supreme Court held that the District Court was therefore correct in granting Norwest's motion for summary judgment. Thornton v. Songstad, 263 M 390, 868 P2d 633, 51 St. Rep. 104 (1994).

Failure to Give Notice of Deficient Performance — Summary Judgment Burdens: Plaintiff alleged it had performed and was entitled to payment under a contract. Defendant answered that plaintiff had performed deficiently and that defendant had not breached the contract and owed no money under it. Since the contract required defendant to notify plaintiff of deficient performance, whether notice was given was crucial to each party's case. Defendant's answer raised the genuine issue of material fact as to whether defendant gave notice of deficiency, so that when plaintiff moved for summary judgment, plaintiff had the initial burden of offering evidence establishing the absence of notice. Statements of plaintiff's attorney that no notice had been given did not meet this burden; therefore, the burden to show that notice had been given did not shift to defendant and the court committed reversible error when it: (1) placed that burden on defendant; (2) granted plaintiff summary judgment for failure of defendant to carry the burden; and (3) refused defendant's motion for alteration or amendment of the judgment. However, defendant could have avoided an unnecessary appeal by filing affidavits or other evidence showing that defendant had given notice and that a genuine issue of material fact thus existed. Brinkman & Lenon v. P&D Land Enterprises, 263 M 238, 867 P2d 1112, 51 St. Rep. 36 (1994).

Affidavit Containing Only Hearsay Stricken: The District Court did not err in striking an affidavit that contained only hearsay statements relating to an issue on which summary judgment was granted. Eberl v. Scofield, 244 M 515, 798 P2d 536, 47 St. Rep. 1780 (1990).

Speculative Statements Insufficient to Raise Genuine Issue of Fact: The petitioner was a nephew of the decedent who left his entire estate to two children's homes. The Supreme Court held that the lower court had properly dismissed the petitioner's case by summary judgment because the affidavits presented by the petitioner on the question of the decedent's competency were from people who had little contact with the decedent and were therefore speculative in nature. In re Estate of Luger, 244 M 301, 797 P2d 229, 47 St. Rep. 1642 (1990).

Allowing Supplemental Affidavits Not Improper: In a slip and fall case, the plaintiffs argued that the lower court erred in dismissing their case when the court relied on supplemental affidavits that the plaintiffs had moved to have stricken. The Supreme Court ruled that it was in the lower court's discretion to allow the additional affidavits. Blaskovich v. Noreast Dev. Corp., 242 M 326, 790 P2d 977, 47 St. Rep. 740 (1990).

Easement by Prescription — Burden of Proof: In a quiet title action, once defendant filed affidavits reciting facts that would fulfill the requirements for a prescriptive easement, it became the duty of the plaintiff not to rest upon mere allegations or denials but to respond by affidavit or otherwise, setting forth specific facts showing there was a genuine issue of material fact for trial. It was the plaintiff's burden to show that defendant's use was permissive. Summary judgment for the defendant was proper due to the plaintiff's failure to establish a genuine issue of material fact. Woods v. Houle, 235 M 158, 766 P2d 250, 45 St. Rep. 2273 (1988).

No Response From Opposing Party: Summary judgment was proper in this case as plaintiff failed to respond to defendant's motion. Plaintiff's contention that affidavits in opposition were not available is untenable because he could have, but failed to, file a responsive brief, attorney affidavit, or affidavits pursuant to Rule 30(e), M.R.Civ.P. If a party moves for summary judgment and the opposing party fails to respond, summary judgment is proper. Payne v. Stratman, 229 M 377, 747 P2d 210, 44 St. Rep. 2059 (1987), followed in Joyner v. Onstad, 240 M 362, 783 P2d 1383, 46 St. Rep. 2195 (1989).

Adverse Party May Not Rely on Mere Allegations of His Pleadings: The initial burden of establishing absence of any issue of material fact is on the party seeking summary judgment, but when the record discloses no genuine issue as to any material fact, then the burden shifts to the party opposing the motion to present evidence of a material and substantial nature to raise a genuine issue of fact. Conclusory or speculative statements are insufficient to raise a genuine issue of material fact. Here, plaintiff repeated the initial allegations contained in the complaint. She may not rest upon the mere allegations of her pleadings but has an affirmative duty to respond by affidavits or reference to sworn testimony with specific facts that show there is a genuine issue for trial. When plaintiff presents evidence of damages which are purely speculative, summary judgment is appropriate. Martin v. St., 698 P2d 399, 42 St. Rep. 272 (1985) (apparently not reported in Montana Reports). See also Mayer Bros. v. Daniel Richard Jewelers, Inc., 223 M 397, 726 P2d 815, 43 St. Rep. 1821 (1986).

Allegations Insufficient: Plaintiff served in the capacity of deputy clerk of the Supreme Court for 20 years. He ran for the Clerk of Court position but was defeated. The newly elected Clerk terminated plaintiff and appointed a new deputy. Plaintiff contended that he was terminated because of his political beliefs, age, or sex. The only indications the Supreme Court found in the record that any discrimination might have occurred were the allegations in plaintiff's complaint. No evidence of discrimination was put forth in opposition to defendants' motion for summary judgment. The court relied on State ex rel. Burlington N., Inc. v. District Court, 159 M 295, 496 P2d 1152 (1972), to find that in the absence of a factual showing summary judgment was proper. Conboy v. St., 214 M 492, 693 P2d 547, 42 St. Rep. 120 (1985), followed in Pipinich v. Battershell, 232 M 507, 759 P2d 148, 45 St. Rep. 1237 (1988).

Failure to Oppose or Defend: Summary judgment for plaintiff on one count of the complaint was proper where court had before it the complaint, answer, 20 requests for admissions and defendants' answers thereto, and plaintiff's supporting affidavit and defendants failed to conduct any discovery or file any opposing affidavits. Willson v. Taylor, 194 M 123, 634 P2d 1180, 38 St. Rep. 1606 (1981).

Opposing Party to Present Material Facts of Substantial Nature: Facts presented by a party in opposition to a motion for summary judgment must be material and of a substantial nature, not fanciful, frivolous, gauzy, or merely suspicious. Willson v. Taylor, 194 M 123, 634 P2d 1180, 38 St. Rep. 1606 (1981).

Mechanics' Lien (Now Construction Lien) — Sufficient Property Description in Affidavits — Summary Judgment: In this case on a mechanics' lien (now construction lien), the issue on appeal was whether the description of the subject property in the notice of the lien filed with the County Clerk and Recorder was legally sufficient to identify the property for purposes of enforcing the lien. The appeal was taken on cross-motions for summary judgment. The Supreme Court found error in granting summary judgment to the property owners and held that the supplier seeking the lien was entitled to summary judgment as a matter of law. Noting that the procedural requirements of 71-3-511 (since repealed) have been held strictly enforceable, the court held that the statutes are to be construed liberally so as to give effect to their remedial character once the procedure has been fulfilled. Although the land on which the structure stood was covered by the lien on the structure, the land did not need to be described. When, as here, the land was described the erroneous part of the description was to be rejected. If a sufficient description remained to identify the particular property sought to be charged, the lien would be upheld. Other documents filed with the notice of lien could be used to identify the building. In this case, those documents and photographs of the property in question sufficed to form a proper basis for summary judgment against the property owners. Gen. Elec. Supply v. Bennett, 192 M 110, 626 P2d 844, 38 St. Rep. 553 (1981).

Refusal to Consider Untimely Filed Affidavits — No Error Found: A seller of real property sought summary judgment in an action based on the contract of purchase, and the buyer's attorney failed to file an affidavit and brief opposing the seller's motion for summary judgment until the day of the hearing. The seller's counsel pointed out the untimeliness of the filing, and the trial court refused to consider the affidavit. On appeal no abuse of discretion was found. The Supreme Court noted, too, the unwarranted delays previously caused by the buyer in the case and the lack of any compelling excuse for the untimely filing. Marcus Daly Mem. Hosp. v. Borkoski, 191 M 366, 624 P2d 997, 38 St. Rep. 322 (1981).

Burden of Proving Nonexistence of Genuine Issue: The moving party must first support his contentions with an appropriate evidentiary basis before the opposing party must do more than simply rest upon the allegations contained in his pleadings. It is only when the moving party has properly supported its motion that the burden is shifted to the opposing party to provide counterproof rather than being permitted to rest solely on the allegations contained in its

pleadings. Mathews v. Glacier Gen. Assurance Co., 184 M 368, 603 P2d 232 (1979), followed in Minnie v. Roundup, 257 M 429, 849 P2d 212, 50 St. Rep. 342 (1993).

Evidence Submitted to Be Timely and in Proper Form: Plaintiff submitted a letter from the State Compensation Insurance Fund in support of a motion to set aside the judgment. The letter was included improperly in appellant's brief for the following reasons: (1) it was not presented in the proper affidavit form as required by Rule 56, M.R.Civ.P.; (2) the opinion set forth in the letter could easily have been presented in timely fashion in opposition to respondent's motion for summary judgment rather than subsequently in support of a motion to set aside the verdict which had been granted on the merits; and (3) the letter sets forth a generalized opinion offered without either foundation or regard to the facts of the case. Since the letter was not in proper form it cannot be considered under Rule 803(a), Montana Rules of Evidence. Scott v. Robson, 182 M 528, 597 P2d 1150 (1979).

Insufficient Showing of Fact Issue — Existence of Joint Venture: Plaintiff's allegation that the defendant was liable for money owed to plaintiff by a corporation because the defendant and the corporation were engaged in a joint venture was not sufficient to defeat a motion for summary judgment. Plaintiff's allegations were supported only by the fact that the defendant and the corporation had been issued a joint venture license by the State of California and that the plaintiff would rely on the testimony of certain contractors. The mere issuance of such a license is insufficient to indicate that it was actually used or that a joint venture existed, and the statement that certain contractors would testify is an unsupported conclusion. Nat'l Gypsum Co. v. Johnson, 182 M 209, 595 P2d 1188 (1979).

Summary Judgment — Depositions — Exhibits: The depositions of witnesses as well as exhibits introduced for the purposes of deposition were a sufficient basis for the court to conclude that there was no genuine issue of material fact regarding the lack of control of the city over an intersection. The court should have granted the city's motion for summary judgment. State ex rel. Helena v. District Court, 167 M 157, 536 P2d 1182 (1975).

Genuine Issue of Fact Found: Summary judgment was reversed because cognizance was not taken of amended allegation raising a genuine issue of fact. Eisemann v. Hagel, 157 M 295, 485 P2d 703 (1971).

Oral Testimony Properly Considered: Where trial judge was present during taking of depositions, facts heard by judge were properly considered on motion for summary judgment pursuant to this section since oral testimony is properly within matters which court may consider under such motion. Citizens St. Bank v. Duus, 154 M 18, 459 P2d 696 (1969).

Failure to Deny Allegation of Pretrial Pleading — Summary Judgment: Court was correct in adopting uncontested statement of fact in pretrial pleading in making its findings of fact for summary judgment. Glacier St. Elec. Supply v. Hoyt, 152 M 415, 451 P2d 90 (1969); Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Pleadings Not Controlling: On a motion for summary judgment the formal issues presented by the pleadings are not controlling, and the court must consider the depositions, answers to interrogatories, admissions on file, oral testimony, and exhibits presented. Hagar v. Tandy, 146 M 531, 410 P2d 447 (1965).

Summary Judgment Not Res Judicata: Where parties went beyond pleadings and introduced other material in support of their motion to dismiss for failure to state a claim, there was justification for treating the court's order as a judgment upon the merits. However, since summary judgment procedure was not followed in this case the principle of res judicata should not apply. Rambur v. Diehl Lumber Co., 144 M 84, 394 P2d 745 (1964).

Rule 56(f). When affidavits are unavailable.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the rules were identical.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Failure to Disclose How Further Discovery Could Preclude Summary Judgment — Request for Further Discovery Properly Denied: The District Court granted summary judgment to plaintiff. Defendant Moon contended that summary judgment was premature because of an inadequate

opportunity for Moon to conduct further discovery and depose various persons or to obtain documents that might demonstrate whether the promissory notes in question were paid and in what manner. Moon had the burden of showing what new facts could have been obtained through further discovery that could defeat the summary judgment motion, but neither his briefs nor his counsel's supporting affidavit established how the proposed discovery could do so. Therefore, the District Court did not err in conducting the summary judgment hearing and ruling on the summary judgment motion without allowing Moon the opportunity for further discovery. Envtl. Contractors, LLC v. Moon, 1999 MT 178, 295 M 268, 983 P2d 390, 56 St. Rep. 696 (1999).

Cutting Off Discovery Appropriate: The plaintiffs had diligently sought to take depositions but were unable to do so because of scheduling problems. The Supreme Court held that the lower court had not abused its discretion in granting the defendants' summary judgment motion because the plaintiffs did not sufficiently establish how the proposed discovery would preclude summary judgment. Howell v. Glacier Gen. Assurance Co., 240 M 383, 785 P2d 1018, 46 St. Rep. 2216 (1989), followed in J.L. v. Kienenberger, 257 M 113, 848 P2d 472, 50 St. Rep. 182 (1993), and Stanley v. Holms, 1999 MT 41, 293 M 343, 970 P2d 1044, 56 St. Rep. 178 (1999).

Discovery Not "Cut Off" Prematurely by Summary Judgment: Plaintiffs contended defendants resisted taking of depositions of witnesses favorable to plaintiffs' cause and thus the court's granting defendants' motion for summary judgment "cut off" discovery prematurely. The court held that plaintiffs failed to present an affidavit as required by Rule 56(f), M.R.Civ.P., stating why depositions could not be taken; nor did plaintiffs exercise their prerogative under Rules 30, 31, or 37, M.R.Civ.P., at any time during the year or more after the complaint was filed. Morales v. Tuomi, 214 M 419, 693 P2d 532, 42 St. Rep. 60 (1985).

Rule 56(g). Affidavits made in bad faith.

Advisory Committee Notes

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the rules were identical.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Issue of Fact: In view of the record indicating that a real estate transaction did not close until between July 28 and July 30, appellant's simple assertion that the transaction closed on July 20 will not serve to create an issue of fact merely to avoid summary judgment. Van Ettinger v. Pappin, 180 M 1, 588 P2d 988 (1978).

Rule 57. Declaratory judgments.

Commission Notes

The rule is identical with the Federal Rule, except that reference is made to the Montana Declaratory Judgment Act instead of the Federal Declaratory Judgment Act, and except that the words "subject to the provisions of section 93-8909, Revised Codes of Montana, 1947 [now codified as 27-8-302, MCA]," are inserted in the first sentence. These words are inserted to make it clear that only issues of fact may be tried by a jury in a declaratory judgment action.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Mootness — No Appeal Absent District Court Ruling on Declaratory Judgment: The high school sports association decided that Grabow was ineligible to play basketball because his eligibility pursuant to the semester rule had elapsed while Grabow was an exchange student in Germany. Grabow filed a complaint in District Court asking for a declaratory ruling that the association lacked rulemaking and adjudicatory authority and requested a hearing on whether a preliminary injunction should be issued precluding enforcement of the association rule until the case could be adjudicated on its merits. After deciding that it was unlikely that Grabow would ultimately prevail, the District Court denied the injunction. Grabow appealed. The Supreme Court granted the injunction pending final disposition of the appeal, and Grabow played

basketball during his senior year. The Supreme Court found that the 1999-2000 season was the only one in which Grabow claimed that he had a right to participate and that because the season was completed, the initial grounds for application of the mootness doctrine to the preliminary injunction issue were met. The declaratory judgment issue was not one capable of repetition, but was one that would evade review, so the Supreme Court remanded for further consideration of Grabow's complaint for declaratory judgment, which would then be subject to appeal following final judgment by the District Court. Grabow v. Mont. High School Assn., 2000 MT 159, 300 M 227, 3 P3d 650, 57 St. Rep. 654 (2000). See also Shamrock Motors, Inc. v. Ford Motor Co., 1999 MT 21, 293 M 188, 974 P2d 1150 (1999).

Declaratory Judgment — Interpretation of Land Exchange Agreement: Shortly after entering into a land purchase agreement, the parties changed the agreement into a tax-free land exchange agreement. The new agreement gave buyer 3 ½ years to acquire like-kind property to be exchanged for seller's ranch. The like-kind property was to be purchased with funds placed periodically by buyer in an escrow account. Several years later a dispute arose concerning the nature and timing of the payments. Buyer submitted the questions to the District Court in a declaratory judgment action. The District Court interpreted the contract in a manner generally favorable to seller, and buyer appealed, claiming that the District Court's decision was unreasonable, contrary to the parties' intentions, and improper under the rules of construction of contracts. The Supreme Court affirmed, ruling that the District Court's interpretation had not been unreasonable since: (1) its decision on the timing of the rental payments was reflective of the parties' intentions as shown by their past performance; (2) its decision on the timing of the amortization payments was consistent with the rule of construction requiring that a contract be construed in such a way as to give effect to all of its provisions; and (3) its ruling on the intention of the parties was supported by the evidence. Finally, 28-3-206 did not entitle buyer to have ambiguities construed in his favor; even though buyer claimed that the nature of the agreement was changed solely for seller's benefit, the agreement was prepared by an attorney for both parties, not by one party alone. Lewis v. Murphy, 199 M 368, 649 P2d 740, 39 St. Rep. 1459 (1982).

Issue of Fact as to Applicability of Insurance Coverage Exclusion: In this case the District Court failed to determine the factual issue of whether the insured, Phalen, expected or intended Thu Duc Vo's injuries. The applicability of coverage provision of the insurance policy excluded those cases where the insured's deliberate acts or assaults resulted in injuries that would be expected or intended by him to result from his deliberate acts. The applicability of Northwestern National's coverage could not be determined until the factual issues concerning the intention and expectation of Phalen as to Vo's injuries was decided in the tort action. Therefore, summary judgment in favor of Northwestern in the declaratory judgment case at bar was improper. NW. Nat'l Cas. Co. v. Phalen, 182 M 448, 597 P2d 720 (1979), distinguished under the rationale of USF&G v. Rae Volunteer Fire Co., 212 M 450, 688 P2d 1246, 41 St. Rep. 1857 (1984), in Burns v. Underwriters Adjusting Co., 234 M 508, 765 P2d 712, 45 St. Rep. 2089 (1988).

Rules Not Designed to Promote Litigation: When defendant in a personal injury accident attempted to compel a potential litigant to appear and bring suit by naming her as a defendant in a third-party declaratory judgment action, the trial court properly dismissed the complaint since the third-party defendant was not an indispensable party or compelled to litigate a claim which she had no intention of pursuing. If equity was to be done in a situation such as this, attorney fees were properly awarded the third-party defendant. Foy v. Anderson, 176 M 507, 580 P2d 114 (1978).

Justiciable Controversy: Under this rule there must be a justiciable controversy which: is existing and genuine; the judgment of the court may effectively operate upon; and is a judicial determination having effect upon the rights, status, or legal relationships of a real party in interest. Or, if lacking these qualities, the case must be of overriding public import. In re Grand Jury, 170 M 354, 553 P2d 987 (1976).

Landowners — Taxpayers: Supreme Court accepted original jurisdiction of proceeding by owners of timberlands for a declaratory judgment and ancillary relief to, among other things, compel valuation and assessment of timberlands for taxation as directed by the Board of Equalization (functions transferred to Director of Department of Revenue and State Tax Appeals Board). State ex rel. Conrad v. Managhan, 157 M 335, 485 P2d 948 (1971).

Review of Declaratory Judgments: In a declaratory judgment action, the court determines issue of facts in the same manner as any other civil action and the Supreme Court will review the judgment in the same manner as any other case. Highway Comm'n v. Flood Control & Drainage District, 155 M 157, 468 P2d 753 (1970).

Exercise of Jurisdiction — Discretion — Procedure: Although the necessary elements for jurisdiction over a declaratory judgment exist, a court is not compelled to exercise it. Dismissal of an action for declaratory judgment lies within the sound discretion of the trial judge. The procedure to be used in determining whether to grant a motion for declaratory judgment is the same as for a motion for summary judgment. Empire Fire & Marine Ins. Co. v. Goodman, 147 M 396, 412 P2d 569 (1966).

Declaratory Injunction Upheld — Water Rights: Declaratory judgment in favor of landowner maintaining that railroad had affirmative duty to maintain a ditch, although land had been sold, was affirmed. Harrer v. N. Pac. Ry., 147 M 130, 410 P2d 713 (1966).

Law Review Articles

Original Petition for Declaratory Relief: This note reviews the case of State ex rel. Morgan v. Bd. of Examiners, 131 M 188, 309 P2d 336 (1957), holding that the Supreme Court has original jurisdiction to hear petitions for declaratory relief. 19 Mont. L. Rev. 56 (1957).

The Application of the Uniform Declaratory Judgments Act in Montana, 8 Mont. L. Rev. 57 (1947).

Procedure: The Application of the Uniform Declaratory Judgments Act in Montana, Paulson, 2 Mont. L. Rev. 106 (1941).

Collateral References

Declaratory Judgment *key* 41 through 47, 251, et seq.

26 C.J.S. Declaratory Judgments §§17 through 23, 104, et seq.

22A Am. Jur. 2d Declaratory Judgments §§14, 15, 186, 187.

Right to jury trial in action for declaratory relief in state court. 33 ALR 4th 146.

Burden of proof in actions under general declaratory judgment acts. 23 ALR 2d 1243.

Rule 58. Entry of judgment.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule except for the omission of the sentence, "The notation of a judgment in a civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry." Rule 79 is not being proposed for adoption at this time.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments to Federal Rule: The above commission note refers to Federal Rule 58 as it stood before a 1963 amendment thereof. The 1963 amendment rewrote the first sentence with no material change in substance, and inserted sentences requiring the judgment to be set forth in a separate document, and prohibiting attorneys from submitting forms of judgment except upon direction of the court. As of May 1, 1990, the preceding comment was still applicable.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 1061
Delay in Entry of Judgment 1062

GENERAL

Filing Notice of Appeal — District Court Deprived of Jurisdiction: A judgment entered after filing of a notice of appeal was invalid because the notice of appeal deprived the District Court of further jurisdiction. In re Marriage of Carlson, 220 M 204, 714 P2d 116, 43 St. Rep. 295 (1986).

Motion Objecting to Costs — No Suspension of Time for Filing Notice of Appeal: On October 9, 1981, 1 day after the entry of judgment against the plaintiff in a quiet title action, the plaintiff filed a motion objecting to the defendant's memorandum of costs, which motion was noticed for hearing but the hearing was never held. Following the filing of a notice of appeal by the plaintiff on January 26, 1982, the Supreme Court held it did not have jurisdiction of the appeal because the 30-day period for the filing of the notice of appeal is not suspended by the filing of a motion objecting to costs. Time for appeal therefore expired on November 9, 1981. O'Connell v. Heisdorf, 202 M 89, 656 P2d 199, 39 St. Rep. 2347 (1982).

Order Not Appealable When Judgment Never Docketed in Record: The District Court made an express order that the Clerk of Court enter final judgment in a case certified for appeal under

Rule 54(b), M.R.Civ.P., but a final judgment was never docketed in the record. Under these circumstances the Supreme Court has no jurisdiction to decide an appeal. Jackson v. Burlington N., Inc., 201 M 123, 652 P2d 223, 39 St. Rep. 1998 (1982).

Disqualification of Judge After Entry of Findings and Conclusions: Defendants filed affidavits of disqualification of the District Judge in a property dispute case after the entry of the judge's findings of fact and conclusions of law. Defendants contended that the filing precluded the judge from entering judgment in accordance with his findings and conclusions. The disqualification was attempted under section 93-901, R.C.M. 1947 (since superseded), which was in effect at the time. The findings and conclusions entered by the judge prior to the filing of the affidavit of disqualification expressly directed that a judgment be prepared "in accordance with" the findings and conclusions. Under these circumstances, the judgment was a part of the findings and conclusions. Accordingly, although the disqualification prevented the District Judge from ruling on posttrial motions under Rules 59 and 60, M.R.Civ.P., and from withdrawing the findings and conclusions previously entered, it was not effective to prevent entry of judgment in favor of plaintiff in accordance with findings and conclusions entered prior to the filing of the affidavit for disqualification. Macpherson v. Smoyer, 191 M 53, 622 P2d 188, 37 St. Rep. 2079 (1980).

Final Judgment at Time of Entry: Judgment became final on April 20, 1959, when entered by the Clerk of the District Court, although appellant's counsel moved to modify the judgment on May 21, 1959, and the trial court overruled the motion on August 14, 1959. Hursh v. Mon-O-Co Oil Corp., 139 M 302, 363 P2d 485 (1961).

Jury Award as Final: Where, in an action to recover a money judgment for personal injuries sustained in an automobile accident, the evidence was conflicting and the plaintiff's damages unliquidated, and the jury's verdict assessed the plaintiff's damages and judgment was entered in conformity to the verdict, neither the trial court nor the Supreme Court possessed the power to delete from the jury's verdict the words and figures denoting the assessed damages. Seibel v. Byers, 136 M 39, 344 P2d 129 (1959).

Attack on Verdict by Motion for New Trial: After a case has been submitted to the jury and a verdict returned, accepted, and filed at the direction of the court and the jury discharged from the case, the only way to reach the verdict, if insufficient or against the law, is by a timely and proper motion for a new trial. Fauver v. Wilkoske, 123 M 228, 211 P2d 420 (1949).

Law Case — Judgment Notwithstanding the Verdict Not Allowed: It is not permissible in this state to move for a judgment non obstante veredicto in a law case. Fauver v. Wilkoske, 123 M 228, 211 P2d 420 (1949).

Special Verdict: The ministerial act of the clerk in recording a general verdict constitutes the rendition of judgment, to the entry of which the signature of the judge is not essential, but when the court directs the jury to return special findings, the announcement of his decision in open court and the entry of it in the minutes constitute the rendition of the judgment. McIntyre v. N. Pac. Ry., 58 M 256, 191 P 1065 (1920), distinguished in Lynch v. Butte, 99 M 287, 43 P2d 652 (1935).

Clerk Without Power to Make Additions to Judgment: While the Clerk of the District Court may enter a decree, he had no power to sign it, thus virtually rendering a judgment in a suit to foreclose mortgages on real and personal property, adjudging, among other things, that plaintiff recover principal, interest, and attorneys' fees, holding defendants personally liable therefor, etc., where the trial judge had done no more than transmit to him his findings of fact and conclusions of law, without any further directions in the matter. State ex rel. Reser v. District Court, 53 M 235, 163 P 1149 (1917).

Stay of Judgment Improper: There cannot be a stay of judgment in aid of a new trial. Such a stay is properly granted only after notice of intention to appeal has been given, and notice of intention cannot be given until judgment has been entered. State ex rel. Jones v. District Court, 50 M 1, 144 P 564 (1914).

Judgment as Act of Court: The entry of the judgment is the act of the clerk, but when entered becomes the judgment of the court. Hynes v. Barnes, 30 M 25, 75 P 523 (1904), distinguished in Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

DELAY IN ENTRY OF JUDGMENT

Twenty-Day Delay — Effect: Failure to have judgment entered until 20 days after verdict does not affect the validity of the judgment, the only penalty for delay being dismissal of the action if not entered within 6 months after verdict. Coover v. Davis, 112 M 605, 121 P2d 985 (1941).

Impossibility of Judgment: A case tried by a jury may be reserved for argument only when the judgment does not necessarily follow the verdict, as for instance in equity suits, or where after discharge of the jury the verdict is claimed to be unresponsive to the issues, or is so ambiguous or informal that no judgment, proper under the issues, could be entered in conformity with it. State ex rel. Jones v. District Court, 50 M 1, 144 P 564 (1914).

Delay Not to Cause Substantial Damage: It is not the intention of the law that a judgment will follow so far behind the verdict as to be the cause of substantial damage, this being apparent from the former code provision requiring the entry of judgment within 24 hours after verdict. Chesnut v. Sales, 49 M 318, 141 P 986 (1914).

Collateral References

Judgment *key* 271, 272, 276.

49 C.J.S. Judgments §§106, 108, 113.

46 Am. Jur. 2d Judgments §§121 through 195.

Entry of final judgment after disagreement of jury. 31 ALR 2d 885.

Power of successor judge taking office during term time to vacate, etc., judgment entered by his predecessor. 11 ALR 2d 1117.

Date of verdict or date of entry of judgment thereon as beginning of interest period on judgment. 1 ALR 2d 479.

Proper insertion or omission of middle initial of one's name as affecting constructive notice from public record. 122 ALR 909.

Liability of officer charged with duty of keeping record of judgment or other instrument affecting title to or interest in property or failure to record and delay in recording. 94 ALR 1309.

Conclusiveness of recital in judgment as to appearance or service of process as affected by contradiction by record. 68 ALR 385.

Rule 59. New trials — amendment of judgment

Case Notes

No Loss of District Court Jurisdiction Upon Filing of Notice of Entry of Judgment — Amended Complaint Allowed: About 2 weeks after defendant filed a notice of entry of judgment, plaintiff filed a motion to amend the original complaint, and the District Court granted the motion. About 3 weeks after the amended complaint was filed, the court entered an order nunc pro tunc stating that it no longer had discretionary authority to grant leave to amend because it lost jurisdiction when defendant filed the notice of entry of judgment. The court held that the order allowing plaintiff's motion to amend was void and should be stricken. Plaintiff appealed the nunc pro tunc order, and the Supreme Court reversed. The filing of a notice of entry of judgment starts the clock running for the time to appeal, but does not divest the District Court of jurisdiction. Rather, the District Court loses jurisdiction when a notice of appeal is filed. Thus, the order issued nunc pro tunc was based on a mistaken interpretation of law because when the motion to amend was granted, the District Court still had jurisdiction. Kruckenberg v. Kalispell, 2004 MT 185, 322 M 177, 94 P3d 748 (2004). See also McCormick v. McCormick, 168 M 136, 541 P2d 765 (1975), Hankinson v. Picotte, 235 M 143, 766 P2d 242 (1988), and Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001).

Informal Witness Discovery Process Compromising Ability to Formulate Trial Strategy — Irregularities Constituting Abuse of Discretion Preventing Fair Trial — New Trial Warranted: If a District Court acts arbitrarily or without conscientious judgment or exceeds the bounds of reason in denying a new trial, it constitutes an abuse of discretion so significant as to materially affect the substantial rights of a complaining party. In the present case, the District Court devised a late hour informal expert witness discovery process that provided no opportunity for plaintiffs to obtain information exclusively in possession of defendants' expert prior to trial. Although the control of discovery activities, including the use of interrogatories, is within the discretion of the District Court, each party has a duty to supplement or amend answers to interrogatories in a timely manner, in order to make all relevant facts available to parties in advance of trial and to reduce the possibility of surprise or unfair advantage. Here, plaintiffs' lack of opportunity to depose defendants' expert, in the face of an inadequate discovery response, materially affected plaintiffs' substantial rights. The District Court's informal discovery process compromised plaintiffs' ability to formulate an effective trial strategy and to prepare adequately for witness cross-examination, which placed plaintiffs at a serious disadvantage. The discovery irregularities constituted an abuse of discretion that materially affected plaintiffs' substantial rights, entitling plaintiffs to a new trial, and the District Court's denial of a new trial motion was therefore reversed. Perdue v. Gagnon Farms, Inc., 2003 MT 47, 314 M 303, 65 P3d 570 (2003).

"Motion for Reconsideration" — Procedural Trap for Unwary and Grave Risk to Meritorious Appeal — Criteria to Equate With Motion to Alter or Amend: Stephen Nelson filed a motion for reconsideration of the District Court's grant of the defendant's motion for summary judgment based on a later-decided Third Circuit Court of Appeals case. Stephen contended that the motion was filed to allow the District Court to alter or amend its judgment to correct its mistake of law. The motion for reconsideration was denied, and Stephen filed a notice of appeal more than 60 days after the notice of entry of judgment but within 60 days from the denial of the motion for reconsideration. The defendant moved for dismissal of the appeal, contending that it had not been timely filed under Rule 5, M.R.App.P. (Title 25, ch. 21), on the grounds that a motion for reconsideration is not a motion to alter or amend under Rule 59(g), M.R.Civ.P. The Supreme Court, warning against the use of motions for reconsideration, established criteria under which to evaluate the motions. When a motion for reconsideration substantively addresses one of the following areas, the court is more likely to conclude that the motion is actually a motion to alter or amend under Rule 59(g), M.R.Civ.P.: (1) to correct manifest errors of law or fact upon which the judgment was based; (2) to raise newly discovered or previously unavailable evidence; (3) to prevent manifest injustice resulting from, among other things, serious misconduct of counsel; or (4) to bring to the court's attention an intervening change in controlling law. The Supreme Court denied the motion to dismiss. Nelson v. Driscoll, 285 M 355, 948 P2d 256, 54 St. Rep. 1190 (1997), followed in Lee v. USAA Cas. Ins. Co., 2001 MT 59, 304 M 356, 22 P3d 631 (2001).

Cumulative Errors Inapplicable in Civil Cases — New Trial Not Warranted: In a wrongful termination action, the District Court erroneously granted a motion for a new trial to the employer based on the cumulative effect of six alleged errors. On appeal, the Supreme Court reversed, ruling that the doctrine of cumulative error, while applied in criminal cases, is not extended to civil cases. Because none of the errors considered individually warranted a new trial, the lower court erred in ordering a new trial on the cumulative effect of six errors. Baxter v. Archie Cochrane Motors, Inc., 271 M 286, 895 P2d 631, 52 St. Rep. 444 (1995).

Jury Finding of Lack of Negligence Not Overturned on Grounds of Passion or Prejudice: Joshua Lloyd suffered a seizure and died after being held by the Flathead County Sheriff for emergency detention. Buhr, Joshua's personal representative, sued the county, the Sheriff, and others, alleging negligence. The jury found that there was no negligence. Buhr argued that despite the jury's interpretation of the evidence, the verdict was the result of passion or prejudice. The Supreme Court noted that it must view the evidence in the light most favorable to the prevailing party. The Supreme Court held that its role was not to retry a case based upon one party's view of the evidence and that it was within the jury's province to adopt testimony presented by one party to the exclusion of testimony presented by another. Buhr v. Flathead County, 268 M 223, 886 P2d 381, 51 St. Rep. 1258 (1994).

New Trial Granted Because of Intervenor's Failure to Serve All Parties: In a dissolution action, Keaster and his ex-wife stipulated that he was not the natural parent of her child. The ex-wife subsequently named Fleming as the natural father, and the Child Support Enforcement Division initiated proceedings to collect support payments from Fleming. Fleming intervened in the dissolution proceedings without giving notice to Keaster. The lower court reinstated Keaster's support payments and denied Keaster's motion for a new trial on the basis that it had not been timely made. The Supreme Court reversed the lower court's decision and held that by rule, Fleming had to serve all parties to the action in which he was intervening. In re Marriage of Keaster, 259 M 48, 853 P2d 1191, 50 St. Rep. 669 (1993).

Motion for Modification of Child Custody Decree: Wife filed for modification of a child custody order, and the subsequent order issued by the court affected only the terms of the original custody decree that relate to the notice required prior to visitation and to allocation of transportation costs. In response to husband's argument that wife's motion for modification should be denied because it was not properly filed under the time limitations established in this rule or Rule 60, M.R.Civ.P., the court held that the motion was filed under 40-4-217, which contains no time limitations. In re Marriage of Chase, 237 M 224, 772 P2d 1264, 46 St. Rep. 754 (1989), replacing previous opinion at 46 St. Rep. 540 (1989).

Failure to File Notice of Entry of Judgment — Amended Complaint Allowed: Unless posttrial motions are made by the losing party under Rule 52, M.R.Civ.P., or this rule, the losing party is not required to adhere to the 30-day period for filing a notice of appeal until proper service of notice of entry of judgment is made. This rule applies to orders that may become final as well as to judgments. In this case, notice of entry of judgment was not served and no posttrial motions were made. The time for appeal did not begin to run, the order of dismissal of the original complaint did not become final, and the District Court had jurisdiction to grant leave to file an

amended complaint. The District Court had not lost subject matter jurisdiction. Hankinson v. Picotte, 235 M 143, 766 P2d 242, 45 St. Rep. 2259 (1988).

Substantial Evidence to Support Verdict — New Trial Inappropriate: When a jury verdict is appealed, the appellate court's function is to determine whether there is substantial credible evidence to support the verdict. The lower court's discretion to grant a new trial for insufficiency of the evidence is exhausted when it finds substantial evidence to support the verdict. The court may not grant a new trial only on the basis that it chose to believe one line of testimony different from that which the jury believed. Tope v. Taylor, 235 M 124, 768 P2d 845, 45 St. Rep. 2242 (1988).

Disqualification of Judge After Entry of Findings and Conclusions — Ruling on Motions Prohibited: Defendants filed affidavits of disqualification of the District Judge in a property dispute case after the entry of the judge's findings of fact and conclusions of law. Defendants contended that this precluded the judge from entering judgment in accordance with his findings and conclusions. The disqualification was attempted under section 93-901, R.C.M. 1947 (since superseded), which was in effect at the time. The findings and conclusions entered by the judge prior to the filing of the affidavit of disqualification expressly directed that a judgment be prepared "in accordance with" the findings and conclusions. Under these circumstances, the judgment was a part of the findings and conclusions. Accordingly, although the disqualification prevented the District Judge from ruling on posttrial motions under Rules 59 and 60, M.R.Civ.P., and from withdrawing the findings and conclusions previously entered, it was not effective to prevent entry of judgment in favor of plaintiff in accordance with findings and conclusions entered prior to the filing of the affidavit for disqualification. Macpherson v. Smoyer, 191 M 53, 622 P2d 188, 37 St. Rep. 2079 (1980).

Lack of Findings on Marital Home Not Correctable by District Court After Time Limitations Expire: In a divorce settlement, the trial court findings contained no determination of the net worth of the parties, the net worth of the husband's medical practice, or the relative financial contributions of the two parties. The findings of fact also were inconclusive as to the value and disposal of the family home. Five months after the decree was entered, the husband petitioned for amendment, requesting award of the family home to him. Eleven months later the District Court found that it was the original intention of the court to distribute the home to the husband. The Supreme Court concluded that the District Court erred in its attempt to amend the decree. Under Rule 60(a), M.R.Civ.P., clerical errors in judgments may be corrected at any time since correction does not alter substantive rights of the parties. Here the attempted change adversely affected the wife's substantive rights by depriving her of her interest in the family home, a major asset of the marriage. Such error is judicial in nature and could not be corrected by the District Court except by motion made within the time limitations of Rules 50(b), 52(b), 59, or 60(b)(1), M.R.Civ.P. No such motion having been made, the error would have been correctable by appeal, which was never taken by either of the parties. The District Court therefore lacked jurisdiction to make the change effected by its entry of the amended findings and decree. The case was remanded. Thomas v. Thomas, 189 M 547, 617 P2d 133, 37 St. Rep. 1710 (1980).

Law Review Articles

The Montana Rules of Civil Procedure, Mason, 23 Mont. L. Rev. 1 (1961).

Rule 59(a). Grounds.

Commission and Advisory Committee Notes

COMMISSION NOTE

The rule is identical with the Federal Rule, except that subdivision (a) has been rewritten to adapt it to state practice.

ADVISORY COMMITTEE'S NOTE
TO DECEMBER 31, 1975, AMENDMENT

Halsey v. Uithof, 166 Mont. 319, 532 P 2d 686, 32 St. Rep. 89 (1975), requires a motion for new trial to set forth the grounds with particularity, and just using the statutory grounds is not sufficient. The Montana Supreme Court relied upon Rule 7(b) as the basis for this requirement. Rule 7(b) requires that all motion shall state with particularity the grounds therefor, but this has not always been followed, particularly with Rule 12 motions. Thus, as a matter of practice, the Rule 7(b) requirement has carried the implication "where necessary".

Rather than broaden the technical operation of Rule 7(b), the Advisory Committee felt that the changes in practice regarding motions for new trials in the district courts, initiated by Halsey, should be incorporated in Rule 59.

The additional amendment requiring that orders granting new trials shall set forth the grounds with sufficient particularity to apprise the parties and the appellate court of the the trial court's rationale is for the express purpose of narrowing the issues on appeal and obviating the need to read the entire record on appeal to find the rationale underlying the trial court's ruling. This does not limit the parties or the appellate court in the scope of appellate argument or review, e.g., a new trial properly granted but based on an erroneous rationale.

Compiler's Comments

Amendments — Identity With Federal Rule: The above commission note was written prior to the amendments of 1969 and 1975. The amendment of May 21, 1969, made no change in this rule.

The amendment of December 31, 1975, inserted the present second paragraph.

Case Notes

General 1066
New Trial Granted — Particular Cases 1069
New Trial Denied — Particular Cases 1072

GENERAL

Stipulation to Not Mention Suspended Driver's License at DUI Trial — Mention of Expired Driver's License Cured by Jury Admonition: Brady was charged with DUI, fourth or subsequent offense, arising from circumstances surrounding a single-vehicle accident in which Brady swerved off the highway, hit a rock wall, and rolled the vehicle. The information also charged Brady with three misdemeanors: driving while his license was suspended or revoked, failure to provide proof of insurance, and failure to give notice of an accident by the quickest means. Shortly before voir dire, Brady stated that he would plead guilty to the misdemeanors and moved that the state's witnesses not mention any of the offenses to which Brady would plead guilty. The state did not object to the motion. The third witness for the state, a deputy who was at the wreck scene, testified that he found a wallet near the vehicle that contained an expired driver's license. Brady moved for mistrial on grounds that the state violated the judge's order not to mention an expired license. The state countered that the stipulation was that the state would not mention that the license was suspended, but that mention of an expired license was not covered. The District Court found that there was a difference between the jury knowing that Brady's license was suspended, which suggested criminal activity, and knowing that the license was expired, which is not in itself criminal. The court then admonished the jury to disregard the testimony regarding the expired license as irrelevant to the case. Brady was convicted of DUI and appealed on grounds that denial of his motion for a mistrial was reversible error because the state's witness deliberately violated an order in limine to which the state previously stipulated. Granting a mistrial is appropriate when a reasonable possibility exists that inadmissible evidence might have contributed to the conviction. The strength of the evidence against the defendant, together with the prejudicial influence of the inadmissible evidence and whether a cautionary jury instruction could cure any prejudice, must be considered in determining whether a prohibited statement contributed to the conviction. A mistrial should be denied for technical errors of defects that do not affect the defendant's substantial rights and when the record is sufficient to establish guilt. The Supreme Court agreed that there is a difference between an expired license and a suspended license with regard to implications of guilt. Here, any potential prejudice that might have resulted from testimony about the expired license was sufficiently cured by the admonition to the jury, and the District Court did not abuse its discretion in denying the motion for mistrial. St. v. Brady, 2000 MT 282, 302 M 174, 13 P3d 941, 57 St. Rep. 1178 (2000), distinguishing St. v. Partin, 287 M 12, 951 P2d 1002 (1997).

Mistrial Determinations — Trial Court and Supreme Court Standards: The Supreme Court recently clarified the standard to be applied by a trial court considering the grant of a mistrial by stating that a mistrial should be granted either when there is a demonstration of a manifest necessity or when a party has been denied a fair and impartial trial. The Supreme Court now adopts the rule that the manifest necessity part of the standard should be applied only if the trial court considers the grant of a mistrial when the allegedly injured party does not request or consent to a mistrial and that the denial of a fair and impartial trial part of the standard applies when the allegedly injured party does request or consent to a mistrial. As to the Supreme Court's standard of review of the District Court's ruling, the Supreme Court will no longer apply the standard of clear and convincing evidence that the trial court's ruling is erroneous. The standard to be applied is whether the trial court abused its discretion, clarifying St. v. Ford, 278 M 353, 926 P2d 245, (1996), St. v. Romero, 279 M 58, 926 P2d 717 (1996), and St. v. Walker, 280 M 346,

930 P2d 60 (1996). St. v. Partin, 287 M 12, 951 P2d 1002, 54 St. Rep. 1474 (1997), followed in St. v. Clark, 1998 MT 221, 290 M 479, 964 P2d 766, 55 St. Rep. 919 (1998), St. v. Maier, 1999 MT 51, 293 M 1, 972 P2d 827, 56 St. Rep. 208 (1999), and St. v. Weldele, 2003 MT 117, 315 M 452, 69 P3d 1162 (2003). See also St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453, 57 St. Rep. 734 (2000), in which it was held that the District Court did not err when it denied defendant's motion for mistrial based on trial testimony that the court had previously excluded in its order in limine because the objectionable testimony was not prejudicial, and St. v. Long, 2005 MT 130, 327 M 238, 113 P3d 290 (2005).

Evidence of Existence of Pain and Suffering Uncontroverted by Evidence of Causation and Evidence of Extent of Damages: Thompson's automobile was rear-ended by a Bozeman police car, and Thompson filed suit against the city. The city admitted negligence and causation, and the action went to trial on the issues of whether Thompson suffered damages and the amount of those damages. The jury returned a verdict of $2,800 in damages for medical expenses and lost wages but awarded no damages for pain and suffering, loss of ability to pursue an occupation, loss of future wages, loss of ability to pursue an established course of life, and future medical expenses. Thompson moved for a new trial, arguing that there was insufficient evidence for the jury to award no damages, and the District Court granted the motion. The Supreme Court noted that it had addressed the issue of zero damage awards in light of uncontroverted evidence in Gehnert v. Cullinan, 211 M 435, 685 P2d 352 (1984), and Brockie v. Omo Constr., 268 M 519, 887 P2d 167 (1994). In those cases, the Supreme Court explained that it had held that the jury did not have any choice but to award some damages when the evidence was uncontroverted that the plaintiff had suffered some damages. It is only when the evidence of the existence of damages is controverted, the Supreme Court said, should a court defer to the judgment of the jury in refusing to award any damages at all. The Supreme Court then reviewed the testimony offered by the city and held that the evidence presented addressed the issue of the extent of damages and not whether any damages at all were caused. The Supreme Court analyzed the case of Maykuth v. Eaton, 212 M 370, 687 P2d 726 (1984), relied on by the city, and noted that the case stood for the proposition that when a jury awards at least some damages based upon its assessment of conflicting evidence, a court may not substitute its judgment for the jury's judgment based upon the court's view of what evidence is most believable. In the case before it, the Supreme Court noted that the city did not controvert Thompson's evidence that at least some pain and suffering occurred and it was therefore correct for the District Court to grant a new trial when the jury awarded no damages other than medical expenses and lost wages. Thompson v. Bozeman, 284 M 440, 945 P2d 48, 54 St. Rep. 957 (1997).

Standard of Review of Grant or Denial of New Trial — Jury or Bailiff Misconduct: In the two most recent cases in which jury or bailiff misconduct was the basis for granting or denying a new trial, the Supreme Court stated that the standard is that the decision is within the sound discretion of the trial judge, whose decision will not be disturbed absent a showing of manifest abuse of that discretion. The Supreme Court reaffirmed this standard and overruled those cases with a different standard. Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995).

No Abuse of Discretion in Failure to Grant Mistrial Because of Testimony Concerning Costs and Attorney Fees: In the course of a lawsuit against his insurer for failure to settle a claim resulting from hail damage to his wheat crop, Dees testified that he had incurred substantial expense for costs and attorney fees in bringing the action against the insurer. The insurer moved for a mistrial, which was denied, and the jury subsequently awarded Dees a large punitive damages judgment. The Supreme Court held that it was not an abuse of discretion for the District Court to deny the motion for a mistrial. The District Court's findings and conclusions attributed the punitive damages award to the insurance company's dogmatic position that the crop was not damaged by hail and to the haughtiness of its witnesses. Because the District Court observed the trial, it is reasonable to infer that the District Court Judge considered the reference to costs to be comparatively insignificant. The District Court therefore did not abuse its discretion in denying the motion for a mistrial. Dees v. Am. Nat'l Fire Ins. Co., 260 M 431, 861 P2d 141, 50 St. Rep. 1068 (1993).

Time Allowed for Filing Motion for New Trial: Rule 59(b), M.R.Civ.P., provides that a motion under this rule for a new trial must be filed within 10 days after service of notice of entry of judgment. The day of mailing is excluded under Rule 6(a), M.R.Civ.P. Because notice of entry of judgment was served by mail, 3 days are added under Rule 6(e), M.R.Civ.P. The combined total of days allowed under Rules 59(b) and 6(e), M.R.Civ.P., is 13 days. In re Marriage of Schmitz, 255 M 159, 841 P2d 496, 49 St. Rep. 919 (1992).

Use of Juror Affidavits in Attempt to Prove Irregularity or Accident Improper: In moving for a new trial, plaintiffs submitted juror affidavits as evidence that the jury was misled in its duties,

asserting that constituted an irregularity or accident preventing plaintiffs from receiving a fair trial. However, this tactic was an attempt to use juror affidavits to impeach the jury's own verdict. If a motion for a new trial is to be granted, an irregularity or accident in jury proceedings must exist independent of juror affidavits. Use of juror affidavits to prove irregularity or accident is clearly improper. The alleged misunderstanding of the jurors in this case did not fit any of the exceptions enumerated in Rule 606(b), M.R.Ev. (Title 26, ch. 10). Motion for a new trial was properly denied. Boyd v. St. Medical Oxygen & Supply, Inc., 246 M 247, 805 P2d 1282, 47 St. Rep. 1923 (1990).

Discretion of Court: The granting of a new trial is within the sound discretion of the court and will be reversed only for manifest abuse of discretion. Larson v. K-Mart Corp., 241 M 428, 787 P2d 361, 47 St. Rep. 415 (1990); Jankovich v. Neill, 153 M 337, 457 P2d 475 (1969); Kincheloe v. Rygg, 152 M 187, 448 P2d 140 (1968); Benner v. B. F. Goodrich Co., 150 M 97, 430 P2d 648 (1967); In re Maricich, 145 M 146, 400 P2d 873 (1965); Herren v. Hawks, 139 M 440, 365 P2d 641 (1961).

Instructions Based on Out-of-State Supreme Court Decision Rather Than Appellate Court Decision — No Error: Plaintiff complained that the District Court erred in refusing to give three jury instructions based on a Washington appellate court decision and in giving instead an instruction taken from the Washington Supreme Court appeal of the same case, which modified the appellate court decision. The District Court did not err in refusing to give instructions based on a theory of law rejected by the Washington Supreme Court. Larson v. K-Mart Corp., 241 M 428, 787 P2d 361, 47 St. Rep. 415 (1990).

Irregularities in Jury Proceedings — Juror Affidavit — New Trial Denied: To support their motion for a new trial in District Court, plaintiffs submitted an affidavit of one juror, alleging that certain statements made by the bailiff during jury deliberations misled the jury and prevented clarification of the issue of proximate cause. Juror affidavits are admissible to show grounds upon which a new trial may be granted when a juror has personal knowledge of an alleged irregularity in the proceedings and the only other individual who has personal knowledge of the facts surrounding the irregularity is the individual who committed the alleged infraction. Only the facts upon which the alleged irregularities are based are admissible. Any allegations regarding the inner workings of the jury deliberations are inadmissible. The Supreme Court will not overrule the District Court's refusal to grant a new trial unless the evidence is clear and convincing that the trial court erred. Ahmann v. Am. Fed. S&L Ass'n, 235 M 184, 766 P2d 853, 45 St. Rep. 2305 (1988), overruled as to standard of review in Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995), and distinguished in State ex rel. St. Comp. Mut. Ins. Fund v. Berg, 279 M 161, 927 P2d 975, 53 St. Rep. 1098 (1996).

Contract Providing Attorney Fees as Part of Record — Fees Mentioned in Pretrial Order: A motion to amend pursuant to Rules 52(b) and 59(a), M.R.Civ.P., to include attorney fees was denied on the basis that defendants abandoned their claim for attorney fees by neglecting to state a claim in their pretrial order and because no evidence relative to fees was introduced at trial and therefore could not be added as a posttrial issue. The Supreme Court noted that attorney fees were contractually agreed to by the parties, so the issue of whether fees should be awarded was not one that would have been argued at trial. Further, since the contract was before the court as evidence and since the issue of attorney fees was raised twice in the pretrial order, the issue was not outside the court's record. The case was remanded for determination of reasonable attorney fees. Bell v. Richards, 228 M 215, 741 P2d 788, 44 St. Rep. 1467 (1987).

Grant of New Trial Not a New Action: The grant of a new trial by a District Court or the Supreme Court is not the filing of a new action and is limited to the original pleadings. Town Pump, Inc. v. District Court, 180 M 358, 590 P2d 1126 (1979).

Scope of New Trial: Under certain circumstances a District Court may order a new trial limited to the issue of damages. Bohrer v. Clark, 180 M 233, 590 P2d 117, 35 St. Rep. 1878 (1978).

Motion Inadequate: Defendants' motion for new trial was inadequate and defective in its essential elements because it merely recited the statutory language of 25-11-102 without stating with particularity the precise facts or circumstances being relied upon in support of their motion. Mont. Williams Double Diamond Corp. v. Hill, 175 M 248, 573 P2d 649 (1978).

Distinction — Reopening Case: The time for filing motions under this rule applies when a party desires a new trial, not when a case is reopened to take further testimony which is a matter within the sound discretion of the trial court. Compton v. Alcorn, 171 M 230, 557 P2d 292 (1976).

Recomputation of Hours Not to Include New Evidence: Hearing on a case remanded for recomputation of hours worked by the plaintiff should not include the reception of new evidence, but merely a recalculation of evidence already in the records. Glick v. Dept. of Institutions, 165 M 307, 528 P2d 686 (1974).

Motions — Directed Verdict — New Trial — Relationship: Motions for a new trial and for a directed verdict raise the same question. They both question the sufficiency of the evidence to support a verdict. Appeal will be accepted based upon insufficiency of the evidence notwithstanding failure to move for a new trial if motion was made for directed verdict. Davis v. Davis, 159 M 355, 497 P2d 315 (1972).

New Evidence Insufficient: Ex parte affidavit which alleged newly discovered evidence but was only cumulative in nature was insufficient in light of the record to authorize a new trial. Fisher v. Mitzel, 158 M 265, 491 P2d 186 (1971).

Motion Viewed in Light Most Favorable to Party Directed Against: The court must view motions for directed verdict and for new trials in light most favorable to the party against whom the motion is directed. Dieruf v. Gallaher, 156 M 440, 481 P2d 322 (1971).

Loss of Jurisdiction — Divorce Proceeding: The court exceeded its jurisdiction by determining paternity after entry of the original divorce decree. Relief was not sought under Rule 59 or Rule 60 as it could have been. Butler v. Brownlee, 152 M 453, 451 P2d 836 (1969).

Effect of District Court Rules: Notwithstanding the fact that court rule considered failure to file a brief in support of a motion for new trial an admission that the motion was without merit, the court has the discretion to proceed with the motion in accordance with its own opinion. Crissey v. Highway Comm'n, 147 M 374, 413 P2d 308 (1966).

No Retroactive Effect of Rule: Defendant was entitled to appeal in spite of time limitation of section 93-5606, R.C.M. 1947 (superseded by Rule 59(d), M.R.Civ.P.), for filing bill of exceptions where motion for new trial was combined with motion to amend findings and request for review of facts, conclusions of law, and judgment since limitation under section 93-5606 did not apply prior to enactment of new Rules of Civil Procedure. Crissey v. Highway Comm'n, 147 M 374, 413 P2d 308 (1966).

Order Denying New Trial — Misstatement in Order: When motion for new trial would have been correct because it was not served within 10 days, but court's order stated that motion was dismissed because not "filed" within 10 days, order was correct because court understood grounds for dismissal. Clark v. Worrall, 146 M 374, 406 P2d 822 (1965).

Rules 59 and 62 Distinguished: The denial of a motion for new trial is not in effect a denial of a stay of proceedings to enforce a judgment. State ex rel. Dawson v. Butte, 145 M 316, 400 P2d 629 (1965).

Retrial of Summary Judgment: Propriety of motion for a new trial in a summary judgment proceeding was not questioned on appeal. Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Disqualification — New Judge to Consider Motion: Where District Court did not grant a new trial on its own initiative but relators filed affidavits of disqualification against District Judge under section 93-901, R.C.M. 1947 (superseded by Supreme Court Rule No. 34), the District Judge was in error in not calling another judge to consider motions for new trial filed by defendants. State ex rel. Cline v. District Court, 142 M 278, 384 P2d 490 (1963).

Erroneous Order — Corrected Nunc Pro Tunc: Court's nunc pro tunc order correcting erroneous contempt judgment was not in violation of Supreme Court's writ because the order was made before the writ was issued. Niewoehner v. District Court, 142 M 1, 381 P2d 464 (1963).

Time for Disqualification of Judge: Neither Rule 59 nor Rule 50(b) deals with the disqualification of a trial judge. A trial judge may be disqualified after the return of a verdict and before the motion for a new trial has been made. State ex rel. Bellon v. District Court, 140 M 447, 373 P2d 314 (1962).

NEW TRIAL GRANTED — PARTICULAR CASES

Informal Witness Discovery Process Compromising Ability to Formulate Trial Strategy — Irregularities Constituting Abuse of Discretion Preventing Fair Trial — New Trial Warranted: If a District Court acts arbitrarily or without conscientious judgment or exceeds the bounds of reason in denying a new trial, it constitutes an abuse of discretion so significant as to materially affect the substantial rights of a complaining party. In the present case, the District Court devised a late hour informal expert witness discovery process that provided no opportunity for plaintiffs to obtain information exclusively in possession of defendants' expert prior to trial. Although the control of discovery activities, including the use of interrogatories, is within the discretion of the District Court, each party has a duty to supplement or amend answers to interrogatories in a timely manner, in order to make all relevant facts available to parties in advance of trial and to reduce the possibility of surprise or unfair advantage. Here, plaintiffs' lack of opportunity to depose defendants' expert, in the face of an inadequate discovery response, materially affected plaintiffs' substantial rights. The District Court's informal discovery process compromised plaintiffs' ability to formulate an effective trial strategy and to prepare adequately

for witness cross-examination, which placed plaintiffs at a serious disadvantage. The discovery irregularities constituted an abuse of discretion that materially affected plaintiffs' substantial rights, entitling plaintiffs to a new trial, and the District Court's denial of a new trial motion was therefore reversed. Perdue v. Gagnon Farms, Inc., 2003 MT 47, 314 M 303, 65 P3d 570 (2003).

Insufficient Evidence to Support Jury Verdict Limiting Damages to Past Medical Expenses but Not Pain and Suffering: Renville was injured as a passenger in an automobile accident in 1995, and liability was not contested. Evidence was uncontroverted that Renville had subsequently experienced pain and suffering as a result of the accident. The jury was instructed to award damages for past and future medical expenses, loss of earnings and earning capacity, pain and suffering, and loss of the ability to pursue an occupation and an established course of life. However, the jury limited its verdict to only past medical expenses, so Renville sought a new trial on grounds of insufficient evidence to support the award and irregularities in the proceedings. On review, the Supreme Court noted that a jury may not disregard uncontradicted, credible, nonopinion evidence. The court applied Thompson v. Bozeman, 284 M 440, 945 P2d 48 (1997), in holding that if a jury fails to award damages when the only evidence of record supports an award, that verdict is not supported by substantial evidence and may be set aside. Renville was entitled to some award for damages for proved pain and suffering, and the Supreme Court remanded for new trial limited to the issue of damages. Renville v. Taylor, 2000 MT 217, 301 M 99, 7 P3d 400, 57 St. Rep. 864 (2000). On remand, the District Court concluded that factual issues still existed as to the amount of Renville's past medical expanses and that the issues must be determined by a jury on retrial. The court found that the effect of the decision in Renville I, id., was to remand the entire issue of damages for a new trial. The Supreme Court disagreed. The decision in Renville I clearly stated that the award was limited to Renville's past medical expenses, which had been proved and awarded. Therefore, the law of the case precluded the District Court from revisiting the issue of Renville's past medical expenses on remand. It was an abuse of discretion for the District Court to deny Renville's motion for summary judgment and request for declaratory judgment on the issue of past medical expenses. Renville v. Farmers Ins. Exch., 2003 MT 103, 315 M 295, 69 P3d 217 (2003). See also St. v. Gilder, 2001 MT 121, 305 M 362, 28 P3d 488 (2001).

Irrelevant and Prejudicial Evidence of Consumption of Alcohol by Plaintiff: Violette pulled out of a store's parking lot in front of Havens, and the two collided. Havens sued the state, claiming negligent failure to place a stoplight at the parking lot entrance. It was not error to deny Havens' motion to exclude evidence of his alcohol consumption before the accident when the state opposed the motion by stating that it would show that the consumption was a cause of the accident. However, this forced Havens to introduce evidence of, and to address, his alcohol consumption. In addition, the state offered no evidence that Havens' alcohol consumption helped cause the accident and the state's medical expert and a law enforcement officer both testified that Havens was not negligent. Evidence of the alcohol consumption prejudiced the whole trial. It was reversible error to deny a motion for a new trial. Havens v. St., 285 M 195, 945 P2d 941, 54 St. Rep. 1108 (1997), followed in St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

Jury's Use of Dictionary Definitions Conflicting With Instructions: The jury used an ordinary dictionary and a legal dictionary, improperly given to the jury by the bailiff at the jury's request, to look up the terms "proximate cause" and "prudent". The definitions relating to causation did not contain the foreseeability element that was contained in an instruction given to the jury. The jury's conduct constituted improper independent research on extraneous material that redefined the critical element of causation by effectively eliminating from the instruction any reference to foreseeability. This was sufficient to demonstrate probable prejudice and potential injury to defendant, against whom the jury returned a verdict in this action. At the very least, there was a reasonable probability that the jury's misconduct influenced its decision, and as a consequence, defendant's substantial rights were compromised, along with his right to a fair trial. The trial judge's denial of a new trial was reversed, and the case was remanded. Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995).

Motion for New Trial Not Denied When Opposing Party's Argument Based on Semantics: Riverview Lounge argued that Peck's motion for a new trial should have been denied because Peck's attorney listed the alleged particular grounds for a new trial under a section of his motion designated "Brief" rather than under the section designated "Motion". The Supreme Court held that such a technical flaw was not fatal to Peck's motion and that the lower court did not abuse its discretion in granting the motion. Peck v. Riverview Lounge, Inc., 272 M 152, 900 P2d 270, 52 St. Rep. 678 (1995).

Newly Disclosed Evidence Wrongfully Withheld by Employer and Showing Wrongful Discharge: The trial court, in which a wrongful discharge plaintiff was granted a $70,000 jury verdict for damages, properly granted a new trial on the issue of damages on the basis that documents in the employer's files, requested by the plaintiff and not produced by the employer, but anonymously mailed to the plaintiff after the trial, showing that the employer had planned for some time to terminate the plaintiff, would have affected the damages award had they been available for the trial. Sullivan v. Sisters of Charity of Providence of Mont., 268 M 71, 885 P2d 488, 51 St. Rep. 1193 (1994).

Agreement by Lower Court That Its Instructions Constituted Error: In a personal injury suit, the lower court granted the plaintiffs' motion to exclude all references to the findings of the OSHA administrative law judge so long as the plaintiffs did not question their experts on possible OSHA violations by the defendant. The judge allowed the defendant to cross-examine the plaintiffs' experts about possible conformance with OSHA standards by the defendant, and the judge submitted instructions to the jury presented by the defendant pertaining to those standards. After a verdict in favor of the defendant, the lower court granted the plaintiffs' motion for a new trial on the basis that the instructions on OSHA standards were in error. The Supreme Court held that the lower court had not abused its discretion in granting a new trial. Griffith v. Mont. Power Co., 243 M 246, 794 P2d 692, 47 St. Rep. 1213 (1990). See also Dale v. Three Rivers Tel. Co-ops, Inc., 2004 MT 74, 320 M 401, 87 P3d 489 (2004), in which the District Court erred by not granting plaintiffs a new trial when defendant took unfair advantage of a motion in limine to preclude plaintiffs' line of questioning after defendant opened the door to the issue addressed in the motion. Dale v. Three Rivers Tel. Co-ops, Inc., 2004 MT 74, 320 M 401, 87 P3d 489 (2004).

Inconsistent Jury Findings — New Trial Granted: The District Court did not err in granting a new trial after finding that the jury was confused, that jury findings were inconsistent or in disregard of the court's instructions, and that it was too difficult to speculate as to how the jury arrived at its conclusions. Mont. Bank of Red Lodge v. Lightfield, 237 M 41, 771 P2d 571, 46 St. Rep. 605 (1989).

Motion for New Trial Erroneously Granted: A statement by defense counsel to jury in closing argument suggesting that "a fair verdict would be $30,000" was not a statement against interest setting lower limits of a verdict at $30,000. The District Court erred in granting a new trial on grounds that the $25,000 jury award to the plaintiff constituted inadequate damages when there was substantial credible evidence to support the verdict of the jury. Brown v. Markve, 216 M 145, 700 P2d 602, 42 St. Rep. 708 (1985). See also White v. Ford, Bacon & Davis Tex., Inc., 256 M 9, 843 P2d 787, 49 St. Rep. 1117 (1992).

Jury Verdict Internally Inconsistent: The Supreme Court will not disturb a trial court's ruling regarding a motion for a new trial in the absence of a showing of an abuse of discretion. In a nuisance action filed by home owners residing near a city dump, it was proper to order a new trial; the jury found that the city dump was the proximate cause of the nuisance but then found the home owners 90% comparatively negligent. Wilhelm v. Great Falls, 211 M 430, 685 P2d 350, 41 St. Rep. 1471 (1984). A later appeal of a District Court ruling that the City of Great Falls was not negligent was affirmed in Wilhelm v. Great Falls, 225 M 251, 732 P2d 1315, 44 St. Rep. 211 (1987).

Accident or Surprise — Change of Key Witness' Testimony: The ultimate issue in motor vehicle accident case was what caused tractor-trailer combination to overturn and slide into the other lane. Plaintiff introduced an accident scene diagram drawn by a state engineer from figures obtained by the investigating highway patrolmen. It placed the tractor-trailer's skid marks in the early part of the curve in which the overturn occurred, where the curve's radius was less than it was later in the curve, thus buttressing plaintiff's theory of the case. At trial, defendants recalled a highway patrolman, who testified that the patrolmen had incorrectly placed the skid marks on the diagram and that they should be placed farther into the curve, where the radius of the curve was sharper. The placement of the skid marks and the sharpness of the curve at the point of the skid were essential to resolution of the ultimate issue. Plaintiff was properly granted a new trial on the ground of accident or surprise which ordinary prudence could not have guarded against because: (1) it was clearly shown that he was actually surprised; (2) the facts causing the surprise had a material bearing on the case; (3) the verdict or decision resulted mainly from those facts; (4) the surprise did not result from plaintiff's inattention or negligence; (5) plaintiff acted promptly and claimed relief at the earliest opportunity; (6) plaintiff used every means reasonably available at the time of the surprise to remedy it; and (7) the result of a new trial without the surprise would probably be different. Ewing v. Esterholt, 210 M 367, 684 P2d 1053, 41 St. Rep. 1095 (1984), followed in In re Adoption of S.E., 232 M 31, 755 P2d 27, 45 St. Rep. 843 (1988).

References to Matters Not Within Record Included in Closing Argument — New Trial Ordered: The Supreme Court ordered a new trial in a wrongful death action on the grounds that the final argument of a defense counsel to the jury was improper because reference was made to: (1) matters withdrawn from the record by instruction to the jury; (2) matters withdrawn from the record by order in limine; (3) facts never entered into the record; and (4) facts irrelevant to the legal issues involved in the case. Kuhnke v. Fisher, 210 M 114, 683 P2d 916, 41 St. Rep. 952 (1984). Despite repeated attorney misconduct warranting sanction on retrial, the District Court ruled that the misconduct was not of the magnitude of that found in Kuhnke I, supra, and that viewed in the context of the entire trial, the improper conduct did not impact the jury to such an extent as to require a new trial. The Supreme Court found substantial credible evidence to support the verdict reached by two juries on two separate occasions hearing the same facts and noted that it was unlikely a third trial before a third jury would produce a different result. Kuhnke v. Fisher, 227 M 62, 740 P2d 625, 44 St. Rep. 895 (1987).

Trailer Swinging Into Wrong Lane When Driver Swerves to Avoid Collision — No Negligence — No New Trial: Undisputed evidence showed plaintiff was partly in defendant's lane on two-lane road while driving through a curve and that the approaching defendant responded by swerving to the right to avoid a head-on collision. The swerve caused a trailer that defendant was hauling behind his tractor-trailer truck to swing into plaintiff's lane and collide with plaintiff. There was no evidence that defendant was driving unsafely prior to that or that he was in any way negligent. Defendant acted reasonably and prudently, and plaintiff's actions supported a finding that he was the proximate cause of his injuries. The jury verdict found defendant was not negligent. It was an abuse of discretion and reversible error for the court to grant plaintiff a new trial, for there was sufficient evidence to support the verdict. Shannon v. Hulett, 205 M 345, 668 P2d 228, 40 St. Rep. 1349 (1983).

Motion for New Trial Erroneously Granted: Although the testimony of witnesses conflicted, substantial credible testimony elicited from on-the-scene witnesses corroborated defendant's version of a collision with the deceased pedestrian. The lower court erred when it granted plaintiffs' motion for new trial and to set aside the verdict of the jury because the judge relied on a line of conflicting testimony different than the testimony relied on by the jury. Yerkich v. Opsta, 176 M 272, 577 P2d 857 (1978).

Mistake or Inadvertence: Grant of new trial to permit plaintiff to give additional testimony on issue of damages only was not improper, notwithstanding that ground for relief was mistake or inadvertence and should have been given pursuant to Rule 60(b), where no intervening rights had attached in reliance upon judgment and no actual injustice would ensue. John J. Ming, Inc. v. District Court, 155 M 84, 466 P2d 907 (1970).

Erroneous Instructions — New Trial Based Upon: Court was correct in granting new trial because instructions on assumption of risk had been erroneously given. Jankovich v. Neill, 153 M 337, 457 P2d 475 (1969).

Inadequacy of Award — Abuse of Discretion: Court abused discretion in granting new trial "upon the grounds of insufficiency of the evidence to justify the verdict in that the verdict awarded by the jury to the plaintiff is wholly inadequate" where there was conflict in evidence and where it was question for jury whether injuries suffered by passenger were caused by grossly negligent operation of car or whether passenger assumed risk of going into car driven by man who had several drinks. Heen v. Tiddy, 151 M 265, 442 P2d 434 (1968).

Jury Misconduct: New trial was properly granted when foreman of jury made independent investigation of accident scene after hearing testimony and informed other jury members of the results. Goff v. Kinzle, 148 M 61, 417 P2d 105 (1966), distinguished in Highway Comm'n v. Roth, 159 M 268, 496 P2d 1136 (1972).

Condemnation Proceeding: In condemnation proceeding where State appraised land at $18,000, condemnee appraised it at $95,000 and jury awarded condemnee $21,000, granting of new trial because award was inadequate was not such an abuse of trial judge's discretion as to warrant reversal in spite of the fact there was no rebuttal of State's only expert witness. Highway Comm'n v. Greenfield, 145 M 164, 399 P2d 989 (1965).

NEW TRIAL DENIED — PARTICULAR CASES

Jury Award Based on Contested Expenses — Sufficient Evidence to Support Verdict: Plaintiffs asserted that a new trial was warranted because the jury in a personal injury case returned a verdict of $9,873, which amounted to significantly less than plaintiffs' evidence of past and future medical expenses, loss of past and future wages, and pain and suffering. However, the District Court denied a new trial, and the Supreme Court affirmed, noting that if a jury award is insufficient to cover uncontested expenses, then it is not supported by substantial

evidence, but that was not the case here. Evidence presented by both parties revealed a significant dispute in the nature, cause, and severity of the injury, the need for future treatment, the existence and amount of past and future wage loss, and pain and suffering. Based on the record of disputed expenses, there was substantial evidence to support the jury award, and the Supreme Court declined to retry the case or disturb the judgment, especially when the District Court had already upheld the sufficiency of the evidence on motion for a new trial. Jenks v. Bertelsen, 2004 MT 50, 320 M 139, 86 P3d 24 (2004).

Strongly Conflicting Evidence — Within Jury's Province to Determine Credibility: The Satterfields argued that there was not sufficient evidence to support the jury's verdict in a contract dispute over the construction of a house. The Supreme Court held that there was strongly contradictory evidence given by the two sides in the case, that apparently the jury had believed the Satterfields' opponent, and that there was substantial evidence to support the jury's verdict. Satterfield v. Medlin, 2002 MT 260, 312 M 234, 59 P3d 33 (2002).

Substantial Credible Evidence to Support Jury Verdict — Verdict Affirmed: Plaintiff was injured when a donkey savagely bit her arm. Defendant treated her at the local hospital. Plaintiff endured several surgeries and eventually lost her arm below the elbow. She sued defendant, claiming that defendant's negligence subjected her to an increased risk of harm and lessened her chances for a better result. The jury found that defendant was negligent but that the negligence did not cause injury to plaintiff. On appeal, the Supreme Court found that there was substantial credible evidence in the record to support the jury's verdict. Much of the testimony of plaintiff's expert witness was contradicted by defendant's expert witnesses. An attack upon a jury verdict alleging that it is not supported by the evidence is proper only when there is a complete absence of any credible evidence in support of the verdict. The District Court did not abuse its discretion in denying the motion to alter or amend the judgment or for a new trial. Campbell v. Canty, 1998 MT 278, 291 M 398, 969 P2d 268, 55 St. Rep. 1137 (1998).

New Evidence of One Witness's Schizophrenia and Another's Night Blindness: New evidence of one witness's schizophrenia and of another's night blindness served only to impeach their credibility. Neither piece of evidence, a 1969 letter mentioning schizophrenia and undocumented and unsupported information as to night blindness, was so probative as to make a material difference in a jury's assessment of the credibility of the witnesses. Thus, the evidence was not so material that it would probably produce a different result upon a new trial. In addition, the night blindness evidence could have been discovered before trial. Therefore, it was not error to refuse a new trial because of the evidence. St. v. Lawrence, 284 M 140, 948 P2d 186, 54 St. Rep. 1082 (1997). See also companion case, St. v. Jenkins, 285 M 131, 948 P2d 204, 54 St. Rep. 1078 (1997).

Statements Regarding Value of Partnership Assets No Barrier to Presentation of Evidence — New Trial Denied: Wife argued for a new trial based on conflicting information compiled after trial regarding the value of the marital estate. With the exercise of reasonable diligence, the evidence could have been discovered prior to trial. Husband's trial statements concerning partnership assets did not materially thwart wife's ability to present her case, indicating lack of fraud, so a new trial was unwarranted. In re Marriage of Barnes, 251 M 334, 825 P2d 201, 49 St. Rep. 67 (1992).

Finding of Negligence Not Necessary in Every Accident: Plaintiff was a passenger in a truck involved in a collision in which each driver claimed the other was negligent, but the jury attributed negligence to neither. Plaintiff cited Aemisegger v. Herman, 215 M 347, 697 P2d 925 (1985), in claiming he was entitled to a new trial because that kind of accident cannot happen absent negligence and because a violation of basic traffic rules constitutes negligence per se. The Supreme Court distinguished Aemisegger because in that case, there was clear evidence of fault. The Supreme Court noted that simply because there is an accident does not mean someone must be negligent. The trial court did not err in refusing plaintiff's motion for a new trial on the basis that defendants were negligent as a matter of law. Brookings v. Thompson, 248 M 249, 811 P2d 64, 48 St. Rep. 418 (1991).

Jury Instructions Not Founded in Evidence or Misstatement of Law — New Trial Denied: Plaintiffs sought a new trial on grounds that the trial court improperly refused to give plaintiffs' proffered instructions on termination of power of attorney, warranty, and fraudulent conveyance. However, the instructions were correctly refused because: (1) there were undefined legal terms in the instructions on termination of power of attorney that rendered the instructions ambiguous or unintelligible; (2) the giving of non-Uniform Commercial Code warranty instructions in a Uniform Commercial Code case was a technical defect and did not constitute a misstatement of law affecting the plaintiffs' rights; and (3) there was no evidence of fraudulent conveyance, rendering that instruction improper. Boyd v. St. Medical Oxygen & Supply, Inc., 246 M 247, 805 P2d 1282, 47 St. Rep. 1923 (1990).

Substantial Evidence Supporting Personal Injury Award: Plaintiff, who turned down a $20,000 settlement offer and recovered only $7,800 from the jury, moved for a new trial on the basis that the verdict was contrary to the evidence presented at trial. The lower court's finding that substantial evidence existed to support the award (thereby exhausting its discretion to grant a new trial) was affirmed on appeal. Feller v. Fox, 237 M 150, 772 P2d 842, 46 St. Rep. 694 (1989).

No Objection to Jury View — New Trial Not Granted: Plaintiff contended that District Court erred in not granting a new trial when the jury was allowed to view the property prior to the time the plaintiff rested her case and in not giving a cautionary instruction. However, the record showed that plaintiff's counsel made no objection to the jury view and did not request a cautionary instruction. The Supreme Court found no District Court error for a procedure to which plaintiff did not object. Bushnell v. Cook, 221 M 296, 718 P2d 665, 43 St. Rep. 825 (1986).

Right to Jury Trial — Equity Claim and Claim for Damages Tried in Single Proceeding: The District Court granted plaintiffs' motion for a new nonjury trial, ruling that an action under Title 49, ch. 2, is equitable in nature and implies no right to a trial by jury in a federal suit under Title VII of the federal Civil Rights Act of 1964 (Act). Plaintiffs contended that the only damages sought were backpay and reinstatement. The Supreme Court found that the record disclosed that plaintiffs submitted evidence of damages other than backpay and reinstatement and concluded that a claim for relief under the Act and a legal claim for damages as a result of unlawful discharge were tried in a single proceeding, each claim arising out of common fact issues. The court held that the right to a jury trial encompassed both the claims under the Act and the legal claims for damages, and that the trial judge was bound by the jury's determination of facts on all issues. The Supreme Court further held that the District Court erred in granting a new nonjury trial, and the case was remanded with instructions to reinstate the jury verdict and enter judgment accordingly. Breese v. Steele Mtn. Enterprises, Inc., 220 M 454, 716 P2d 214, 43 St. Rep. 522 (1986).

Failure to Produce Evidence of Poor Health — Specious Allegation on Appeal: Husband's contention that the award of maintenance to his wife places a financial burden on him that he is unable to comply with is without merit. The sole basis of his motion for a new trial was his contention that he was not in good health. None of the statutory requirements for a new trial were presented, nor did the husband produce any evidence at trial that would establish his poor health. In re Marriage of Yadon, 216 M 59, 699 P2d 75, 42 St. Rep. 638 (1985).

Substantial Evidence Supporting Award — Error to Grant New Trial: District Court committed error when it granted a new trial based on inadequacy of damages when jury awarded plaintiff $2,000 of which no more than $700 was for pain and suffering caused by injuries received in automobile accident. In reversing the grant of new trial and ordering entry of judgment on the jury's verdict, the Supreme Court stated that the jury is not compelled to believe plaintiff's testimony and that to allow the District Court to simply substitute its judgment for that of the jury when there is substantial evidence to support the jury award would "create a bench supremacy and sap the vitality of jury verdicts". Maykuth v. Eaton, 212 M 370, 687 P2d 726, 41 St. Rep. 1800 (1984), distinguished in Thompson v. Bozeman, 284 M 440, 945 P2d 48, 54 St. Rep. 957 (1997).

Juror Affidavit Alleging Compulsion, Belief in Innocence, and Improper Belief in Effect of Hung Jury: A new trial was not required when defendant offered an affidavit in which a juror stated: (1) her belief that defendant was innocent; (2) that the verdicts were the result of pressure against her and other jurors to end deliberation; and (3) her belief that if a new trial was ordered defendant would be convicted anyway. St. v. Anderson, 211 M 272, 686 P2d 193, 41 St. Rep. 1357 (1984).

Child Custody Dispute — Allegedly Unsafe Condition of Custodian's Yard Knowable Before Trial: There was no merit to husband's claim that new evidence warranted a new trial of divorce proceeding. Wife was granted custody of the child of the marriage, and the asserted new evidence, that part of the backyard where wife lived was bounded by a ditch, was available at the time of the trial and could have been ascertained by husband. Cherewick v. Cherewick, 205 M 75, 666 P2d 742, 40 St. Rep. 1106 (1983).

Divorce Proceeding — Counselor Testimony Available at Trial: Husband argued that a new divorce trial was justified by the fact that a psychiatrist who had counseled both parties prior to the dissolution of their marriage decided to testify. He refused to testify at the original hearing because the parties agreed that the information obtained by him in counseling would not be used in court. However, he was later willing to testify. He was available at the time of trial and could have been subpoenaed. The evidence did not come to the knowledge of husband after the trial, and husband lacked diligence as to the testimony. The materiality of the evidence was not so

great as to produce a different result by the District Court. Therefore, the District Court did not abuse its discretion by denying a new trial. Cherewick v. Cherewick, 205 M 75, 666 P2d 742, 40 St. Rep. 1106 (1983).

Newly Discovered Evidence — Lack of Diligence: Plaintiff who knew witness was crucial and could have learned the location of the witness by questioning his other witnesses was not entitled to a new trial on the ground of newly discovered evidence consisting of the fact that plaintiff located the witness after the trial. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982).

"Newly Discovered Evidence" — Prior Knowledge: Buyer looked at horse for sale, suggested it had a navicular disease, called seller later in the day to say he would take the horse, and the sale was concluded 2 days later. Upon discovering that the horse would not perform as advertised by seller, buyer returned the horse and sued for the purchase price. Defendant received a jury verdict, and buyer moved for a new trial on ground of newly discovered evidence consisting of a veterinarian's finding, after buyer retrieved the horse after the trial, that the horse had a navicular disease and should not be ridden. Denial of a new trial was proper. Buyer initially suspected the disease existed, yet did not have the horse inspected. Fordyce v. Hansen, 198 M 344, 646 P2d 519, 39 St. Rep. 1043 (1982), followed in Geiger v. Sherrodd, Inc., 262 M 505, 866 P2d 1106, 50 St. Rep. 1661 (1993).

Conflicting Though Substantial Evidence of Reason for Collision — New Trial Denied: The plaintiff and the defendant collided on the highway. At trial, the defendant successfully counterclaimed and the plaintiff appealed, claiming that there was insufficient evidence to support the jury verdict. An order denying a new trial will not be reversed when the evidence is conflicting if there is substantial evidence to support the verdict. When the surrounding circumstances make the testimony of a witness highly improbable or incredible, that testimony is not "substantial evidence". Here, the appellant argued that the physical evidence showed the respondent must have seen his turn signal and thus was at fault in running into the appellant's vehicle. The Supreme Court disagreed. It discussed several reasons why the inconsistencies between the testimony and the physical evidence might have occurred. The Supreme Court concluded that there was substantial evidence to support the jury verdict. Burns v. U & R Express, 191 M 343, 624 P2d 487, 38 St. Rep. 302 (1981), followed in Nelson v. Flathead Valley Transit, 251 M 269, 824 P2d 263, 49 St. Rep. 58 (1992).

Verdict Supported by Substantial Evidence — No New Trial: A new trial may not be granted by the trial court when it finds substantial evidence in the record to support the verdict. Stenberg v. Neel, 188 M 333, 613 P2d 1007 (1980). See also Pfau v. Richland County, 227 M 362, 739 P2d 950, 44 St. Rep. 1150 (1987).

"Newly Discovered Evidence" — Motion Properly Denied: Substantial credible evidence existed to support findings of fact and conclusions of law, and were unaffected by alleged "newly discovered" evidence which at best was merely cumulative. Furthermore, because the "new evidence" was at all times in the exclusive possession of appellants, motion for new trial was denied. Kartes v. Kartes, 175 M 210, 573 P2d 191 (1977), followed in In re Marriage of Burner, 246 M 394, 803 P2d 1099, 48 St. Rep. 7 (1991).

Action on Contract to Enforce Payment — Denial of Motion: Substantial evidence to support the jury verdict and no abuse of discretion in denial were found in denying motion for new trial. Brothers v. Virginia City, 171 M 352, 558 P2d 464 (1976), followed in Krueger v. Gen. Motors Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989).

False Testimony: When verdict was based upon false testimony, it was error to deny motion for new trial. Morris v. Corcoran Pulpwood Co., Inc., 154 M 468, 465 P2d 827 (1970).

New Trial — Properly Denied — Negligence: Court interpreted law correctly and properly denied motion for a new trial. Gunderson v. Brewster, 154 M 405, 466 P2d 589 (1970); Knowlton v. Sandaker, 150 M 438, 436 P2d 98 (1968).

Collateral References

New Trial *key* 1.

66 C.J.S. New Trial §§17 through 144.

58 Am. Jur. 2d New Trial §§83 through 469.

Necessity of notice of application or intention to correct error in judgment entry. 14 ALR 2d 224.

Rule 59(b). Time for motion.

Commission Notes

The rule is identical with the Federal Rule, except that the phrase "service of notice of" has been added in subdivisions (b) and (e).

Compiler's Comments

Amendment — Identity With Federal Rule: The amendment of May 21, 1969, made no change in this rule. As of May 1, 1990, the above commission note was still applicable.

Case Notes

General 1076
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GENERAL

Lack of Findings on Marital Home Not Correctable by District Court After Time Limitations Expire: In a divorce settlement, the trial court findings contained no determination of the net worth of the parties, the net worth of the husband's medical practice, or the relative financial contributions of the two parties. The findings of fact also were inconclusive as to the value and disposal of the family home. Five months after the decree was entered, the husband petitioned for amendment, requesting award of the family home to him. Eleven months later the District Court found that it was the original intention of the court to distribute the home to the husband. The Supreme Court concluded that the District Court erred in its attempt to amend the decree. Under Rule 60(a), M.R.Civ.P., clerical errors in judgments may be corrected at any time since correction does not alter substantive rights of the parties. Here the attempted change adversely affected the wife's substantive rights by depriving her of her interest in the family home, a major asset of the marriage. Such error is judicial in nature and could not be corrected by the District Court except by motion made within the time limitations of Rules 50(b), 52(b), 59, or 60(b)(1), M.R.Civ.P. No such motion having been made, the error would have been correctable by appeal, which was never taken by either of the parties. The District Court therefore lacked jurisdiction to make the change effected by its entry of the amended findings and decree. The case was remanded. Thomas v. Thomas, 189 M 547, 617 P2d 133, 37 St. Rep. 1710 (1980).

Violation of Montana Rules of Civil Procedure — Effect on Motion for New Trial: Since counsel for petitioner violated Rule 77(d), M.R.Civ.P., by giving notice of entry of judgment himself rather than having the clerk of court serve notice of entry of judgment, opposing counsel was not required to adhere to the 30-day period for filing of notice of appeal until proper service was made; thus the court committed no error in denying petitioner's motion to strike all posttrial motions as untimely. Pierce Packing Co. v. District Court, 177 M 51, 579 P2d 760 (1978).

Motions — Directed Verdict — New Trial — Relationship: Motions for a new trial and for a directed verdict raise the same question. They both question the sufficiency of the evidence to support a verdict. Appeal will be accepted based upon insufficiency of the evidence notwithstanding failure to move for a new trial if motion was made for directed verdict. Davis v. Davis, 159 M 355, 497 P2d 315 (1972).

Filing Motion for Disqualification Before Motion for New Trial: A judge may be disqualified after return of verdict but before new trial motion was made. State ex rel. Bellon v. District Court, 140 M 447, 373 P2d 314 (1962); Russell v. Sunburst Ref. Co., 83 M 452, 272 P 998 (1928); Hill v. Nelson Coal Co., 40 M 1, 104 P 876 (1909); State ex rel. Carelton v. District Court, 33 M 138, 82 P 789 (1905). But see State ex rel. Cline v. District Court, 142 M 278, 384 P2d 490 (1963); State ex rel. Perry v. District Court, 145 M 287, 400 P2d 648 (1965), where the doctrine was criticized and the statute was considered improperly construed when disqualification is permitted pending a motion for a new trial. And, see State ex rel. Wilson v. District Court, 143 M 543, 393 P2d 39 (1964), where the Supreme Court refused to follow the interpretation given the civil statute and declined to permit the disqualification of a judge in a criminal case following verdict and before hearing upon a motion for a new trial. Disqualification, preventing a ruling on posttrial motions, after entry of findings and conclusions, was most recently allowed in Macpherson v. Smoyer, 191 M 53, 622 P2d 188, 37 St. Rep. 2079 (1980).

Motion Ineffective as to Jurisdiction: If notice of intention to move for a new trial is given either after the time has expired or before the time has commenced to run, it is ineffective for the purpose of conferring jurisdiction. Calvert v. Anderson, 78 M 334, 254 P 184 (1927).

Purpose of Notice — Statutory Procedure Exclusive: The procedure to be followed in connection with a motion for new trial prescribed is exclusive, the notice of intention being the step initiating the proceeding, the chief function of which is to bring within the jurisdiction of the court those parties to the original action whose interests would be adversely affected by the granting of the motion. Calvert v. Anderson, 78 M 334, 254 P 184 (1927).

Jurisdiction Lost by Improper Timing — Orders Void: Where notice of intention to move for a new trial was not filed until 11 days after return of the verdict, the court was without jurisdiction to entertain it, and any orders made by it thereafter upon the assumption that the motion for new trial was still pending were void. Hence, an order made thereafter granting movant an extension of time within which to file his bill of exceptions (exceptions abolished by Rules 7(c) and 46, M.R.Civ.P., and 25-31-503, now repealed) was null, rendering the bill subject to a motion to strike from the record. Stabler v. Adamson, 73 M 490, 237 P 483 (1925).

Presumption of Regular Service: The presumption is that the notice of intention to move for new trial was served and filed in time unless the contrary affirmatively appears from the record. Best Mfg. Co. v. Hutton, 49 M 78, 141 P 653 (1914); State ex rel. Cohn v. District Court, 38 M 119, 99 P 139 (1909).

Withdrawal of Motion or Notice: Where a written motion for a new trial has been made, its withdrawal and the substitution of another after the time for filing a notice had expired does not constitute, in effect, a withdrawal of the notice of intention to move so as to operate as an abandonment of the proceeding. Wastl v. Mont. Union Ry., 13 M 500, 34 P 844 (1893).

TIME OF MOTION OR NOTICE

Motion for Posttrial Relief Untimely — Posttrial Motion to Correct Clerical Mistakes Proper — Motion for Posttrial Relief Not Substitute for Appeal: Following notice of entry of judgment in a marriage dissolution trial, the husband had 10 days to file a motion under Rule 59, M.R.Civ.P., but missed the deadline by 2 days, so the motion was properly ruled untimely. The husband had 30 days to file a notice of appeal, but the untimely Rule 59 motion did not toll the time for appeal, and that time also expired. The decree became final, subject only to the husband's motion for relief under the various provisions of Rule 60, M.R.Civ.P. The District Court erred in not applying Rule 60(a), M.R.Civ.P., to correct clerical mistakes in the findings of facts. However, a Rule 60 motion may not be used as a substitute for appeal, so the husband's Rule 60 motion essentially seeking to set aside the decree based on insufficient evidence was properly denied. In re Marriage of Schoenthal, 2005 MT 24, 326 M 15, 106 P3d 1162 (2005).

Calculating Time for Service of Motion — Days Before Saturday Christmas and New Year's Day Not Holidays: Burlington Northern alleged that it had timely served its motion for a new trial, thereby tolling the 30-day period for appealing the jury verdict in favor of Dunkelberger. The railroad argued that Christmas and New Year's Day had fallen on Saturday and, since the courts were closed on the preceding Fridays, those Fridays were holidays and were not to be counted in determining whether the motion for new trial had been served within the required 10 days. The Supreme Court held that the fact that those Fridays were holidays for state workers did not make them statutory holidays and that those Fridays counted as part of the 10-day period. Dunkelberger v. Burlington N. RR Co., 265 M 243, 876 P2d 218, 51 St. Rep. 499 (1994).

Time Allowed for Filing Motion for New Trial: This rule provides that a Rule 59(a), M.R.Civ.P., motion for a new trial must be filed within 10 days after service of notice of entry of judgment. The day of mailing is excluded under Rule 6(a), M.R.Civ.P. Because notice of entry of judgment was served by mail, 3 days are added under Rule 6(e), M.R.Civ.P. The combined total of days allowed under Rule 6(e), M.R.Civ.P., and this rule is 13 days. In re Marriage of Schmitz, 255 M 159, 841 P2d 496, 49 St. Rep. 919 (1992).

Belated Expert Opinion Constituting Newly Discovered Evidence: When presented with the question of whether an opinion of a trial expert, offered for the first time after final judgment and based on a fact asserted by the plaintiff and within her knowledge prior to judgment, constituted newly discovered evidence, the court declined to distinguish between opinion evidence and other kinds of evidence because the opinion evidence met the tests ordinarily required of newly discovered evidence. The failure to produce the evidence at trial must not have been caused by the moving party's lack of due diligence. The evidence must be admissible, credible, and of such a material and controlling nature as will probably change the outcome. Halse v. Murphy, 237 M 509, 774 P2d 418, 46 St. Rep. 1009 (1989), distinguished, on grounds of failure to exercise due diligence in producing required expert testimony, in Estate of Nielsen v. Pardis, 265 M 470, 878 P2d 234, 51 St. Rep. 591 (1994).

Time for Motion to Amend Motion: Neither a motion to amend findings nor a motion for a new trial may be amended after the time allowed for filing the original motion has passed. In re Marriage of Wilson, 216 M 392, 701 P2d 1372, 42 St. Rep. 894 (1985).

Service of Notice of Entry of Judgment by Mail — Effective Three Days After Mailing: Notice of entry of judgment was mailed to the parties on May 21, 1980. Twelve days later the respondent filed a motion to amend findings and judgment and a motion for a new trial. Because service of a notice of entry of judgment by mail is not effective until 3 days after the mailing under Rule 6(e),

M.R.Civ.P., the motions were timely. Wilson v. Wilson, 198 M 147, 645 P2d 393, 39 St. Rep. 828 (1982).

Time for Making — Failure to Serve as Effecting Denial: A motion for new trial may be made before or after entry of judgment subject to the limitation of 10 days after service of notice of entry of judgment. If not served within the 10-day period, the motion is considered denied under the provisions of the last paragraph of Rule 59(d), M.R.Civ.P. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Untimely Motion Equivalent to Motion for Relief From Judgment: A motion for new trial that is not timely may be considered as a motion under Rule 60 when it states grounds for relief under that rule. Nomenclature is unimportant. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

New Trial Motion Untimely: The District Court erred in granting a motion for new trial because the requirements of Rule 59(b), M.R.Civ.P., were not complied with. The notice of entry of judgment, although prepared and signed by Gilbert, was served on the Gordons by the Clerk of the Court on July 25, 1979. The motion for a new trial, however, was not filed or served on opposing counsel until January 1980, some 6 months later. This court will not disregard the 10-day time limitation. Additionally, there is no requirement that the notice of entry of judgment be signed by the Clerk or be prepared and given to the Clerk by the "prevailing party". In re Gordon, 192 M 499, 628 P2d 1117, 38 St. Rep. 887 (1981).

Motion for a New Trial — Time for Notice of Appeal Suspended: A judgment was entered against the appellant May 31. On June 6, appellant mailed a motion for a new trial and for extension of the time for filing briefs. On June 11 the District Court gave appellant until June 25 to file its brief, which appellant did on that date. On July 20 the District Court denied appellant's motion for a new trial without hearing, and on August 2 the appellant mailed his notice of appeal. Under these circumstances the notice of appeal was timely filed, since the filing of appellant's motion for a new trial suspended the running of the time in which to file a notice of appeal and the District Court's order extending the time for filing supporting briefs must by necessary implication extend the time for ruling on that motion. The 10-day period for ruling on the motion did not begin to run until the appellant's brief was filed within the time period allowed by the court. The motion for a new trial was automatically denied when it was not acted upon within 15 days. Appellant thereafter had 30 days in which to file its notice of appeal, which was done on August 3. Britton v. Burlington N., Inc., 184 M 107, 601 P2d 1192 (1979).

Service After Findings and Before Judgment: Where movant filed a notice of motion to move for new trial 5 days after service of notice of the court's findings of fact and conclusions of law upon him, the court's findings of fact and conclusions of law, though not constituting a judgment, were equivalent to a decision and therefore, the notice of motion was timely. State ex rel. King v. District Court, 107 M 476, 86 P2d 755 (1939).

Intent of Rule: The clear intendment of section 93-5605, R.C.M. 1947 (superseded by Rule 59, M.R.Civ.P.), providing that notice of motion of a new trial must be served and filed within 10 days after return of the verdict (referring to a jury trial), or within 10 days after receiving notice of the decision of the court (referring to a trial without a jury), was that the notice be given only after all the issues of fact necessary to a determination of the whole case upon the pleadings have been determined. Calvert v. Anderson, 78 M 334, 254 P 184 (1927).

Notice of Motion May Be Stricken: A party desiring to move for a new trial must, under section 93-5605, R.C.M. 1947 (superseded by Rule 59, M.R.Civ.P.), serve his notice of motion upon the adverse party within 10 days after verdict. If not served within that time it may be stricken from the files. La Bonte v. Mut. Fire & Lightning Ins. Co., 75 M 1, 241 P 631 (1925).

Notice on Same Day as Judgment: Though the notice of intention to move for a new trial was served and filed on the same day that judgment was entered, with a fraction of a day intervening, such notice is not abortive because it was served and filed before the judgment was actually spread upon the judgment book. Where no question of priority arises it will be presumed that the clerk did his duty. State ex rel. Brown v. District Court, 55 M 158, 174 P 601 (1918).

Time for Service of Notice: A party intending to move for a new trial may do so by serving his notice within 10 days after notice of the entry of judgment, but not before. McIntyre v. MacGinniss, 41 M 87, 108 P 353 (1910).

PARTIES SERVED

Definition of Adverse Parties: With respect to the definition of adverse parties upon whom notice must be served, section 93-5605, R.C.M. 1947 (superseded by Rule 59, M.R.Civ.P.), relating to motions for new trial, and section 93-8005, R.C.M. 1947 (superseded by Rule 4,

M.R.App.P.), relating to appeals, were on the same footing. In re Hardy's Estate, 133 M 536, 326 P2d 692 (1958).

Will Contest — Notice Not Required: Resident heirs summoned in a will contest but who did not appear are not adverse parties upon whom notice of motion for new trial must be served, even though no default was entered against them. In re Hardy's Estate, 133 M 536, 326 P2d 692 (1958).

Service of Defendants by Codefendant: Where one of several defendants served his notice of intention to move for a new trial and his notice of appeal upon the only one of his codefendants who had any interest in opposing the relief sought by the motion and appeal, the service was sufficient as against the objection that not all the adverse parties had been served. McIntyre v. MacGinniss, 41 M 87, 108 P 353 (1910).

WAIVER OF SERVICE

Ability to Waive: Service of notice of intention to move for a new trial may be waived. State ex rel. King v. District Court, 107 M 476, 86 P2d 755 (1939); Curn v. Perkins, 40 M 588, 107 P 901 (1910); McAllister v. McDonald, 40 M 575, 106 P 882 (1910); Kenyon-Noble Lumber Co. v. School District, 40 M 123, 105 P 551 (1909); Harrigan v. Lynch, 21 M 36, 52 P 642 (1898); Territory v. Rehberg, 6 M 467, 13 P 132 (1887).

Extension of Time Not Allowed: The time for filing of notice of motion for a new trial cannot be extended either by order or stipulation, and therefore where such a notice was not filed until after the expiration of 10 days it was too late and was properly stricken from the records, the contention that the defect was waived by the actions of opposing counsel being of no avail. Dilts v. Brooks, 66 M 346, 213 P 600 (1923).

Facts Constituting Waiver: Where a notice of intention to move for a new trial was served and filed before entry of judgment, the opposing party waived the point that the notice was premature, by stipulating with movant that the latter might have additional time in which to file his bill of exceptions (exceptions abolished by Rules 7(c) and 46, M.R.Civ.P., and 25-31-503, now repealed) in support of his motion, by thereafter accepting service thereof without objection, and by raising no objection at the argument, other than that there had been delay in calling it up. Kenyon-Noble Lumber Co. v. School District, 40 M 123, 105 P 551 (1909).

NOTICE OF JUDGMENT

Service of Notice of Entry of Judgment by Mail — Effective Three Days After Mailing: Notice of entry of judgment was mailed to the parties on May 21, 1980. Twelve days later the respondent filed a motion to amend findings and judgment and a motion for a new trial. Because service of a notice of entry of judgment by mail is not effective until 3 days after the mailing under Rule 6(e), M.R.Civ.P., the motions were timely. Wilson v. Wilson, 198 M 147, 645 P2d 393, 39 St. Rep. 828 (1982).

Motion for a New Trial — Time for Notice of Appeal Suspended: A judgment was entered against the appellant May 31. On June 6, appellant mailed a motion for a new trial and for extension of the time for filing briefs. On June 11 the District Court gave appellant until June 25 to file its brief, which appellant did on that date. On July 20 the District Court denied appellant's motion for a new trial without hearing, and on August 2 the appellant mailed his notice of appeal. Under these circumstances the notice of appeal was timely filed, since the filing of appellant's motion for a new trial suspended the running of the time in which to file a notice of appeal and the District Court's order extending the time for filing supporting briefs must by necessary implication extend the time for ruling on that motion. The 10-day period for ruling on the motion did not begin to run until the appellant's brief was filed within the time period allowed by the court. The motion for a new trial was automatically denied when it was not acted upon within 15 days. Appellant thereafter had 30 days in which to file its notice of appeal, which was done on August 3. Britton v. Burlington N., Inc., 184 M 107, 601 P2d 1192 (1979).

Attempts to Give Notice Insufficient: Where the record on appeal did not affirmatively show that counsel for appellant was present when judgment was entered, or that it was entered before an extension of time in which to file his bill of exceptions (exceptions abolished by Rules 7(c) and 46, M.R.Civ.P., and 25-31-503, now repealed) on motion for new trial and stay of execution were asked for and granted on May 2, and the Clerk of the District Court on May 6 attempted to advise him that the entry had been made 2 days before, and on May 15 counsel for respondent served formal notice upon him to that effect, appellant's notice of intention to move for new trial, served on May 21, was in time. Best Mfg. Co. v. Hutton, 49 M 78, 141 P 653 (1914).

Letter as Insufficient Notice: A letter to the plaintiff's counsel, written by the clerk of the court, informing him that a judgment for the defendant has been signed, is not a sufficient notice of the entry of judgment. Best Mfg. Co. v. Hutton, 49 M 78, 141 P 653 (1914).

Waiver of Notice: Though a party intending to move for a new trial may waive formal notice of the entry of judgment by instituting proceedings in support of his motion without it, such waiver may not be imputed to him where he inadvertently proceeds before he may properly do so. McIntyre v. MacGinniss, 41 M 87, 108 P 353 (1910).

Type of Notice Contemplated by Rule: The notice of the entry of judgment contemplated by section 93-5605, R.C.M. 1947 (superseded by Rule 59(b), M.R.Civ.P.), was a legal notice, that is, such as was described in section 93-8501, R.C.M. 1947 (superseded by Rules 5 and 6(e), M.R.Civ.P.), and served in the manner described in section 93-8502, R.C.M. 1947 (superseded by Rules 5 and 6(e), M.R.Civ.P.). State ex rel. Cohn v. District Court, 38 M 119, 99 P 139 (1909).

Collateral References

New Trial *key* 116, 117.

66 C.J.S. New Trial §§153 through 164.

58 Am. Jur. 2d New Trial §§475 through 493.

Motions for new trial: time limitations under Rule 59(b) of Federal Rules of Civil Procedure. 45 ALR Fed. 104.

Rule 59(c). Time for serving affidavits.

Compiler's Comments

Amendment — Identity With Federal Rule: The amendment of May 21, 1969, made no change in this rule. As of May 1, 1990, this rule was still identical to the Federal Rule.

Case Notes

Discretion of District Court to Grant or Deny Unanswered Motions: Following the District Court's entry of judgment, plaintiffs filed and served motions to amend the findings, for a new trial, and to alter the judgment. Defendants did not file a response to the motions within the 10 days allowed under this rule. Plaintiffs then moved that the motions be deemed admitted and well-taken as allowed under Rule 2(b), M.U.D.C.R. (Title 25, ch. 19). The court denied the motions, and plaintiffs argued that defendants' failure to file a response in the time allowed requires the court to grant the unanswered motions. However, Rule 2(b), M.U.D.C.R., does not remove the discretion of the District Court to grant or deny unanswered motions as it sees fit. Maberry v. Gueths, 238 M 304, 777 P2d 1285, 46 St. Rep. 1287 (1989).

Time of Hearing on Motion: Where notice of intention to move for a new trial was to be based on the minutes of court and affidavits but no affidavits were filed and no additional time for filing was obtained from the court, the moving parties had only 10 additional days after the 10-day period for filing affidavits in which to have the motion heard. State ex rel. Lake v. District Court, 131 M 404, 310 P2d 1055 (1957).

Extension of Time by Stipulation — Cumulative Effect: Where a finding and decision was filed on August 30 and on September 6 the parties stipulated that any party might have 30 days "additional" time in which to give notice of intention to move for a new trial, and also 90 days "additional" time to file affidavits, and appellant gave notice for a new trial on October 7 and filed affidavits on January 3, the affidavits were filed on time since the effect of the stipulation was to give appellant 30 days in addition to the 4 days of the 10-day period not yet expired when the stipulation was made in which to serve notice and 90 days for filing affidavits, in addition to the 10-day period allowed after the service of notice. Hill v. McKay, 36 M 440, 93 P 345 (1908).

Collateral References

New Trial *key* 140.

66 C.J.S. New Trial §219.

Rule 59(d). Time for ruling on motion.

Advisory Committee Notes

Advisory Committee's Note to May 21, 1969, Amendment

Explanation of change: Section 93-5606, R.C.M. 1947, is hereby superseded. There has been some confusion by reason of ambiguous language in section 93-5606, R.C.M. 1947, a hold-over statute from the practice which existed before the rules were adopted, and because of the necessity of researching for, and referring to, the case decisions under the statute spelling out the jurisdictional time limits and the effect thereof. It is felt that by incorporating our practice into this one rule, and eliminating the necessity of referring to statutes and case decisions, that it will be easier for the practitioner to comply.

Advisory Committee's Note to October 9, 1984, Amendment

Subdivision 59(d). The amendment is being adopted in order to obviate the problems discussed in Supreme Court decisions which have held that notices of appeal were filed too late under the language of the previous rule. See Marvel Brute Steel Bldg. v. Bass, (1980) 189 Mont. 480, 616 P.2d 380. The self-executing language of the previous rule often led to extremely harsh results to an inadvertent party. No attempt is being made in the amendment to control the time for hearing on the motion, a feature of the previous rule, but rather this is being left to the attorneys and court with the proviso that in any event if the court shall fail to rule upon the motion within 45 days from its filing date, the motion shall at the expiration of the period be automatically deemed denied. It is hoped that the simplicity and clear language of the amendment will prevent attorneys from being "trapped" as has been the case too often in the past.

Compiler's Comments

1995 Amendment: Extended time for appeal from 45 days to 60 days. Amendment effective October 1, 1995.

Amendments — Identity With Federal Rule: The amendment of Rule 59 by Supreme Court Order No. 10750-9 enacted this subparagraph as Rule 59(d) and designated former Rules 59(d) and 59(e) as 59(e) and 59(f), respectively. This rule has no counterpart in the Federal Rules.

The amendment of October 9, 1984, in first paragraph substituted present language for "Hearing on the motion shall be had within 10 days after it has been served, or within 10 days after the party opposing the motion for new trial has served his affidavits as set forth in subparagraph (c) hereinabove except that at any time after the notice of hearing on the motion has been served the court may issue an order continuing the hearing for not to exceed 30 days. In case the hearing is continued by the court, it shall be the duty of the court to hear the same at the earliest practicable date thereafter, and the court shall rule upon and decide the motion within 15 days after the same is submitted. If the court shall fail to rule upon the motion within said time, the motion shall, at the expiration of said period, be deemed denied"; and deleted third paragraph, which read: "If the motion is not noticed up for hearing and no hearing is held thereon, it shall be deemed denied as of the expiration of the period of time within which hearing is required to be held under this Rule 59."

Case Notes

Time Limit for Filing for New Trial Constitutional — No Jurisdiction to Grant New Trial After Time Limit Runs: After the 60-day deadline for granting a new trial in this rule, the District Court granted plaintiff a new trial. Defendant appealed, saying that the District Court was without jurisdiction. On appeal, plaintiff argued that the time limit was unconstitutional and arbitrary and deprived plaintiff of procedural due process. Citing In re Marriage of Richards, 2001 MT 183, 306 M 212, 31 P3d 1002 (2001), the Supreme Court noted that just because a rule is arbitrary does not mean that it should not be favored and that insisting on a firm time limit advances the cause of justice by bringing predictability to the legal process. The court concluded that the time limit is constitutional and that the District Court did not have jurisdiction to grant plaintiff a new trial after the time limit had run. Forsythe v. Leydon, 2004 MT 327, 324 M 121, 102 P3d 25 (2004). See also Kelly v. Sell & Sell Paint Contractors, 175 M 440, 574 P2d 1002 (1978).

Improper Grant of New Trial After Time to Move for New Trial Expired: A substitute District Court Judge assumed jurisdiction of a marriage dissolution case 1 day after the husband moved for reconsideration or a new trial. The motion for a new trial was granted 76 days later. The wife contended that the court exceeded its jurisdiction because the motion was granted more that 60 days after being filed, in violation of Rule 52(d), M.R.Civ.P., and this rule. The husband argued that an equitable exception to the rules should be granted because the presiding judge was substituted between the time when the motion was filed and when it was ruled upon. The Supreme Court declined to make an exception, reiterating that the time and procedural limitations for motions subsequent to judgment are mandatory and strictly enforced. The District Court exceeded its jurisdiction in ordering a new trial after the time to rule on the motion had expired, so the order was reversed. In re Marriage of Richards, 2001 MT 183, 306 M 212, 31 P3d 1002 (2001).

Motion to Disqualify Other Party's Attorney Does Not Stay Sixty-Day Requirement for Judge to Rule on Motion to Vacate Default Judgment: Johnson's attorney obtained a default judgment on behalf of his client, and when an attorney appeared for the defendant and moved to have the default judgment set aside, Johnson's attorney moved to have the attorney disqualified because the trial court judge was related to a member of the defense attorney's law firm. The judge

recused himself, and the new judge entered an order setting aside the default judgment. The Supreme Court held that the 60-day period for the lower court to rule on the motion to vacate ran from the time that the motion was filed, not from the time that the second judge assumed jurisdiction, and because the time had expired, the motion to vacate was considered denied. The lower court did not have jurisdiction over the issue and could not thereafter set aside the default judgment. Johnson v. Eagles Lodge Aerie 3913, 284 M 474, 945 P2d 62, 54 St. Rep. 984 (1997).

Time for Appeal Not Tolled During Extra Time Granted to File Brief in Support of Posttrial Motion: A District Court cannot grant extensions under Rule 59(g), M.R.Civ.P., for additional briefing time and must rule on a Rule 59(g) motion to amend a judgment within the time allotted without regard to the status of the briefing. If the court does not rule on the motion within the allotted time, the motion is considered denied. The court's grant of a 16-day extension of time in which to file a brief in support of the motion did not suspend for 16 days the time allotted for appeal. Failure to file a notice of appeal within the allotted time was an absolute jurisdictional bar to Montana Supreme Court consideration of the appeal. Challinor v. Glacier Nat'l Bank, 283 M 342, 943 P2d 83, 54 St. Rep. 520 (1997).

Failure to Follow Uniform Building Code as Negligence Per Se — Denial of Judgment N.O.V. Reversed: Rosauers Supermarket undertook remodeling for which ALSC was the architect. As a change order to the remodeling, Rosauers asked that a walk-in freezer be removed and that the access door to a walkway over the freezer be closed off. Unknown to Rosauers and its employee, Pierce, the door was never closed off even though the freezer was removed. Pierce was injured when he fell through a false ceiling after stepping off the walkway, assuming that the freezer was still in place and that it would support him. After a jury verdict finding no negligence on the part of ALSC, Pierce moved for judgment N.O.V., which was denied by virtue of the fact that the District Court failed to grant the motion within 45 days. The Supreme Court found that ALSC had knowledge of the change order and knew that without the access door being blocked, the door and walkway would leave an unsafe condition after the freezer was removed. Citing Herbst v. Miller, 252 M 503, 830 P2d 1268 (1992), the Supreme Court also found that failure to place a guardrail around the walkway in accordance with the Uniform Building Code caused an unsafe condition in violation of the code, which constituted negligence per se on the part of ALSC. For this reason, the Supreme Court held that the District Court erred when it denied Pierce's motion for judgment N.O.V. by failing to grant the motion with 45 days. Pierce v. ALSC Architects, P.S., 270 M 97, 890 P2d 1254, 52 St. Rep. 93 (1995).

Denial of Motion for Extension of Time Allowed for Filing Notice of Appeal as Appealable Order — Applicability of Forty-Five-Day Rule: The denial of a motion made pursuant to Rule 5(a)(5), M.R.App.P. (Title 25, ch. 21), for an extension of the time allowed for filing a notice of appeal is an appealable order. However, the District Court did not abuse its discretion in denying plaintiff's extension request because the 45-day limit for filing a motion for relief from summary judgment, as set out in Rule 60(c), M.R.Civ.P., and this rule, had expired. It was the responsibility of plaintiff's counsel to be aware of the 45-day rule, and lack of knowledge of a clear rule of civil procedure is not an excuse for relief from the rules. Sadowsky v. Glendive, 259 M 419, 856 P2d 556, 50 St. Rep. 860 (1993), citing Shields v. Pirkle Refrigerated Freightlines, 181 M 37, 591 P2d 1120 (1979), and distinguishing Zell v. Zell, 172 M 496, 565 P2d 311 (1977).

Untimely Appeal Dismissed: The Supreme Court dismissed an appeal filed after the mandatory time limit imposed under this rule as untimely filed pursuant to Rule 59(g), M.R.Civ.P. Easley v. Burlington N. RR, 234 M 290, 762 P2d 870, 45 St. Rep. 1915 (1988). See also Miller v. Herbert, 272 M 132, 900 P2d 273, 52 St. Rep. 655 (1995).

Court Discretion to Order New Trial or Reopen Case — Jurisdiction to Amend Findings and Conclusions: Upon dissolution of a marriage, the District Court retained jurisdiction to determine the division of marital property. Following a 4-day trial, the court divided the property, whereupon both parties filed motions to amend the findings. A hearing was held. Subsequently, the court ordered the parties to appear for the limited purpose of testifying to the respective proposals for handling certain real estate, and the court then issued amended findings of fact and conclusions of law. Appellant contended that the District Court lacked jurisdiction to issue the amended findings because it failed to rule on the motions to amend within 45 days, pursuant to Rules 52(b) and 59(d), M.R.Civ.P. The Supreme Court disagreed, holding that the order to appear for limited testimony was essentially an order for a new trial and that under Rule 59(e), M.R.Civ.P., and 25-11-102, the District Court had jurisdiction to order a new trial on its own initiative or to reopen the case and thus had jurisdiction to amend the findings and conclusions. In re Marriage of Kink, 226 M 313, 735 P2d 311, 44 St. Rep. 681 (1987). However, see Pierce v. ALSC Architects, P.S., 259 M 379, 856 P2d 969, 50 St. Rep. 842 (1993), ruling that the District Court lost jurisdiction to grant plaintiff a new trial for reasons

stated in plaintiff's motion 45 days after filing of the motion despite the fact that judgment had not been entered.

Notice of Denial of Motion Not Required — Appeal Period: Appellant's posttrial motion for a new trial was considered denied upon failure of the District Court to rule on it for 45 days, under Rule 59(d), M.R.Civ.P. No notice of such denial is required under Rule 5, M.R.Civ.P. The 30-day period for appeal under Rule 5, M.R.App.P., begins to run upon expiration of the 45-day period of Rule 59(d). Mortensen Constr. Co. v. Burlington N., Inc., 218 M 415, 708 P2d 1006, 42 St. Rep. 1699 (1985).

Failure to Obtain Continuance — No Invalidation of Proceeding: Following service of the notice of entry of judgment, the defendants filed a timely motion to amend the judgment pursuant to Rule 52(b), M.R.Civ.P. However, hearing on the motion was not held within 10 days of service as required by Rule 59(d), M.R.Civ.P. However, the hearing was within the total of 40 days which Rule 59(d) allows for the hearing. The notice of hearing was given within the 10-day period. The defendant's technical failure to obtain a continuance from the trial court is not a sufficient reason to invalidate the proceedings when the hearing is held within the period prescribed by the rule. Redinger v. French, 216 M 16, 699 P2d 94, 42 St. Rep. 604 (1985).

Jurisdiction Over Appeal of Untimely Motion, Hearing, or Order:

Summary judgment was entered against appellant by the District Court on November 25, 1980. On December 4, 1980, he filed his motion to alter or amend the summary judgment. He noticed the hearing on the motion for December 15, 1980. Under Rule 59(g), the motion was timely filed, but under this subsection, the hearing was set 1 day too late. The time for hearing expired December 14, 1980. Therefore, the time for filing a notice of appeal began running that date and his appeal which was filed on February 4, 1981, was not timely and was dismissed. Malinak v. Safeco Title Ins. Co. of Idaho, 203 M 69, 661 P2d 12, 39 St. Rep. 2046 (1982).

Following an adverse ruling in a quiet title action, the plaintiff and defendant submitted a motion on November 17, 1981, to amend the judgment, but the motion was not noticed for hearing and was not ruled on by the District Court until December 24, 1981. On appeal, the Supreme Court held that because the motion was considered denied if the District Court had not ruled within 15 days of the filing of the motion, the motion was considered denied on December 2, 1981, and the appeal was therefore untimely taken, denying the Supreme Court jurisdiction of the appeal. O'Connell v. Heisdorf, 202 M 89, 656 P2d 199, 39 St. Rep. 2347 (1982); accord, In re Marriage of Page, 39 St. Rep. 2360 (1982) (apparently not reported in Pacific Reporter or Montana Reports).

On October 9, 1981, 1 day after the entry of judgment against the plaintiff in a quiet title action, the plaintiff filed a motion objecting to the defendant's memorandum of costs, which motion was noticed for hearing but the hearing was never held. Following the filing of a notice of appeal by the plaintiff on January 26, 1982, the Supreme Court held it did not have jurisdiction of the appeal because the 30-day period for the filing of the notice of appeal is not suspended by the filing of a motion objecting to costs. Time for appeal therefore expired on November 9, 1981. O'Connell v. Heisdorf, 202 M 89, 656 P2d 199, 39 St. Rep. 2347 (1982).

Notice of entry of judgment against appellant was served on him on November 6, 1981. On November 20, 1981, he filed a motion to amend the findings. He did not file a notice of hearing on the motion. The motion was heard on February 1, 1982, and denied on February 2, 1982. Later in February, appellant filed a notice of appeal. The Supreme Court held that appellant's notice was not timely and dismissed the appeal. Under Rule 59(d), M.R.Civ.P., a motion to amend a judgment is considered denied at the end of the time period in which a hearing on the motion must be held. A hearing must be held within 10 days after the motion is filed. Therefore, appellant's motion was considered denied on November 30, 1981, and the notice of appeal was not timely. Fields v. Summit Eng'r, 201 M 204, 653 P2d 1204, 39 St. Rep. 2057 (1982).

The lower court order attempted to modify the findings of fact and conclusions of law more than 15 days after submission of appellant's posttrial motions. By exceeding the time period mandated by Rule 59, M.R.Civ.P., the District Court divested itself of jurisdiction to determine the motion, and its order was a nullity. The original notice of appeal from the second decree, based on that order, was untimely under Rule 5, M.R.App.P., and the Supreme Court has no jurisdiction as to the second decree. However, the jurisdictional defect is cured by the appellants having lodged an appeal to the first decree. Sell v. Sell, 193 M 88, 630 P2d 222, 38 St. Rep. 956 (1981).

Motion to Vacate Default Judgment — Time Limits Jurisdictional: The 10th day after moving to vacate a default judgment under Rule 60 (b)(1), M.R.Civ.P., fell on July 6, and a hearing set for that date was, by stipulation, continued to July 17. On July 17 the District Court vacated and reset the hearing for October 7 because of calendar conflict. The hearing was held on

October 7, and the order was dated October 20. The motion to set aside the default was beyond the jurisdiction of the District Court because 30 days after July 6 (August 5) was the last day the District Court had jurisdiction, and no decision being made by that date, the motion was considered denied and the 30 days for appeal began to run. Wallinder v. Lagerquist, 201 M 212, 653 P2d 840, 39 St. Rep. 2063 (1982).

Hearing Continued — Motion Not Considered Denied: A motion is not considered denied 15 days after it was submitted when a hearing was set within 10 days of submission, then, by stipulation of counsel, it was continued for less than 30 days and the subsequent hearing and ruling complied with the provisions of this rule. Lilienthal v. District Court, 200 M 236, 650 P2d 779, 39 St. Rep. 1711 (1982).

Hearing on Motion to Vacate to Be Within Ten Days of Service: The District Court entered judgment on May 22, 1980. On May 22, 1981, the defendant served plaintiff with a motion to vacate the judgment pursuant to Rule 60(b), M.R.Civ.P. On June 3, 1981, the District Court set a hearing on the motion for June 30, 1981. Because the District Court failed to hold the hearing within 10 days after the motion was served, the motion was considered denied on June 1, 1981. Lerum v. Logue, 198 M 194, 645 P2d 418, 39 St. Rep. 873 (1982).

Failure to Serve Within Time Limitation as Effecting Denial: A motion for new trial may be made before or after entry of judgment subject to the limitation of 10 days after service of notice of entry of judgment contained in Rule 59(b), M.R.Civ.P. If not served within the 10-day period, the motion is considered denied under the provisions of the last paragraph of this rule. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Extension of Hearing Date on Motion to Amend — What Suffices for Compliance With Time Requirements: The wife appealed from an amended decree dissolving her marriage, granting child custody, awarding support, and dividing the property of the marriage. The appellant filed and served a motion to amend the judgment. Including 3 days for mailing, the hearing on that motion was either required to be held within 13 days or to be continued by the court within 13 days. The District Court entered an order setting a hearing date on the appellant's and respondent's motions to amend, which order was filed on the last day of the 13-day period. The order constituted a continuation of the hearing date on the motions to alter or amend. That order did set a hearing date within a 30-day period required by Rule 59(d), M.R.Civ.P. The District Court then ruled on the motions to alter or amend within 5 days following the hearing. Therefore, the District Court's actions regarding the petitioner's motions to alter or amend the original decree complied with the time requirements of the rule. The amending order of the District Court was therefore valid. Tefft v. Tefft, 192 M 456, 628 P2d 1094, 38 St. Rep. 837 (1981).

Time for Appeal Following Motion for New Trial Made Without Hearing — Time Limits of Rules Jurisdictional Regardless of Stipulation: Where, following a judgment against the defendant for damages caused by fraudulent misrepresentation and breach of warranty, the defendant and plaintiff orally agreed to waive the hearing on defendant's motion for a new trial, filed on April 23 and denied by the court on May 15, the defendant's notice of appeal filed on June 12 was untimely and the plaintiff's motion to dismiss the appeal was granted. Because no hearing was held on the motion for a new trial, the motion was considered denied, under Rule 59(d), M.R.Civ.P., 10 days after it was made and the time for appeal expired on June 2. The defendant's argument that the stipulation meant the motion for a new trial would be considered submitted "at the completion of briefing" cannot extend the time for the court's ruling, as the time limits imposed by the rules of procedure are mandatory and the parties may not by stipulation confer jurisdiction on the court beyond the time provided by the rules. Marvel Brute Steel Building, Inc. v. Bass, 189 M 480, 616 P2d 380, 37 St. Rep. 1670 (1980), distinguished in In re Marriage of Bryant, 276 M 317, 916 P2d 115, 53 St. Rep. 412 (1996).

Time Limit for Hearing Motion for New Trial: The District Court had no jurisdiction to grant a new trial where the motion for new trial was made on January 25, but the hearing was not had until March 19. Oster v. Oster, 186 M 160, 606 P2d 1075 (1980).

Motion for a New Trial — Time for Notice of Appeal Suspended: A judgment was entered against the appellant May 31. On June 6, appellant mailed a motion for a new trial and for extension of the time for filing briefs. On June 11 the District Court gave appellant until June 25 to file its brief, which appellant did on that date. On July 20 the District Court denied appellant's motion for a new trial without hearing, and on August 2 the appellant mailed his notice of appeal. Under these circumstances the notice of appeal was timely filed, since the filing of appellant's motion for a new trial suspended the running of the time in which to file a notice of appeal and the District Court's order extending the time for filing supporting briefs must by necessary implication extend the time for ruling on that motion. The 10-day period for ruling on the motion did not begin to run until the appellant's brief was filed within the time period

allowed by the court. The motion for a new trial was automatically denied when it was not acted upon within 15 days. Appellant thereafter had 30 days in which to file its notice of appeal, which was done on August 3. Britton v. Burlington N., Inc., 184 M 107, 601 P2d 1192 (1979).

Ruling on Motion — Mandatory Time Limitation: It was error for the court to rule on a motion to alter or amend judgment after expiration of the 15-day time period measured from the date of submission of the motion. Kelly v. Sell & Sell Paint Contractors, 175 M 440, 574 P2d 1002 (1978).

Disqualification of Judge — Remand by Supreme Court — Time Limits Inapplicable: Where Supreme Court vacated orders of judge who had been disqualified and remanded motion for new trial for hearing before new judge, the time limits of this rule were not applicable since there was no final judgment from which time limits could be computed. Kamp Implement Co. v. Amsterdam Lumber, Inc., 166 M 435, 533 P2d 1072 (1975).

Failure to Comply: Default judgment should not have been set aside when, under rule, the maximum amount of time by which case could have been extended would have been 55 days from the date of service of the motion, and when 245 days elapsed from date of service of the motion until it was ruled upon. Sikorski & Sons, Inc. v. Sikorski, 162 M 442, 512 P2d 1147 (1973).

Time Limits Exceeded: Default judgment should not have been set aside when time extension limits of Rule 59, M.R.Civ.P., were exceeded. Sikorski & Sons, Inc. v. Sikorski, 162 M 442, 512 P2d 1147 (1973).

Failure to Comply — Reversible Error: Granting of new trial was reversible error where time limits set forth in this rule were disregarded. Cain v. Harrington, 161 M 401, 506 P2d 1375 (1973).

Ruling After Time Limitation Void: Under this rule, once the self-executing denial of a motion becomes effective any subsequent order by the court concerning that motion is outside the court's jurisdiction and consequently void. Leitheiser v. Mont. St. Prison, 161 M 343, 505 P2d 1203 (1973).

Untimely Appeal From Denial of Motion for New Trial: When motion for new trial was filed without notice of hearing, the motion was automatically denied 10 days after service notwithstanding letter from clerk notifying movant of denial on some other date. Appeal filed later than 60 days after denial of the motion was untimely. Leitheiser v. Mont. St. Prison, 161 M 343, 505 P2d 1203 (1973).

Discretion Exhausted When Substantial Evidence Supports Verdict: Although the granting of a new trial for insufficiency of the evidence is a discretionary power of the District Court which will not be disturbed except for abuse of discretion, the District Court's discretion is exhausted when it finds substantial evidence to support the verdict. Kincheloe v. Rygg, 152 M 187, 448 P2d 140 (1968).

Filing Motion for Disqualification Before Motion for New Trial: A judge may be disqualified after return of verdict but before new trial motion was made. State ex rel. Bellon v. District Court, 140 M 447, 373 P2d 314 (1962); Russell v. Sunburst Ref. Co., 83 M 452, 272 P 998 (1928); Hill v. Nelson Coal Co., 40 M 1, 104 P 876 (1909); State ex rel. Carelton v. District Court, 33 M 138, 82 P 789 (1905). But see State ex rel. Cline v. District Court, 142 M 278, 384 P2d 490 (1963); State ex rel. Perry v. District Court, 145 M 287, 400 P2d 648 (1965), where the doctrine was criticized and the statute was considered improperly construed when disqualification is permitted pending a motion for a new trial. And, see State ex rel. Wilson v. District Court, 143 M 543, 393 P2d 39 (1964), where the Supreme Court refused to follow the interpretation given the civil statute and declined to permit the disqualification of a judge in a criminal case following verdict and before hearing upon a motion for a new trial. Disqualification, preventing ruling on posttrial motions, after entry of findings and conclusions, was most recently allowed in Macpherson v. Smoyer, 191 M 53, 622 P2d 188, 37 St. Rep. 2079 (1980).

Law Review Articles

Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 352 (1981).

Collateral References

66 C.J.S. New Trial §238.

Rule 59(e). On initiative of court.

Advisory Committee Notes

NOTE TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed. R. Civ. P. 59(d), as amended 1966.

Explanation of change: The purpose of this amendment is to make it clear that a court, after notice and opportunity to be heard, may grant a new trial even though a motion for new trial has been made, for a ground not stated in the motion. Some cases have held otherwise.

NOTE TO DECEMBER 31, 1975, AMENDMENT

See note under Rule 59(a).

Compiler's Comments

Amendments — Identity With Federal Rule: The amendment of September 29, 1967, added the second sentence and made changes in phraseology.

The amendment of May 21, 1969, made no change in the wording of this rule.

The amendments of Rule 59 by Supreme Court Order No. 10750-9 designated this former Rule 59(d) as Rule 59(e).

The amendment of December 31, 1975, deleted the last sentence which read "In either case, the court shall specify in the order the grounds therefor." As of May 1, 1990, this rule was still identical to the Federal Rule, except for the last sentence of the Federal Rule, which requires the court to specify the grounds for ordering a new trial in that order.

Case Notes

Court Discretion to Order New Trial or Reopen Case — Jurisdiction to Amend Findings and Conclusions: Upon dissolution of a marriage, the District Court retained jurisdiction to determine the division of marital property. Following a 4-day trial, the court divided the property, whereupon both parties filed motions to amend the findings. A hearing was held. Subsequently, the court ordered the parties to appear for the limited purpose of testifying to the respective proposals for handling certain real estate, and the court then issued amended findings of fact and conclusions of law. Appellant contended that the District Court lacked jurisdiction to issue the amended findings because it failed to rule on the motions to amend within 45 days, pursuant to Rules 52(b) and 59(d), M.R.Civ.P. The Supreme Court disagreed, holding that the order to appear for limited testimony was essentially an order for a new trial and that under Rule 59(e), M.R.Civ.P., and 25-11-102, the District Court had jurisdiction to order a new trial on its own initiative or to reopen the case and thus had jurisdiction to amend the findings and conclusions. In re Marriage of Kink, 226 M 313, 735 P2d 311, 44 St. Rep. 681 (1987). However, see Pierce v. ALSC Architects, P.S., 259 M 379, 856 P2d 969, 50 St. Rep. 842 (1993), ruling that the District Court lost jurisdiction to grant plaintiff a new trial for reasons stated in plaintiff's motion 45 days after filing of the motion despite the fact that judgment had not been entered.

When Time Limits Inapplicable: The inherent power of the court to enter such orders as are necessary to enforce a judgment is not limited by the time limits in Rules 59 and 60, M.R.Civ.P., because such orders are interlocutory orders, not final ones. Smith v. Foss, 177 M 443, 582 P2d 329 (1978), followed in In re Marriage of Blair, 271 M 196, 894 P2d 958, 52 St. Rep. 401 (1995).

Motion Combined With Motion to Alter Judgment — Time Limits: Combined motion for new trial and to alter, amend, and supplement findings of fact, conclusions of law and judgment was not subject to time limits of section 93-5606, R.C.M. 1947 (superseded by Rule 59(d), M.R.Civ.P.), requiring prompt hearing on new trial motion and superseded by this rule. State ex rel. Rozan v. District Court, 147 M 532, 416 P2d 19 (1966). See also Crissey v. Highway Comm'n, 147 M 374, 413 P2d 308 (1966).

Amendment Mandated: Court was required to amend judgment upon remand. Daniels v. Paddock, 145 M 207, 399 P2d 740 (1965).

Judge's Discretion to Prevent Miscarriage of Justice: The jury is delegated the task of finding the facts, but the trial judge has the discretion to prevent a miscarriage of justice by granting a new trial if there is an insufficiency of evidence to support the verdict. Campeau v. Lewis, 144 M 543, 398 P2d 960 (1965), explained in Morris v. Corcoran Pulpwood Co., Inc., 154 M 468, 465 P2d 827 (1970).

Purpose of Rule: The purpose of this rule is to give a trial judge power to prevent what he considers a miscarriage of justice. Campeau v. Lewis, 144 M 543, 398 P2d 960 (1965); State ex rel. Cline v. District Court, 142 M 248, 384 P2d 490 (1963).

Purpose — Scope — Appellate Review: The rule's purpose is to grant the judge discretion to prevent miscarriages of justice. The scope of the rule extends to all interpretations of former statutes preceding the rule. The ruling should not be disturbed on appeal unless an abuse of discretion is proved. Campeau v. Lewis, 144 M 543, 398 P2d 960 (1965), explained in Morris v. Corcoran Pulpwood Co., Inc., 154 M 468, 465 P2d 827 (1970).

Scope of Rule: This rule permits the trial judge to order a new trial on his own initiative for the same reasons one could be ordered pursuant to 25-11-102 and is subject to the same interpretations as expressed in previous opinions on motions for new trials before adoption of the rule. Campeau v. Lewis, 144 M 543, 398 P2d 960 (1965).

Disqualification of Judge: No disqualifying affidavit can deprive the court of jurisdiction to grant a new trial on its own initiative under this rule. State ex rel. Cline v. District Court, 142 M 278, 384 P2d 490 (1963), modifying State ex rel. Bellon v. District Court, 140 M 447, 373 P2d 314 (1962).

Filing Motion for Disqualification Before Motion for New Trial: A judge may be disqualified after return of verdict but before new trial motion was made. State ex rel. Bellon v. District Court, 140 M 447, 373 P2d 314 (1962); Russell v. Sunburst Ref. Co., 83 M 452, 272 P 998 (1928); Hill v. Nelson Coal Co., 40 M 1, 104 P 876 (1909); State ex rel. Carelton v. District Court, 33 M 138, 82 P 789 (1905). But see State ex rel. Cline v. District Court, 142 M 278, 384 P2d 490 (1963); State ex rel. Perry v. District Court, 145 M 287, 400 P2d 648 (1965), where the doctrine was criticized and the statute was considered improperly construed when disqualification is permitted pending a motion for a new trial. And see State ex rel. Wilson v. District Court, 143 M 543, 393 P2d 39 (1964), where the Supreme Court refused to follow the interpretation given the civil statute and declined to permit the disqualification of a judge in a criminal case following verdict and before hearing upon a motion for a new trial. Disqualification, preventing a ruling on posttrial motions after entry of findings and conclusions, was most recently allowed in Macpherson v. Smoyer, 191 M 53, 622 P2d 188, 37 St. Rep. 2079 (1980).

Collateral References

New Trial *key* 110.

66 C.J.S. New Trial §§145, 146.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion. 23 ALR 2d 852.

Rule 59(f). Order granting new trial.

Advisory Committee's Note to December 31, 1975, Amendment

See note under Rule 59(a).

Compiler's Comments

Amendments: The amendment of Rule 59 by Supreme Court Order No. 10750, December 31, 1975, enacted this subparagraph as Rule 59(f) and designated former Rule 59(f) as Rule 59(g).

Case Notes

Prejudicial Effect of Misconduct of Defense Counsel — New Trial Properly Granted: Even though defendant may have presented sufficient evidence to prevail against plaintiff's motion for judgment as a matter of law, the District Court nevertheless properly granted plaintiff's motion for a new trial after finding that the defense counsel's misconduct prejudiced plaintiff's right to a fair hearing and resolution of the case. The trial judge is in the best position to determine the prejudicial effect of an attorney's conduct. Even when there is substantial evidence supporting a jury's verdict, the trial court has an overriding duty to prevent a miscarriage of justice by granting a new trial if the misconduct of counsel prevents an opposing litigant from having a fair trial on the merits. Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160, 55 St. Rep. 198 (1998).

No Error in Failure to Grant Mistrial Motion for "Error" Caused by Movant: Garrison brought a civil action against a real estate broker and others for rescission of a sale of real property on Flathead Lake. Garrison was asked by the District Court to estimate the amount of time required for trial and estimated 4 days, but those days were used almost exclusively for presentation of Garrison's case. Trial was rescheduled for October but was reset for December, with the consent of all counsel. In November, Garrison moved for a mistrial, claiming that the District Court's grasp of the issues was dulled by the intervening delay between the completion of his case in chief and presentation of the defendants' case. The Supreme Court held that the District Court did not err in denying Garrison's motion for a mistrial because the District Court relied upon the judgment of Garrison's counsel to estimate the original number of days needed for trial (which were all taken up by Garrison's case in chief, thus necessitating rescheduling of the defendants' case) and because Garrison agreed to the later rescheduling. Citing Hando v. PPG Indus., Inc., 272 M 146, 900 P2d 281 (1995), the Supreme Court said that as a general rule, it would not put the trial court in error for a procedure in which the appellant has acquiesced or participated or to which no objection was made. The Supreme Court also noted that Garrison had not demonstrated how he was prejudiced by the delay, beyond his general assumption that the

memory of the District Court would be dulled by the delay. Garrison v. Averill, 282 M 508, 938 P2d 702, 54 St. Rep. 454 (1997).

No Abuse of Discretion in Failure to Grant Mistrial Because of Testimony Concerning Costs and Attorney Fees: In the course of a lawsuit against his insurer for failure to settle a claim resulting from hail damage to his wheat crop, Dees testified that he had incurred substantial expense for costs and attorney fees in bringing the action against the insurer. The insurer moved for a mistrial, which was denied, and the jury subsequently awarded Dees a large punitive damages judgment. The Supreme Court held that it was not an abuse of discretion for the District Court to deny the motion for a mistrial. The District Court's findings and conclusions attributed the punitive damages award to the insurance company's dogmatic position that the crop was not damaged by hail and to the haughtiness of its witnesses. Because the District Court observed the trial, it is reasonable to infer that the District Court Judge considered the reference to costs to be comparatively insignificant. The District Court therefore did not abuse its discretion in denying the motion for a mistrial. Dees v. Am. Nat'l Fire Ins. Co., 260 M 431, 861 P2d 141, 50 St. Rep. 1068 (1993).

Appeal of Grant of New Trial Made After Second Trial — Moot by Failure to Object or Timely Appeal: Following a trial on the distribution of marital property, wife requested and the District Court ordered a new trial. Husband waited until after the second trial to object to the order, contending that the court abused its discretion in granting a new trial because: (1) wife was incorrectly allowed to argue matters additional to those raised in the motion for a new trial; (2) the court did not rule on his motion to reconsider the order granting a new trial; and (3) the court did not state with particularity the reasons for granting a new trial. The Supreme Court held that husband's grounds for appeal must fail because he failed to object or bring an appeal in a timely fashion. The question of the propriety of the trial court's order is one that should have been considered earlier and was rendered moot by the fact that the second trial had already occurred. Husband's attempt to raise the issue for the first time on appeal was barred by the doctrine of laches. In re Marriage of Danelson, 253 M 310, 834 P2d 1382, 49 St. Rep. 597 (1992).

Prejudicial Closing Argument Made by Attorney for One of Several Defendants — Plaintiff Entitled to New Trial Against All Defendants: In a wrongful death action involving several defendants, when a new trial was ordered because of several improper statements made in his closing argument by one defendant's attorney, the Supreme Court held that the plaintiff was entitled to a new trial with respect to all of the defendants because it was impossible to separate the defendants in considering the effect of the prejudice created by the argument of the lawyer for one of the defendants. Kuhnke v. Fisher, 210 M 114, 683 P2d 916, 41 St. Rep. 952 (1984), followed in Rieger v. Coldwell, 254 M 507, 839 P2d 1257, 49 St. Rep. 768 (1992), Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160, 55 St. Rep. 198 (1998), Benson v. Heritage Inn, Inc., 1998 MT 330, 292 M 268, 971 P2d 1227, 55 St. Rep. 1341 (1998), and Federated Mut. Ins. Co. v. Anderson, 1999 MT 288, 297 M 33, 991 P2d 915, 56 St. Rep. 1152 (1999). Despite repeated attorney misconduct warranting sanction on retrial, the District Court ruled that the misconduct was not of the magnitude of that found in Kuhnke I, supra, and that viewed in the context of the entire trial, the improper conduct did not impact the jury to such an extent as to require a new trial. The Supreme Court found substantial credible evidence to support the verdict reached by two juries on two separate occasions hearing the same facts and noted that it was unlikely a third trial before a third jury would produce a different result. Kuhnke v. Fisher, 227 M 62, 740 P2d 625, 44 St. Rep. 895 (1987).

Appeal Dismissed — Reasons Not Contained in Order for New Trial: In granting plaintiffs a new trial under this section, the trial court entered an order stating that there had been "good cause shown". No further reason for the new trial was given by the court. Defendants appealed, and 3 ½ months after entry of the notice of appeal, the trial court filed a document with the Supreme Court entitled "Certification of Issues on Appeal in Granting Motion for New Trial". The Supreme Court declined to consider the certification in place of the original order granting a new trial and dismissed the appeal for failure to comply with this rule. Shannon v. Hulett, 205 M 345, 656 P2d 825, 40 St. Rep. 35 (1983), followed in Campbell v. Johnson, 246 M 122, 802 P2d 1262, 47 St. Rep. 2292 (1990).

Order for New Criminal Trial to Include Grounds: This rule is applicable to a motion for a new trial in a criminal case filed under 46-16-702. St. v. Williams, 193 M 432, 632 P2d 328, 38 St. Rep. 1253 (1981), distinguished in St. v. Hall, 203 M 528, 662 P2d 1306, 40 St. Rep. 621 (1983).

Error in Granting New Trial Where Objectionable Exhibit Never Admitted: In an action for damages for injuries suffered from an auto accident the lower court erred in granting a new trial to the State since its substantial rights were not affected by plaintiff's offer of an exhibit in the form of a petition signed by residents protesting conditions of the highway in the vicinity of the

accident. No prejudice existed because the offered exhibit was never admitted as evidence. Giles v. Flint Valley Forest Prod., 179 M 382, 588 P2d 535 (1979), overruled, in part, by Shannon v. Hulett, 205 M 345, 656 P2d 825, 40 St. Rep. 35 (1983).

New Trial Granted Summarily: This rule makes it clear the time is past when a District Court can summarily grant a new trial and rely on the Supreme Court to provide a legally adequate reason for its order. Ballantyne v. The Anaconda Co., 175 M 406, 574 P2d 582 (1978).

Altering or Amending Commissioners' Award: Court could not use this rule to validate its altering and amending commissioners' award in eminent domain proceeding notwithstanding the fact that the award was not in accordance to the court's instructions. State ex rel. Frelich v. District Court, 141 M 169, 375 P2d 1016 (1962).

Collateral References

66 C.J.S. New Trial §§280 through 283.

58 Am. Jur. 2d New Trial §564.

Rule 59(g). Motion to alter or amend a judgment.

Commission and Advisory Committee Notes

COMMISSION NOTE

The rule is identical with the Federal Rule, except that the phrase "service of notice of" has been added in subdivisions (b) and (e).

ADVISORY COMMITTEE'S NOTE
TO DECEMBER 31, 1975, AMENDMENT

See note under Rule 59(a).

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

Subdivision 59(g). The amendment conforms the language to that now found in Rule 59(d).

Compiler's Comments

1995 Amendment: In last sentence increased time for appeal from 45 days to 60 days. Amendment effective December 19, 1995.

Amendments — Identity With Federal Rule: The amendment of Rule 59 by Supreme Court Order No. 10750-9 designated this former Rule 59(e) as Rule 59(f).

The amendment of Rule 59 by Supreme Court Order No. 10750, December 31, 1975, designated this former Rule 59(f) as Rule 59(g).

The amendment of September 7, 1965, added a second paragraph which read: "Motions provided by this subdivision shall be heard and determined within the time provided by Section 93-5606 of the 1947 Revised Codes of Montana in the case of motions for a new trial."

The amendment of May 21, 1969, added "and may be combined with the motion for a new trial herein provided for" to the first sentence; substituted the second sentence for the former second paragraph added in 1965; and made changes in phraseology.

The amendment of December 31, 1975, redesignated this rule and made no other change. The above commission note was written prior to the redesignation of Rule (e) as Rule (f). As of August 1, 1987, only the first portion of the first sentence, ending with "entry of the judgment", is found in the Federal Rule.

The amendment of October 9, 1984, in second sentence before "determined" deleted "heard and", and inserted "and if the court shall fail to rule on the motion within the 45 day period, the motion shall be deemed denied".

Case Notes

Motion to Amend Judgment Inappropriate When Testimony and Evidence Available in Original Proceedings: Plaintiff moved to alter or amend a summary judgment order based on affidavits and evidence regarding whether a franchise existed between the parties. The District Court denied the motion, and the Supreme Court affirmed. The affidavits and evidence were not considered newly discovered or previously unavailable, and plaintiff failed to establish that the District Court had the evidence available during the original proceeding, so a motion to alter or amend the judgment was inappropriate. Hi-Tech Motors, Inc. v. Bombardier Motor Corp. of Am., 2005 MT 187, 328 M 66, 117 P3d 159 (2005). See also Lee v. USAA Cas. Ins. Co., 2001 MT 59, 304 M 356, 22 P3d 631 (2001).

Improper for District Court to Look Beyond Language of Amended Judgment Decree When Judgment Not Ambiguous or Obscure: Following remand of Harland v. Anderson, 169 M 447, 548 P2d 613 (1976), which awarded defendant summary judgment on plaintiff's claims for a

prescriptive easement across defendant's property, the District Court took up plaintiff's alternative request to condemn an easement across defendant's land for plaintiff's use. In 1983, the court granted plaintiff an unrestricted easement, and defendant moved to amend the judgment to provide compensation for the taking of the easement, but the motion was denied. The parties then entered a stipulation providing $7,500 for defendant's attorney fees and costs, and the parties agreed not to appeal the amended judgment. The stipulation was approved. Almost 20 years later, plaintiffs commenced litigation seeking declaratory and injunctive relief on grounds that defendant had wrongfully interfered with the 1983 unrestricted easement. Defendant claimed that the 1983 right-of-way was limited to agricultural and grazing purposes and moved for summary judgment on grounds of res judicata, judicial estoppel, laches, and waiver. The District Court concluded that the language of the 1983 amended judgment implied that the findings and conclusions were necessary to the judgment, so the court reviewed the 1983 findings and conclusions, concluded that the easement was restricted to agricultural and grazing purposes, granted defendant summary judgment on res judicata grounds, and dismissed plaintiffs' summary judgment motion and claim with prejudice. On appeal, plaintiffs asserted that the District Court erred in looking beyond the plain language of the 1983 amended judgment. The Supreme Court cited Quigley v. McIntosh, 110 M 495, 103 P2d 1067 (1940), for the holding that a District Court may refer to the entire record in an original case when construing a decree that is obscure or ambiguous, but that when the language of the decree is plain, there is no need to construe it or to resort to pleadings or evidence. In this case, the 1983 decree clearly and unambiguously granted plaintiff an unrestricted easement across defendant's ranch, and it was error for the District Court to look beyond the face of the decree instead of accepting it at face value and speculating as to the reasoning behind the particular result. Thus, summary judgment for defendant was reversed, and the District Court was ordered to enter summary judgment for plaintiffs. Harland v. Anderson Ranch Co., 2004 MT 132, 321 M 338, 92 P3d 1160 (2004).

No District Court Jurisdiction to Award Attorney Fees Beyond Mandatory Time Limit: Final judgment was entered on January 8, 2003, and the next day plaintiffs filed a motion requesting attorney fees. Defendant objected, and the District Court conducted a hearing on the matter on February 25, 2003. The court finally granted the motion on April 3, 2003. Defendant contended on appeal that the award was untimely, and the Supreme Court agreed. Under this rule, a mandatory jurisdictional time limit requires a ruling on a motion for attorney fees within 60 days after final judgment or the motion is considered denied. The District Court had until March 10, 2003, to rule on the motion, but failed to do so. Thus, the court lacked jurisdiction to enter an order granting attorney fees in April, and the award was reversed. Assoc. Press v. Crofts, 2004 MT 120, 321 M 193, 89 P3d 971 (2004).

Attorney Fees Not Considered Costs — Declaratory Judgment Equitable Exception to Rule That Attorney Fees Not Awarded Absent Contractual or Statutory Provision: The District Court initially awarded costs and attorney fees to defendants for defending a declaratory judgment action. Plaintiff moved under this rule to strike the award of attorney fees. The District Court then concluded that it lacked authority to award attorney fees because plaintiff did not force defendants to defend against a frivolous or malicious action, so the court struck the award of attorney fees, and defendants appealed. Generally, under the American rule, a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory provision, although equitable exceptions are recognized. Section 27-8-311 provides that in any proceeding under Title 27, ch. 8, equitable and just costs may be awarded, but attorney fees are not, in any proper sense, considered part of the costs in a case and thus are not allowed as costs under 27-8-311. However, 27-8-313 draws no distinction between declaratory judgment actions adjudicating the rights of an insured against an insurer and actions adjudicating rights outside the confines of an insurance policy, so a court may award attorney fees pursuant to 27-8-313 when the court, in its discretion, considers such an award necessary or proper. Therefore, after finding that the District Court erred in concluding that it lacked authority to award attorney fees, the Supreme Court reversed for a determination of whether an award of attorney fees was necessary or proper in this case. Trustees of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 M 210, 69 P3d 663 (2003), overruling State ex rel. Swart v. Casne, 172 M 302, 564 P2d 983 (1977), State ex rel. Dept. of Health and Environmental Sciences v. Lincoln County, 178 M 410, 584 P2d 1293 (1978), State ex rel. Leach v. Visser, 234 M 438, 767 P2d 858 (1988), McKamey v. St., 268 M 137, 885 P2d 515 (1994), and Dorwart v. Caraway, 1998 MT 191, 290 M 196, 966 P2d 1121 (1998), to the extent that those cases hold that a District Court has no discretionary authority to award attorney fees in a declaratory judgment action.

Authority of District Court to Retroactively Supersede Temporary Child Support Enforcement Division's Order: While the wife's dissolution petition was pending, she asked the Child Support Enforcement Division to set child support. The Division gathered information regarding the parties' income and set a support amount. Both parties disputed the amount, and a contested hearing was held. After the hearing, the Division issued a temporary support obligation order. The husband petitioned for judicial review of the order, but the Division informed the court that the order was not appealable, so the parties stipulated to dismiss the petition for judicial review, and the court dismissed the petition. The court eventually set a child support amount, and the husband moved to have the court's order applied retroactively, but the court concluded that the order could not be applied retroactively, so the husband appealed. The Supreme Court reversed. Under 40-5-225, the Division may set a temporary support order if one has not been set, but the very nature of the temporary order contemplates that the Division's order will be superseded by order of the District Court. Thus, the District Court erred when it held that it did not have authority to retroactively supersede the Division's temporary order, and it was an abuse of discretion for the court not to do so. In re Marriage of Banka, 2003 MT 84, 315 M 97, 67 P3d 885 (2003).

Substantial Credible Evidence to Support Jury Verdict — Verdict Affirmed: Plaintiff was injured when a donkey savagely bit her arm. Defendant treated her at the local hospital. Plaintiff endured several surgeries and eventually lost her arm below the elbow. She sued defendant, claiming that defendant's negligence subjected her to an increased risk of harm and lessened her chances for a better result. The jury found that defendant was negligent but that the negligence did not cause injury to plaintiff. On appeal, the Supreme Court found that there was substantial credible evidence in the record to support the jury's verdict. Much of the testimony of plaintiff's expert witness was contradicted by defendant's expert witnesses. An attack upon a jury verdict alleging that it is not supported by the evidence is proper only when there is a complete absence of any credible evidence in support of the verdict. The District Court did not abuse its discretion in denying the motion to alter or amend the judgment or for a new trial. Campbell v. Canty, 1998 MT 278, 291 M 398, 969 P2d 268, 55 St. Rep. 1137 (1998).

Adequacy of Compensatory and Punitive Damages Upheld — Motion for Directed Verdict Properly Denied: In a civil action for damages against Huggins and the Carpet Barn, stemming from criminal acts damaging plaintiffs David and Susan Black's automobiles, the Blacks' wholly owned corporation was awarded $35,000 in compensatory damages and $51 in punitive damages. The Blacks contended that the award was insufficient because it failed to award damages for emotional distress and property damages and awarded only $51 in punitive damages. The District Court denied Blacks' motion for a directed verdict. The Supreme Court held that the District Court properly denied the motion because there was conflicting evidence as to the cause of Blacks' emotional distress and because the record showed that Susan Black had been reimbursed through criminal restitution and that amount was not deducted from the award to the Blacks' corporation. Concerning the amount of punitive damages awarded, the Supreme Court cited Safeco Ins. Co. v. Ellinghouse, 223 M 239, 725 P2d 217 (1986), and Dees v. Am. Nat'l Fire Ins. Co., 260 M 431, 861 P2d 141 (1993), and held that the District Court properly instructed the jury, reviewed the award in accordance with 27-1-221, and left the award intact. The Supreme Court therefore held that the District Court did not abuse its discretion in denying the motion. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

"Motion for Reconsideration" — Procedural Trap for Unwary and Grave Risk to Meritorious Appeal — Criteria to Equate With Motion to Alter or Amend: Stephen Nelson filed a motion for reconsideration of the District Court's grant of the defendant's motion for summary judgment based on a later-decided Third Circuit Court of Appeals case. Stephen contended that the motion was filed to allow the District Court to alter or amend its judgment to correct its mistake of law. The motion for reconsideration was denied, and Stephen filed a notice of appeal more than 60 days after the notice of entry of judgment but within 60 days from the denial of the motion for reconsideration. The defendant moved for dismissal of the appeal, contending that it had not been timely filed under Rule 5, M.R.App.P. (Title 25, ch. 21), on the grounds that a motion for reconsideration is not a motion to alter or amend under this rule. The Supreme Court, warning against the use of motions for reconsideration, established criteria under which to evaluate the motions. When a motion for reconsideration substantively addresses one of the following areas, the court is more likely to conclude that the motion is actually a motion to alter or amend under this rule: (1) to correct manifest errors of law or fact upon which the judgment was based; (2) to raise newly discovered or previously unavailable evidence; (3) to prevent manifest injustice resulting from, among other things, serious misconduct of counsel; or (4) to bring to the court's

attention an intervening change in controlling law. The Supreme Court denied the motion to dismiss. Nelson v. Driscoll, 285 M 355, 948 P2d 256, 54 St. Rep. 1190 (1997), distinguished in Carr v. Bett, 1998 MT 266, 291 M 326, 970 P2d 1017, 55 St. Rep. 1098 (1998), and followed in Lee v. USAA Cas. Ins. Co., 2001 MT 59, 304 M 356, 22 P3d 631 (2001).

No Abuse of Discretion Found in Refusal to Amend Award of Personal Property — Findings and Conclusions, Decree, and Minute Order Held Consistent — Award Based Upon Stipulation of Current Cash Value of IRA Accounts Upheld: Soon after a decree was issued dissolving her marriage, Janet moved, pursuant to this rule, to amend the judgment because it concerned the distribution of the parties' personal property. Janet claimed that the District Court should have awarded her the personal property listed on Exhibit "A" to her proposed findings of fact and conclusions of law. The District Court denied her motion. Janet argued before the Supreme Court that the decree of dissolution did not conform to the District Court's findings of fact and conclusions of law in that the District Court intended to award her the property listed on Exhibit "A" to her proposed findings and conclusions but that the property awarded was taken from a different exhibit and paragraph of her amended proposed findings and conclusions. The Supreme Court held that the District Court's distribution of the parties' property was clear and definite. The Supreme Court noted that the District Court had made a minute entry 10 days before Janet filed her motion to amend and that the minute order stated that certain items from Janet's Exhibit "A" were to be returned to her. The Supreme Court concluded that by using this language in the minute order, the District Court intended that certain items of Janet's property listed in her exhibit were to be returned to her and that the remainder was to remain with her ex-husband. In all material respects, the Supreme Court said, the findings and conclusions, decree, and minute order all conform with one another, and therefore, the District Court did not abuse its discretion in denying the motion to amend. The Supreme Court also upheld the District Court's division of the parties' two IRA accounts, noting that the parties arrived at the value by adding the two together for a total of $64,445 and then subtracting 30% for taxes and a 10% penalty, leaving a net redemption value of $38,666, and then dividing that remainder in half. The District Court gave Janet's ex-husband the option of transferring ownership of one-half of the IRAs to Janet or paying Janet $19,333, one-half the net value of those accounts. The Supreme Court held that because Janet had stipulated to the present cash value of the IRAs, if her ex-husband chose to pay her one-half the current cash value of the accounts, she is receiving an equitable distribution. In re Marriage of Dorsey, 284 M 392, 945 P2d 430, 54 St. Rep. 934 (1997).

Motion for Reconsideration Held Not to Be Motion to Alter or Amend Judgment — Rule 5(a)(1), M.R.App.P., Held Applicable — Notice of Appeal Filed Before Receipt of Notice of Entry of Judgment Not Premature: In an action to enforce the Individuals With Disabilities Education Act (IDEA), the Shieldses filed a motion for reconsideration shortly after the District Court dismissed their first amended complaint. Before the District Court ruled on the motion for reconsideration, the Shieldses filed a notice of appeal. The defendants claimed that the motion for reconsideration should be treated as a motion to alter or amend judgment under this rule and that because Rule 5(a)(4), M.R.App.P. (Title 25, ch. 21), specifies that a notice of appeal filed before the disposition of a motion to alter or amend judgment has no effect until the motion to alter or amend judgment is disposed of, the Shieldses' notice of appeal was ineffective. The Supreme Court noted that a motion for reconsideration is not one of the motions provided for or authorized by the Montana Rules of Civil Procedure. The Supreme Court reviewed the substance of the motion for reconsideration to determine whether, under Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364 (1996), the motion could be treated as a motion to alter or amend judgment and held that the motion could not be so treated. Because the motion could not be treated as a motion to alter or amend judgment, the time for the Shieldses to file a notice of appeal was governed by Rule 5(a)(1), M.R.App.P., and not Rule 5(a)(4), M.R.App.P. Under Rule 5(a)(1), the Shieldses had 30 days from the time of notice of entry of judgment under Rule 77(d), M.R.Civ.P., in which to file their notice of appeal. However, the Supreme Court also noted that there was nothing in the Montana Rules of Civil Procedure that prevented the Shieldses from filing their notice of appeal earlier than provided under Rule 77(d), and for that reason, the Supreme Court held the filing of the notice of appeal to be effective. Shields v. Helena School District No. 1, 284 M 138, 943 P2d 999, 54 St. Rep. 815 (1997).

Time for Appeal Not Tolled During Extra Time Granted to File Brief in Support of Posttrial Motion: A District Court cannot grant extensions under this rule for additional briefing time and must rule on a motion to amend a judgment within the time allotted without regard to the status of the briefing. If the court does not rule on the motion within the allotted time, the motion is considered denied. The court's grant of a 16-day extension of time in which to file a brief in

support of the motion did not suspend for 16 days the time allotted for appeal. Failure to file a notice of appeal within the allotted time was an absolute jurisdictional bar to Montana Supreme Court consideration of the appeal. Challinor v. Glacier Nat'l Bank, 283 M 342, 943 P2d 83, 54 St. Rep. 520 (1997).

Equating Motion for Reconsideration to Motion to Alter or Amend: Miller filed a motion for reconsideration of the District Court's grant of the defendant's motion for summary judgment. Miller's motion for reconsideration was denied, and he appealed the summary judgment order, not within 30 days of entry of the summary judgment but within 30 days of the denial of the motion for reconsideration. The defendant moved for dismissal of the appeal on the grounds that it had not been timely filed. Miller argued that the motion for reconsideration stopped the running of the 30-day requirement and that the 30-day requirement started to run again from the time that the motion to reconsider was denied. Miller based his argument on the holding in Easley v. Burlington N. RR, 234 M 290, 762 P2d 870 (1988), which stated that although a motion for reconsideration is not specifically referred to in this rule, it can be equated to a motion to alter or amend a judgment. The Supreme Court held that it would allow Miller's appeal because of his reliance on Easley but that any future motion to reconsider would not be treated as equivalent to a motion to alter or amend unless the motion contains statements or allegations demonstrating that the motion is equivalent to a motion to alter or amend. Miller v. Herbert, 272 M 132, 900 P2d 273, 52 St. Rep. 655 (1995), overruling in part Easley v. Burlington N. RR, 234 M 290, 762 P2d 870 (1988). See also Shields v. Helena School District No. 1, 284 M 138, 943 P2d 999, 54 St. Rep. 815 (1997). However, see Moody v. Northland Royalty Co., 286 M 89, 951 P2d 18, 54 St. Rep. 1317 (1997), which distinguished Miller by holding that defendant's motion to dismiss was not supported by a properly identified brief pursuant to Rule 2, M.U.D.C.R. (Title 25, ch. 19). See also Carr v. Bett, 1998 MT 266, 291 M 326, 970 P2d 1017, 55 St. Rep. 1098 (1998), distinguishing Miller by holding that the Supreme Court will not analyze the substance of the motion to determine if the motion fits the definition of a motion to alter or amend.

Claim for Attorney Fees Raised for First Time in Motion to Amend Judgment Premature: It was premature to grant a claim for attorney fees, based on a breach of contract claim, that was raised for the first time in a motion to amend a judgment. The claim was supported only by a postjudgment affidavit attached to a reply brief in support of the motion to amend. The claim was premature in light of the fact that the underlying breach of contract claim had not been raised or argued by the parties in any meaningful or appropriate fashion. Clark v. Dussault, 265 M 479, 878 P2d 239, 51 St. Rep. 642 (1994).

No Basis for Amending Summary Judgment Apart From Motion for Relief From Judgment When Relief Denied: Plaintiff sought to amend judgment, but in neither the trial court nor the Supreme Court was any basis advanced for amending the summary judgment apart from arguments supporting plaintiff's motion for relief from judgment. Because the trial court properly declined to grant relief from judgment under Rule 60(b)(2), M.R.Civ.P., there was no abuse of discretion in denying the motion to amend the judgment. Estate of Nielsen v. Pardis, 265 M 470 878 P2d 234, 51 St. Rep. 591 (1994). See also Bevacqua v. Union Pac. RR Co., 1998 MT 120, 289 M 36, 960 P2d 273, 55 St. Rep. 469 (1998).

Failure to Give Notice of Deficient Performance — Summary Judgment Burdens: Plaintiff alleged it had performed and was entitled to payment under a contract. Defendant answered that plaintiff had performed deficiently and that defendant had not breached the contract and owed no money under it. Since the contract required defendant to notify plaintiff of deficient performance, whether notice was given was crucial to each party's case. Defendant's answer raised the genuine issue of material fact as to whether defendant gave notice of deficiency, so that when plaintiff moved for summary judgment, plaintiff had the initial burden of offering evidence establishing the absence of notice. Statements of plaintiff's attorney that no notice had been given did not meet this burden; therefore, the burden to show that notice had been given did not shift to defendant and the court committed reversible error when it: (1) placed that burden on defendant; (2) granted plaintiff summary judgment for failure of defendant to carry the burden; and (3) refused defendant's motion for alteration or amendment of the judgment. However, defendant could have avoided an unnecessary appeal by filing affidavits or other evidence showing that defendant had given notice and that a genuine issue of material fact thus existed. Brinkman & Lenon v. P&D Land Enterprises, 263 M 238, 867 P2d 1112, 51 St. Rep. 36 (1994).

Interplay Between Time for Filing Notice of Appeal and Time for Filing Motion to Amend or Alter Judgment: District Courts retain jurisdiction to consider and resolve timely motions to alter or amend filed pursuant to Rule 52(b), M.R.Civ.P., or this rule. A notice of appeal filed under Rule 5, M.R.App.P. (Title 25, ch. 21), prior to the expiration of the time allowed for motions

to alter or amend but followed by such motions timely filed has no effect. Shull v. First Interstate Bank of Great Falls, 262 M 355, 864 P2d 1268, 50 St. Rep. 1594 (1993).

Ineffective Appeal After Motion to Alter or Amend Judgment — Failure to Cure Results in Dismissal: On April 30, Grounds filed a motion to alter or amend a judgment partially granting her former husband's (Coward's) posttrial motions. On May 17, before Grounds' motion was ruled upon, Coward filed a notice of appeal from the disposition of his pretrial motions. The Supreme Court held that under Rule 6(a), M.R.Civ.P., the day the order was issued on his motions is not to be counted and that because the time for serving a motion to alter or amend judgment is less than the 11 days referred to in Rule 6(a), intervening Saturdays and Sundays are not counted. Therefore, the District Court could still rule on Grounds' motion. Under Rule 5(a)(4), M.R.App.P. (Title 25, ch. 21), Coward filed a premature notice of appeal and should have waited until Grounds' motion was disposed of or considered denied. Failure of Coward to file a new notice of appeal after Grounds' motion was considered denied means that his own appeal must be dismissed. In re Marriage of Grounds & Coward, 256 M 397, 846 P2d 1034, 50 St. Rep. 114 (1993).

Lack of Supporting Brief and Notice of Motion — Ruling Not Invalidated: Coward made a motion to alter or amend judgment but failed to file a supporting brief within 5 days and failed to give notice to Grounds that the motion would be heard along with the hearing on her motion for contempt. These omissions notwithstanding, the District Court partially granted Coward's motion. The Supreme Court held that the District Court did not abuse its discretion. Citing Maberry v. Gueths, 238 M 304, 777 P2d 1285 (1989), the Supreme Court said that even though failure to file a brief is an admission that the motion is not well taken, the District Court still has discretion whether to grant the motion. The parties were also invited to propose a briefing schedule and/or evidentiary hearing date to present supplemental arguments, but failed to do so. Under these circumstances, the District Court did not abuse its discretion. In re Marriage of Grounds & Coward, 256 M 397, 846 P2d 1034, 50 St. Rep. 114 (1993). However, see Moody v. Northland Royalty Co., 286 M 89, 951 P2d 18, 54 St. Rep. 1317 (1997), which held that the District Court erred when it granted defendant's motion to dismiss after designating defendant's answer as the brief supporting a motion to dismiss pursuant to Rule 2, M.U.D.C.R. (Title 25, ch. 19).

Failure to Perfect Appeal Within Time Limits as Precluding Jurisdiction: Failure to perfect an appeal within the time limits provided by law prevents the Supreme Court from acquiring jurisdiction to entertain the appeal. First Sec. Bank of Havre v. Harmon, 255 M 168, 841 P2d 521, 49 St. Rep. 955 (1992), followed in In re Marriage of Yeanuzzi, 2001 MT 171, 306 M 163, 30 P3d 1095 (2001).

Retention of District Court Jurisdiction After Filing of Appeal: A motion filed under this rule must be determined by the District Court within 45 days. If the court fails to rule within that time, the motion is considered denied. Rule 5(a)(1), M.R.App.P. (Title 25, ch. 21), requires the notice of appeal in civil cases to be filed within 30 days of judgment. However, if a motion is timely filed under this rule, the time for appeal runs from the entry of an order granting or denying the motion or, if applicable, from the time the motion is considered denied at the end of the 45-day period (see 1995 amendment). If a notice of appeal is filed before the motion is disposed of, the notice of appeal has no effect. Semenza v. Hartelius, 248 M 294, 811 P2d 1262, 48 St. Rep. 356 (1991).

Court Failure to Rule Within Forty-Five Days on Motion to Set Aside or Amend — Loss of Jurisdiction Over That Issue: Subsequent to obtaining a decree of dissolution, the husband died intestate and his ex-wife moved to have the decree set aside. More than 45 days later (see 1995 amendment), the District Court set aside the decree and also granted the ex-wife's motion to substitute as personal representative. The Supreme Court reversed, stating that a postjudgment motion not ruled on within 45 days is considered denied and at that time, the lower court lost its jurisdiction with respect to setting aside the decree. The court also held that the 45 days run from the time the motion to set aside or amend is filed and is not affected by when the notice of entry of judgment is filed. In re Marriage of Miller, 238 M 108, 776 P2d 1218, 46 St. Rep. 1128 (1989).

Untimely Appeal Dismissed: The Supreme Court dismissed an appeal filed after the mandatory time limit imposed under Rule 59(d), M.R.Civ.P., as untimely filed pursuant to this rule. Easley v. Burlington N. RR, 234 M 290, 762 P2d 870, 45 St. Rep. 1915 (1988). See also Miller v. Herbert, 272 M 132, 900 P2d 273, 52 St. Rep. 655 (1995).

Failure to Obtain Continuance — No Invalidation of Proceeding: Following service of the notice of entry of judgment, the defendants filed a timely motion to amend the judgment pursuant to Rule 52(b), M.R.Civ.P. However, hearing on the motion was not held within 10 days of service as required by Rule 59(d), M.R.Civ.P. However, the hearing was within the total of 40

days which Rule 59(d) allows for the hearing. The notice of hearing was given within the 10-day period. The defendant's technical failure to obtain a continuance from the trial court is not a sufficient reason to invalidate the proceedings when the hearing is held within the period prescribed by the rule. Redinger v. French, 216 M 16, 699 P2d 94, 42 St. Rep. 604 (1985).

Effect of Stipulation Based on Mistake in Interpretation of Law: At entry of judgment the District Court permitted entry of a stipulation that apportioned attorney fees between the parties on the basis of an incorrect interpretation of the law. The parties agreed that attorney fees are costs in mechanics' lien (now construction lien) foreclosure actions. It was error for the District Court to refuse to alter or amend the judgment upon timely application under Rules 59(g) and 60(b), M.R.Civ.P. A judgment by stipulation is as binding as any judgment or verdict, no more or less. The court was responsible for a correct application of the law in accepting the stipulation and in later ruling on whether to alter or amend the judgment thereby entered. Schillinger v. Brewer, 215 M 333, 697 P2d 919, 42 St. Rep. 408 (1985).

No Basis to Reopen Dissolution Decree: The appellant did not claim the existence of unconscionability, fraud, or any other inequitable situation that would give a court a legal basis upon which to reopen a dissolution decree. She attempted to enhance enforcement of the judgment that incorporated the parties' stipulations as to the property division by making a motion to modify. She was precluded by statutory time limits and by the fact that she had no legal basis to compel a court to reopen the judgment. Since no conditions existed that would justify reopening the judgment, the District Court was not required to enter findings of fact. Keirle v. Keirle, 210 M 214, 681 P2d 703, 41 St. Rep. 1016 (1984).

Award of Attorney Fees on Remand Improper: On remand from the Supreme Court, the District Court granted the mother's motion for attorney fees for the first trial and appeal. The District Court was without jurisdiction to grant attorney fees. The original judgment did not provide for attorney fees, and the judgment would have had to be amended before either party could be ordered to pay those fees. A motion to amend a judgment must be made within 10 days of its entry. This rule applies to requests for attorney fees and is not overridden by 40-4-110. Since mother's motion was not timely, the District Court was without jurisdiction to grant attorney fees for the first trial. R.L.S. & T.L.S v. Barkhoff, 207 M 199, 674 P2d 1082, 40 St. Rep. 1982 (1983).

Marital Separation Agreement Not a Judgment Amendable for Failure of Consideration: A marital separation agreement is not a conveyance. A separation agreement incorporated into a divorce decree is enforceable only as a judgment. A judgment can be reopened if obtained through fraud but not for lack of fair consideration. It was error to annul a marital separation agreement under 31-2-311 (now repealed). Witbart v. Witbart, 204 M 446, 666 P2d 1217, 40 St. Rep. 994 (1983).

Motion for Attorney Fees Following Judgment — Not Costs — Timeliness of Motion: The defendants signed a contract to purchase a tract of land from plaintiffs. The contract provided for attorney fees to the prevailing party in an action commenced on the contract. Plaintiffs filed suit alleging that under the contract and various oral agreements, defendants had agreed to pay a real estate commission to plaintiffs. The trial court granted summary judgment to defendants, holding that written evidence of an agreement to pay a commission did not exist. No notice of entry of judgment was ever filed. Defendants later moved to set an attorney fee award. The trial court ruled that under Title 25, ch. 10, attorney fees were not recoverable costs and that the motion for costs was not timely, as it was not filed within 5 days of judgment. On appeal, the Supreme Court held that attorney fees were awardable under the contract and that defendants' motion was essentially a motion to amend judgment under Rule 59(g), M.R.Civ.P. The motion was timely made since no notice of entry of judgment was ever filed. Cook v. Harrington, 203 M 479, 661 P2d 1287, 40 St. Rep. 580 (1983).

Untimely Motion, Notice, or Hearing Not Suspending Time for Appeal — Appeal Not Timely: Summary judgment was entered against appellant by the District Court on November 25, 1980. On December 4, 1980, he filed his motion to alter or amend the summary judgment. He noticed the hearing on the motion for December 15, 1980. Under Rule 59(g), the motion was timely filed, but under this subsection, the hearing was set 1 day too late. The time for hearing expired December 14, 1980. Therefore, the time for filing a notice of appeal began running that date and his appeal which was filed on February 4, 1981, was not timely and was dismissed. Malinak v. Safeco Title Ins. Co. of Idaho, 203 M 69, 661 P2d 12, 39 St. Rep. 2046 (1982).

After the plaintiff and defendant stipulated to costs in a quiet title action, an amended judgment was entered by the District Court on October 29, 1981, but on November 13, the plaintiff filed a motion to amend judgment. On appeal by the plaintiff, the Supreme Court held that inasmuch as the motion to amend judgment was not timely filed, the motion did not suspend

the running of the time for appeal, and that because the running of the time for filing an appeal had not been suspended, the notice of appeal was filed too late and the court lacked jurisdiction of the appeal. O'Connell v. Heisdorf, 202 M 89, 656 P2d 199, 39 St. Rep. 2347 (1982), followed in Estate of Stinson, 240 M 1, 782 P2d 78, 46 St. Rep. 1892 (1989).

Notice of entry of judgment against appellant was served on him on November 6, 1981. On November 20, 1981, he filed a motion to amend the findings. He did not file a notice of hearing on the motion. The motion was heard on February 1, 1982, and denied on February 2, 1982. Later in February, appellant filed a notice of appeal. The Supreme Court held that appellant's notice was not timely and dismissed the appeal. Under Rule 59(d), M.R.Civ.P., a motion to amend a judgment is considered denied at the end of the time period in which a hearing on the motion must be held. A hearing must be held within 10 days after the motion is filed. Therefore, appellant's motion was considered denied on November 30, 1981, and the notice of appeal was not timely. Fields v. Summit Eng'r, 201 M 204, 653 P2d 1204, 39 St. Rep. 2057 (1982).

When a motion to vacate and set aside a portion of a judgment was made 46 days beyond the authority of Rule 52, M.R.Civ.P., it did not suspend the running of time permitted to file appeal under Rule 5, M.R.App.P. Appellant's contention that Rule 60, M.R.Civ.P., was applicable did not operate to vest the Supreme Court with jurisdiction to hear the appeal. First Nat'l Bank of Lewistown v. Fry, 176 M 58, 575 P2d 1325 (1978).

Time Limits to Be Followed — Jurisdictional Requirement: The parties' marriage was dissolved on April 14, 1980, and a portion of the decree provided that the wife was to receive monthly payments equal to one-half the value of stock. On April 23, 1980, the wife moved under Rule 52(b), M.R.Civ.P., to amend the findings and judgment to correct the valuation of the stock. The motion was properly noticed for hearing under Rule 59(g), M.R.Civ.P. On May 1, 1980, the judge continued the hearing for 30 days upon written stipulation of counsel. The hearing was held on June 5, 1980, but no order was entered. The court finally held a later hearing after the wife again moved on May 4, 1981, and in an order dated October 7, 1981, denied her request. On appeal, the Supreme Court held that once the Rule 52(b) motion was made, the time limits of Rule 59(g) applied and a hearing had to be held within 10 days or the court could continue the hearing not to exceed 30 days. In this case, the court held the hearing 5 days later than the extended date and thereby lost jurisdiction of the motion. Further, the court did not rule on the motion within the required 15 days. Because the time for the wife's appeal began to run on the last day that the District Court could have ruled on the Rule 52 motion, her appeal was not timely and the Supreme Court had no jurisdiction. In re Marriage of Winn, 200 M 402, 651 P2d 51, 39 St. Rep. 1831 (1982).

Notice of Appeal Divests Trial Court of Jurisdiction to Amend Judgment: After respondent moved to amend the judgment of the District Court, appellant filed a notice of appeal. The filing of the notice of appeal deprived the trial court of jurisdiction to amend the judgment. However, under 3-2-204, the Supreme Court can return jurisdiction to the trial court. United Farm Agency v. Blome, 198 M 435, 646 P2d 1205, 39 St. Rep. 1115 (1982).

Service of Notice of Entry of Judgment by Mail — Effective Three Days After Mailing: Notice of entry of judgment was mailed to the parties on May 21, 1980. Twelve days later the respondent filed a motion to amend findings and judgment and a motion for a new trial. Because service of a notice of entry of judgment by mail is not effective until 3 days after the mailing under Rule 6(e), M.R.Civ.P., the motions were timely. Wilson v. Wilson, 198 M 147, 645 P2d 393, 39 St. Rep. 828 (1982).

Challenge of Decree and Property Settlement After Six Years — Res Judicata: A property settlement and decree entered in 1974 cannot be set aside in 1980 on the grounds of unconscionability. The failure of the spouse to appeal the court's decree in 1974 has rendered the issue res judicata. Hadford v. Hadford, 194 M 518, 633 P2d 1181, 38 St. Rep. 1308 (1981).

Proposed Findings and Conclusions Adopted Verbatim: Notwithstanding the duty imposed in Rule 52(a), M.R.Civ.P., upon a District Court to "find the facts specially and state separately its conclusions of law thereon" is not automatically breached when a court adopts verbatim the proposed findings and conclusions submitted by the prevailing party, especially where, as here, the District Judge invited both parties to submit proposed findings and conclusions prior to making his decision. Adopted findings, though not the product of the District Judge's mind, are formally his and will stand if supported by the evidence. The District Court therefore did not err in denying the petitioner's motion to amend the findings and conclusions, which motion was based upon the verbatim adoption. Billings v. P.S.C., 193 M 358, 631 P2d 1295, 38 St. Rep. 1162 (1981), followed in Sawyer-Adecor Int'l, Inc. v. Anglin, 198 M 440, 646 P2d 1194, 39 St. Rep. 1118 (1982).

Extension of Hearing Date on Motion to Amend — What Suffices for Compliance With Time Requirements: The wife appealed from an amended decree dissolving her marriage, establishing child custody and support, and dividing the property of the marriage. The appellant filed and served a motion to amend the judgment. Including 3 days for mailing, the hearing on that motion was either required to be held within 13 days or to be continued by the court within 13 days. The District Court entered an order setting a hearing date on the appellant's and respondent's motions to amend. That order was filed on the last day of the 13-day period. The order constituted a continuation of the hearing date on the motions to alter or amend. That order did set a hearing date within a 30-day period required by Rule 59(d), M.R.Civ.P. (See 1995 amendment). The District Court then ruled on the motions to alter or amend within 5 days following the hearing. Therefore, the District Court's actions regarding the petitioner's motions to alter or amend the original decree complied with the time requirements of the rule. The amending order of the District Court was therefore valid. Tefft v. Tefft, 192 M 456, 628 P2d 1094, 38 St. Rep. 837 (1981).

Petition to Alter or Amend Judgment With Regard to Fees and Costs in Divorce Case: A petition to alter or amend a judgment must be served not later than 10 days after notice of entry of judgment, and the court was without jurisdiction to grant a petition asking for attorney's fees that was filed almost 3 months after entry of an order that required each party to pay his own fees and costs. McDonald v. McDonald, 183 M 312, 599 P2d 356 (1979), followed in Haugen v. Nelson, 240 M 28, 782 P2d 901, 46 St. Rep. 1915 (1989), and in Estate of Stinson, 240 M 1, 782 P2d 78, 46 St. Rep. 1892 (1989).

Practice of Additur: The practice of additur by the District Courts is prohibited notwithstanding the court's dictum in Ferguson v. Town Pump, Inc., 177 M 122, 580 P2d 915 (1978). Bohrer v. Clark, 180 M 233, 590 P2d 117, 35 St. Rep. 1878 (1978), affirmed in Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996).

Ruling on Motion — Mandatory Time Limitation: It was error for the court to rule on a motion to alter or amend judgment after expiration of the 15-day time period measured from the date of submission of the motion. Kelly v. Sell & Sell Paint Contractors, 175 M 440, 574 P2d 1002 (1978), affirmed in Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996).

Rule Mandatory — Untimely Order Void: Order granting motion to alter or amend judgment was void where hearing was not held within 10 days after service as required by this rule; time and procedural limitations for motions subsequent to judgment set out in this rule are mandatory. Armstrong v. High Crest Oils, Inc., 164 M 187, 520 P2d 1081 (1974).

Motion for Modification of Paternity Decree — Requirements of Rules Not Satisfied — Jurisdiction Precluded: Where a husband filed a "motion for modification of divorce decree" more than 4 years after the divorce in an attempt to relitigate the issue of his paternity of the children of the parties, the District Court was without jurisdiction to hear the petition. As the petition on its face did not seek relief under Rules 59 or 60, M.R.Civ.P., and was based on facts which predated the original finding of paternity, which finding was not appealed, the District Court had no jurisdiction to modify its previous order. Butler v. Brownlee, 152 M 453, 451 P2d 836 (1969).

Additur Not Allowed: This rule did not give the District Court power to order an additur to a condemnation award as a condition of denying motion for new trial. Highway Comm'n v. Schmidt, 143 M 505, 391 P2d 692 (1964).

Condemnation Proceedings — Rule Inapplicable to Award by Commissioners: Subdivision (e) of this rule (now subdivision (g)) did not apply in determining right of District Court to alter or amend an award of damages as found by the report of commissioners in condemnation proceeding under 70-30-303 after the award had been filed with the District Court and notice thereof given to the parties by the clerk as the commissioners' award was not a judgment. State ex rel. Frelich v. District Court, 141 M 169, 375 P2d 1016 (1962).

Collateral References

Judgment *key* 321.

49 C.J.S. Judgments §252.

Rule 60. Relief from judgment or order

Case Notes

No Showing of Damages or That Client Would Have Prevailed on Lost Appeal of Marital Dissolution Case — Failure of Legal Malpractice Claim: Richards brought a malpractice claim against an attorney who negligently failed to appeal Richards' marriage dissolution proceeding prior to the deadline for appeal. The District Court dismissed the claim, ruling that the court, rather than a jury, should decide the consequences of the attorney's failure to file the appeal and

that the lost appeal would not have succeeded. Richards appealed, but the Supreme Court affirmed. Even though the attorney admitted malpractice by allowing the claim to expire, the attorney contended that no damages occurred. When a malpractice claim changes to the question of whether an attorney perfected an appeal, the analysis shifts from one of fact to one of law, which is properly considered by the court rather than a jury. The question of the probable outcome of a lost appeal also presents a question of law for the trial court to decide based on the special expertise required to analyze the relevant law and rules of appellate procedure, and the review is limited to the transcript and record of the underlying action and arguments presented by counsel. Here, there was substantial credible evidence regarding primary parenting time, valuation of the marital estate, and child support payments showing that Richards' lost appeal would not have resulted in a successful or favorable outcome. Further, one element of a legal malpractice claim requires a showing that the attorney's conduct proximately caused damages suffered by the claimant. Because Richards failed to show that the lost appeal would have been successful, he also failed to show that the attorney's breach caused any damages, so the malpractice claim failed. Richards v. Knuchel, 2005 MT 133, 327 M 249, 115 P3d 189 (2005).

Lack of Hearing Record on Support Modification — Vacation of District Court Decree Required: Pamela filed a motion to amend the decree dissolving her marriage, in order to increase child support payments, and a motion to hold her ex-husband, Earl, in contempt for failure to pay child support. The District Court held a hearing, which Earl did not attend. Based upon the hearing, of which no record was made, the District Court modified the decree by increasing Earl's child support payments. Earl was also ordered to pay Pamela's attorney fees and costs. In response, Earl filed a motion under this rule for relief from the judgment, but that motion was denied when the District Court failed to rule. Citing Malley v. Malley, 190 M 141, 619 P2d 531 (1980), the Supreme Court held that without a record, the Supreme Court could not determine the change in circumstances justifying the amended decree and Earl was thereby denied effective appellate review. The District Court's order was vacated, and the case was remanded for a hearing on the merits of Pamela's motion. In re Marriage of Long, 268 M 187, 885 P2d 533, 51 St. Rep. 1252 (1994).

New Trial Denied — Lack of Diligence: The defendants sought a new trial on the basis of newly discovered evidence indicating that the valuation of real property reached by the trial court was $13,000 too high. The Supreme Court affirmed the lower court's denial of the motion, holding that the defendants had not demonstrated that the evidence could not have been discovered in time for the trial with exercise of due diligence on their part. Brunner v. LaCasse, 241 M 102, 785 P2d 210, 47 St. Rep. 117 (1990).

Motion for Modification of Child Custody Decree: Wife filed for modification of a child custody order, and the subsequent order issued by the court affected only the terms of the original custody decree that relate to the notice required prior to visitation and to allocation of transportation costs. In response to husband's argument that wife's motion for modification should be denied because it was not properly filed under the time limitations established in Rule 59, M.R.Civ.P., or this rule, the court held that the motion was filed under 40-4-217, which contains no time limitations. In re Marriage of Chase, 237 M 224, 772 P2d 1264, 46 St. Rep. 754 (1989), replacing previous opinion at 46 St. Rep. 540 (1989).

Appeal Not Timely: When a motion to vacate and set aside a portion of a judgment was made 46 days beyond the authority of Rule 52, M.R.Civ.P., it did not suspend the running of time permitted to file appeal under Rule 5, M.R.App.P. Appellant's contention that Rule 60, M.R.Civ.P., was applicable did not operate to vest the Supreme Court with jurisdiction to hear the appeal. First Nat'l Bank of Lewistown v. Fry, 176 M 58, 575 P2d 1325 (1978).

Loss of Jurisdiction — Divorce Proceeding: The court exceeded its jurisdiction by determining paternity after entry of the original divorce decree. Relief was not sought under Rule 59 or Rule 60 as it could have been. Butler v. Brownlee, 152 M 453, 451 P2d 836 (1969).

Rule 60(a). Clerical mistakes.

Commission Notes

Subdivision (a) of the rule is identical with the Federal Rule, except that the phrase "and in pleadings" has been added to make it clear that pleadings may be corrected, and except that the last sentence of the Federal Rule, which deals with the correction of mistakes pending appeal, has been omitted as unnecessary.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Motion for Posttrial Relief Untimely — Posttrial Motion to Correct Clerical Mistakes Proper — Motion for Posttrial Relief Not Substitute for Appeal: Following notice of entry of judgment in a marriage dissolution trial, the husband had 10 days to file a motion under Rule 59, M.R.Civ.P., but missed the deadline by 2 days, so the motion was properly ruled untimely. The husband had 30 days to file a notice of appeal, but the untimely Rule 59 motion did not toll the time for appeal, and that time also expired. The decree became final, subject only to the husband's motion for relief under the various provisions of Rule 60, M.R.Civ.P. The District Court erred in not applying this rule to correct clerical mistakes in the findings of facts. However, a Rule 60 motion may not be used as a substitute for appeal, so the husband's Rule 60 motion essentially seeking to set aside the decree based on insufficient evidence was properly denied. In re Marriage of Schoenthal, 2005 MT 24, 326 M 15, 106 P3d 1162 (2005).

No Time Limit on Court's Correcting Clerical Error if There Is No Currently Pending Appeal: At a bench trial, the lower court ruled that a disputed parking easement between the parties did not contain a certain portion of a lot. However, in the court's written opinion, the court cited the easement as containing that portion of the lot that the court's findings had delineated as not being part of the easement. The Franks brought a motion for relief from judgment based on a clerical error by the court. The lower court denied the Franks' motion without explanation, and the Franks appealed. Muri argued that the Franks had not timely filed their appeal because it was filed after the time for filing an appeal had elapsed. The Supreme Court stated that the lower court had clearly made a clerical error in its description of the easement and had abused its discretion in refusing to amend its ruling. The Supreme Court held that under this rule, unless there was a currently pending appeal, the rule had to be interpreted literally to mean that the lower court could correct its clerical error and therefore the time to file an appeal did not apply. The Supreme Court remanded the case and ordered the lower court to correct its error. Muri v. Frank, 2001 MT 29, 304 M 171, 18 P3d 1022 (2001). On remand, the District Court improperly made new findings of fact that conflicted with the unchallenged findings upon which the Supreme Court based its decision in Muri, id. Because plaintiff did not appeal the findings from the first appeal, the District Court had no authority to ignore the law of the case and reconsider its findings on remand. Muri v. Frank, 2003 MT 316, 318 M 269, 80 P3d 77 (2003).

Judge's Answer to Jury Question Held Not External Influence — Juror Affidavits Not Proper — Motions to Change Verdict Denied: In a civil suit, the special verdict form contained question #5 that read: "Do you find by clear and convincing evidence that Defendants acted either fraudulently and or with malice?" This question was taken nearly verbatim from plaintiff's proposed verdict form except that the proposed form contained a slash ("/") between the "and" and "or" in the question. Plaintiff did not object to this clerical error at or prior to the time that the form was submitted to the jury. During jury deliberations, the jury submitted a question to the judge stating: "Do we have to differencateate [sic] Between [sic] fraud and malice in #5." The judge answered "No" to the jury question, and neither plaintiff nor defendants objected to the answer at the time. After the trial, plaintiff filed alternative posttrial motions requesting the court to order that the answer to question #5 be "Yes", to set aside the jury verdict on question #5, and to either enter judgment against defendant on the issue of punitive damages as a matter of law or grant a new trial on the issue of punitive damages. The motions were based on affidavits of eight jurors alleging mistake or confusion based on the court's "No" answer. The District Court denied the motions. The Supreme Court upheld the denial, determining that plaintiff waived her claims of error by failing to object to the special verdict form submitted to the jury; that based on the "invited error rule", plaintiff participated in the error by submitting the conjunctive-disjunctive question; and that the affidavits were not proper because the jury had not been subject to external influences. Sandman v. Farmers Ins. Exch., 1998 MT 286, 291 M 456, 969 P2d 277, 55 St. Rep. 1165 (1998).

Oral Pronouncement as Legally Effective Sentence — Correction of Error in Written Judgment by Nunc Pro Tunc Order — Due Process and Double Jeopardy Rights Not Violated: The oral pronouncement of sentence is the legally effective sentence. The written judgment and commitment serves as evidence of the sentence orally pronounced. In the event of a conflict between the oral and written sentence, the oral controls. The sentencing court may correct an error in a written judgment and commitment by a nunc pro tunc order, pursuant to 46-18-117 (now repealed), to accurately reflect what was orally pronounced at the sentencing hearing. Absent evidence of a tangible detriment or concrete injury to defendant, a clarifying nunc pro tunc order does not jeopardize a defendant's due process rights or constitute double jeopardy. St. v. Lane, 1998 MT 76, 288 M 286, 957 P2d 9, 55 St. Rep. 311 (1998), overruling St. v. Enfinger, 222 M 438, 722 P2d 1170 (1986), St. v. Wirtala, 231 M 264, 752 P2d 177 (1988), St. v. Mason, 253 M

419, 833 P2d 1058 (1992), and St. v. Graveley, 275 M 519, 915 P2d 184 (1996), to the extent that those cases held that the written judgment and commitment, rather than the oral pronouncement of sentence, was to be considered the final, valid order. Lane was followed in St. v. Horton, 2001 MT 100, 305 M 242, 25 P3d 886 (2001), and St. v. Ringewold, 2001 MT 185, 306 M 229, 32 P3d 729 (2001). The Supreme Court amended Rule 5, M.R.App.P. (Title 25, ch. 21), to reflect the Lane decision in In re Amending Rule 5 of the Mont. Rules of Appellate Procedure, 55 St. Rep. 1267 (1998).

Notice or Motion Not Required to Correct Clerical Error in Order — Reentry of Judgment Not Required: The District Court entered judgment terminating parental rights but misspelled the father's first name. One week later, the court issued an amended order correcting the clerical error but made no other changes. The state did not notify appellant of entry of the amended judgment. Seventeen months after the termination of parental rights, appellant served notice of the amended order on the state and filed a notice of appeal from the amended order based on Rule 5, M.R.App.P. (Title 25, ch. 21), contending that the state never entered the amended judgment and that therefore the 60-day appeal period did not run until the amended judgment was entered by the appellant's attorney. Under this rule, the District Court has inherent power at any time to correct clerical errors in its own judgments in order to ensure that the record speaks the truth and reflects the court's decision. A notice or motion is not required to rectify a clerical error, nor must the order that makes the correction be denominated a nunc pro tunc order. An error may also be corrected by the issuance of a new order that does not contain the clerical error and that entirely replaces the old order. In the present case, appellant was properly notified when judgment was entered and the original order was handed down. The state was not required to enter judgment again after the amended new order was issued or to notify appellant of the entry of the amended order in order to keep the appeal clock running. Because appellant failed to file a notice of appeal within 60 days of the entry of judgment, the appeal was dismissed as untimely. In re N.K.O. & Z.J.M., 277 M 122, 919 P2d 394, 53 St. Rep. 570 (1996), distinguishing El-Ce Storms Trust v. Svetahor, 223 M 113, 724 P2d 704 (1986), Kenny v. Koch, 227 M 155, 737 P2d 491 (1987), Hankinson v. Picotte, 235 M 143, 766 P2d 242 (1988), and In re Marriage of Robertson, 237 M 406, 773 P2d 1213 (1989).

Clerical Correction of Error in Calculating Child Support Obligation: This rule was an appropriate vehicle for correcting a miscalculation in the net available resources to be considered in setting the amount of child support obligation. In re Marriage of Fronk v. Wilson, 250 M 291, 819 P2d 1275, 48 St. Rep. 936 (1991).

Corrective Order — Not Modification of Judgment: In an action to modify a final decree of dissolution distributing a marital estate, the trial court, under the authority of Rule 60(a), M.R.Civ.P., issued a corrective order to amend the judgment to express what was actually decided and to grant the relief originally intended. The order was not a modification of judgment subject to Rule 60(b), M.R.Civ.P. The court did not have a change of mind or correct a judicial error. In re Marriage of Cannon, 215 M 272, 697 P2d 901, 42 St. Rep. 348 (1985).

Timeliness of Motion — Clerical Errors to Be Corrected at Any Time: The parties' marriage was dissolved on April 14, 1980, and a portion of the decree provided that the wife was to receive monthly payments equal to one-half the value of stock. On April 23, 1980, the wife moved under Rule 52(b), M.R.Civ.P., to amend the findings and judgment to correct the valuation of the stock. The motion was properly noticed for hearing under Rule 59(g), M.R.Civ.P. On May 1, 1980, the judge continued the hearing for 30 days upon written stipulation of counsel. The hearing was held on June 5, 1980, but no order was entered. The wife moved to revalue the stock again on January 22, 1981. The court held a hearing on May 4, 1981, and in an order dated October 7, 1981, denied her request. On appeal the wife contended that her January 22 motion should be considered a motion under Rule 60, M.R.Civ.P., on the grounds of newly discovered evidence. Montana's Rule 60(b) requires the motion to be within 60 days following the entry of judgment. However, it can be considered if the relief could have been granted because the substance of the motion brought it under Rule 60(b)(6), M.R.Civ.P. This was foreclosed here by the District Court ruling on the motion on its merits. The Supreme Court did resolve an apparent conflict between Rule 60(a) and Rule 60(c), M.R.Civ.P., by holding that when a clerical mistake occurs in a judgment, order, or other part of a court record and the error is admitted or can be corrected or clarified without inequity or prejudice to a party, the error can be corrected by the court at any time, either nunc pro tunc or by a new order. In re Marriage of Winn, 200 M 402, 651 P2d 51, 39 St. Rep. 1831 (1982), followed in In re Marriage of Becker, 244 M 469, 798 P2d 124, 47 St. Rep. 1729 (1990).

Amending on Remand Judgment Upheld on First Appeal — Law of Case — Abuse of Discretion: In an original judgment of October 31, 1979, plaintiffs were given the alternatives of

either repairing a damaged irrigation ditch or paying damages of $5,500. The case was appealed to the Supreme Court, and in Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981), the court found substantial evidence to support the District Court's findings. This became the law of the case. The case was remanded for a determination of attorney fees to be awarded to defendant. On remand, the District Court amended its conclusions and findings to omit the alternative allowing plaintiffs to repair the ditch and awarded damages without the submission of any additional evidence. On appeal, the Supreme Court found this to be an abuse of discretion, as none of the exceptions found in Rules 52(b), 60(a), or 60(b), M.R.Civ.P., applied. The court abused its discretion in not holding a hearing to determine if either alternative of the original judgment had been complied with. Marta v. Smith, 200 M 414, 650 P2d 1387, 39 St. Rep. 1839 (1982).

Lack of Findings on Marital Home Not Correctable by District Court After Time Limitations Expire: In a divorce settlement, the trial court findings contained no determination of the net worth of the parties, the net worth of the husband's medical practice, or the relative financial contributions of the two parties. The findings of fact also were inconclusive as to the value and disposal of the family home. Five months after the decree was entered, the husband petitioned for amendment, requesting award of the family home to him. Eleven months later the District Court found that it was the original intention of the court to distribute the home to the husband. The Supreme Court concluded that the District Court erred in its attempt to amend the decree. Under Rule 60(a), M.R.Civ.P., clerical errors in judgments may be corrected at any time since correction does not alter substantive rights of the parties. Here the attempted change adversely affected the wife's substantive rights by depriving her of her interest in the family home, a major asset of the marriage. Such error is judicial in nature and could not be corrected by the District Court except by motion made within the time limitations of Rules 50(b), 52(b), 59, or 60(b)(1), M.R.Civ.P. No such motion having been made, the error would have been correctable by appeal, which was never taken by either of the parties. The District Court therefore lacked jurisdiction to make the change effected by its entry of the amended findings and decree. The case was remanded. Thomas v. Thomas, 189 M 547, 617 P2d 133, 37 St. Rep. 1710 (1980).

Error in Distribution of Decedent's Estate: When the mineral rights distributed in a decree of settlement of final account and distribution of estate had been previously conveyed by sale, the District Court has jurisdiction to reopen the case to amend the decree because the District Court was without authority to distribute items which were not properly included in the inventory of the estate. In re Estate of Swandal, 179 M 429, 587 P2d 368 (1978).

Finding Equivalent to Denial of Relief: Finding that "The evidence presented does not warrant any setting aside of the default judgment. . ." was equivalent to a denial of relief under this rule. Corban v. Corban, 161 M 93, 504 P2d 985 (1972).

Contempt — Excessive Sentence Corrected: Trial court could correct a judgment imposing a term of imprisonment for contempt of court in excess of that authorized by 3-1-519 (now repealed), and this was harmless error where the correction was made within the period of a stay of execution. Niewoehner v. District Court, 142 M 1, 381 P2d 464 (1963).

Erroneous Order — Corrected Nunc Pro Tunc: Court's nunc pro tunc order correcting erroneous contempt judgment was not in violation of Supreme Court's writ because the order was made before the writ was issued. Niewoehner v. District Court, 142 M 1, 381 P2d 464 (1963).

Effect of Change Governing — Time for Correction: The test is whether on the one hand the change will make the record speak the truth as to what was actually determined or done, or intended to be determined or done by the court, or whether on the other hand it will alter such action or intended action. Where the amendment comes within the permissible class there would seem to be no reason, nor any supportable precedent, limiting by time or term the court's right to correct its record; for if the power is to be effective and do justice to parties and public it must continue until the error is called to the court's attention and corrected. Morse v. Morse, 116 M 504, 154 P2d 982 (1945).

Party Omitted From Judgment: Where findings of fact and conclusions of law declared that both plaintiff wife and minor children should share in a $15 weekly allowance as the parties had agreed, but the decree by mistake or inadvertence omitted the wife's name as a participant, the court may properly allow the amendment that she participate, under section 21-139, R.C.M. 1947 (since repealed), and the court's inherent power to correct errors of clerk, judge, or counsel, to speak the actual decision, either immediately or years later. Judgment must conform to verdict, decision, or findings in substantial particulars. Morse v. Morse, 116 M 504, 154 P2d 982 (1945).

Time of Correction: The District Court has power to order its judgments amended by nunc pro tunc order to correct an error which has crept into the judgment by reason of misprision on the part of the judge, clerk, or counsel and is apparent on the face of the record, so that it shall truly

express what was actually decided, irrespective of the time intervening between the commission of the error and time correction order is made, provided the amendment does not change the rights fixed by the judgment as originally intended and made. State ex rel. Kruletz v. District Court, 110 M 36, 98 P2d 883 (1940).

Change of Substance — Order Void: Judgment of foreclosure of a real estate mortgage was based on a provision that if the mortgagor should default in payment of principal or interest on the note secured thereby, the whole debt should become due and collectible and all the rents and profits of the property should immediately accrue to the mortgagee. Nine months after its entry the trial court granted the mortgagor's motion to strike the clause relating to rents and profits. The order did not correct a mere clerical mistake but operated as a change of substantial rights adjudicated by the judgment. When made, the trial court had lost jurisdiction to amend or modify it; hence the order was void. Edgar St. Bank v. Long, 85 M 225, 278 P 108 (1929).

Defect in Affidavit Readily Curable: The District Court may and should, on motion to discharge a Writ of Attachment because of a defective affidavit, in furtherance of justice permit amendment of the affidavit and deny the motion, where the defect is readily amendable. Jenkins v. First Nat'l Bank, 73 M 110, 236 P 1085 (1925).

Affidavit Amended Before Answer: An affidavit, made on information and belief in support of an application for an injunction, was amendable, before demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) or answer, by substituting a verification. Claussen v. Chapin, 69 M 205, 221 P 1073 (1923).

Pleadings Amended After Default: In a divorce suit where the plaintiff inadvertently alleges that the defendant, instead of the plaintiff, has been a resident of the state for more than 1 year prior to the commencement of the action, a mistake apparently affecting the question of jurisdiction, he will be allowed after a default judgment has been entered and after the expiration of the 6 months' limitation, to amend his complaint by substituting the word "plaintiff" for the word "defendant". Eadie v. Eadie, 44 M 391, 120 P 239 (1911). See Ivanhoff v. Teale, 47 M 115, 130 P 972 (1913).

Attachment Proceeding Amendable: The procuring of an attachment and the steps necessary therefor is a proceeding within the spirit of the Code, and if such proceeding is defective the same may be amended in furtherance of justice like any other proceeding. Wilson v. Barbour, 21 M 176, 53 P 315 (1898); Herbst Importing Co. v. Hogan, 16 M 384, 41 P 135 (1895); Newell v. Whitwell, 16 M 243, 40 P 866 (1895); Muth v. Erwin, 14 M 227, 36 P 43 (1894); Josephi v. Mady Clothing Co., 13 M 195, 33 P 1 (1893); Magee v. Fogerty, 6 M 237, 11 P 668 (1886); Langstaff v. Miles, 5 M 554, 6 P 356 (1885); Pierse v. Miles, 5 M 549, 6 P 347 (1885).

Amendment of Void Process: Section 93-3905, R.C.M. 1947 (superseded by Rule 60, M.R.Civ.P.), did not confer power upon the court to amend a void jurisdictional writ or process. Sharman v. Huot, 20 M 555, 52 P 558 (1898), distinguished in Kipp v. Burton, 29 M 96, 74 P 85 (1903); Choate v. Spencer, 13 M 127, 32 P 651 (1893), distinguished in Kipp v. Burton, 29 M 96, 74 P 85 (1903).

Collateral References

Judgment *key* 295, 306.

49 C.J.S. Judgments §§228, 237.

47 Am. Jur. 2d Judgments §§807 through 827.

Relief against judgment ambiguous or silent as to amount of recovery. 55 ALR 2d 723.

Necessity of notice of application or intention to correct error in judgment entry. 14 ALR 2d 224.

Correction of mistake in judgment entered under warrant of attorney to confess judgment. 144 ALR 830.

Correcting clerical errors in judgments. 126 ALR 956, superseded in part by 14 ALR 2d 224.

Construction of Rule 60(a) of Federal Rules of Civil Procedure authorizing correction of clerical mistakes in judgments, orders, or other parts of record, and errors therein arising from oversight or omission. 13 ALR Fed. 794.

Rule 60(b). Mistakes — inadvertence — excusable neglect — newly discovered evidence — fraud, etc.

Commission and Advisory Committee Notes

ORIGINAL COMMISSION NOTE

Subdivision (b) is identical with the Federal Rule, except that the words "as may be provided by law" in the last sentence of the proposed rule have been substituted for "Title 28, U.S.C.,

§1655," and except that the last sentence of the Federal Rule abolishing specified writs as a means of obtaining relief from a judgment is omitted as unnecessary.

COMMISSION NOTE TO AUGUST 1, 1965, AMENDMENT

The purpose of this amendment is to make the Montana practice correspond to practice under the last sentence of R.C.M. 1947, §93-3905 (which was repealed with the adoption of the Rules of Civil Procedure), as construed in Smith v. Collis, 42 Mont. 350, 365-370 (1910). The time within which the motion may be made is shortened, but considered adequate.

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: None.

The federal rule measures the time for the motion for reasons (1), (2), and (3) from time the "judgment, order, or proceeding was entered or taken." The Montana rule measures the time from the "date of service of entry of the judgment or order or action taken"; but Rule 77(d), requiring notice of entry, is confined to judgments in actions in which an appearance has been made. This amendment, using the federal rule language adjusted to the requirements of Montana Rule 77(d), is for the purpose of avoiding ambiguity and litigation as to what, if any, time limit is imposed in cases of orders, and proceedings, and judgments where no appearance has been made.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments: The amendment of August 1, 1965, substituted "within 60 days when a defendant has been personally served, whether in lieu of publication or not, calculated from the date of service of notice of entry of the judgment or order or action taken in the proceeding" for "not more than one year after the judgment, order or proceeding was entered or taken" after "for reasons (1), (2), and (3)" in the second sentence; and inserted the third sentence.

The amendment of September 29, 1967, rewrote the second sentence and substituted "required" for "provided" in the last sentence.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

General 1103
Mistake, Inadvertence, Surprise, or Excusable Neglect 1114
Failure of Service 1122
Fraud 1123
Judgment Void or Voidable 1127
Prior Judgment Reversed 1128
Time Limitations 1129
Independent Action 1135
Any Other Reason Justifying Relief 1136
Equitable Relief 1139

GENERAL

Failure to Answer Complaint Not Excusable Neglect — Motion to Set Aside Default Properly Denied: Matthews filed a complaint in a wrongful discharge action, and the summons and complaint with an acknowledgment of service were forwarded to defendant's attorney. The attorney returned the acknowledgment, but the attorney's assistant failed to calendar the answer's due date and misfiled the summons and complaint in a different file. An answer was not timely filed, so Matthews sought and was granted a hearing on a default judgment and damages, but defendant's counsel did not attend the hearing, and a default judgment and damages of $185,000 were entered for Matthews. Defendant moved to set aside the default, but the District Court did not rule on the motion within 60 days, so the motion was considered denied. On appeal, defendant argued that the motion to set aside the default should have been granted on grounds of excusable neglect. However, by the time of the default hearing, the lack of attention to Matthew's complaint was a serious disregard of the judicial process and could not be considered excusable neglect, nor did the situation demonstrate extraordinary circumstances justifying setting aside the default judgment under this rule. Further, the actions of defense counsel did

not constitute gross negligence or actual misconduct, and defendant was not completely innocent in the matter, so any neglect of counsel was properly charged to defendant. The District Court did not abuse its discretion in denying the motion to set aside the judgment, and the default judgment was affirmed. Matthews v. Don K Chevrolet, 2005 MT 164, 327 M 456, 115 P3d 201 (2005), applying the standard for setting aside a default in Blume v. Metropolitan Life Ins. Co., 242 M 465, 791 P2d 784 (1990). See also Lords v. Newman, 212 M 359, 688 P2d 290 (1984).

Appropriate Standards for Setting Aside Entry of Default and Default Judgment: Defendant failed to respond to a complaint within 20 days, and default was entered in favor of plaintiff. Defendant sought to set aside the entry of default under the good cause standard provided under Cribb v. Matlock Communications, Inc., 236 M 27, 768 P2d 337 (1989). Plaintiff contended that in order to meet the good cause standard, a party would have to meet the higher excusable neglect standard set out in Blume v. Metropolitan Life Ins. Co., 242 M 465, 791 P2d 784 (1990). The District Court held that the Blume standard applied and that defendant's neglect was inexcusable, so default judgment was entered. On appeal, the Supreme Court took the opportunity to clarify the applicable standards. When the issue is the setting aside of a default judgment under this rule, either alone or in conjunction with an entry of default, the appropriate standard is the Blume excusable neglect standard. When the issue is the setting aside of an entry of default under Rule 55(c), M.R.Civ.P., as opposed to a default judgment, the appropriate standard is the Cribb good cause standard. This case involved setting aside an entry of default, so the court applied the Cribb standard. Defendant failed to show that its default was not willful, instead professing ignorance in the face of repeated warnings that if no answer was filed, a default would be taken. The Cribb standard also compels consideration of the prejudice to plaintiff and whether defendant had a meritorious defense. Plaintiff had a right to be apprised of defendant's defense in a timely manner, and defendant should have raised those claims in a timely fashion rather than ignore plaintiff's repeated attempts to elicit a responsive pleading. Defendant was correct that the proper standard to be applied in this case was the Cribb standard, but defendant nevertheless failed to show good cause to set aside entry of default under that standard. Thus, even though the District Court applied the wrong standard, it reached the correct result for the wrong reason, and the Supreme Court affirmed the default judgment. Essex Ins. Co. v. Jaycie, Inc., 2004 MT 278, 323 M 231, 99 P3d 651 (2004), followed in Peak Dev., LLP v. Juntunen, 2005 MT 82, 326 M 409, 110 P3d 13 (2005).

Abuse of Discretion in Reopening and Amending Final Dissolution Decree Absent Evidence of Fraud or Newly Discovered Evidence: Following judgment in a dissolution proceeding, the husband moved to reopen the case on grounds that the wife's testimony constituted fraud and that the husband had newly discovered evidence that was not available at trial. The District Court reopened the case and held that the husband was not responsible for the wife's dental bills, even though the husband had agreed to pay them. The wife appealed. The record showed that the wife used the present tense in answering a question regarding whether she was providing medical coverage for the husband, even though she had terminated coverage on the husband over a year before. However, the deficient question and answer did not rise to the level of fraud because the husband: (1) knew that coverage had been discontinued and failed to object to the inaccurate answer; (2) was not misled by the response; and (3) was not deprived of the opportunity to rebut the testimony or to present his case. Further, he admitted at a postdissolution hearing that he had no new evidence. Thus, the conditions were not sufficient to justify the reopening of the judgment, and the District Court committed reversible error in reopening and amending the final decree. The Supreme Court remanded with instructions to reinstate the final decree. In re Marriage of Weber, 2004 MT 211, 322 M 341, 96 P3d 716 (2004).

Failure of Defendants to Monitor Litigation — Relief From Default Judgment Properly Denied: Although default judgments are not favored, litigants nevertheless have a duty to monitor litigation. Here, the District Court did not abuse its discretion in refusing to set aside a default judgment when defendants: (1) knew that litigation was proceeding; (2) knew that a status conference had been scheduled but failed to attend in person or to hire an attorney to appear in their behalf; (3) failed to notify the court or the opposing party of their intention to miss the conference; (4) were aware that service upon the listed post-office box was considered effective service for all matters regarding the litigation; and (5) neglected to notify the court of a change of address. Caplis v. Caplis, 2004 MT 145, 321 M 450, 91 P3d 1282 (2004).

Failure to Litigate Claims Justifying Dismissal of Counterclaims With Prejudice — Lack of Specific Findings on Counterclaims Not Erroneous: Defendants failed to litigate the claims against them, resulting in default judgment in plaintiffs' favor and dismissal of defendants' counterclaims with prejudice. On appeal, defendants asserted that the District Court committed reversible error in failing to mention the counterclaims and enter general findings from which

the Supreme Court could determine whether the counterclaims had merit. The Supreme Court affirmed dismissal of the counterclaims. Failure to litigate the claims justified dismissal of the counterclaims with prejudice, and entry of the default judgment on the issues in the complaint also served to settle any compulsory counterclaims arising out of the transaction or occurrence that was the subject of the suit. Further, the District Court did not err in failing to make specific findings regarding the counterclaims because the counterclaims were considered dismissed and res judicata upon entry of the default judgment in favor of plaintiffs. Caplis v. Caplis, 2004 MT 145, 321 M 450, 91 P3d 1282 (2004).

Improper Assumption That Defense Verdict in Underlying Negligence Action Precludes Subsequent Unfair Trade Practices Claims — Reversible Error: Plaintiff was involved in an automobile accident when an employee of the Goosebill Ranch struck a vehicle driven by the Cloutiers and then struck plaintiff's vehicle, which was pushed across an intersection and collided with a truck that was proceeding through the intersection. Plaintiff sued Goosebill Ranch for negligence, but the jury returned a verdict for the ranch, and plaintiff appealed. The Cloutiers also sued Goosebill Ranch in a separate action, and in that case, the jury found that the ranch was negligent and awarded the damages to the Cloutiers. The damages were paid by the defendant insurance company. While appeal of plaintiff's negligence case was pending, plaintiff settled, and the judgment against plaintiff was released as part of the settlement, but plaintiff reserved the right to bring a bad faith action against that insurer. Plaintiff then brought an unfair trade practices claim against the insurers, asserting violation of 33-18-242 and alleging claims for outrage or intentional infliction of severe emotional distress. The District Court held that the initial jury verdict for Goosebill Ranch provided the insurers with a reasonable basis defense to plaintiff's subsequent unfair trade practices claim and that plaintiff could not bring a statutory bad faith action claiming liability was reasonably clear when the jury had decided the opposite, so plaintiff's claim was dismissed. On appeal, the Supreme Court reversed. The District Court's assumption that the unfair trade practices claim sought to relitigate the underlying claim and that the issues in both claims were the same was incorrect because the issues were in fact separate. An unfair trade practices claim is considered an independent cause of action. The District Court's reasoning that an unfair trade practices claimant must first establish liability in an underlying claim and that an adverse jury verdict defeats the claim was also erroneous because under 33-18-242, a settlement of the underlying claim is sufficient to allow an unfair trade practices claim, and a defense verdict in the underlying negligence suit was not tantamount to a finding that the insurer did not engage in unfair trade practices. Further, a ruling that a defense verdict provided a reasonable basis defense to a subsequent unfair trade practices claim as a matter of law was also erroneous because insurers would then be encouraged to obtain defense verdicts at any cost to shield themselves from subsequent unfair trade practices claims. Thus, a defense verdict in the underlying negligence claim did not collaterally estop plaintiff from pursuing an unfair trade practices claim. Last, plaintiff's failure to raise the issue of insurer misconduct in a motion under this rule in the underlying negligence case did not preclude pursuit of an unfair trade practices claim because the unfair trade practices claims were not litigated in the underlying case and were not issues that should have been litigated in the negligence suit for personal injuries. Graf v. Cont. W. Ins. Co., 2004 MT 105, 321 M 65, 89 P3d 22 (2004). See also Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834 (2000), and Rausch v. Hogan, 2001 MT 123, 305 M 382, 28 P3d 460 (2001).

No Abuse of Discretion in Granting Marriage Dissolution Default Judgment Given Failure to Establish Good Cause to Set Aside Default: The wife Florence petitioned for a legal separation to which her husband William did not respond. The District Court subsequently entered a default judgment against William, who appealed. The Supreme Court noted that default judgments are not favored and that a finding of even a slight abuse of discretion warrants setting aside a default judgment if good cause is shown. The court then applied the criteria in In re Marriage of McDonald, 261 M 466, 863 P2d 401 (1993), to determine whether William established good cause, which include whether: (1) the defaulting party proceeded with diligence; (2) the defaulting party's neglect was excusable; (3) the defaulting party has a meritorious defense to the claim; and (4) the judgment, if permitted to stand, will injure the defaulting party. William met the first and third criteria, but his neglect was not excusable, nor could he show that default would result in injury. Having failed to meet the McDonald good cause criteria, the court declined to address possible relief under this rule, and default judgment was affirmed. In re Marriage of Shannon, 2004 MT 25, 319 M 357, 84 P3d 645 (2004), distinguishing In re Marriage of Winckler, 2000 MT 116, 299 M 428, 2 P3d 229 (2000).

Deficiency Judgment Embraced Within Assignment Order Seeking to Enforce That Judgment — Appeal of Assignment Order Divesting District Court of Jurisdiction to Address Motion to Set

Aside Deficiency Judgment: Andersen executed a promissory note in favor of the Alpine Buffalo, Elk and Llama Ranch, Inc. (Alpine), and secured the note with real property. When no payments were made, Alpine received a judgment and foreclosure decree. After Andersen's property was sold, Alpine also received a deficiency judgment in the amount still owing. Andersen neither appealed the judgment nor made payment. Alpine later learned that Andersen was plaintiff in a pending malpractice claim against her former attorney, so Alpine sought and received an assignment of the prospective proceeds from that action. Andersen appealed the assignment order, and on the same day moved to set aside the deficiency judgment pursuant to this rule, claiming that the judgment was improperly based on the value of the property from the Sheriff's sale rather than the fair market value of the property. The District Court declined to address Andersen's motion under this rule on grounds that the appeal of the assignment order divested the court of jurisdiction. The Supreme Court affirmed. The assignment order and the motion to set aside the deficiency judgment were inextricably intertwined. The motion under this rule challenged the validity of the very deficiency judgment on which the appealed assignment order was based and that the assignment order sought to enforce. The District Court did not err in finding that appeal of the assignment order divested the court of its jurisdiction to address the motion to set aside the deficiency judgment. Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001), following McCormick v. McCormick, 168 M 136, 541 P2d 765 (1975).

Change in Decisional Law Not Extraordinary Circumstance to Allow Reopening Law of Case: Calcaterra's initial wrongful death action failed because Calcaterra did not raise a genuine issue of material fact regarding whether her husband's employer caused his death through an intentional act or omission. Relying on Schmidt v. St., 286 M 98, 951 P2d 23 (1997), the Supreme Court affirmed in Calcaterra v. Mont. Resources, 1998 MT 187, 289 M 424, 962 P2d 590 (1998), citing the proposition that proof of negligence was insufficient to avoid the exclusive remedy provided in the Workers' Compensation Act. However, in Sherner v. Conoco, Inc., 2000 MT 50, 298 M 401, 995 P2d 990 (2000), the Supreme Court subsequently clarified the definition of intentional and malicious within the context of the Act, holding that the term should be defined according to the plain meaning in 39-71-413 and the definition of actual malice in 27-1-221. Calcaterra then moved for reconsideration under this rule, contending that Sherner changed the definition with respect to the exclusivity provision and created extraordinary circumstances justifying an exception to the doctrine of the law of the case and the reopening of the 1998 case. The Supreme Court disagreed. Both Fiscus v. Beartooth Elec. Co-op, Inc., 180 M 434, 591 P2d 196 (1979), and In re Marriage of Waters, 223 M 183, 724 P2d 726 (1986), support the conclusion that a change in decisional law subsequent to a final judgment does not constitute extraordinary circumstances that would allow reopening of that judgment. Calcaterra v. Mont. Resources, 2001 MT 193, 306 M 249, 32 P3d 764 (2001).

Motion for Relief From Judgment Barred by Res Judicata — Sanctions Appropriate: McLaughlins moved for relief from judgment under this rule, but the motion was denied by the District Court. On appeal, McLaughlins raised 14 different reasons why the District Court's judgment following remand was void. The thrust of their argument was that the District Court failed to follow statutory law when awarding punitive damages against them. In denying the motion under this rule, the District Court noted that the issues raised by the motion had been appealed three times to the Supreme Court and affirmed each time in noncite opinions and held that the motion under this rule was dilatory in nature and without substance in law or fact. On this fourth appeal, the Supreme Court agreed, finding that all of the issues raised by the McLaughlins in their motion under this rule were barred by res judicata because they either had been previously litigated or could have been litigated in prior proceedings. Further, because the latest appeal was taken without substantial or reasonable grounds, it was frivolous pursuant to Rule 32, M.R.App.P. (Title 25, ch. 21), so sanctions in the form of reasonable costs and attorney fees were ordered to be added to the judgment against McLaughlins on remand. Bragg v. McLaughlin, 1999 MT 320, 297 M 282, 993 P2d 662, 56 St. Rep. 1276 (1999). See also Wellman v. Wellman, 198 M 42, 643 P2d 573 (1982), Searight v. Cimino, 238 M 218, 777 P2d 335, 46 St. Rep. 1217 (1989), and Loney v. Milodragovich, Dale & Dye, P.C., 273 M 506, 905 P2d 158, 52 St. Rep. 1093 (1995).

Failure to Submit Available Evidence Precluding Setting Aside of Judgment: At a 1995 hearing on child support, a father was defiantly uncooperative in providing documentation of any kind regarding his finances, assets, the provision of insurance for the children, or past child support payments. At a 1998 hearing on suspension of his driver's, hunting and fishing, and electrician's licenses, he claimed that he should be allowed to present the evidence that he refused to provide earlier. The District Court declined to reopen the 1995 hearing, and the

Supreme Court affirmed. If there was anything that prevented the father from a fair submission of the controversy, it was his own defiance of the justice system. His failure to avail himself of the opportunity to present the appropriate information in 1995 and his desire to retroactively argue a factual issue in the case were not sufficient reasons to justify setting aside the judgment. His motion for a new trial was properly denied, and in the interests of finality of litigation, the Supreme Court declined to upset the judgment. In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999). See also Karlen v. Evans, 276 M 181, 915 P2d 232, 53 St. Rep. 337 (1996).

Extension of Time Deadline by Rule Inapplicable to Administrative Law Judge's Decision — Dismissal for Lack of Subject Matter Jurisdiction Proper: The mother petitioned for judicial review of an order by an administrative law judge regarding her child support action. The Child Support Enforcement Division moved to dismiss the petition on grounds that it was not timely filed pursuant to 2-4-702 and that, as a result, the District Court lacked subject matter jurisdiction to hear the case. The mother filed a motion under Rule 6(b), M.R.Civ.P., seeking an enlargement of time in which to file the petition, asserting that her failure to file the petition within the 30-day deadline was the result of excusable neglect. The motion was denied. The mother then filed for relief under this rule, and that motion was also denied. The mother appealed from the denial of both motions. The Supreme Court held that Rule 6(b), by its terms, applies only to acts required by the Montana Rules of Civil Procedure or by court order, but does not apply to acts required within a statutory framework, such as that established in 2-4-702. Thus, the rule does not apply, either by its terms or by analogy, to petitions for judicial review of administrative proceedings because applying the rule in that manner would extend the jurisdiction of District Courts beyond that allowed by the statute. Further, this rule does not provide a basis for relief in this case because the District Court was automatically deprived of jurisdiction once the 30-day period expired, and this rule cannot be applied to revest jurisdiction where none existed in the first place. Dismissal of the mother's petition was not an abuse of discretion, and the District Court order was affirmed. In re Support of McGurran, 1999 MT 192, 295 M 357, 983 P2d 968, 56 St. Rep. 741 (1999).

Summary Judgment Improper Before Meaningful Discovery Conducted: Ranch Recovery Limited Liability Company (Ranch Recovery) was the assignee of the vendor's interest in real property that was subjected to a mortgage foreclosure brought by First Security Bank of Missoula (First Security). Upon the vendee's default, the District Court awarded summary judgment to First Security. Ranch Recovery moved for reconsideration and for permission to amend its counterclaim based on newly discovered evidence, which had come to light during the summary judgment hearing. The evidence consisted of financing authorization documents allegedly incorporated by reference into the contract for deed, as well as privileged bank account information that had been unobtainable prior to the hearing. The District Court denied Ranch Recovery's motions, reasoning that the evidence could have been discovered prior to entry of judgment through the exercise of due diligence. In this case, judgment was the result of a summary proceeding, not the result of a trial on the merits. The record on appeal revealed that First Security's motion for summary judgment was filed before Ranch Recovery had even filed its answer and counterclaim, but there was no indication in the record that any formal discovery had been conducted prior to entry of summary judgment. Thus, the Supreme Court declined to characterize the failure to discover this particular evidence as failure to exercise due diligence for the discovery and presentation of evidence at trial. Ranch Recovery met its burden of establishing that the newly discovered evidence was not "newly discovered" for lack of diligence. The District Court erred in refusing to consider Ranch Recovery's motion to reconsider. First Sec. Bank of Missoula v. Ranch Recovery Ltd. Liab. Co., 1999 MT 43, 293 M 363, 976 P2d 956, 56 St. Rep. 188 (1999), following Fjelstad v. St., 267 M 211, 883 P2d 106, 51 St. Rep. 1047 (1994). See also Gregorian v. Izvestia, 871 F2d 1515 (9th Cir. 1989).

Judge's Answer to Jury Question Held Not External Influence — Juror Affidavits Not Proper — Motions to Change Verdict Denied: In a civil suit, the special verdict form contained question #5 that read: "Do you find by clear and convincing evidence that Defendants acted either fraudulently and or with malice?" This question was taken nearly verbatim from plaintiff's proposed verdict form except that the proposed form contained a slash ("/") between the "and" and "or" in the question. Plaintiff did not object to this clerical error at or prior to the time that the form was submitted to the jury. During jury deliberations, the jury submitted a question to the judge stating: "Do we have to differencateate [sic] Between [sic] fraud and malice in #5." The judge answered "No" to the jury question, and neither plaintiff nor defendants objected to the answer at the time. After the trial, plaintiff filed alternative posttrial motions requesting the court to order that the answer to question #5 be "Yes", to set aside the jury verdict on question #5,

and to either enter judgment against defendant on the issue of punitive damages as a matter of law or grant a new trial on the issue of punitive damages. The motions were based on affidavits of eight jurors alleging mistake or confusion based on the court's "No" answer. The District Court denied the motions. The Supreme Court upheld the denial, determining that plaintiff waived her claims of error by failing to object to the special verdict form submitted to the jury; that based on the "invited error rule", plaintiff participated in the error by submitting the conjunctive-disjunctive question; and that the affidavits were not proper because the jury had not been subject to external influences. Sandman v. Farmers Ins. Exch., 1998 MT 286, 291 M 456, 969 P2d 277, 55 St. Rep. 1165 (1998).

Later Finding of Unconscionability Proper Upon Failure to Make Initial Determination of Conscionability: Wife contended that a dissolution agreement was unconscionable as a matter of law because: (1) her understanding of English was limited; (2) both parties were initially represented by the same attorney; and (3) the agreement did not include a statement of the parties' incomes, property valuations, or child support calculations. Husband maintained that the trial court was estopped from finding unconscionability because of its initial finding that the agreement was not unconscionable. However, in this case, the District Judge did not make a specific inquiry into conscionability because the parties had reached a separation agreement. The Supreme Court held that when a District Court fails to make an initial investigation of conscionability of an agreement, it is not estopped from later finding that the agreement is unconscionable if the decree adopting the agreement is set aside pursuant to subsection (3) of this rule. In re Marriage of Gudmundson, 1998 MT 54, 288 M 70, 955 P2d 648, 55 St. Rep. 226 (1998).

Past Available Records Not Newly Discovered Evidence Warranting New Trial: State Medical Oxygen contended that a new trial was warranted based on newly discovered evidence consisting of two sets of records, but conceded that the evidence was in its possession prior to oral arguments on the summary judgment motion. The evidence could thus not be characterized as newly discovered in the context of this rule. Given the lack of effort on State Medical Oxygen's part to bring the evidence to the court's attention and its failure to request additional time prior to resolution of the summary judgment motion, coupled with the fact that the evidence was not truly newly discovered, it was not error for the trial court to deny a motion for relief from judgment in this case. St. Medical Oxygen & Supply, Inc. v. Am. Medical Oxygen Co., 267 M 340, 883 P2d 1241, 51 St. Rep. 1063 (1994). See also In re Estate of Bolinger, 1998 MT 303, 291 M 134, 967 P2d 779, 55 St. Rep. 1251 (1998).

Newly Discovered Evidence of Federally Recommended Highway Guardrail Upgrade — New Trial: Following an automobile collision with a guardrail in which his daughter was injured and his wife and another child were killed, Fjelstad sued the state for negligent guardrail design, installation, and maintenance. The state denied negligence and alleged that its conduct with regard to the guardrail conformed to the applicable standard of care at all times prior to the accident. Following trial, in which the state was held not liable, Fjelstad received additional evidence in the form of recommendations in federal documents regarding upgrade of guardrail installations during overlay projects. The existence of the documents was known by the state prior to trial but not disclosed. The District Court granted Fjelstad's motion for a new trial based on newly discovered evidence, and the state appealed. The Supreme Court held that the evidence was not cumulative and that it did not simply tend to impeach the state's witnesses. Because the newly discovered evidence would probably produce a different result on retrial, the motion for a new trial was properly granted. Fjelstad v. St., 267 M 211, 883 P2d 106, 51 St. Rep. 1047 (1994), followed in First Sec. Bank of Missoula v. Ranch Recovery Ltd. Liab. Co., 1999 MT 43, 293 M 363, 976 P2d 956, 56 St. Rep. 188 (1999).

Newly Discovered Evidence — Proof — Summary Judgment Proper: The District Court properly granted defendant summary judgment on a collateral estoppel defense and properly ruled on nonadmissibility of a statement that, at most, would have constituted newly discovered evidence and that plaintiff failed to establish could not have been discovered earlier with due diligence. Farmers Plant Aid, Inc. v. Huggans, 266 M 249, 879 P2d 1173, 51 St. Rep. 803 (1994).

Settlement Agreement From Parties' First Divorce Not to Be Set Aside Sua Sponte by Trial Court: The parties entered into a property settlement agreement that was incorporated into their divorce decree in 1989. Seven months later, they remarried; their marriage was again dissolved in 1993. The lower court found that the parties had not performed or complied with the terms of the prior decree and that they were estopped from asserting any rights under the previous agreement. The Supreme Court held that the lower court had no jurisdiction to declare the agreement null and void because neither party had requested that the agreement be set

aside and there had been no finding that the agreement was unconscionable. In re Marriage of Nordberg, 265 M 352, 877 P2d 987, 51 St. Rep. 531 (1994).

Relatively Minor Disputes in Property Valuation — Failure to Appear — Relief Not Granted: The Supreme Court will not mandate relief pursuant to this rule over relatively minor disputes in property valuation or identification when a party does not appear at hearing to present evidence concerning those matters. In re Marriage of Miller, 260 M 15, 858 P2d 338, 50 St. Rep. 912 (1993).

Newly Discovered Evidence of Stock Ownership — Judgment Affirmed by Finding Evidence Would Not Change Result of Trial: Cowles brought an action against Sheeline to quiet title to a Montana mining claim. Evidence at trial consisted of confusing and incomplete evidence of stock transactions. Following a judgment for Cowles, Sheeline moved for relief from judgment on the basis of newly discovered evidence consisting of stock records found in an unlikely place upon moving from her home in Boston. The District Court found a lack of due diligence and that the new evidence would not have changed the result of trial and denied the motion after expiration of the 45-day limit provided in Rule 59(d), M.R.Civ.P. The Supreme Court determined that the District Court should have found due diligence but after a review of the new evidence, concurred with the District Court that although some of the evidence was not produced at trial, it was cumulative and duplicative with introduced evidence and would not have altered the outcome of the trial. Cowles v. Sheeline, 259 M 1, 855 P2d 93, 50 St. Rep. 653 (1993).

Failure of Bonding Company to Tender Defense to Known Suit — No Excusable Neglect or Other Reason Justifying Relief: American Casualty Company provided a construction bond to a general contractor, C&D Contractors, for an expansion of the Billings city hall. Because subcontractor Empire Lath & Plaster, Inc., was not paid for all of its work for C&D, Empire submitted a notice of claim against the bond to C&D, Billings, and American Casualty. Over a month later, because it had received no reply to its notice of claim, Empire filed suit on the bond against American Casualty. The claims analyst receiving the complaint sent it to C&D and tendered a defense, but no response was received from C&D. A default judgment was entered against American Casualty, and the District Court refused to set aside the default. Distinguishing Blume v. Metropolitan Life Ins. Co., 242 M 465, 791 P2d 784 (1990), the Supreme Court held that the failure of American Casualty to respond to the complaint, when it knew of the pending action and knew it had received no response from C&D to the tender of defense, was not excusable neglect, nor was there any other reason to relieve American Casualty from the default. Therefore, the District Court did not abuse its discretion. Empire Lath & Plaster, Inc. v. Am. Cas. Co., 256 M 413, 847 P2d 276, 50 St. Rep. 128 (1993).

Statements Regarding Value of Partnership Assets No Barrier to Presentation of Evidence — New Trial Denied: Wife argued for a new trial based on conflicting information compiled after trial regarding the value of the marital estate. With the exercise of reasonable diligence, the evidence could have been discovered prior to trial. Husband's trial statements concerning partnership assets did not materially thwart wife's ability to present her case, indicating lack of fraud, so a new trial was unwarranted. In re Marriage of Barnes, 251 M 334, 825 P2d 201, 49 St. Rep. 67 (1992).

Failure to Discuss Grounds for Relief Until Reply Brief — Review of Order of Denial Only: Plaintiffs devoted the majority of their initial brief to arguing the merits of the court's grant of summary judgment to defendant and did not even discuss the grounds for relief under this rule until their reply brief. While an order denying a motion under this rule is final and appealable, the appeal brings up for review only the order of the denial itself and not the underlying judgment. Reconsideration of an earlier motion on its merits cannot be the subject of a motion under this rule. Therefore, failure to raise the merits of the grant of summary judgment with a timely appeal or request for consideration precluded Supreme Court review. Donovan v. Graff, 248 M 21, 808 P2d 491, 48 St. Rep. 303 (1991).

Belated Expert Opinion Constituting Newly Discovered Evidence: When presented with the question of whether an opinion of a trial expert, offered for the first time after final judgment and based on a fact asserted by the plaintiff and within her knowledge prior to judgment, constituted newly discovered evidence, the court declined to distinguish between opinion evidence and other kinds of evidence because the opinion evidence met the tests ordinarily required of newly discovered evidence. The failure to produce the evidence at trial must not have been caused by the moving party's lack of due diligence. The evidence must be admissible, credible, and of such a material and controlling nature as will probably change the outcome. Halse v. Murphy, 237 M 509, 774 P2d 418, 46 St. Rep. 1009 (1989), distinguished, on grounds of failure to exercise due diligence in producing required expert testimony, in Estate of Nielsen v. Pardis, 265 M 470, 878 P2d 234, 51 St. Rep. 591 (1994).

Standards Applicable to Setting Aside Default Entry and Default Judgment: The default entry is simply an interlocutory order that in itself determines no rights or remedies, whereas the default judgment is a final judgment that terminates the litigation and decides the dispute. Therefore, the "good cause" standard for setting aside a default entry under Rule 55(c), M.R.Civ.P., is more flexible and lenient than the "excusable neglect" standard for setting aside a default judgment under this rule. Cribb v. Matlock Communications, Inc., 236 M 27, 768 P2d 337, 46 St. Rep. 156 (1989), followed in In re Marriage of Fronk v. Wilson, 250 M 291, 819 P2d 1275, 48 St. Rep. 936 (1991).

Evidence Available but Not Presented — Motion Denied: The District Court did not abuse its discretion in denying a motion for a new trial or, in the alternative, amending the judgment when evidence claimed to be newly discovered could have been available but was not presented at trial. Goodover v. Lindey's, Inc., 232 M 302, 757 P2d 1290, 45 St. Rep. 1068 (1988), affirmed in 264 M 449, 872 P2d 764, 51 St. Rep. 317 (1994). Lindey's, Inc.'s attempt to quiet title to a newly disputed parcel was held to be res judicata, the matter having already been adjudged and affirmed in this case, in Lindey's, Inc. v. Goodover, 264 M 489, 872 P2d 767, 51 St. Rep. 359 (1994).

Judgment Final — Law of the Case — Issues Outside Scope of Original Action: Plaintiff moved for relitigation of contractual issues on which judgment was final and also moved for consideration of new contractual issues that had arisen after judgment. All issues previously ruled upon were subject to the law of the case doctrine and could not be relitigated. See Schmidt v. Colonial Terrace Associates, 202 M 46, 656 P2d 807, 39 St. Rep. 2318 (1982); on remand, Schmidt v. Colonial Terrace Associates, 215 M 62, 694 P2d 1340, 42 St. Rep. 182 (1985). Contractual issues arising after the judgment were outside the scope of the original action. Rule 60(b)(5), M.R.Civ.P., did not give the court power to preside over controversies throughout the life of the contract. Schmidt v. Colonial Terrace Associates, 223 M 8, 723 P2d 954, 43 St. Rep. 1489 (1986).

Marital Assets Not Considered Child Support — Modification of Payments: Property that was clearly denominated personal property in a division of marital assets may not later be claimed for inclusion as child support simply because it is used primarily for a child. Modification of payments that are part of a property settlement agreement is governed by Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), rather than the rules for modification of support in 40-4-208. In re Marriage of Conklin/Clark, 221 M 30, 716 P2d 629, 43 St. Rep. 611 (1986).

Corrective Order — Not Modification of Judgment: In an action to modify a final decree of dissolution distributing a marital estate, the trial court, under the authority of Rule 60(a), M.R.Civ.P., issued a corrective order to amend the judgment to express what was actually decided and to grant the relief originally intended. The order was not a modification of judgment subject to Rule 60(b), M.R.Civ.P. The court did not have a change of mind or correct a judicial error. In re Marriage of Cannon, 215 M 272, 697 P2d 901, 42 St. Rep. 348 (1985).

Motion for Summary Judgment — Judge's Discretion to Allow Late Briefs and Arguments: The District Court did not err by allowing defendants to submit briefs and argue plaintiffs' summary judgment motion late upon learning why defendants' counsel originally overlooked the matter. Although there are no Montana cases on point, the Supreme Court analogized the judge's discretion to set aside judgments under Rule 60(b), M.R.Civ.P., as basis for judges' discretion to allow late briefs and arguments. Todd v. Berner, 214 M 263, 693 P2d 506, 41 St. Rep. 2462 (1984).

Motion to Change Venue After Default Judgment Entered — Denied as Untimely — Proper Course Suggested: A motion for a change of venue may not be made after judgment has been entered. Thus, in this case defendant's motion to change venue was correctly denied as untimely because a default divorce judgment had been granted. Defendant's proper course of action should have been to move for relief from judgment under Rule 60(b), M.R.Civ.P.; then, if granted, she should attempt to withdraw her initial appearance and request a change of venue. Hoyt v. Hoyt, 208 M 83, 675 P2d 392, 41 St. Rep. 183 (1984).

Newly Discovered Evidence — Reopening Proper: Four days after the original hearing on attorney fees was held, counsel for respondent, the prevailing party, moved to reopen the hearing pursuant to this rule. The basis for the motion was that time records which had been misfiled and could not be located prior to the original hearing had been found. Respondent claimed this entitled him to a reopening of the hearing under the "newly discovered evidence" provision of Rule 60(b), M.R.Civ.P. The District Court reopened the hearing, and the Supreme Court affirmed, finding no abuse of discretion by the District Court. Nicholson v. Cannon, 207 M 476, 674 P2d 506, 41 St. Rep. 86 (1984).

Order Conditionally Setting Aside Prior Decree Found to Be Abuse of Discretion: Where the District Court entered a decree in 1981 finding the property settlement agreement of the parties not unconscionable within the meaning of 40-4-201(2) and in 1983 issued an order stating that the property settlement agreement would be set aside if not complied with by the husband by a specific date, the Supreme Court found that the District Court erred in making the 1983 order. The 1981 decree and property settlement could, under the rationale of Hadford v. Hadford, 194 M 518, 633 P2d 1181, 38 St. Rep. 1308 (1981), be modified only if the conditions specified in Rule 60(b), M.R.Civ.P., were found to exist. Because the court issued no findings of fact indicating conditions that justified the reopening of the 1981 decree, the court abused its discretion in making the 1983 order. Lorge v. Lorge, 207 M 423, 675 P2d 115, 41 St. Rep. 50 (1984).

Marital Separation Agreement Not a Judgment Amendable for Failure of Consideration: A marital separation agreement is not a conveyance. A separation agreement incorporated into a divorce decree is enforceable only as a judgment. A judgment can be reopened if obtained through fraud but not for lack of fair consideration. It was error to annul a marital separation agreement under 31-2-311 (now repealed). Witbart v. Witbart, 204 M 446, 666 P2d 1217, 40 St. Rep. 994 (1983).

Amending on Remand Judgment Upheld on First Appeal — Law of Case — Abuse of Discretion: In an original judgment of October 31, 1979, plaintiffs were given the alternatives of either repairing a damaged irrigation ditch or paying damages of $5,500. The case was appealed to the Supreme Court, and in Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981), the court found substantial evidence to support the District Court's findings. This became the law of the case. The case was remanded for a determination of attorney fees to be awarded to defendant. On remand, the District Court amended its conclusions and findings to omit the alternative allowing plaintiffs to repair the ditch and awarded damages without the submission of any additional evidence. On appeal, the Supreme Court found this to be an abuse of discretion, as none of the exceptions found in Rules 52(b), 60(a), or 60(b), M.R.Civ.P., applied. The court abused its discretion in not holding a hearing to determine if either alternative of the original judgment had been complied with. Marta v. Smith, 200 M 414, 650 P2d 1387, 39 St. Rep. 1839 (1982).

Untimely Motion for New Trial — Equivalent to Motion for Relief From Judgment: A motion for new trial under Rule 59(b), M.R.Civ.P., that is not timely may be considered as a motion under this rule when it states the proper grounds for relief. Nomenclature is unimportant. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Relief Under Subsections Exclusive: If a party seeks relief under one subsection of Rule 60(b), Fed.R.Civ.P., then it cannot also claim relief under the general catchall subsection, 60(b)(6). Libby Rod & Gun Club v. Moraski, 519 F. Supp. 643, 38 St. Rep. 1213 (D.C. Mont. 1981), followed in Koch v. School District No. 2, 253 M 261, 833 P2d 181, 49 St. Rep. 517 (1992).

Order Denying Motion for Relief From Default Judgment Properly Appealed — Special Appearance Abolished: When the defendant honey processing company twice moved to vacate and dismiss a default judgment obtained against it by the plaintiff honey producing company, the Supreme Court had jurisdiction over an appeal from the District Court's denial of the second motion to vacate and dismiss. The defendant's first motion was untimely filed, and the fact that it was brought to challenge the personal jurisdiction of the court and characterized as a "special appearance" is of no effect, as special appearances have been abolished and the same requirements for timely appeal applies to all appearances. The second motion was properly appealable as it is considered denied, which denial is a final order, if the court has not ruled on the motion within 15 days after submission. Foster Apiaries, Inc. v. Hubbard Apiaries, Inc., 193 M 156, 630 P2d 1213, 38 St. Rep. 1025 (1981).

Quiet Title — Collateral Attack on Judgments — Reasonable Diligence — Invalid Service — Jurisdiction: While it is a general rule that a judgment cannot be attacked in a collateral action, such attack is permissible if the first judgment is void for lack of jurisdiction. If service of process is improperly made, the court acquires no jurisdiction over that party and it may collaterally attack the judgment. "Reasonable diligence" was not used by appellants in the prior action to locate individuals to be served under Rule 4(D)(2)(f), M.R.Civ.P., because they had dealt with such individuals before and should have been able to contact them and the Secretary of State had the name and address of the corporate agent and director on file. Therefore, service upon the Secretary of State did not confer jurisdiction and collateral attack was proper. Russell Realty v. Kenneally, 185 M 496, 605 P2d 1107 (1980), followed in Baertsch v. Lewis & Clark County, 256 M 114, 845 P2d 106, 49 St. Rep. 1162 (1992).

Jurisdiction Not Retained by District Court After Appeal Taken: When petitioner moved the District Court to set aside its judgment and thereafter filed a notice of appeal to the Supreme Court, the District Court properly asserted that it had no authority to rule on petitioner's motion.

Upon a proper appeal being taken, jurisdiction of the cause passes to the Supreme Court, subject to the right of the District Court to correct clerical errors. N. Plains Resource Council v. Bd. of Health & Environmental Sciences, 184 M 466, 603 P2d 684 (1979), followed in Lewistown Propane Co. v. Moncur, 2003 MT 368, 319 M 105, 82 P3d 896 (2003).

Evidence Submitted to Be Timely and in Proper Form — Relief From Judgment Denied: Plaintiff submitted a letter from the State Compensation Insurance Fund in support of a motion to set aside the judgment. The letter was improperly included in appellant's brief for the following reasons: (1) it was not presented in the proper affidavit form as required by Rule 56, M.R.Civ.P.; (2) the opinion set forth in the letter could easily have been presented in timely fashion in opposition to respondent's motion for summary judgment rather than subsequently in support of a motion to set aside the verdict which had been granted on the merits; and (3) the letter sets forth a generalized opinion offered without either foundation or regard to the facts of the case. Since the letter was not in proper form it cannot be considered under Rule 803(a), Montana Rules of Evidence. Scott v. Robson, 182 M 528, 597 P2d 1150 (1979).

Amendments to Decree: Amendments to a decree to reflect plaintiff's true interest in property are permissible if the amendments make the meaning of a judgment or decree more clear and will not act inequitably or to the prejudice of a party. Doble v. Talbott, 180 M 166, 589 P2d 994 (1979).

Setting Aside Satisfaction of Judgment: By giving effect to the plain language used in Rule 60(b) and considering the rule in its entirety, the court held that the intent of the drafters was that a satisfaction of judgment could not be set aside by a motion under this rule. The appropriate proceeding was an independent action in equity. McGee v. Burlington N., Inc., 179 M 1, 585 P2d 1296 (1978).

Newly Discovered Evidence — Motion Properly Denied: Substantial credible evidence existed to support findings of fact and conclusions of law, and were unaffected by alleged "newly discovered" evidence which at best was merely cumulative. Furthermore, because the "new evidence" was at all times in the exclusive possession of appellants, motion for new trial was denied. Kartes v. Kartes, 175 M 210, 573 P2d 191 (1977), followed in Carbon Co. v. Schwend, 212 M 474, 688 P2d 1251, 41 St. Rep. 1874 (1984), and in In re Marriage of Burner, 246 M 394, 803 P2d 1099, 48 St. Rep. 7 (1991).

No Substitute for Appeal: Defendants who had filed an appeal but never perfected it, could not use this rule to raise an issue which had been presented at the original proceedings, or to relitigate matters previously determined. Sheridan v. Martinsen, 164 M 383, 523 P2d 1392 (1974).

Adherence to Time Limits: Default judgment should not have been set aside when time extension limits of Rule 59, M.R.Civ.P., were exceeded. Sikorski & Sons, Inc. v. Sikorski, 162 M 442, 512 P2d 1147 (1973).

Finding Equivalent to Denial of Relief: Finding that "The evidence presented does not warrant any setting aside of the default judgment. . ." was equivalent to a denial of relief under this rule. Corban v. Corban, 161 M 93, 504 P2d 985 (1972).

Meritorious Defense — No Affidavit Required: Answer and counterclaim need not be verified when submitted with motion under this rule which stated generally that there was a meritorious defense, and there is no longer a requirement for an affidavit of merit. Keller v. Hanson, 157 M 307, 485 P2d 705 (1971), followed in Maulding v. Hardman, 257 M 18, 847 P2d 292, 50 St. Rep. 141 (1993).

Motion for Modification of Paternity Decree — Requirements of Rules Not Satisfied — Jurisdiction Precluded: Where a husband filed a "motion for modification of divorce decree" more than 4 years after the divorce in an attempt to relitigate the issue of his paternity of the children of the parties, the District Court was without jurisdiction to hear the petition. As the petition on its face did not seek relief under Rules 59 or 60, M.R.Civ.P., and was based on facts which predated the original finding of paternity, which finding was not appealed, the District Court had no jurisdiction to modify its previous order. Butler v. Brownlee, 152 M 453, 451 P2d 836 (1969).

Scope of Rule — Inaccurate Language Not Covered: Contention that default judgment was erroneous on its face and should be set aside because the judgment and an exhibit attached to the complaint contained inaccurate and erroneous language was outside scope of rule and could not be raised thereunder. Uffleman v. Labbit, 152 M 238, 448 P2d 690 (1968).

Failure to Request Amendment — Appeal Precluded: Where proper notice of hearing on application for judgment of divorce was given defendant in accordance with Rule 55(b), M.R.Civ.P., and no relief different from that demanded in the complaint was granted in violation of Rule 54(c), an appeal on those grounds was dismissed by the Supreme Court on its own motion

where no application to set aside the default or judgment was made under this rule. Sowerwine v. Sowerwine, 148 M 195, 418 P2d 859 (1966).

Service Upon Corporation — Proper Agent: The doctrine of ostensible agency appears to have no application when it becomes involved with the question whether service of process has been legally made upon a "managing or general agent". Further, service upon a former employee of a company was not service upon the company itself and default judgment was vacated and set aside. Kraus v. Treasure Belt Min. Co., 146 M 432, 408 P2d 151 (1965).

Adequate Showing Required: The party applying for relief must make a proper and adequate showing, wherein he sets forth the particular facts and circumstances constituting the mistake, inadvertence, surprise, or excusable neglect upon which he relies. White v. Connor, 138 M 1, 354 P2d 722 (1960).

Quashing of Writ as Amendable Judgment: Where order sustained motion to quash a Writ of Certiorari and dismissed action, it amounted to a judgment which could be set aside on the ground of mistake, inadvertence, surprise, or excusable neglect, but the applicant could not, without vacating the judgment, file an amended application for the Writ. State ex rel. Walker v. Bd. of Comm'rs, 120 M 413, 187 P2d 1013 (1947), distinguished in Kelly v. Harris, 158 F. Supp. 243 (D.C. Mont. 1958).

Legal Conclusions Insufficient — Facts to Be Shown: On motion to set aside a default, the applicant must make a statement of facts from which the court can determine whether the mistake, inadvertence, surprise, or excusable neglect urged is within the contemplation of the statute, the bare statement of the conclusion that the default occurred by mistake, etc., being insufficient to move the discretion of the court. Madson v. Petrie Tractor & Equip. Co., 106 M 382, 77 P2d 1038 (1938); Robinson v. Petersen, 63 M 247, 206 P 1092 (1922).

Application to Probate Proceedings: Notwithstanding the former provision that a decree directing the distribution of the property of an estate is conclusive unless reversed, set aside, or modified on appeal, the District Court may set it aside on a showing by an aggrieved party that it had been taken against him through his mistake, surprise, inadvertence, or excusable neglect. State ex rel. O'Neil v. District Court, 96 M 393, 30 P2d 815 (1934).

Adequate Remedy at Law — Failure to Exercise as Bar to Equity: Where a party seeking relief from a judgment has an adequate remedy at law by motion in the original case, equity will not interpose in his favor while that remedy is available, nor thereafter if he does not show a sufficient excuse for not having resorted to it at the proper time, and where he has once resorted to the legal remedy and was denied it because of his own fault he is barred from relief by equity on grounds which were then available or which might have been urged. Meyer v. Lemley, 86 M 83, 282 P 268 (1929), followed in Krein v. Heineman, 226 M 474, 736 P2d 481, 44 St. Rep. 813 (1987).

Execution on Judgment Set Aside: A judgment may be set aside on motion even after it has been satisfied by sale under execution, under proper circumstances. Meyer v. Lemley, 86 M 83, 282 P 268 (1929).

Relief From Default Limited by Statute: One desiring to be relieved from a default must bring his case within one of the grounds mentioned in the statute. Even then relief may not be demanded as a matter of right, the application being addressed to the sound legal discretion of the District Court, with the exercise of which the Supreme Court will not interfere except upon a showing of manifest abuse thereof. Mihelich v. Butte Elec. Ry., 85 M 604, 281 P 540 (1929).

Waiver of Right to Hearing: Where, in an action against a county, the County Attorney joined with the plaintiff in submitting the matter to the District Court without further notice and without argument, he waived the county's right to its day in court and the District Court was justified in disposing of the matter without a hearing. By denying a motion for relief from the decision, the District Court impliedly found that the County Attorney did so waive a hearing. Huntington v. Yellowstone County, 80 M 20, 257 P 1041 (1927).

Application of Six-Month Limitation: The limitation of 6 months (reduced by the 1965 amendment) prescribed by section 93-3905, R.C.M. 1947 (superseded by Rule 60, M.R.Civ.P.), within which a default judgment may be vacated, referred to defaults entered through mistake, inadvertence, or excusable neglect only and therefore had no application to a case where lack of power in the court to enter the judgment appeared upon the face of the judgment roll. Hodson v. O'Keeffe, 71 M 322, 229 P 722 (1924).

Purpose of Provision: The purpose of the statute permitting relief from a judgment is to further the administration of justice so that the very right upon the merits may be determined, and to that end to grant relief from excusable neglect in cases where diligence is shown in applying promptly for the relief sought, provided the opposite party be not deprived of any advantage to which he may properly be entitled. Lovell v. Willis, 46 M 581, 129 P 1052 (1913);

Greene v. Mont. Brewing Co., 32 M 102, 79 P 693 (1905); Collier v. Fitzpatrick, 22 M 553, 57 P 181 (1899).

MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT

Busy Work Schedule or Season Insufficient: The mere press of a busy schedule or a busy work season does not constitute excusable neglect necessary to overturn a default judgment under this rule. Peak Dev., LLP v. Juntunen, 2005 MT 82, 326 M 409, 110 P3d 13 (2005).

Forgetfulness Insufficient: Failure to enter an appearance through forgetfulness because of other more important business is inexcusable. Peak Dev., LLP v. Juntunen, 2005 MT 82, 326 M 409, 110 P3d 13 (2005); Foster Apiaries, Inc. v. Hubbard Apiaries, Inc., 193 M 156, 630 P2d 1213, 38 St. Rep. 1025 (1981); Schalk v. Bresnahan, 138 M 129, 354 P2d 735 (1960).

Failure of Pro Se Litigant to Include Filing Fee Considered Excusable Neglect Warranting Reversal of Default Judgment: A Texas defendant, acting pro se, filed a timely answer and special appearance in response to plaintiff's complaint and summons, but failed to include the $65 filing fee, which was not mentioned in the summons. By the time that defendant learned that a filing fee was required to be submitted with the response, plaintiff had already applied for and received a default judgment without notice to defendant. Defendant's motion to set aside the default judgment was denied. On appeal, the Supreme Court held that defendant had acted with diligence and that the failure to appear was not due to inexcusable neglect or disrespect for the court, but that defendant mistakenly assumed that if the instructions in the summons were followed, the answer would be filed. Defendant satisfied the good cause criteria in Rule 55(c), M.R.Civ.P., and because defendant's default was not willful, the neglect was excusable under this rule. The District Court's refusal, by operation of law, to set aside the default judgment was at a minimum a slight abuse of discretion. Thus, because of the policy to resolve issues on the merits, the Supreme Court reversed the default judgment and remanded for further proceedings. Sun Mtn. Sports, Inc., v. Gore, 2004 MT 56, 320 M 196, 85 P3d 1286 (2004).

Unintentional Default for Failure to Appear in Dissolution Proceeding — Abuse of Discretion in Refusal to Set Aside Default Judgment: On November 9, 1998, the wife gave her husband a copy of a petition for dissolution and summons. In early December 1998, the wife's Montana attorney contacted the husband by telephone at his home in Nevada and asked if the husband had reviewed the petition. The husband replied that he had only looked at it briefly and had not retained counsel. Following the conversation, the husband signed the acknowledgment of receipt of summons and petition and sent it back to the attorney, who did not receive it until December 10. However, because the acknowledgment had not been received within the specified timeframe, the attorney had the husband served personally on December 8. Believing that he had responded appropriately and that the wife would propose a property settlement agreement, the husband took no further action. On December 29, 1998, default judgment was entered against the husband and on January 5, 1999, a final decree was entered, apportioning most of the marital debt to the husband. Upon receipt of the notice of entry of judgment, the husband retained counsel and, within a week, filed a motion to alter or amend judgment, for a new trial, or for relief from judgment. Both parties were granted extensions for further briefing. Subsequently, the parties realized that because the District Court had not issued a formal opinion within 60 days of the motion, as required in this rule, the husband's motion was considered denied. He appealed, contending that he had met his burden for setting aside the default judgment. The Supreme Court agreed. The husband's default was unintentional, based on the mistaken belief that the wife's attorney was going to prepare a property settlement proposal and that the husband's acknowledgment of service was the only act required of him until the parties negotiated an agreement. The Supreme Court favors resolution on the merits, and because the husband fulfilled the requirements of Rule 55(c), M.R.Civ.P., and this rule, the District Court's refusal to set aside the default judgment amounted to an abuse of discretion and reversible error. In re Marriage of Winckler, 2000 MT 116, 299 M 428, 2 P3d 229, 57 St. Rep. 486 (2000).

Summary Judgment Improper Before Meaningful Discovery Conducted: Ranch Recovery Limited Liability Company (Ranch Recovery) was the assignee of the vendor's interest in real property that was subjected to a mortgage foreclosure brought by First Security Bank of Missoula (First Security). Upon the vendee's default, the District Court awarded summary judgment to First Security. Ranch Recovery moved for reconsideration and for permission to amend its counterclaim based on newly discovered evidence, which had come to light during the summary judgment hearing. The evidence consisted of financing authorization documents allegedly incorporated by reference into the contract for deed, as well as privileged bank account

information that had been unobtainable prior to the hearing. The District Court denied Ranch Recovery's motions, reasoning that the evidence could have been discovered prior to entry of judgment through the exercise of due diligence. In this case, judgment was the result of a summary proceeding, not the result of a trial on the merits. The record on appeal revealed that First Security's motion for summary judgment was filed before Ranch Recovery had even filed its answer and counterclaim, but there was no indication in the record that any formal discovery had been conducted prior to entry of summary judgment. Thus, the Supreme Court declined to characterize the failure to discover this particular evidence as failure to exercise due diligence for the discovery and presentation of evidence at trial. Ranch Recovery met its burden of establishing that the newly discovered evidence was not "newly discovered" for lack of diligence. The District Court erred in refusing to consider Ranch Recovery's motion to reconsider. First Sec. Bank of Missoula v. Ranch Recovery Ltd. Liab. Co., 1999 MT 43, 293 M 363, 976 P2d 956, 56 St. Rep. 188 (1999), following Fjelstad v. St., 267 M 211, 883 P2d 106, 51 St. Rep. 1047 (1994). See also Gregorian v. Izvestia, 871 F2d 1515 (9th Cir. 1989).

Party Misled by Attorney's Actions — Extraordinary Circumstances Warranting Relief Under Rule: The trial court granted defendant's motion to dismiss for failure to prosecute under Rule 41(b), M.R.Civ.P. Nearly 13 months later, plaintiffs moved to set aside the dismissal order pursuant to this rule because their attorney had failed to make them aware that the case had been dismissed. This rule is an exception to the doctrine of finality of judgments. In the case of an attorney's mistake, inadvertence, misconduct, or neglect, either subsection (1) or (6) of this rule may be applicable, depending on the facts and the nature and seriousness of the mistake, inadvertence, misconduct, or neglect involved. Under ordinary circumstances, subsection (1) will apply. However, when the moving party can meèt the higher burden of demonstrating extraordinary circumstances, gross neglect, or actual misconduct and of demonstrating that the client was blameless and acted to set aside the default within a reasonable time, then subsection (6) is available. In this case, plaintiffs' former attorney intentionally misled them into believing that their case was proceeding and concealed the fact that the case had been dismissed. Conduct of such an egregious nature falls within the "any other reason" clause of subsection (6). The District Court properly granted plaintiffs' motion to set aside the default judgment, and because subsection (6) applied, the motion was considered reasonably timely even though filed 13 months after judgment. Karlen v. Evans, 276 M 181, 915 P2d 232, 53 St. Rep. 337 (1996), following In re Marriage of Waters, 223 M 183, 724 P2d 726 (1986). Karlen was followed in Wright Oil & Tire Co. v. Goodrich, 284 M 6, 942 P2d 128, 54 St. Rep. 811 (1997), and Bahm v. Southworth, 2000 MT 244, 301 M 434, 10 P3d 99, 57 St. Rep. 1030 (2000).

Pro Se Dissolution — Defendant's Mistaken Assumption That Response to Complaint Filed With Court — Default Set Aside: After Ranae's attorney filed a petition for dissolution and had a copy served upon her husband Robert, Robert responded by sending a pro se response to the petition to Ranae's attorney. Robert failed to file a copy of the response with the District Court because he misunderstood the summons. After receiving Robert's response, Ranae's attorney filed a note of issue with the District Court. Later, upon discovery that a response had not been filed with the District Court, Ranae's attorney filed a praecipe for default, and a default judgment was granted. The Supreme Court held that Robert was mistaken when he failed to file his response with the District Court and that he was diligent in moving to set aside the default once he discovered the error. The Supreme Court therefore set aside the default and remanded the case to the District Court, noting that Ranae's attorney did nothing to correct Robert's mistake once the attorney discovered that Robert had defaulted, notwithstanding the attorney's filing of the note of issue. In re Marriage of Broere, 263 M 207, 867 P2d 1092, 51 St. Rep. 17 (1994), followed in In re Marriage of Martin, 265 M 95, 874 P2d 1219, 51 St. Rep. 443 (1994).

Mistake of Law Insufficient: A mistake as to the law is not the mistake that will justify relief, and ignorance of the law is not an excuse for a default. In re Marriage of McDonald, 261 M 466, 863 P2d 401, 50 St. Rep. 1411 (1993); Donovan v. Graff, 248 M 21, 808 P2d 491, 48 St. Rep. 303 (1991); Fed. Land Bank of Spokane v. Gallatin County, 84 M 98, 274 P 288 (1929); Canning v. Fried, 48 M 560, 139 P 448 (1914); Willoburn Ranch Co. v. Yegen, 45 M 254, 122 P 915 (1912); Donlan v. Thompson Falls Copper & Mill. Co., 42 M 257, 112 P 445 (1910); Mantle v. Casey, 31 M 408, 78 P 591 (1904).

Untimely Motion:

A motion to set aside a default judgment made 165 days after entry of judgment was not timely made under the rule, and there was no abuse of discretion in denying the motion. Bd. of Directors of Edelweiss Owners' Ass'n v. McIntosh, 251 M 144, 822 P2d 1080, 48 St. Rep. 1131 (1991).

A motion to set aside a default judgment made 118 days after judgment was entered is not timely and may not be granted. Elk Run Ranch v. Green Line Implement Co., 205 M 413, 668 P2d 258, 40 St. Rep. 1397 (1983).

A judgment may be set aside because of excusable neglect under Rule 60(b), M.R.Civ.P. However, where the party seeking relief was personally served, motion for such relief must be made within 60 days from entry of judgment. Where party here seeking relief waited until 231 days after judgment was entered, relief is precluded. Schmidt v. Jomac, Inc., 196 M 323, 639 P2d 517, 39 St. Rep. 130 (1982).

When defendant's motion to set aside default judgment in a divorce proceeding was filed approximately 6 months after the default decree was entered, the decree should not have been set aside for excusable neglect. Olson v. Olson, 175 M 444, 574 P2d 1004 (1978).

Slight Abuse Sufficient to Reverse Order Refusing to Set Aside Default Judgment: The plaintiff initiated a wrongful termination suit against her former employer, an out-of-state insurance company. A copy of the complaint was sent to the insurer by the Commissioner of Insurance, and when no answer was received, the plaintiff was awarded a default judgment. Thereafter, the defendant moved to have the judgment set aside, stating that although the complaint had been received by its mail room, the complaint had been lost before it ever reached anyone in the legal department. The lower court denied the motion. The Supreme Court held that the lower court's ruling could be set aside upon a showing of slight abuse of discretion. The court held that the facts showed that the defendant's neglect was excusable. Blume v. Metropolitan Life Ins. Co., 242 M 465, 791 P2d 784, 47 St. Rep. 882 (1990), followed in Waldher v. Fed. Deposit Ins. Corp., 282 M 59, 935 P2d 1101, 54 St. Rep. 241 (1997).

Defendant Not Understanding Procedural Requirement: A pro se defendant failed to file an affidavit in opposition to the plaintiff's summary judgment motion. The defendant moved the lower court to reconsider its grant of the motion, arguing that he had not understood the requirement to file an opposing affidavit. The Supreme Court held that a lack of understanding of procedural requirements was not grounds under this rule for reconsideration. Taylor v. Honnerlaw, 242 M 365, 790 P2d 996, 47 St. Rep. 790 (1990).

No Basis for Discretionary Dismissal After Motion Withdrawn — Mistake or Inadvertence in Involuntary Dismissal: In a wrongful discharge action, petitioner filed a complaint on October 24, 1985, and on December 12, 1986, the state moved to dismiss for failure to prosecute, pursuant to Rule 41(b), M.R.Civ.P. On December 31, 1986, the state withdrew its motion based on an agreement that the claim would be held in abeyance until resolution of a companion case. However, on January 6, 1987, the District Court entered an order of dismissal but failed to serve either party with notice of dismissal. On January 13, 1988, the District Court ignored its own order of dismissal and held a hearing regarding disputed discovery. Both parties proceeded with discovery until counsel for respondent discovered the order of dismissal while reviewing the court file. Petitioner then moved for relief under Rule 60, M.R.Civ.P. The Supreme Court reversed and remanded for further proceedings after finding that: (1) Rule 41(b) provides no basis for a discretionary dismissal after the motion to dismiss is withdrawn; (2) the order of dismissal was either a mistake or inadvertent as contemplated by this rule; and (3) appellant was not personally notified, so relief was appropriate. Diemert v. St., 242 M 127, 788 P2d 1355, 47 St. Rep. 633 (1990).

Failure of Attorney to Read Findings, Conclusions, and Order Not Excusable Neglect: Defendant prevailed in a case regarding a real estate transaction. The trial court addressed reciprocal award of attorney fees in its findings, conclusions, and order and set a hearing to determine fees. Plaintiff's attorney failed to read the findings, to notice the date of the hearing, or to appear at the hearing. Defendant was subsequently allowed to present his claim for fees and costs. The District Court properly found that the attorney's failure to carefully read the findings, conclusions, and order was not excusable neglect. Watson v. Fultz, 239 M 364, 782 P2d 361, 46 St. Rep. 1751 (1989), followed in In re Marriage of Castor, 249 M 495, 817 P2d 665, 48 St. Rep. 807 (1991).

Defendant's Financial Hardship — Failure to Pay Attorney: The defendant's financial hardship and failure to pay the advance costs and fee retainer required by her attorney, which resulted in the attorney's failure to file an appearance, did not support a finding of excusable neglect. The actions of both the defendant and her attorney contributed to entry of the default order. The attorney's neglect is attributable to the client defendant. Myers v. All W. Transp., 235 M 233, 766 P2d 864, 45 St. Rep. 2345 (1988).

Corporate Neglect Inexcusable: In attempting to prove excusable neglect for failure to appear, it was not sufficient for a company to plead forgetfulness, inattention to pertinent documents, the resignation of a company officer, the taking of a summer vacation by another company

officer, and the press of other, more important business. Siewing v. Pearson Co., 226 M 458, 736 P2d 120, 44 St. Rep. 800 (1987), followed in Myers v. All W. Transp., 235 M 233, 766 P2d 864, 45 St. Rep. 2345 (1988), and Roberts v. Empire Fire & Marine Ins. Co., 278 M 135, 923 P2d 550, 53 St. Rep. 871 (1996).

Failure to Read Mail — Excusable Neglect: District Court properly refused to grant defendants' motion to set aside a default judgment entered January 11, 1985, when defendants' attorney had failed to read until February 12 mail received in his office on December 20, 1984, containing letter and copy of complaint and summons served on defendants on December 5. Attorney's neglect is attributable to defendants when they were not diligent in checking on the suit. Griffin v. Scott, 218 M 410, 710 P2d 1337, 42 St. Rep. 1695 (1985).

Neglect of Attorney Attributable to Client: When defendant's attorney received notices and talked on the phone on behalf of his clients but failed to do anything in response to numerous requests by opposing counsel and continued to postpone preparation and filing of a pleading, the attorney's procrastination was a type of neglect which was properly attributable to a client and did not constitute abandonment, which would excuse neglect. The Supreme Court found no abuse of discretion in District Court's conclusion that the attorney's conduct was not excusable neglect. Paxson v. Rice, 217 M 521, 706 P2d 123, 42 St. Rep. 1355 (1985), followed in In re Marriage of Castor, 249 M 495, 817 P2d 665, 48 St. Rep. 807 (1991).

Effect of Stipulation Based on Mistake in Interpretation of Law: At entry of judgment the District Court permitted entry of a stipulation that apportioned attorney fees between the parties on the basis of an incorrect interpretation of the law. The parties agreed that attorney fees are costs in mechanics' lien (now construction lien) foreclosure actions. It was error for the District Court to refuse to alter or amend the judgment upon timely application under Rules 59(g) and 60(b), M.R.Civ.P. A judgment by stipulation is as binding as any judgment or verdict, no more or less. The court was responsible for a correct application of the law in accepting the stipulation and in later ruling on whether to alter or amend the judgment thereby entered. Schillinger v. Brewer, 215 M 333, 697 P2d 919, 42 St. Rep. 408 (1985).

Default Preventable by Attorney — Client Not Absolutely Liable for Attorney's Neglect: It appears from a review of the record that attorney for appellants could have easily acted to prevent entry of default and default judgment. However, the court has moved away from the rule that a client is absolutely responsible for attorney's neglect. Lords v. Newman, 212 M 359, 688 P2d 290, 41 St. Rep. 1793 (1984). Furthermore, the court will not overturn a District Court order setting aside a default unless the order amounts to a manifest abuse of discretion. There are, in the affidavit of appellants' counsel, grounds to overturn the default, and that order must stand. Graham v. Mack, 216 M 165, 699 P2d 590, 41 St. Rep. 2521 (1984).

Standard of Review — Neglect of Attorney: The Supreme Court held that the trial court abused its discretion by failing to set aside a default judgment when the defendants were completely abandoned by their attorney (after he made a general appearance on behalf of the clients who had neither been served with process nor authorized him to so act), proceeded with diligence to rectify the court's action, and alleged a potential defense to the action. The Supreme Court determined that, under the facts of the case, it would be unconscionable to apply the general rule charging the client with the attorney's neglect. The Supreme Court clarified which standard of review applies in default cases: (1) when a trial court has granted a motion to vacate the default, a strict standard of review applies—the trial court's action will only be set aside upon a showing of manifest abuse; (2) when a trial court has denied a motion to set aside a default, a "no great abuse" standard applies—only "slight abuse" is sufficient to reverse an order refusing to set aside a default. Lords v. Newman, 212 M 359, 688 P2d 290, 41 St. Rep. 1793 (1984), followed in Griffin v. Scott, 218 M 410, 710 P2d 1337, 42 St. Rep. 1695 (1985), Siewing v. Pearson Co., 226 M 458, 736 P2d 120, 44 St. Rep. 800 (1987), In re Marriage of Whiting, 259 M 180, 854 P2d 343, 50 St. Rep. 747 (1993), In re Marriage of Martin, 265 M 95, 874 P2d 1219, 51 St. Rep. 443 (1994), and Peak Dev., LLP v. Juntunen, 2005 MT 82, 326 M 409, 110 P3d 13 (2005).

Failure to Pay Fee for Filing Pleading: District Court did not abuse its discretion in refusing to set aside default judgment against defendant, and the judgment would not be overturned on appeal from denial of motion to set aside the default judgment, where the court found that negligent failure to pay filing fee for answer until 2 ½ months after filing of the answer was not excusable, that the fee was not filed until after plaintiffs requested entry of default, that the answer did not present a prima facie meritorious defense, that the evidence overwhelmingly indicated there was no defense, and that defendant's reckless disregard for the rights and feelings of the plaintiffs and his attempt to prolong the litigation were adequate reasons to deny his motion to set aside the judgment. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982).

Mistake of Law Not Grounds for Motion: Where appellants sought to set aside default judgment entered against them individually when they failed to answer complaint, on basis that the business they owned was declaring bankruptcy and they thought the automatic stay provision of the Bankruptcy Code, section 362, would bar any action, it was held that the automatic stay provision applied only to debtor in bankruptcy, not to an individual or codebtor not in bankruptcy, and as individuals, appellants had the responsibility to answer the summons. A mistake of law (mistaken reliance on automatic stay provision of Bankruptcy Code) is not a "mistake" under Rule 60(b)(1) that will support vacating a default judgment. Schmidt v. Jomac, Inc., 196 M 323, 639 P2d 517, 39 St. Rep. 130 (1982).

Mistake as to Meaning and Effect of Process Not Supported by Evidence: The District Court properly denied a motion to set aside a default judgment where plaintiff's attorney wrote defendant stating suit had been filed and offering to settle, the summons and complaint served upon defendant were legally sufficient and clearly stated that suit had been filed against him, defendant's reply letter to plaintiff's attorney indicated that he was literate and intelligent, and defendant supported his motion by stating that he did not realize the summons and complaint were official and required him to respond, that he had never been sued before, and that he had believed the papers were an attempt by the attorney for plaintiff to scare him into settling and only required a response to plaintiff's attorney. Gergen v. Pitsch, 194 M 70, 634 P2d 652, 38 St. Rep. 1679 (1981).

Insufficient Reason to Justify Relief From Judgment — Unresponsive Party: The District Court properly refused to grant appellants' motion to set aside a default judgment under Rule 60, M.R.Civ.P., where appellants received notice that their counsel had withdrawn from their case and yet had made no attempt (1) to obtain another counsel to assist them in answering interrogatories, (2) to make an adequate showing of why they failed to file interrogatories at any time, or (3) to offer proper answers to the interrogatories. Audit Serv. v. Kraus Constr., 189 M 94, 615 P2d 183 (1980).

"Excusable Neglect" — Illness: A default judgment was entered against defendant in a claim for wages and expenses. Defendant contends that because he was ill and under a doctor's care he left his business in the care of others, which resulted in his neglect of this lawsuit. He contends this was "excusable neglect", for which reason the default judgment should be set aside. Defendant, however, was properly served with the complaint, and the record does not show that he was so ill as to render his neglect excusable. Morris v. Frank Trans. Co., 184 M 74, 601 P2d 698 (1979).

Failure to Appear — Excusable Neglect: Plaintiff entered into a contract to sell real property and a beer license to Dayton, who assigned the contract to Borkoski. Plaintiff later brought an action against Dayton and Borkoski. Borkoski failed to appear and a default judgment was entered. Borkoski believed that he did not have to appear until Dayton was served. He also called the clerk of court, who said that no hearing date had been set. In addition, the defendant only had 6 days from the time served until the default judgment was entered. Borkoski sought to have the default set aside but his motion was denied. On appeal, the Supreme Court found that these facts constitute excusable neglect and the District Court abused its discretion in not setting aside the default judgment. Kootenai Corp. v. Dayton, 184 M 19, 601 P2d 47 (1979).

Excusable Neglect in Default Judgments — Failure to Update Name of Registered Agent: Where a complaint was served on a person listed as the registered agent of the defendant corporation, but who was no longer the agent of the corporation, and the corporation diligently sought to defend the action upon receipt of actual notice, failure of the defendant corporation to replace the name of its registered agent was excusable neglect and entry of default judgment was an abuse of the trial court's discretion. Clute v. A. B. Concrete, 179 M 475, 587 P2d 392 (1978).

Inadvertence or Excusable Neglect: The court properly denied a motion to set aside a default judgment against a defendant who allegedly received no notice of the action because he failed to meet the burden of proving, as the moving party, inadvertence or excusable neglect. Purington v. Soundwest, 173 M 106, 566 P2d 795 (1977).

Failure to Appear Without Reason: The court did not abuse its discretion in denying the motion to set aside the default judgment since there was no showing of what excuse the attorney for defendant may have had to not appear for jury trial or to apprise the defendant of the trial date. Credit Counsellors, Inc. v. Alcorn, 173 M 72, 566 P2d 77 (1977).

Setting Aside Default Judgment — When: It was proper for court to set aside default judgment caused by attorney misfiling complaint. The court used its discretion and will not be reversed unless manifest abuse is proved. Judgment by default is not favored. Keller v. Hanson, 157 M 307, 485 P2d 705 (1971).

No Reliance on Judgment or Injustice: Grant of new trial pursuant to Rule 59(a) to permit plaintiff to give additional testimony on damages that had been omitted by excusable neglect was not improper, notwithstanding that such relief should have been given under this section, where no intervening rights had attached in reliance upon judgment and no actual injustice would ensue. John J. Ming, Inc. v. District Court, 155 M 84, 466 P2d 907 (1970).

Quiet Title Action — Colorable Title Required: In quiet title action, District Court properly denied motion to set aside default decree where moving party had no color of title. Under this section, default judgment will be set aside for excusable neglect only if movant is able to show good defense on merits. Diamond Inv. Co. v. Geagan, 154 M 122, 460 P2d 760 (1969).

Mistake of Law as to Contract Held Insufficient: Mistaken belief of party, against whom default judgment was taken, as to legal effect of contract with adverse party was mistake of law rather than mistake of fact, and was not such a "mistake" as would support vacating the default. Uffleman v. Labbit, 152 M 238, 448 P2d 690 (1968).

Slight Abuse Sufficient for Reversal: Slight abuse of discretion in refusing to set aside default judgment for "mistake, inadvertence, surprise, or excusable neglect" is sufficient to justify reversal, and when motion to vacate default judgment is supported by showing which leaves court in doubt or upon which reasonable minds might reach different conclusions, the doubt should be resolved in favor of the motion. Uffleman v. Labbit, 152 M 238, 448 P2d 690 (1968).

Change of Counsel: Motion to have judgment vacated as to date and redated so as to permit moving party to file exceptions to findings or take other steps counsel considered necessary for protection of client was improperly denied, and was abuse of discretion where moving party had inadequate time in which to obtain present counsel when conflict of interest arose with prior counsel. Schmidt v. Lloyd, 152 M 158, 447 P2d 485 (1968).

Probate Matters: Final decree of distribution and discharge in probate will not be set aside on ground of inadvertence or fraud either under statute or Rule 60(b) in absence of manifest abuse of court's discretion in case where moving party had every opportunity to protect his claim in probate and failed to do so. Werning v. McFarland, 149 M 137, 423 P2d 851 (1967).

Motion After Default — Discretion of Court: Where record showed that defendant took no action for nearly 3 months after default judgment had been entered, defendant was not prejudiced by plaintiff's failure to give written notice of application for default judgment as required by Rule 55(b)(2), M.R.Civ.P., and District Court did not abuse its discretion in denying defendant's motion to vacate the default judgment under Rule 55 (c), M.R.Civ.P. Williams v. Superior Homes, Inc., 148 M 38, 417 P2d 92 (1966).

"Personal Problems" Insufficient: Defendant's contention that "personal problems drove all thought of lesser problems from his mind" was not sufficient to set aside a default judgment under subsection (1) of this section. Dudley v. Stiles, 142 M 566, 386 P2d 342 (1963).

Failure to Read Mail Not Excusable Neglect: Trial court did not abuse its discretion in refusing to vacate a default judgment where the facts advanced as "excusable neglect" were that defendant's counsel failed to read a letter from plaintiff's counsel for 2 or 3 weeks because he was occupied with other urgent matters and because he assumed that the letter was on another matter that was not urgent. U.S. Rubber Co. v. Community Gas & Oil Co., 139 M 36, 359 P2d 375 (1961).

Representations of Plaintiff — Default Properly Opened: The trial court did not err in granting a motion to vacate a default judgment where the defendant made a showing that plaintiff gave him the impression that the matter involved would not be pressed, and that he had therefore made no appearance on account of his impression. Simons v. Keller, 137 M 52, 350 P2d 366 (1960).

Mistake as to Service — Excusable Neglect: Affidavit to the effect that defendant's attorney mistakenly believed that papers were served on his client the same day the client delivered them to his office was a sufficient showing of excusable neglect to justify setting aside of default judgment. Worstell v. DeVine, 135 M 1, 335 P2d 305 (1959).

Party to Be Directly Affected: The purpose of the provision for relief from judgment is to give relief to a party who is directly affected and not to give relief to a stranger who might be indirectly affected. Moore v. Capitol Gas Corp., 117 M 148, 158 P2d 302 (1945).

Attorney's Neglect Imputed to Client: Neglect of an attorney to make proper inquiry into the facts of a case before entering into an agreed statement of facts upon which the case was tried was the neglect of his client, and unless excusable, relief could not be had from the resultant adverse judgment. Rieckhoff v. Woodhull, 106 M 22, 75 P2d 56 (1937).

Default by Nonresident — Mistake as to Foreign Law: The rule of 28-2-411 that mistakes of foreign law are mistakes of fact was not available to nonresident petitioning the court to set aside a judgment on ground of mistake where he brought foreclosure proceedings in Montana through

a local attorney and failed to advise attorney of a payment that kept the debt alive in the belief the law here was the same as in his state, and attorney entered into an agreed statement of facts upon the trial of which the court found that the debt was outlawed. Rieckhoff v. Woodhull, 106 M 22, 75 P2d 56 (1937).

Mistake as to Law — Purpose of Rule: Setting aside a judgment on the ground of mistake may not be had where the mistake is one of law, as ignorance of the law is no excuse. Otherwise, there could be no security in legal rights, no certainty in judicial investigations, and no finality in litigation. Rieckhoff v. Woodhull, 106 M 22, 75 P2d 56 (1937).

Motion Addressed to Court's Discretion: An application to set aside a judgment on ground it was taken through applicant's mistake, inadvertence, or excusable neglect is addressed to the discretion of the trial court, and in absence of manifest abuse of discretion will not be disturbed on appeal. Each application must be determined upon its own facts. Rieckhoff v. Woodhull, 106 M 22, 75 P2d 56 (1937).

Information From Third Party Held Insufficient: Showing in support of a motion to set aside a default made 11 months after entry, to the effect that defendant in an action for slander had been informed by a third person that plaintiff did not intend to do anything with the action and intended to let the matter drop, with the result that she did not think anything more about it and did not consult anyone until she learned of the entry of judgment by default, was insufficient to warrant setting aside of the default, and the court abused its discretion in granting the motion. Kosonen v. Waara, 87 M 24, 285 P2d 668 (1930).

Equitable and Legal Remedy Precluded: Plaintiff mortgage company, holding a first mortgage upon a tract of land, by inadvertence omitted from its complaint for foreclosure a description of the most valuable part of the tract, had judgment and bought the property as described on execution sale. Subsequently it discovered the error and moved to have the decree vacated. The motion was granted, a new decree filed, and a new order of sale issued, but on appeal the new decree was set aside for failure of plaintiff to pursue properly the remedy for relief from judgment. Thereafter the holder of the second mortgage brought suit to foreclose and plaintiff filed a cross-complaint in which, appealing to the equity arm of the court, it sought relief from the earlier judgment. Plaintiff had an adequate remedy by motion, lost it through its own fault, and could not thereafter invoke the equity power of the court to obtain the relief it might have had under its motion. Meyer v. Lemley, 86 M 83, 282 P 268 (1929), followed in Krein v. Heineman, 226 M 474, 736 P2d 481, 44 St. Rep. 813 (1987).

Parties Entitled to Relief: The legal remedy for the vacation of a judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect is as available to one in whose favor judgment was rendered as to him against whom it went, providing diligence is exercised in asserting the right. Meyer v. Lemley, 86 M 83, 282 P 268 (1929).

Additional Time to Answer Not Used: Where counsel for plaintiff for 40 days after defendant filed its answer requiring a reply failed to file it, and then upon decision of a motion to strike were granted 20 days in which to further plead but omitted to do so, the court may not be said to have abused its discretion in refusing to set aside the consequent default, even though counsel may have been excusable in that, while in court at the time of the order resulting in the granting of the additional time in which to plead, they did not hear the announcement of the order. Mihelich v. Butte Elec. Ry., 85 M 604, 281 P 540 (1929).

Discharge of Counsel — Default Properly Opened: Where the resident agent of a foreign corporation had been served with summons and mailed it to the general counsel of defendant without knowledge that the latter had been discharged and the general counsel failed to transmit it to his former client, the failure of defendant company to advise its agent of counsel's discharge, resulting in the entry of a judgment by default, was excusable under the circumstances of the case. Reynolds v. Gladys Belle Oil Co., 75 M 332, 243 P 576 (1926), followed in Twenty-Seventh Street, Inc. v. Johnson, 220 M 469, 716 P2d 210, 43 St. Rep. 534 (1986).

Failure of Mails as Excusable Neglect: Miscarriage of a letter sent by defendant to his attorney, asking him to take care of a case pending against him, receipt of which would have avoided an entry of default, is a sufficient showing of excusable neglect to warrant the setting aside of the default. Reynolds v. Gladys Belle Oil Co., 75 M 332, 243 P 576 (1926).

Mental Defective — Mistake as Excusable Neglect: Where defendant had been restored to capacity about 8 months before summons was served on her, and at that time she was still of doubtful mentality and was under the impression that by appearing before a notary public to give her deposition at the instance of plaintiff she had made appearance in the cause, a case of excusable neglect was made and the court abused its discretion in refusing to grant the motion. Brothers v. Brothers, 71 M 378, 230 P 60 (1924).

Attorney's Headache Held Insufficient: Showing made by defendant in aid of his motion to set aside a default judgment, to the effect that he intended to appear on the last day but forgot because of a headache, was insufficient to invoke judicial discretion in his favor and the court in setting aside the judgment committed error. Pac. Acceptance Corp. v. McCue, 71 M 99, 228 P 761 (1924).

Default — Prerequisites for Opening: To warrant the vacation of a default, it is necessary that the party in default show affirmatively that he proceeded with diligence, that the neglect was excusable, that the judgment if permitted to stand will affect him injuriously, and that he has a good defense on the merits. Eder v. Bareolos, 63 M 363, 207 P 471 (1922); Delaney v. Cook, 59 M 92, 195 P 833 (1921).

Distraction of Counsel — Default Properly Opened: In setting aside a default judgment for neglect of counsel for defendant in an action for trespass, the court did not abuse its discretion where counsel had been for some time prior to, and was at, the date for appearance engaged as counsel for defendant in a homicide case of unusual importance and in the conduct of which his attention was so absorbed as to cause him to overlook making appearance, where it further appeared that he acted promptly and had a meritorious defense. Eder v. Bareolos, 63 M 363, 207 P 471 (1922).

Insufficient Facts Alleged — Mistake as to Filing Date: An affidavit of counsel for defendant in support of his application for vacation of default, that he misunderstood the date upon which the appearance of his client was due and mistakenly supposed it to be at a date 10 days later than it actually was, without a statement of any fact or circumstance out of which the misunderstanding arose, was insufficient to move the discretion of the court and therefore an order granting the motion was error. Robinson v. Petersen, 63 M 247, 206 P 1092 (1922).

Inexcusable Delay — Motion Properly Denied: Where defendant knew of the pendency of an action against him 5 months before judgment by default was entered but took no steps looking to a defense on the merits until 7 months after its entry, when he moved to set the judgment aside, asking leave to file his answer, and thereafter for 3 years more neglected to bring his motion on for hearing, denial of the motion on the ground of inexcusable delay was proper. Hinderager v. MacGinniss, 61 M 312, 202 P 200 (1921).

Default Properly Opened: Where defendants' attorney had prepared a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) and intended to file it within the time allowed by statute, but on account of important business engagements elsewhere failed to do so, where during his absence and upon recalling the fact that he had not filed it he advised one of defendants by letter where the demurrer could be found in his office with directions to file it, etc., and where an answer was tendered with the motion, the District Court did not abuse its discretion in granting a motion to set aside a judgment by default. Farmers' Co-op Ass'n v. Roper, 57 M 42, 188 P 141 (1919).

Relief From Default Not a Right: When one who is in default applies to the court for relief, it is incumbent upon him to show affirmatively that the default resulted from mistake, inadvertence, or excusable neglect. Even when such showing is made, relief cannot be demanded as a matter of right. The statute refers the subject to the sound legal discretion of the trial court. Kersten v. Coleman, 50 M 82, 144 P 1092 (1914).

Mistake as to Filing Date — Default Properly Opened: It is no abuse of discretion to set aside a default judgment entered through a mistake of counsel as to the date when an amended complaint was to have been filed. Voelker v. Golden Curry Consol. Min. Co., 40 M 466, 107 P 414 (1910).

Mistake of Court Not Covered by Rule: Where an order taxing costs in favor of plaintiff, included in a judgment for him, omitted certain items claimed by him which judgment had been affirmed on appeal by defendant, the trial court had no authority after affirmance to make an order taxing such costs, though the failure to tax them originally was an oversight on the part of the court. The provision for relief applies only to the mistake, inadvertence, surprise, or excusable neglect of the party litigant and not of the court. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 32 M 20, 79 P 410 (1905).

Time for Answer — Mistake of Law Insufficient: The failure of defendant's counsel to know that a special appearance to move to quash the service of summons did not extend the time for a general appearance and answer is not such surprise or excusable neglect as justifies relief. Mantle v. Casey, 31 M 408, 78 P 591 (1904).

Lack of Consent to Continuance Insufficient: Where, after a case had been set for trial, the attorney for the defendants wrote to the opposing attorney requesting a continuance, but before receiving an answer to his letter he left the place of his residence, and his whereabouts was unknown to the attorney for the plaintiff until it was too late for the latter to inform him that he

could not consent to the continuance, and judgment was rendered for the plaintiffs upon the day set for the trial, the facts did not show any surprise, mistake, or excusable neglect authorizing the court to set aside the judgment. Lowell v. Ames, 6 M 187, 9 P 826 (1886), distinguished in Whiteside v. Logan, 7 M 373, 17 P 34 (1888) and Benedict v. Spendiff, 9 M 85, 22 P 500 (1889).

FAILURE OF SERVICE

No District Court Jurisdiction to Enter Marriage Dissolution in Favor of One Party Absent Service of Dissolution Petition and Summons on Other Party: On August 15, 2003, the parties entered a property settlement agreement dividing the marital estate, and the wife also signed a consent to entry of judgment agreeing to dissolution if the property settlement agreement was presented to the District Court for approval and made an integral part of the dissolution. The husband then filed a petition for dissolution and included the settlement agreement and the wife's consent to entry of judgment, but did not serve the wife with any of the filings. The District Court held a hearing without the wife being present, adopted the settlement agreement, and entered a decree of dissolution. The husband's counsel mailed a copy of the judgment to the wife, who then filed a motion under this rule to set aside the judgment, claiming that the decree was void because the husband failed to have a summons issued and to serve her with process. The motion was denied, but on appeal, the Supreme Court vacated the judgment. Dissolution proceedings are not exempt from rules regarding service of process, and if one party commences a dissolution proceeding, the other party must be served as provided in the Montana Rules of Civil Procedure. Further, a petition for dissolution must be signed under oath by both parties. The wife's execution of the documents prior to the filing of the case did not constitute a voluntary appearance in the action, nor does notice of a hearing substitute for service of summons. A District Court may obtain personal jurisdiction through strict compliance with the mandatory rules for service of process, and in this case, the wife's signing of documents prior to the filing of the dissolution petition did not confer jurisdiction on the court absent service of process. Thus, the District Court abused its discretion in failing to grant the wife's motion to set aside the judgment, and the case was remanded for further proceedings. In re Marriage of Zacher, 2004 MT 249, 323 M 54, 98 P3d 309 (2004), following Marriage of Blaskovich, 249 M 248, 815 P2d 581 (1991), and In re Marriage of Grounds/Coward, 271 M 350, 897 P2d 200 (1995).

Entry of Judgment Not Filed — Time for Filing Appeal Not Running Until Notice of Entry Issued: When no notice of entry of judgment is filed by a party, the time for filing an appeal does not begin to run until the Clerk of Court issues a notice of entry of judgment under Rule 77(d), M.R.Civ.P., nor does the time to request the court to modify or vacate an order begin to run. In the present case, the filing of a notice of entry of judgment was required under that rule as an action in which an appearance has been made, but neither party filed the notice. As a result, the 60-day filing period required under this rule could not begin to run, so a subsequent motion for relief was not time-barred. In re Marriage of Bell, 2000 MT 88, 299 M 219, 998 P2d 1163, 57 St. Rep. 381 (2000).

Withdrawal of Counsel — "Rule 10 Notice" Sent to Last-Known Address Held "Notice as Required by Law": In a dissolution proceeding between Christina and Laramie, Laramie's counsel withdrew after he had not been contacted by Laramie for approximately 18 months. In the notice of withdrawal, Laramie's counsel provided Christina's counsel with Laramie's last-known address. Christina's counsel then sent a "Rule 10 notice", pursuant to Rule 10, M.U.D.C.R. (Title 25, ch. 19), to Laramie at the address provided by his former counsel, informing Laramie that he must appoint another attorney, that trial was scheduled for a particular date, and that if he did not appoint an attorney or appear, a default judgment might be made against him. That notice was returned by the post office because Laramie was apparently no longer living at that address. After a decree of dissolution was entered, Christina's counsel obtained Laramie's address from his mother and sent Laramie a notice of entry of judgment. Fifty-six days later, Laramie moved, pursuant to this rule, to set aside the judgment, arguing that Christina's counsel did not exercise due diligence in obtaining his correct mailing address and that if Christina's counsel obtained his correct address through his mother after entry of judgment, Christina's counsel could have done so before entry of judgment. Citing McPartlin v. Fransen, 178 M 178, 582 P2d 1255 (1978), and Stanley v. Holms, 281 M 329, 934 P2d 196 (1997), the Supreme Court held that Christina's counsel, by mailing the Rule 10 notice to Laramie's last-known address, satisfied the requirement that he make a good faith effort to notify Laramie and that Christina's counsel had no obligation to "track down" Laramie through his mother. In re Marriage of Wallace, 284 M 360, 944 P2d 227, 54 St. Rep. 920 (1997).

Marriage Dissolution — Insufficient Service of Process Based on Insufficient Affidavit: An affidavit of the husband's lawyer stating that the husband had not heard from his wife was

insufficient in that it did not state that the wife was out of state or was concealing herself or that a diligent inquiry had been made as to her whereabouts. Because the affidavit did not allege diligent inquiry, it was not sufficient evidence of diligent inquiry, and service by publication based on the affidavit was insufficient service of process. The District Court abused its discretion in refusing to vacate the default judgment and an order to convey real property. In re Marriage of Shikany, 269 M 493, 887 P2d 153, 51 St. Rep. 1031 (1994).

Invalidity of Default and Summary Judgments for Failure to Give Notice and Other Failures: Kenner's filing of two motions to dismiss constituted appearances in Moran's quiet title action, and Kenner was thus entitled to written notice of Moran's application for default judgment at least 3 days prior to the hearing on the application. The informal communications to Kenner's attorney by Moran's attorney, threatening to proceed with the quiet title action if Kenner did not fulfill the terms of a settlement agreement that the parties had signed, were not the equivalent of and could not substitute for the required notice. The failure to notify was compounded by failure to notify Kenner that the default judgment had been entered. Therefore, default judgment against Kenner was void, and Kenner's motion for summary judgment in Kenner's independent action to set aside the default judgment should have been granted. Furthermore, at the hearing in Kenner's action, Moran's request for summary judgment on Moran's counterclaim for specific performance of the settlement agreement should not have been granted because neither party had entered evidence on that issue, Moran had not moved for summary judgment, and Kenner had no notice of the request for summary judgment. Kenner v. Moran, 263 M 368, 868 P2d 620, 51 St. Rep. 94 (1994).

Notice of Default on Tax Deed Not Personally Served — Order Set Aside: In a case involving the setting aside of a default judgment in a tax deed setting, the defaulting party was not personally served, service being accomplished through legal publication. Because a motion to set aside was timely made and service was not personally made, the party was entitled to use Rule 60(b), M.R.Civ.P., to set aside the order of default. McDonald v. Grassle, 228 M 25, 740 P2d 1122, 44 St. Rep. 1312 (1987).

Default Judgment Void for Failure of Service: The District Court was correct in setting aside the default judgment against Western Supply, Inc. as void under Rule 60(b)(4), M.R.Civ.P., for failure of service of process when the fatal flaw in the service was not merely in a lack of due diligence, but also in the failure to submit a proper and sufficient affidavit in compliance with Rule 4D(2)(f), M.R.Civ.P., in support of substituted service on the Secretary of State. Jurisdiction cannot be acquired without strict compliance with the statute. Shields v. Pirkle Refrigerated Freightlines, Inc., 181 M 37, 591 P2d 1120 (1979), followed in Ihnot v. Ihnot, 2000 MT 77, 299 M 137, 999 P2d 303, 57 St. Rep. 338 (2000).

Default Judgment Set Aside — Improper Service: Because service upon a former employee was not service upon the company itself, default judgment was void for want of jurisdiction and set aside. Kraus v. Treasure Belt Min. Co., 146 M 432, 408 P2d 151 (1965).

Failure of Service — Time for Motion: The 12 months' period (reduced by 1965 amendment to 180 days) after rendition of judgment within which a defaulting party not personally served with summons may be permitted to answer to the merits begins to run from the date of such rendition, and the limitation applies to the time when the motion is made and not to when it is heard. State ex rel. Hahn v. District Court, 83 M 400, 272 P 525 (1928).

Failure of Service Not Shown Upon Complaint: Where a decree of divorce against an insane husband was procured without personal service of summons and is therefore void for want of jurisdiction, there can be no relief after the expiration of the time limit fixed except by an action in equity to set aside the decree, as it is fair upon its face, and the defect of jurisdiction must be made to appear by evidence dehors the record. The defendant is not to be denied relief in equity because he did not proceed under the provision for setting aside a decree where no lack or want of diligence is imputed to him. State ex rel. Happel v. District Court, 38 M 166, 99 P 291 (1909), distinguished in Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937).

FRAUD

Error in Denial of Motion to Set Aside Past-Due Child Support Judgment for Fraud — Payments Improperly Applied to Barred Debt: In 1998, a mother sought $33,350 in past-due child support owed over a 20-year period. The District Court found that the statute of limitations in 27-2-201 limited recovery to arrearages incurred only in the 10 years prior to filing the complaint. At trial, the father provided documentation that some support had been paid, but the mother denied ever receiving any payments. After trial, the father attempted to introduce evidence of additional payments, but the evidence was disallowed. The District Court then calculated the amount of child support owed since 1988, but applied payments made since 1988

to the obligations incurred prior to 1988, irrespective of the statute of limitations. The father then moved to set aside the judgment because the mother committed fraud by denying the receipt of certain payments, but that motion was denied without reaching the issue of fraud. On appeal, the Supreme Court held that the District Court erred in denying the motion. Although a District Court should apply any payment of child support to the earliest arrearage, an award may be applied only to arrearages due within 10 years of a suit for enforcement. It is incongruous for a court to bar a plaintiff from bringing an action to enforce a certain debt, but then apply payments toward that barred debt. Thus, the District Court erred in applying payments made since 1988 to the obligations incurred prior to 1988, and in turn erred in failing to address the merits of the father's motion alleging fraud. The case was remanded for further consideration. Roberts v. Nickey, 2002 MT 37, 308 M 335, 43 P3d 263 (2002). See also In re Adoption of C.J.H., W.L.H., & T.A.H., 246 M 52, 803 P2d 214 (1990), and In re Marriage of Hooper & Crittendon, 247 M 322, 806 P2d 541 (1991).

Equitable Action — Type of Fraud for Which Relief May Be Granted: A father was assessed back child support but claimed that he was entitled to a new trial on the issue because at the hearing, the mother had represented that the children had lived with her the entire time, when in fact, the children lived with their father for a period, which he claimed was fraud upon the court, entitling him to relief. Citing Brown v. Jensen, 231 M 340, 753 P2d 870, 45 St. Rep. 665 (1988), the Supreme Court noted that the type of fraud for which relief may be granted in an independent equitable action is extrinsic or collateral, rather than intrinsic fraud. Extrinsic fraud is an intentional act by the prevailing party that prevents the unsuccessful party from having a fair submission of the controversy. False or fraudulent representations, concealments, and perjured testimony by a party during court proceedings constitute only intrinsic fraud and do not rise to the level of fraud upon the court. In this case, the father presented testimony at the hearing rebutting the mother's representation of the living arrangements. Thus, the court was aware of the father's contention, so it could not be claimed that the mother acted fraudulently or that her representations were misleading or relied upon by the father to his prejudice. The father failed to demonstrate that the mother committed extrinsic or intrinsic fraud upon the court, and his motion for relief was properly denied. In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999). See also In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Fraud Must Be Extrinsic — Motion for Relief May Be Barred by Res Judicata: Loney was sued by his law firm for fees owed for representing him in bankruptcy proceedings. Loney failed to answer the complaint, and a default judgment was entered. Loney subsequently filed a complaint to have the judgment declared void on the basis that the debt had been discharged in bankruptcy. Loney also argued that the judgment should be set aside on the basis that the law firm's failure in its suit against him to notify the court that the fees had not been approved by the bankruptcy court constituted fraud. The Supreme Court held that Loney could have litigated the issues of the discharge of the debt and fraud on the part of the law firm when the law firm sued him. Therefore, he was barred by the doctrine of res judicata from litigating those issues again in his suit to have the firm's judgment set aside. The Supreme Court also held that any fraud by the law firm was intrinsic and that the fraud had to be extrinsic to warrant setting aside the judgment on that basis. Loney v. Milodragovich, Dale & Dye, P.C., 273 M 506, 905 P2d 158, 52 St. Rep. 1093 (1995), followed in Butler v. Colwell, 1998 MT 241, 291 M 134, 967 P2d 779, 55 St. Rep. 1007 (1998).

Intrinsic Fraud — Motion for Relief Subject to Sixty-Day Time Limitation: Upon the divorce of John and Andrea, John agreed to pay certain jointly held debts, and the District Court entered the agreement into its decree. Later, after John filed a Chapter 11 bankruptcy proceeding, Andrea obtained a modification of the original decree on the basis that John's representations of payment constituted extrinsic fraud. The modification was obtained by a motion made long after the expiration of the 60-day deadline provided in this rule. The Supreme Court reversed the District Court, holding that the representations made by John did not come within the scope of the residual clause of the rule because those representations did not constitute a fraud upon the court or serve as the basis for an independent action for extrinsic fraud. Thus, the Supreme Court held that the motion for relief was untimely made and improperly granted. In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Fraud Between Parties Not Fraud Upon Court: More than 2 years after the dissolution order, Wise brought a motion to set aside the property settlement agreement drawn up by her attorney, contending that her husband had committed fraud against her and the court in that he told her that his work pension was not a marital asset. The statute of limitations had run for appealing the order on the basis of fraud between the parties, but the lower court found that the husband's

statements to his wife constituted an extrinsic fraud upon the court. The Supreme Court held that fraud upon the court includes only the most egregious conduct and that generally fraud between the parties does not rise to that level, particularly in the present case when Wise's attorney drew up the property settlement agreement. Wise v. Nirider, 261 M 310, 862 P2d 1128, 50 St. Rep. 1334 (1993), followed in In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999).

Allegations Plaintiff and Its Lawyers Engaged in Perjury, Misrepresentations, Deception, Subversion of Justice, and Fictitious Theories of the Case — No Extrinsic Fraud: For purposes of relief from a judgment through an independent equitable action under this rule, extrinsic fraud is fraud that prevented the unsuccessful party from presenting the party's case, is collateral to the matters tried by the court, and is not fraud in the matters on which the judgment was rendered. Perjury and false or fraudulent allegations used in obtaining a judgment are not extrinsic fraud. Appellants' claims that the bank and lawyers conspired to deceive the court and subvert justice, misrepresented facts, committed perjury, and used forceful arguments and artful pleading to develop a fictitious theory of the case that misled the court did not allege extrinsic fraud. Moreover, the allegations did not constitute fraud upon the court. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993), followed in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Fraud Between Parties — No Fraud Upon Court: Fraud between parties to a case does not, without more, constitute fraud upon the court. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993), followed in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995), and In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999).

Failure to Show Unfair Denial of Opportunity to Have Case Heard — Res Judicata: Richland County sought to enforce a 6 ¼% oil, gas, and mineral royalty interest reserved prior to a 1937 quiet title decree by asserting that there was extrinsic fraud upon the court because plaintiff's attorney in the quiet title action, who also happened to be the Richland County Attorney, failed to appear on behalf of the county, resulting in a default judgment against the county and denying the county the opportunity to litigate the reservation. However, the county failed to produce facts to substantiate its theory that the county's interest was subverted or that the county was unfairly denied an opportunity to have its case heard. Absent such a showing, relitigation of the reservation claim was barred by res judicata. Filler v. Richland County, 247 M 285, 806 P2d 537, 48 St. Rep. 200 (1991).

Trial on Merits Not Warranted in Every Case of Fraud: Appellant contended the distinction between intrinsic and extrinsic fraud was so difficult to ascertain that a trial on the merits must be allowed in every case. The Supreme Court recognized that allegations of fraud must be carefully scrutinized on a case-by-case basis but disagreed that distinctions between extrinsic and intrinsic fraud were so elusive as to warrant trial in every case. Brown v. Jensen, 231 M 340, 753 P2d 870, 45 St. Rep. 665 (1988).

Failure to Disclose Debts — Extrinsic Fraud: A couple's failure to disclose certain debts in their property settlement agreement misled the trial court as to the actual financial status of the marital estate. This failure to disclose was extrinsic fraud. It misled the court to a false judgment that wrongfully insulated the couple's property from creditors. Extrinsic fraud justifies invoking the inherent equitable power of a court to reopen and set aside a judgment. Relief from a judgment obtained by extrinsic fraud may be granted on motion in the original action or in a separate suit in equity. In re Marriage of Witbart, 216 M 178, 701 P2d 339, 42 St. Rep. 725 (1985), overruled in part in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Motion Not Timely Filed — Intrinsic Fraud Not Grounds for Motion: Appellant asserted sex- or race-based discrimination when the University of Montana (now University of Montana-Missoula) failed to renew her teaching contract. At trial, the head of appellant's department testified that there were no funds available to renew appellant's contract. The District Court determined no unlawful discrimination had occurred. Subsequently, the head of the department pleaded guilty to misuse of federal funds granted to the University and diversion of such funds far in excess of appellant's salary. Appellant filed a motion under Rule 60, M.R.Civ.P. (Title 25, ch. 20), to vacate the judgment on the grounds of fraud. The District Court denied the motion, and the Supreme Court affirmed. The Supreme Court found the claim was time-barred under the rule because it was filed after the 60-day time limit. The claim was not allowed under the residual clause in Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), because the fraud fell short of what is legally required to vacate a final judgment. The Supreme Court found the misappropriation of funds did not materially and directly affect the outcome of the case and the

false in-court testimony was intrinsic fraud upon the court, rather than extrinsic, and therefore did not constitute sufficient grounds to vacate a judgment under the residual clause. Salway v. Arkava, 215 M 135, 695 P2d 1302, 42 St. Rep. 241 (1985), followed in Filler v. Richland County, 247 M 285, 806 P2d 537, 48 St. Rep. 200 (1991), and In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Property Settlement — Extrinsic Fraud: The husband retained an attorney in a dissolution proceeding. Husband convinced the wife that only one attorney was necessary, and that attorney represented both parties, with the wife being named as the petitioner. The husband and the attorney failed to disclose to the court the balloon payment due on the house given to the wife and the value of the husband's pension. This failure to disclose relevant information to the court was extrinsic fraud and was the basis upon which to reopen a judgment dividing the marital estate. In re Marriage of Madden, 211 M 237, 683 P2d 493, 41 St. Rep. 1332 (1984), overruled in part in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Dissolution of Marriage — Fraud as Ground for Relief From Property Disposition — No Fraud Found: The trial court properly dismissed a motion to set aside a decree of dissolution incorporating a property settlement agreement that was essentially drafted by the petitioner and executed against the advice of counsel. There was no fraud evidenced. The wife settled for a disproportionate settlement, then several years later, changed her mind with regard to what property she wanted from the marital estate. Schaak v. Schaak, 210 M 242, 681 P2d 1089, 41 St. Rep. 1033 (1984).

Intrinsic Fraud Not Grounds for Motion — Motion Not Timely Filed: Appellant was personally served with a petition for dissolution of marriage and a property settlement. Appellant failed to answer or otherwise appear, and a default was entered. One and one-half years after the default was entered, appellant moved to have the default set aside upon the ground of fraud. Appellant argued that the value of certain property was exaggerated by his spouse in her testimony. The court held that if fraud existed it was intrinsic fraud, and intrinsic fraud is not grounds for reopening a decree or judgment. In addition, the motion to reopen the decree 1 ½ years after the decree had been entered is not timely as a 60-day motion under Rule 60(b), M.R.Civ.P. In re the Marriage of Lance v. Lance, 195 M 176, 635 P2d 571, 38 St. Rep. 1772 (1981), followed in Salway v. Arkava, 213 M 135, 695 P2d 1302, 42 St. Rep. 241 (1985), In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995), Falcon v. Faulkner, 273 M 327, 903 P2d 197, 52 St. Rep. 1011 (1995), and In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999).

Fraudulent Inducement — Signing of Admission of Service: Appellant contends that respondent fraudulently induced the clerk of court to enter a default judgment against appellant. Appellant contends that since she signed a document stating that she voluntarily entered her general appearance and admitted service of documents, that it was extrinsic fraud to enter a default judgment without giving her her day in court. However, on the same certificate there was language to the effect that respondent declined to answer and conserved that her default be entered. Appellant is constrained by the whole document and there was no extrinsic fraud. Miller v. Miller, 187 M 286, 609 P2d 1185 (1980).

Intrinsic Fraud: Husband's concealment of a statement as to property holdings at a trial of a dissolution of marriage is intrinsic fraud and does not warrant relief on appeal. This is particularly so where husband's statements or concealments in no material way thwarted appellant's ability to present her case. Miller v. Miller, 187 M 286, 609 P2d 1185 (1980), following Minter v. Minter, 103 M 219, 62 P2d 283 (1936).

Dissolution of Marriage — Fraud as Ground for Relief From Property Disposition: Under this rule and 40-4-208(1)(b)(ii), the District Court has jurisdiction to determine whether fraud has been committed upon the court. The power of the court to set aside a judgment on the basis of fraud is inherent and independent of statute, and this rule's 60-day time limitation does not apply. However, the District Court properly denied the motion as untimely because after 60 days the issue cannot be raised by motion but must be raised in an independent action for relief and because the 60-day limit applied in any case since the court found no fraud had been committed. The wife's failure to disclose her recently secured employment was not fraud since it was not an intentional concealment or misrepresentation and since the judgment was based on an agreement between the parties. Hopper v. Hopper, 183 M 543, 601 P2d 29 (1979).

Alleged Fraud — Failure to Appeal — Effect: After motion to set aside judgment on grounds of fraud was denied and evidence of fraud was rejected by the court, plaintiff's remedy was to appeal the denial, and his failure to do so rendered the decision res judicata and barred the filing of a second action to litigate the same claim or issues. Kamp Implement Co. v. Amsterdam

Lumber, Inc., 166 M 435, 533 P2d 1072 (1975), followed in Krein v. Heineman, 226 M 474, 736 P2d 481, 44 St. Rep. 813 (1987).

Fraudulently Obtained Judgments — Time Limitation Inapplicable: Time within which trial court could set aside judgment on basis of fraud upon the court depended upon equity and discretion, not time limitation of this rule. In re Bad Yellow Hair, 162 M 107, 509 P2d 9 (1973), overruled in part in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Judgment Obtained by Fraud — Inherent Powers of Court: Court of equity has inherent power, independent of statute, to vacate judgment obtained by fraud in violation of last sentence of Rule 60(b) even though party seeking relief was not necessary party in original action, and motion to vacate was not made within liberal time limits prescribed by rule but was nevertheless timely, considering that aggrieved party engaged attorney to file motion to vacate within 30 days after discovery of existence of judgment. Selway v. Burns, 150 M 1, 429 P2d 640 (1967), distinguished in Kamp Implement Co. v. Amsterdam Lumber Co., 166 M 435, 533 P2d 1072 (1975).

Probate Matters: Final decree of distribution and discharge in probate will not be set aside on ground of inadvertence or fraud either under statute or Rule 60(b) in absence of manifest abuse of court's discretion in case where moving party had every opportunity to protect his claim in probate and failed to do so. Werning v. McFarland, 149 M 137, 423 P2d 851 (1967).

Divorce by Fraud — Remedy: Where a divorce judgment was taken against defendant through plaintiff's extrinsic fraud on both the defendant and the court, the court could grant relief at any time either on motion in original suit or in a separate equity suit. Gillen v. Gillen, 117 M 496, 159 P2d 511 (1945), distinguished in Deich v. Deich, 136 M 566, 323 P2d 35 (1958).

Remedy for Fraud — Equitable Relief: Where fraud entered into the rendition of a judgment or it was brought about by the misconduct of the one in whose favor it was rendered, or, though fair on its face, there was a want of jurisdiction, or the statutory remedy for setting it aside is inadequate, or the aggrieved party has been deprived of his legal remedy without any fault of his own, equity will assume jurisdiction and set it aside, under such circumstances the statutory remedy being considered cumulative or concurrent. Meyer v. Lemley, 86 M 83, 282 P 268 (1929).

JUDGMENT VOID OR VOIDABLE

Insufficient Service — Judgment Void — Error in Dismissal of Action to Set Aside Default Judgment: In March of 1995, John conveyed a farm and residence to his brother Richard by quitclaim deed. One year later, after arranging for another person to farm the property and live in the residence, Richard left for the Philippines to be married. One month later, John filed an action seeking to cancel the quitclaim deed, serving the summons and complaint upon Richard by publication because John stated that he was unable to determine Richard's address. Default judgment was entered for John 2 months later. In 1999, Richard moved to set aside the default judgment, alleging that service by publication and the resulting judgment were void because of extrinsic fraud by John and because John did not comply with the service requirements of Rule 4D(5)(e), M.R.Civ.P. The District Court dismissed Richard's action, and he appealed. The Supreme Court held that the District Court abused its discretion in dismissing Richard's claim. The District Court did not provide any findings of fact, conclusions of law, memorandum, or legal authority for its decision. Insufficient service of process is an ample ground to vacate a default judgment. Because of the absence of any hearing or oral argument in the matter, an unsupported cursory order, and an overall undeveloped record, the Supreme Court remanded for a hearing to address whether Richard's claim for relief under this rule was filed within a reasonable time. Ihnot v. Ihnot, 2000 MT 77, 299 M 137, 999 P2d 303, 57 St. Rep. 338 (2000). See also Shields v. Pirkle Refrigerated Freightlines, Inc., 181 M 37, 591 P2d 1120 (1979), and In re Marriage of Fonk/Ulsher, 260 M 379, 860 P2d 145, 50 St. Rep. 1112 (1993).

Dissolution of Marriage — Hearing Requirement Not Jurisdictional: Wife sought to have judgment dissolving her marriage declared void and vacated under Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), on the grounds that the trial judge did not hold a hearing and receive evidence on the issue of irretrievable breakdown of marriage and was therefore without jurisdiction to dissolve the marriage. Supreme Court affirmed District Court decision that the judgment was premature because there was no hearing, but that failure to hold a hearing was a procedural rather than jurisdictional defect rendering the judgment voidable but not void. The premature summary judgment in this case is not yet ripe for appeal because issues collateral to the dissolution remain undecided. The premature summary judgment could be reviewed by the Supreme Court at this point only with a Rule 54(b), M.R.Civ.P. (Title 25, ch. 20), certification, which plaintiff had not attempted. In re Marriage of Kraut, 215 M 170, 696 P2d 981, 42 St. Rep. 268 (1985), followed, regarding the need for evidence and hearing but not for express testimony on irretrievable

breakdown, in In re Marriage of Miller, 260 M 15, 858 P2d 338, 50 St. Rep. 912 (1993), and In re Marriage of Geror, 2000 MT 60, 299 M 33, 996 P2d 381, 57 St. Rep. 285 (2000), regarding the determination that a marriage is irretrievably broken is a judicial function, rather than a conclusive presumption arising from the parties' testimony or from the petition for dissolution.

Suit Attacking Judgment After Motion to Set Aside — New Issue Raised — Res Judicata Applied: In 1971 a default judgment had been entered against present plaintiffs, granting sole ownership of certain property to present defendant E.G.W., who sold the property to present codefendants in 1972. Plaintiffs' 1971 motion to set aside the default was denied. In 1981 plaintiffs sued for a one-half quieted interest, or in the alternative, an accounting and one-half the proceeds of the 1972 sale. The complaint was based on the claim that the 1971 judgment was void because it granted relief beyond that prayed for in the pleadings and the court lacked jurisdiction to grant the relief it granted. Res judicata barred litigation of the voidness issue because plaintiffs failed to raise it in their 1971 motion to set aside the default. Once there has been full opportunity to present an issue for judicial decision in a given proceeding, including jurisdiction issues, the court's determination in that proceeding must be accorded full finality as to all issues raised or which fairly could have been raised and their later consideration is precluded by res judicata. Wellman v. Wellman, 198 M 42, 643 P2d 573, 39 St. Rep. 752 (1982). See also First Bank v. District Court, 226 M 515, 737 P2d 1132, 44 St. Rep. 861 (1987), St. v. Perry, 232 M 455, 758 P2d 268, 45 St. Rep. 1192 (1988), Higham v. Red Lodge, 247 M 400, 807 P2d 195, 48 St. Rep. 273 (1991), and Tungsten Holdings, Inc. v. Kimberlin, 2000 MT 24, 298 M 176, 994 P2d 1114, 57 St. Rep. 125 (2000).

Default Judgment Void for Failure of Service: The District Court was correct in setting aside the default judgment against Western Supply, Inc. as void under Rule 60(b)(4), M.R.Civ.P., for failure of service of process when the fatal flaw in the service was not merely in a lack of due diligence, but also in the failure to submit a proper and sufficient affidavit in compliance with Rule 4D(2)(f), M.R.Civ.P., in support of substituted service on the Secretary of State. Jurisdiction cannot be acquired without strict compliance with the statute. Shields v. Pirkle Refrigerated Freightlines, Inc., 181 M 37, 591 P2d 1120 (1979), followed in Ihnot v. Ihnot, 2000 MT 77, 299 M 137, 999 P2d 303, 57 St. Rep. 338 (2000).

Applicability to Voidable Judgment: This rule has no applicability to a default judgment that is merely voidable. Sowerwine v. Sowerwine, 145 M 81, 399 P2d 233 (1965).

Premature Default Judgment Not Covered: This rule has no application to prematurely entered default judgments since it applies to void and not voidable judgments. Sowerwine v. Sowerwine, 145 M 81, 399 P2d 233 (1965).

No Application to Voidable Judgment: This rule does not apply to voidable judgments. Interstate Counseling Serv. v. Emeline, 144 M 409, 396 P2d 727 (1964).

Failure of Service Not Shown Upon Complaint: Where a decree of divorce against an insane husband was procured without personal service of summons and is therefore void for want of jurisdiction, there can be no relief after the expiration of the time limit fixed except by an action in equity to set aside the decree, as it is fair upon its face, and the defect of jurisdiction must be made to appear by evidence dehors the record. The defendant is not to be denied relief in equity because he did not proceed under the provision for setting aside a decree where no lack or want of diligence is imputed to him. State ex rel. Happel v. District Court, 38 M 166, 99 P 291 (1909), distinguished in Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937).

Judgment Void on Its Face: Though a judgment void on its face may be set aside on motion at any time, this may not be done where the judgment is fair on its face, the infirmity of which must be made to appear by evidence dehors the record. State ex rel. Happel v. District Court, 38 M 166, 99 P 291 (1909), distinguished in Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937).

PRIOR JUDGMENT REVERSED

Change in Governmental Immunity Law — Extraordinary Circumstance Warranting Reversal of Prior Judgment — Reasonable Time for Filing Claim for Relief: Although generally a change in decisional law is not a valid reason under which a prior judgment may be reversed pursuant to subsection (5) of this rule, extraordinary circumstances may warrant modification, under subsection (6) of this rule, of a final judgment. Legislative revision of 2-9-111, enacted in response to the decisions in Eccleston v. District Court, 240 M 44, 783 P2d 363 (1990), and Crowell v. School District No. 7, 247 M 38, 805 P2d 522 (1991), significantly changed the statute and modified the theories expressed in those immunity cases so as to constitute circumstances extraordinary enough to warrant reversal. This does not establish a general rule for reopening a final judgment merely because there has been a substantial change in statutory law upon which that judgment was based because only when extraordinary circumstances are found to exist may

subsection (6) of this rule be used to modify a final judgment. Further, the fact that plaintiffs' motion was filed 48 days after the Crowell decision was not so unreasonable as to make the motion untimely. The discretion of the Supreme Court to revisit a final judgment is flexible enough to allow reconsideration of individual case facts in the interests of justice. Koch v. Billings School District No. 2, 253 M 261, 833 P2d 181, 49 St. Rep. 517 (1992).

Military Pension Considered Marital Asset — Retroactive Modification of Decree Allowed: Six years after husband retired from the Air Force and began receiving a military pension, the husband and wife dissolved the marriage. At the time, Montana treated military pensions as a marital asset. Before entry of the final decree, however, the U.S. Supreme Court in McCarty ruled that federal law precluded state courts from dividing military pensions. As a result, the District Court ruled that the husband's pension was not a marital asset and awarded the wife $300 a month in maintenance. Passage of the Uniformed Services Former Spouses' Protection Act (USFSPA) allowed state courts to once again consider military pensions when making property distribution. Subsequently, the wife filed a petition under Rule 60(b)(5), M.R.Civ.P. (Title 25, ch. 20), to modify the dissolution decree, contending that the USFSPA should be applied retroactively to allow her a share of the husband's pension. The District Court denied the husband's motion to dismiss, entering a judgment awarding the wife one-half of the pension. On appeal, the Supreme Court affirmed the judgment, ruling that the USFSPA should be applied retroactively to modify dissolution decrees that were final after McCarty but before the USFSPA effective date. In re Marriage of Waters, 223 M 183, 724 P2d 726, 43 St. Rep. 1642 (1986).

Reversal of Prior Judgment — Not a Basis for Relief: Although Rule 60(b), Fed.R.Civ.P., authorizes relief from a judgment on the ground that the prior judgment upon which the present judgment is based has been overturned, the rule does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another unrelated proceeding. Libby Rod & Gun Club v. Moraski, 519 F. Supp. 643, 38 St. Rep. 1213 (D.C. Mont. 1981).

Vacation of Judgment Under Rule 60(b)(5) and (6): Based on the decision in Fiscus v. Beartooth Elec. Co-op, Inc., 180 M 434, 591 P2d 196 (1979), known as Fiscus II, the Supreme Court found that the District Court exceeded its scope of authority under Rule 60(b)(5) and (6), M.R.Civ.P., in vacating summary judgment in the instant case. The District Court vacated the judgment because Fiscus I (Fiscus v. Beartooth Elec. Co-op, Inc., 164 M 319, 522 P2d 87 (1974)) was overruled in Piper v. Lockwood Water Users Assoc., 175 M 242, 573 P2d 646 (1978). When a decisional law change occurs subsequent to final judgment in another case, that final judgment should not be altered. State ex rel Rhodes v. District Court, 183 M 394, 600 P2d 182 (1979). However, see Koch v. Billings School District No. 2, 253 M 261, 833 P2d 181, 49 St. Rep. 517 (1992), in which the existence of extraordinary circumstances created because of the substantive revision of statutory law was sufficient to warrant reversal of a final judgment under the "other reasons" rationale of subsection (6) of this rule.

Law of the Case: When a decisional law change occurs subsequent to final judgment in a particular case the "law of the case" is that final judgment should not be altered. Fiscus v. Beartooth Elec. Co-op, Inc., 180 M 434, 591 P2d 196 (1979), followed in In re Marriage of Scott, 283 M 169, 939 P2d 998, 54 St. Rep. 548 (1997). In re Marriage of Scott was followed in Hafner v. Conoco, Inc., 1999 MT 68, 293 M 542, 977 P2d 330, 56 St. Rep. 277 (1999).

TIME LIMITATIONS

Motion for Posttrial Relief Untimely — Posttrial Motion to Correct Clerical Mistakes Proper — Motion for Posttrial Relief Not Substitute for Appeal: Following notice of entry of judgment in a marriage dissolution trial, the husband had 10 days to file a motion under Rule 59, M.R.Civ.P., but missed the deadline by 2 days, so the motion was properly ruled untimely. The husband had 30 days to file a notice of appeal, but the untimely Rule 59 motion did not toll the time for appeal, and that time also expired. The decree became final, subject only to the husband's motion for relief under the various provisions of Rule 60, M.R.Civ.P. The District Court erred in not applying Rule 60(a), M.R.Civ.P., to correct clerical mistakes in the findings of facts. However, a Rule 60 motion may not be used as a substitute for appeal, so the husband's Rule 60 motion essentially seeking to set aside the decree based on insufficient evidence was properly denied. In re Marriage of Schoenthal, 2005 MT 24, 326 M 15, 106 P3d 1162 (2005).

Motion for Relief From Termination of Parental Rights Filed Two Years After Termination Untimely as Matter of Law: Both parents were charged in Idaho with sexual abuse crimes against their children, but the parents eluded authorities for several years. P.D.L. was born while the parents were fugitives. Both parents were eventually captured and convicted, and the father was incarcerated for a 17-year term in Idaho. Following service of a petition in prison, the

father's parental rights were terminated. More than 2 years later, the father filed a motion for relief from the termination order under this rule, but the motion was denied. On appeal, the Supreme Court noted the finality provision in 42-2-620, which attempts to provide finality to parental rights termination proceedings so that a child may be safely adopted without the threat of the adoption being set aside at some future date. The termination order was immune from collateral attack 6 months after it was entered, and the father's motion for relief filed more than 2 years later was untimely as a matter of law. In re P.D.L., 2004 MT 346, 324 M 327, 102 P3d 1225 (2004).

Failure to File Timely Reply to Counterclaim — Default Judgment Proper: The District Court directed plaintiff to respond to a counterclaim within 10 days. Plaintiff failed to comply within the designated time, so default judgment was entered against plaintiff, and plaintiff appealed on grounds that the default judgment should be set aside under this rule. The Supreme Court disagreed. As an attorney, plaintiff was sufficiently literate and intelligent to understand the document presented by opposing counsel and to respond accordingly. Any mistake complained of by plaintiff did not rise to a level warranting setting aside of the default judgment. Plaintiff did not meet the burden of proof under this rule to set aside the judgment and did not establish any abuse of discretion by the trial court, so the default judgment was affirmed. Tschida v. Rowe, 2003 MT 192, 316 M 503, 74 P3d 1043 (2003).

Alleged Newly Discovered Evidence That Could Have Been Produced at Trial — Motion for New Parental Rights Termination Trial Properly Denied: The District Court denied a petition to terminate a mother's parental rights and ordered her child returned to her within 30 days. The guardian ad litem appealed, contending that the judgment should be set aside based on newly discovered evidence. The guardian ad litem presented the alleged newly discovered evidence through affidavits, contending that the mother left her apartment in poor condition with empty beer cans, was evicted, was fired twice from her employment, was seen driving a stolen vehicle, and had continued ongoing communication with the child's father. The District Court noted that this was one of the hardest fought and most lengthy parental rights termination trials in the court's experience and found it extremely unlikely that the alleged newly discovered evidence could not with reasonable diligence have been discovered and produced at trial. The District Court weighed the affidavit information and did not act arbitrarily or abuse its discretion in denying the motion to set aside the judgment based on newly discovered evidence. The District Court was affirmed. In re B.B., 2001 MT 285, 307 M 379, 37 P3d 715 (2001).

Criteria for Intervention in Adoption Proceeding — Unfounded and Untimely Motion to Intervene Properly Denied: Couple A adopted a child through a judicial decree in the District Court of the Twenty-First Judicial District. Couple B also wanted to adopt the child and filed a motion, in the District Court of the Twelfth Judicial District where they lived, to intervene and set aside the final decree of adoption, despite the fact that some 6 months had passed since the final adoption decree was issued. Initially, neither District Court was aware of the competing adoption petitions. The Department of Public Health and Human Services had been reviewing both couples as potential adoptive resources at the same time and ultimately determined that because the child had formed a strong bond during placement with couple A for nearly 2 years, it would be in the child's best interests to be adopted by couple A. Couple B contended that the child was a member of their extended family and that the Department should have given them priority as adoptive parents. The Twenty-First District Court held that couple B had no standing to intervene as a matter of right pursuant to Rule 24(a), M.R.Civ.P., and that permissive intervention under Rule 24(b), M.R.Civ.P., was untimely and would undermine the purpose of adoption to the detriment of the child. Couple B's motion to set aside the final decree pursuant to this rule was also denied on grounds that as nonparties to couple A's adoption petition, couple B had no standing to make the motion and that, in any case, it was untimely because it was made more than 180 days after the final decree. Couple B appealed the denial of both motions, arguing first that they had a legal interest by virtue of the family placement preference in the Indian Child Welfare Act (ICWA) and legislative and Departmental policies favoring adoptive placement with extended family members. The Supreme Court noted that a mere claim of interest is insufficient to support intervention as a matter of right and that a party seeking intervention must make a prima facie showing of a direct, substantial, legally protectable interest in the proceedings. No such showing was made here because the child was not Indian and therefore not subject to the ICWA, nor did the relationship of second cousins meet the definition of extended family member. Couple B next argued that they should have been allowed to intervene under the permissive standard of Rule 24(b), M.R.Civ.P., because the competing adoption petitions had common issues of law and fact. Couple B contended that their delay should be excused by their reliance on misrepresentations made by the Department. The

Supreme Court agreed that the Department could have taken a more forthright approach and saved all the parties considerable time and expense, but couple B bore the responsibility for ensuring the timely filing of the motion to intervene. The Supreme Court noted that timeliness is a threshold issue when intervention is sought and that, although none of the factors are dispositive, most courts look to four factors in considering whether a motion to intervene is timely filed: (1) the length of time that the intervenor knew or should have known of its interest in the case before moving to intervene; (2) prejudice to the original parties, if intervention is granted, resulting from the intervenor's delay; (3) prejudice to the intervenor if the motion is denied; and (4) any unusual circumstances mitigating for or against a determination that the application is timely. The Supreme Court considered each factor in detail. Although the third factor weighed in favor of couple B, because denial of the motion to intervene effectively precluded any hope of their adoption of the child, the other factors weighed strongly against them. The District Court made a reasoned analysis when it determined that the motion to intervene was untimely and did not abuse its discretion in denying the motion. Last, because couple B did not address the threshold issues of this rule on appeal, the Supreme Court concluded that denial of the motion to set aside the final adoption decree on grounds of standing and timeliness was proper. In re Adoption of C.C.L.B., 2001 MT 66, 305 M 22, 22 P3d 646 (2001).

Fatally Tardy Request to Set Aside Default Judgment — Elements of Res Judicata Met: Pro se plaintiff filed to set aside a default judgment entered against him over 1 ½ years earlier. The District Court dismissed the motion on grounds of res judicata, noting that plaintiff did not proceed with diligence after being personally served, having ignored the service of the initial complaint, the personal service of defendants' notice of intent to enter default and default judgment, and service of the court's entry of judgment and writ of assistance. Plaintiff argued that as a pro se litigant, he should be accorded extra latitude. The Supreme Court noted that although pro se litigants may be given a certain amount of latitude, that latitude cannot be so wide as to prejudice the other party and that even pro se litigants are expected to adhere to procedural rules. Plaintiff's motion was fatally tardy. Citing Hollister v. Forsythe, 277 M 23, 918 P2d 665 (1996), the court found that the elements of res judicata existed because the parties were the same, the subject matter of the claim was the same, the issues were the same and related to the same subject matter, and the capacities of the persons were the same in reference to the subject matter and the issues. The District Court did not err in dismissing plaintiff's complaint pursuant to res judicata. Greenup v. Russell, 2000 MT 154, 300 M 136, 3 P3d 124, 57 St. Rep. 610 (2000).

No Limit to Number of Timely Motions: The plain language of this rule does not limit the number of motions that a party may make or prescribe the earliest date following judgment on which a motion may be filed. The only restriction and possible bar to a motion filed pursuant to subsection (3) of this rule is that it cannot be filed more than 60 days after service of notice of entry of judgment. In re Marriage of Gudmundson, 1998 MT 54, 288 M 70, 955 P2d 648, 55 St. Rep. 226 (1998).

Time Limitations — Begin to Run Upon Filing of Remittitur: On a subsequent appeal of a partial summary judgment ruling, the time deadline for the court to act on remittitur of the first appeal did not begin to run until the filing of remittitur on the first appeal. Kirchner v. W. Mont. Mental Health Center, 272 M 110, 899 P2d 1102, 52 St. Rep. 753 (1995).

Appeal of Grant of New Trial Made After Second Trial — Moot by Failure to Object or Timely Appeal: Following a trial on the distribution of marital property, wife requested and the District Court ordered a new trial. Husband waited until after the second trial to object to the order, contending that the court abused its discretion in granting a new trial because: (1) wife was incorrectly allowed to argue matters additional to those raised in the motion for a new trial; (2) the court did not rule on his motion to reconsider the order granting a new trial; and (3) the court did not state with particularity the reasons for granting a new trial. The Supreme Court held that husband's grounds for appeal must fail because he failed to object or bring an appeal in a timely fashion. The question of the propriety of the trial court's order is one that should have been considered earlier and was rendered moot by the fact that the second trial had already occurred. Husband's attempt to raise the issue for the first time on appeal was barred by the doctrine of laches. In re Marriage of Danelson, 253 M 310, 833 P2d 215, 49 St. Rep. 597 (1992).

Failure to Appeal Not Fatal — Court Discretion to Reverse Judgment in Light of Statutory Changes: Koch chose not to appeal an adverse District Court decision regarding governmental immunity based on the case law developed on that issue by the Supreme Court. More than 1 year later, following substantive legislative revision of statutory immunity law, Koch sought relief under this rule. Generally, failure to appeal for almost any reason is fatal to a motion to reopen judgment under this rule because if allowed, it would in essence make a motion under this rule a

substitute for appeal, which is an improper use of the motion. Even so, failure to appeal may not be fatal. Relief under this rule is not inflexibly withheld in a case in which an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law and in which there is a later clear and authoritative change in governing law. Therefore, in the present case, the existence of extraordinary circumstances created because of the substantive revision of statutory law was sufficient to warrant reversal of a final judgment under the "other reasons" rationale of subsection (6) of this rule. Having met the standards for relief under the rule, failure to appeal did not bar that relief. Koch v. Billings School District No. 2, 253 M 261, 833 P2d 181, 49 St. Rep. 517 (1992), following Polites v. U.S., 364 US 426, 5 L Ed 2d 173, 81 S Ct 202 (1960), and U.S. v. Wyle, 889 F2d 242 (9th Cir. 1989).

Confession of Judgment Not Set Aside: The defendants argued that the confession of judgment that allowed the plaintiff to attach their bank account should be set aside on the grounds that one of the defendants was under the influence of mind altering drugs at the time he agreed to the judgment. The Supreme Court held that the lower court was entitled to refuse to set aside the judgment because both parties had been represented by counsel at the time and more than 60 days had passed before the defendants had moved to have the judgment set aside. Mont. Deaconess Medical Center v. Doherty, 241 M 243, 786 P2d 669, 47 St. Rep. 267 (1990).

Relief From Judgment Denied — Newly Discovered Evidence Not Presented in Time: The plaintiffs' suit against a used car dealer for negligence in servicing the brakes on a truck they purchased was dismissed pursuant to a summary judgment motion. More than 12 months later, the plaintiffs made a motion for relief from the judgment on the basis of newly discovered evidence. The Supreme Court ruled that the motion could not be brought because it was not filed within the 60-day time limit required by this rule. Murnion v. Heberle Ford Co., 241 M 215, 786 P2d 653, 47 St. Rep. 219 (1990).

Court Failure to Rule Within Forty-Five Days on Motion to Set Aside or Amend — Loss of Jurisdiction Over That Issue: Subsequent to obtaining a decree of dissolution, the husband died intestate and his ex-wife moved to have the decree set aside. More than 45 days later, the District Court set aside the decree and also granted the ex-wife's motion to substitute as personal representative. The Supreme Court reversed, stating that a postjudgment motion not ruled on within 45 days is considered denied and at that time, the lower court lost its jurisdiction with respect to setting aside the decree. The court also held that the 45 days run from the time the motion to set aside or amend is filed and is not affected by when the notice of entry of judgment is filed. In re Marriage of Miller, 238 M 108, 776 P2d 1218, 46 St. Rep. 1128 (1989), followed in Bechhold v. Chacon, 248 M 111, 809 P2d 586, 48 St. Rep. 357 (1991), and in In re Marriage of McKinnon, 251 M 347, 825 P2d 551, 49 St. Rep. 69 (1992).

No Judicial Discretion to Alter Statute of Limitations: Plaintiffs' complaint was dismissed because it was not timely filed, missing the statute of limitations by 1 day. Plaintiffs moved for relief under Rule 60(b), M.R.Civ.P., because of mistake, inadvertence, surprise, or excusable neglect. The statute of limitations does not discriminate between a just and unjust claim. The statute represents legislative and public policy controlling the rights of potential litigants. A trial court does not have judicial discretion to alter, change, or lessen statutory limits for commencement of actions. Schaffer v. Champion Home Builders Co., 229 M 533, 747 P2d 872, 44 St. Rep. 2196 (1987).

Reasonable Time: Notice of entry of default judgment was mailed to wife on August 31, 1984. On September 14, 1984, wife filed her motion to set aside the default judgment. This was within a reasonable time as contemplated in this Rule, therefore the motion was timely filed. In re Marriage of Neneman, 217 M 155, 703 P2d 164, 42 St. Rep. 1095 (1985).

Motion Not Timely Filed — Intrinsic Fraud Not Grounds for Motion: Appellant asserted sex- or race-based discrimination when the University of Montana (now University of Montana-Missoula) failed to renew her teaching contract. At trial, the head of appellant's department testified that there were no funds available to renew appellant's contract. The District Court determined no unlawful discrimination had occurred. Subsequently, the head of the department pleaded guilty to misuse of federal funds granted to the University and diversion of such funds far in excess of appellant's salary. Appellant filed a motion under Rule 60, M.R.Civ.P. (Title 25, ch. 20), to vacate the judgment on the grounds of fraud. The District Court denied the motion, and the Supreme Court affirmed. The Supreme Court found the claim was time-barred under the rule because it was filed after the 60-day time limit. The claim was not allowed under the residual clause in Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), because the fraud fell short of what is legally required to vacate a final judgment. The Supreme Court found the misappropriation of funds did not materially and directly affect the outcome of the case and the false in-court testimony was intrinsic fraud upon the court, rather than extrinsic, and therefore

did not constitute sufficient grounds to vacate a judgment under the residual clause. Salway v. Arkava, 213 M 135, 695 P2d 1302, 42 St. Rep. 241 (1985), followed in Brown v. Small, 251 M 414, 825 P2d 1209, 49 St. Rep. 98 (1992).

Dismissal Under Statute of Limitations — Appeal Appropriate Relief: A complaint was dismissed because the applicable Statute of Limitations had run out. This rule could not be used to attack that dismissal. The appropriate avenue for relief is an appeal. Lussy v. Dye, 215 M 91, 695 P2d 465, 42 St. Rep. 205 (1985).

Action to Reopen and Modify Dissolution Decree After Sixty Days — Not Timely: The husband and wife were married in 1945. In 1975, the wife vanished and her whereabouts is unknown. In 1976, the husband filed for dissolution. The wife was served by publication. The court entered its decree but made no order with respect to distribution of property. In 1983, the husband started a quiet title action to jointly held property. Three months later, the daughter commenced an action in which her mother was determined to be presumed dead. The daughter was named personal representative of the mother's estate. As personal representative, the daughter filed a motion in the dissolution action to reopen and modify the decree regarding property disposition. The District Court refused to reopen the decree. On appeal, the Supreme Court pointed out that 40-1-105 makes the Rules of Civil Procedure applicable to all proceedings relating to marital dissolutions. Section 40-4-208 provides that the provisions of the decree relating to property disposition may not be revoked or modified by the court unless it finds conditions justifying the reopening of a judgment. The court held that even if the District Court failed in its mandatory duty to equitably apportion the property, the decree was final, and that under Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), the motion to reopen had to be brought within 60 days. Once the judgment was final, it was too late to raise issues of misrepresentation which could have been contested in the cause prior to entry of judgment. In re Marriage of Woolsey, 214 M 106, 692 P2d 451, 41 St. Rep. 2349 (1984).

No Basis to Reopen Dissolution Decree: The appellant did not claim the existence of unconscionability, fraud, or any other inequitable situation that would give a court a legal basis upon which to reopen a dissolution decree. She attempted to enhance enforcement of the judgment that incorporated the parties' stipulations as to the property division by making a motion to modify. She was precluded by statutory time limits and by the fact that she had no legal basis to compel a court to reopen the judgment. Since no conditions existed that would justify reopening the judgment, the District Court was not required to enter findings of fact. Keirle v. Keirle, 210 M 214, 681 P2d 703, 41 St. Rep. 1016 (1984).

Timeliness of Motion — Clerical Errors to Be Corrected at Any Time: The parties' marriage was dissolved on April 14, 1980, and a portion of the decree provided that the wife was to receive monthly payments equal to one-half the value of stock. On April 23, 1980, the wife moved under Rule 52(b), M.R.Civ.P., to amend the findings and judgment to correct the valuation of the stock. The motion was properly noticed for hearing under Rule 59(g), M.R.Civ.P. On May 1, 1980, the judge continued the hearing for 30 days upon written stipulation of counsel. The hearing was held on June 5, 1980, but no order was entered. The wife moved to revalue the stock again on January 22, 1981. The court held a hearing on May 4, 1981, and in an order dated October 7, 1981, denied her request. On appeal the wife contended that her January 22 motion should be considered a motion under Rule 60, M.R.Civ.P., on the grounds of newly discovered evidence. Montana's Rule 60(b) requires the motion to be within 60 days following the entry of judgment. However, it can be considered if the relief could have been granted because the substance of the motion brought it under Rule 60(b)(6), M.R.Civ.P. This was foreclosed here by the District Court ruling on the motion on its merits. The Supreme Court did resolve an apparent conflict between Rule 60(a) and Rule 60(c), M.R.Civ.P., by holding that when a clerical mistake occurs in a judgment, order, or other part of a court record and the error is admitted or can be corrected or clarified without inequity or prejudice to a party, the error can be corrected by the court at any time, either nunc pro tunc or by a new order. In re Marriage of Winn, 200 M 402, 651 P2d 51, 39 St. Rep. 1831 (1982).

Motion Before Judgment: A motion for relief from judgment made before judgment is premature and may be disregarded. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Untimely Motion for New Trial — Equivalent to Motion for Relief From Judgment: A motion for new trial under Rule 59(b), M.R.Civ.P., that is not timely may be considered as a motion under this rule when it states the proper grounds for relief. Nomenclature is unimportant. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Intrinsic Fraud Not Grounds for Motion — Motion Not Timely Filed: Appellant was personally served with a petition for dissolution of marriage and a property settlement.

Appellant failed to answer or otherwise appear, and a default was entered. One and one-half years after the default was entered, appellant moved to have the default set aside upon the ground of fraud. Appellant argued that the value of certain property was exaggerated by his spouse in her testimony. The court held that if fraud existed it was intrinsic fraud, and intrinsic fraud is not grounds for reopening a decree or judgment. In addition, the motion to reopen the decree 1 ½ years after the decree had been entered is not timely as a 60-day motion under Rule 60(b), M.R.Civ.P. In re the Marriage of Lance v. Lance, 195 M 176, 635 P2d 571, 38 St. Rep. 1772 (1981), followed in Falcon v. Faulkner, 273 M 327, 903 P2d 197, 52 St. Rep. 1011 (1995), and In re Marriage of Hopper, 1999 MT 310, 297 M 225, 991 P2d 960, 56 St. Rep. 1247 (1999).

Timeliness of Motion to Set Aside Default Judgment: A default judgment was entered against defendant for wrongful taking of plaintiffs' inheritance. Defendant was personally served with a copy of the judgment but did not move the District Court to set aside the judgment until 4 months later. Defendant's motion was properly denied by the District Court. Schneider v. Ostwald, 190 M 29, 617 P2d 1293, 37 St. Rep. 1728 (1980).

Request for Modification of Property Settlement — Determination of "Reasonable Time" for Motion: At the conclusion of a hearing on the enforcement of his divorce settlement agreement several months after his divorce, the former husband moved to amend the findings of deficiency of the agreement or, in the alternative, to grant a new trial. The motion was denied and the former husband appealed. Because the former wife's request for additional property was made orally to the court over 6 months after entry of the legal separation decree and approval of the written agreement, the former husband argued on appeal that the request was barred by Rule 60(b), M.R.Civ.P. The Supreme Court said that this may have been a crucial issue at the trial court but that the husband's failure to object makes timeliness a nonjudicable issue on appeal. Without an objection there need be no ruling, and the Supreme Court concluded that without a ruling the wife made her request within the "reasonable time" required by Rule 60(b), M.R.Civ.P. Harris v. Harris, 189 M 509, 616 P2d 1099, 37 St. Rep. 1696 (1980).

Dissolution of Marriage — Fraud as Ground for Relief From Property Disposition: Under this rule and 40-4-208(1)(b)(ii), the District Court has jurisdiction to determine whether fraud has been committed upon the court. The power of the court to set aside a judgment on the basis of fraud is inherent and independent of statute, and this rule's 60-day time limitation does not apply. However, the District Court properly denied the motion as untimely because after 60 days the issue cannot be raised by motion but must be raised in an independent action for relief and because the 60-day limit applied in any case since the court found no fraud had been committed. The wife's failure to disclose her recently secured employment was not fraud since it was not an intentional concealment or misrepresentation and since the judgment was based on an agreement between the parties. Hopper v. Hopper, 183 M 543, 601 P2d 29 (1979).

Reasonable Time: County Commissioners' motion to dismiss peremptory Writ of Mandate was made within a reasonable time where it was made within the time allowed for an appeal and promptly after Commissioners learned that statutes controlling dispute had been amended. Snyder v. McKinley, 164 M 309, 521 P2d 919 (1974).

Fraudulently Obtained Judgments — Time Limitation Inapplicable: Time within which trial court could set aside judgment on basis of fraud upon the court depended upon equity and discretion, not time limitation of this rule. In re Bad Yellow Hair, 162 M 107, 509 P2d 9 (1973), overruled in part in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Judgment Obtained by Fraud — Inherent Powers of Court: Court of equity has inherent power, independent of statute, to vacate judgment obtained by fraud in violation of last sentence of Rule 60(b) even though party seeking relief was not necessary party in original action, and motion to vacate was not made within liberal time limits prescribed by rule but was nevertheless timely, considering that aggrieved party engaged attorney to file motion to vacate within 30 days after discovery of existence of judgment. Selway v. Burns, 150 M 1, 429 P2d 640 (1967), distinguished in Kamp Implement Co. v. Amsterdam Lumber Co., 166 M 435, 533 P2d 1072 (1975).

Expiration of Time Limit — Diligence of No Avail: The District Court is without power to relieve a party from his default after the expiration of the period mentioned in the statute even on a showing of due diligence. State ex rel. Hahn v. District Court, 83 M 400, 272 P 525 (1928), overruling State ex rel. Kolbow v. District Court, 38 M 415, 100 P 207 (1909).

Failure of Service — Time for Motion: The 12 months' period (reduced by 1965 amendment to 180 days) after rendition of judgment within which a defaulting party not personally served with summons may be permitted to answer to the merits begins to run from the date of such rendition, and the limitation applies to the time when the motion is made and not to when it is heard. State ex rel. Hahn v. District Court, 83 M 400, 272 P 525 (1928).

No Jurisdiction After Expiration of Time Limit: After the expiration of the time limit fixed in the statute, the power of the court over the judgment absolutely ceases and it is without jurisdiction to vacate or modify it. Smith v. McCormick, 52 M 324, 157 P 1010 (1916); State ex rel. Smotherman v. District Court, 51 M 495, 153 P 1019 (1915); State ex rel. Happel v. District Court, 38 M 166, 99 P 291 (1909).

Parties — Application of Time Limit: The period of 6 months mentioned in section 93-3905, R.C.M. 1947 (superseded by Rule 60, M.R.Civ.P.), within which a motion to vacate a judgment must be presented, applied in terms only to the case of one who seeks relief from the consequences of his own mistake, inadvertence, surprise, or excusable neglect. It cannot apply to one who has never been served with summons, and who has not appeared, but whose default has been entered through the the inadvertence of someone else. Morehouse v. Bynum, 51 M 289, 152 P 477 (1915).

INDEPENDENT ACTION

Entry of Judgment by Court of General Jurisdiction in Foreclosure Action Affirmed — Collateral Attack Precluded: Glickman contended that the District Court acted outside or in excess of its jurisdiction by decreeing that the purchaser of Glickman's property at a Sheriff's foreclosure sale be "let into possession". A judgment entered by a court lacking subject matter jurisdiction is subject to attack at any time. A collateral attack on a judgment is possible only if the judgment is void on its face and if it appears affirmatively from the judgment roll that the court did not have jurisdiction or committed an act in excess of jurisdiction. Absent any authority that a court of general jurisdiction may not enter a judgment in a foreclosure sale, the Supreme Court held that the District Court did not act outside or in excess of its jurisdiction by decreeing that the purchaser of the property at a Sheriff's foreclosure sale be "let into possession". Further, Glickman's failure to allege any statutory causes of action in his original petition precluded him from bringing an independent action under the residual clause of this rule. Glickman v. Whitefish Credit Union Ass'n, 1998 MT 8, 287 M 161, 951 P2d 1388, 55 St. Rep. 27 (1998).

Allegations Plaintiff and Its Lawyers Engaged in Perjury, Misrepresentations, Deception, Subversion of Justice, and Fictitious Theories of the Case — No Extrinsic Fraud: For purposes of relief from a judgment through an independent equitable action under this rule, extrinsic fraud is fraud that prevented the unsuccessful party from presenting the party's case, is collateral to the matters tried by the court, and is not fraud in the matters on which the judgment was rendered. Perjury and false or fraudulent allegations used in obtaining a judgment are not extrinsic fraud. Appellants' claims that the bank and lawyers conspired to deceive the court and subvert justice, misrepresented facts, committed perjury, and used forceful arguments and artful pleading to develop a fictitious theory of the case that misled the court did not allege extrinsic fraud. Moreover, the allegations did not constitute fraud upon the court. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993).

Independent Action to Set Marital Property Disposition Aside — Failure of Fraud and Notice Claims: Wife seeking to have court set aside that part of decree of dissolution of marriage that distributed the marital property elected not to file a timely motion for relief under Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), and instead elected to file an independent action for relief as allowed by the last part of Rule 60(b). Her action was properly dismissed insofar as it sought relief on grounds of mistake, inadvertence, excusable neglect, and fraud on herself, which could be the basis for relief only under a timely Rule 60(b) motion. Her independent action claim of no actual personal notification of the divorce proceeding must fail, since she signed the response to the petition (though perhaps not completely sober at the time), indicating actual personal notice. An independent action is not a remedy for inadvertence or oversight by the party losing the original action. Her independent action claim grounded in fraud on the court must fail because she failed to plead with particularity all the elements of the fraud. Her mere suspicion of fraud was not sufficient to sustain her action. The postnuptial agreement she signed some 3 years before her husband filed for a divorce proceeding at which she was not represented by an attorney must stand, since she signed a response to the petition that affirmed the fairness and terms of the agreement and did not appear at the final hearing at which the court approved the agreement with a change favoring her. In re Marriage of Hoyt, 215 M 449, 698 P2d 418, 42 St. Rep. 532 (1985).

Dissolution of Marriage — Fraud as Ground for Relief From Property Disposition: Under this rule and 40-4-208(1)(b)(ii), the District Court has jurisdiction to determine whether fraud has been committed upon the court. The power of the court to set aside a judgment on the basis of fraud is inherent and independent of statute, and this rule's 60-day time limitation does not apply. However, the District Court properly denied the motion as untimely because after 60 days

the issue cannot be raised by motion but must be raised in an independent action for relief and because the 60-day limit applied in any case since the court found no fraud had been committed. The wife's failure to disclose her recently secured employment was not fraud since it was not an intentional concealment or misrepresentation and since the judgment was based on an agreement between the parties. Hopper v. Hopper, 183 M 543, 601 P2d 29 (1979).

Failure to File in Time — Separate Action Not Affected: Defendant's motion to vacate default judgment was properly denied under this rule where the motion was not filed until more than 480 days after the entry of judgment despite fact that defendant was served with neither summons nor complaint. Filing of motion to vacate default judgment under this rule did not constitute a selection of remedies and movant, after denial of motion, was still free to bring an independent action to vacate the judgment for failure to receive service which action would not be subject to the 180-day limitation contained in this rule. Thomas v. Savage, 161 M 192, 505 P2d 118 (1973).

Independent Action — Time Limit to Vacate Exceeded: An independent action is available to vacate judgment for failure to serve process because the 180-day limitation is not applicable to such an action. Thomas v. Savage, 161 M 192, 505 P2d 118 (1973).

Independent Actions — Not Subject to Time Limitations: An independent action to set aside a default judgment is not subject to the time limitation for motions to set aside defaults in the original action. Elliston Lime Co. v. Prentice Lumber Co., 157 M 64, 483 P2d 264 (1971).

Extrinsic Fraud — Remedy: A court of general jurisdiction has the right, entirely independent of statute, to grant relief against a judgment obtained by extrinsic fraud, and may grant that relief either on motion in the original cause or upon a separate equity suit. Cure v. Southwick, 137 M 1, 349 P2d 575 (1960).

Divorce by Fraud — Remedy: Where a divorce judgment was taken against defendant through plaintiff's extrinsic fraud on both the defendant and the court, the court could grant relief at any time either on motion in original suit or in a separate equity suit. Gillen v. Gillen, 117 M 496, 159 P2d 511 (1945), distinguished in Deich v. Deich, 136 M 566, 323 P2d 35 (1958).

ANY OTHER REASON JUSTIFYING RELIEF

Error to Dismiss Action in Light of Evidence That Plaintiff Did Not Receive Motion: City Judge Dorrington cited attorney Fennessy for contempt of court for allegedly making false statements to the court and for a lack of responsibility in the performance of duties and lack of respect for the court. Fennessy filed a motion in District Court to stay the contempt proceeding in City Court, contending that Dorrington did not have jurisdiction to issue the contempt citation and was prohibited from acting as the complaining witness, prosecutor, and judge for the contempt proceedings. Dorrington then filed a motion to dismiss and 3 days later moved to continue the hearing and quash subpoenas. In his response to the motion to continue, Fennessy stated that if Dorrington had filed a motion to dismiss, Fennessy had not received the motion thus he had no opportunity to review it. Nevertheless, that same day the District Court granted the motion to dismiss. Fennessy moved to reconsider and included affidavits from his attorney and staff stating that a motion to dismiss had never been received, but the motion to reconsider was denied, so Fennessy appealed. The Supreme Court reversed. A motion to dismiss is viewed with disfavor and rarely granted, and dismissal of an action is justified only when the allegations of a complaint clearly demonstrate that plaintiff does not have a claim. A court may not dismiss a claim unless it appears that plaintiff is not entitled to relief under any set of facts that could be proved in support of a claim. In this case, the District Court failed to follow Rule 2, M.U.D.C.R. (Title 25, ch. 19), by dismissing Fennessy's motion before the 10-day time limit to respond had expired and abused its discretion by refusing to reconsider its order of dismissal even though there was evidence that Fennessy had not received the motion to dismiss and thus was unable to respond to or review it. Fennessy v. Dorrington, 2001 MT 204, 306 M 307, 32 P3d 1250 (2001).

Failure to Provide Evidence of Extraordinary Circumstances to Warrant Setting Aside Default Judgment: Bahm brought an action concerning a dispute over the possession of real estate, and default judgment was entered against the Southworths; however, that judgment was set aside, and an expedited discovery and trial schedule was set. Following the scheduling conference, Bahm properly served written discovery requests and noticed the Southworths' depositions, but the Southworths did not appear for their depositions and failed to respond to the discovery requests, having left Montana for 45 days and neglecting to maintain contact with their attorney. The District Court again entered default judgment against the Southworths, who filed a pro se motion to set aside the default judgment. The District Court declined to rule on the motion, clarifying for the Southworths that no pro se filings would be considered while they had counsel. Nearly 7 months later, the Southworths again moved to set aside the default judgment

through a different attorney. That motion was denied on grounds that more than 60 days had passed since entry of judgment and because the record contained no evidence of extraordinary circumstances that would allow application of the more expansive "reasonable time" provision in subsection (6) of this rule. The Southworths appealed. Under Karlen v. Evans, 276 M 181, 915 P2d 232 (1996), relief is available under subsection (6) of this rule when a movant demonstrates each of the following elements: (1) there were extraordinary circumstances, including gross neglect or actual misconduct by an attorney; (2) the movant acted to set aside the judgment within a reasonable time; and (3) the movant was blameless. In this case, the Southworths failed to provide any evidence of extraordinary circumstances, relying instead on unsworn allegations and information contained in an affidavit that was not submitted to the court. Further, the Southworths had the opportunity to rectify any alleged attorney mistake or negligence by filing a timely motion to set aside the judgment, yet when they were told that their pro se motion would not be accepted, they did not file a timely motion, but rather waited another 5 months to file a new motion to set aside, which was not considered a reasonable time. Lastly, their absence from the state following the scheduling conference and their failure to appear for their depositions and to respond to discovery requests showed that they were neither diligent nor blameless. Thus, the order refusing to set aside the default judgment was affirmed. Bahm v. Southworth, 2000 MT 244, 301 M 434, 10 P3d 99, 57 St. Rep. 1030 (2000).

Denial of Contractual Liability by Both Defendant Entities — Claims Put in Issue — Burden of Proof — Proposed Findings to Be Based Upon Evidence — No Evidence of Intent to Mislead as Basis for Relief From Judgment: Wright Oil sued Goodrich for petroleum products allegedly delivered but not paid for. Goodrich denied liability, claiming that the products were for the use of West Yellowstone Snowmobile Rentals, Inc. (WYSR), which owned Westgate Texaco, operated by Goodrich. Wright Oil amended its complaint to include WYSR, and after a bench trial, the District Court held against Goodrich because no evidence had been presented proving a contract between WYSR and Wright Oil. Wright Oil then filed a motion for relief from judgment under subsection (6) of this rule, seeking relief from the District Court's failure to hold against WYSR. On the basis of evidence not presented at trial, the District Court granted the motion and ordered an evidentiary hearing to reopen the case against WYSR regarding WYSR's contractual liability to Wright Oil. WYSR appealed. The Supreme Court held that the District Court incorrectly granted the motion because the circumstances of the District Court's failure to hold WYSR liable for the debt to Wright Oil were not so extraordinary as to warrant relief from judgment under subsection (6) of this rule. The Supreme Court noted that WYSR's denial of its liability put the allegation of its contractual liability at issue under Rule 8(b), M.R.Civ.P., and under 26-1-401 and 26-1-402, Wright Oil had the burden of going forward with the evidence of WYSR's contractual liability but failed to present evidence of a contractual relationship between WYSR and Wright Oil. The fact that Goodrich alleged that WYSR was liable for the debt could not, the Supreme Court held, be taken as an admission by WYSR that it was liable for the amounts due. Further, the Supreme Court noted that Wright Oil should not have been surprised by WYSR's proposed findings of fact that it was not liable for the debt because under Rule 52(a), M.R.Civ.P., a party's proposed findings of fact must be supported by the evidence, and Wright Oil failed to produce that evidence of liability. Wright Oil & Tire Co. v. Goodrich, 284 M 6, 942 P2d 128, 54 St. Rep. 811 (1997).

Disqualification in Malpractice Action of Judge Who Represented Plaintiff in Underlying Matter: A judge who had represented plaintiff on the underlying guardianship accounting matter prior to the time that the attorney being sued for malpractice began to represent plaintiff as to the accounting should have disqualified himself from presiding over the malpractice action. A judge may preside over a matter involving a former client if the action over which the judge presides involves a matter different from the one as to which the judge represented the client. In this case, the malpractice action is technically a separate action from the underlying accounting proceeding; however, the malpractice action arose from the legal representation in the accounting proceeding. Default judgment for plaintiff for failure of attorney to plead or in any manner appear was reversed and remanded for a ruling, before another judge, on attorney's motion for relief from judgment for excusable neglect. Shultz v. Hooks, 263 M 234, 867 P2d 1110, 51 St. Rep. 34 (1994).

Paternity Issues Not Extraordinary — Relief Not Justified: Husband advanced several arguments relating to the issue of paternity that he sought to characterize as other reasons justifying relief under this rule. He argued that the case was not ready for litigation because neither wife nor child had submitted blood for paternity testing. The argument was without merit because testing was never ordered for them. He contended that the wife amended her petition by conceding the paternity issue on the date of hearing but that he was not allowed to

respond to the amendment. However, the concession neither added nor removed a claim before the court and was in accord with husband's position, thus providing no basis for relief. He argued that because he was the prevailing party on the paternity issue, the court erred by failing to require the wife to reimburse one-half of his expense in obtaining the blood test pursuant to court order. The issue may have been appropriately raised at the hearing or in proposed findings and conclusions, but did not constitute a circumstance justifying relief from the decree. Absent the extraordinary circumstances necessary to trigger relief under subsection (6) of this rule, relief from judgment was denied. In re Marriage of Miller, 260 M 15, 858 P2d 338, 50 St. Rep. 912 (1993).

Motion Made in Reasonable Time When Other Basis for Relief Time-Barred by Intentional Act of Party's Attorney — Motion Granted: Maulding obtained a default judgment for $81,306.31 against Hardman for injuries received in a car accident. Maulding's attorney wrote Hardman's insurance company 60 days after entry of judgment, offering to settle the case for $75,000 if paid immediately. Four days later the insurance company's counsel moved to set aside the default. Noting that the timing of Maulding's attorney's letter prevented Hardman from moving for relief under other subsections of this rule, the Supreme Court held that the motion under subsection (6) to set aside the default was made within a reasonable time and with due diligence under these circumstances. Citing the manner in which Maulding's attorney handled the case and the manner in which damages were established and awarded, the Supreme Court also held that the facts of the case justified relief from the default under subsection (6). Maulding v. Hardman, 257 M 18, 847 P2d 292, 50 St. Rep. 141 (1993), distinguished in Wright Oil & Tire Co. v. Goodrich, 284 M 6, 942 P2d 128, 54 St. Rep. 811 (1997).

Reason for Relief Mutually Exclusive — Power of Court to Determine Proper Subsection: Maulding obtained a default judgment against Hardman, which Hardman moved to set aside, citing subsections (1), (3), and (6) of this rule. Citing Libby Rod & Gun Club v. Moraski, 519 F. Supp. 643 (D.C. Mont. 1981), Hardman argued that because relief under subsections (1) and (3) was time-barred, relief could not be had under subsection (6) either. Relying upon Wright and Miller, the Supreme Court held that a party is precluded from relief under subsection (6) when the same facts or circumstances bring the case under one of the other five subsections. Citing Koch v. Billings School District No. 2, 253 M 261, 833 P2d 181, 49 St. Rep. 517 (1992), the Supreme Court held that the facts that relief under subsections (1) and (3) was time-barred and that Hardman did not choose between subsections (1) and (3) or subsection (6) were not fatal to the motion because the District Court and the Supreme Court could determine which of the subsections was proper in this case. Maulding v. Hardman, 257 M 18, 847 P2d 292, 50 St. Rep. 141 (1993).

Stipulated Modification Limitation — Events Following Dissolution Not Justification for Reopening Judgment: The parties signed a property settlement agreement that included a modification limitation authorized under 40-4-201 and that required the agreement of both parties for modification. Wife contended that several events substantially altered the valuation of the marital estate, qualifying her for relief under subsection (6) of this rule, including: (1) the forgiveness of a substantial debt owed to husband's parents, knowledge of which was allegedly withheld from wife during settlement negotiations; (2) gifts of stock interests made to husband by his parents after dissolution; (3) the diagnosis of cancer in wife's father and his pending divorce, which precluded his financial help to her; and (4) action by her former attorney for unpaid fees. Under the rationale of Koch v. Billings School District No. 2, 253 M 261, 833 P2d 181, 49 St. Rep. 517 (1992), these events did not constitute extraordinary circumstances sufficient to justify reopening the judgment. In re Marriage of Hamilton, 254 M 31, 835 P2d 702, 49 St. Rep. 604 (1992).

Reopening of Dissolution Decree Without Finding of Unconscionability — Reversible Error: A dissolution decree found that although husband's military pension was not included in a separation agreement, it was included in the general terminology of the agreement. The District Court applied subsection (6) of this rule in granting wife's motion for reconsideration because wife had been advised by counsel that she had a vested interest in the pension and that mention of the pension was therefore not required. The District Court found that the lack of mention of the pension was intentional and did not constitute a waiver or relinquishment of the pension by wife. After reopening the decree, the court granted wife 50% of the pension and made further modifications in property disposition. On appeal, the Supreme Court applied 40-4-201(3), which governs separation agreements, in stating that the standard that justifies reopening the judgment is unconscionability. As in Patzer v. Patzer, 243 M 34, 792 P2d 1101 (1990), absent facts or allegations by wife that the agreement was unconscionable, reopening the decree

constituted reversible error. In re Marriage of Laskey, 252 M 369, 829 P2d 935, 49 St. Rep. 322 (1992).

Unsigned Affidavit Not Basis for Relief From Default Judgment: After a default judgment was entered against defendant property management firm for conversion of plaintiffs' rentals, one of the defendants filed an unsigned affidavit with the District Court, alleging that defendants were Canadian citizens unfamiliar with Montana laws, that they were representing themselves pro se, that they in fact did file an answer, and other factual allegations. The Supreme Court held that the facts alleged were not established by an unsigned affidavit and, citing Gergen v. Pitsch, 194 M 70, 634 P2d 652 (1981), concluded that defendants were both intelligent and literate and could not have so misunderstood the proceedings against them as to warrant setting the judgment aside. The court, citing Schmidt v. Jomac, Inc., 196 M 323, 639 P2d 517 (1982), further held that the default judgment should not be set aside for failure of defendants to receive notice of the entry of the default judgment because notice was not required to be sent by the Clerk of the District Court. Bd. of Directors of Edelweiss Owners' Ass'n v. McIntosh, 251 M 144, 822 P2d 1080, 48 St. Rep. 1131 (1991).

Default Dissolution Set Aside: The wife was entitled to have the default judgment set aside because of the entirety of the circumstances of the case. After her second attorney withdrew, the court fixed September 11 as the next hearing date. However, pursuant to 37-61-405, the husband's counsel gave notice for her to appoint other counsel or appear in person on August 6, a date of no significance. When the wife did not appear on that date the husband filed a motion for default judgment, which was granted by the court on August 14 without a hearing. No copy of the application was mailed to the wife, and she did not respond. Taking all the facts into consideration, the circumstances justified setting aside the default judgment. In re Marriage of Neneman, 217 M 155, 703 P2d 164, 42 St. Rep. 1095 (1985).

Physically Disabled Defendant — Default Divorce Set Aside: The plaintiff obtained a default divorce against his wife of over 30 years and was awarded the ownership of the family farm. It was error for the District Court to refuse to set aside the default judgment where there was medical evidence that the wife was totally and permanently physically disabled by multiple sclerosis and was confined to a nursing home, and where there was no evidence that she made a knowing and voluntary relinquishment of her interest in the family farm. Tesch v. Tesch, 199 M 240, 648 P2d 293, 39 St. Rep. 1318 (1982).

Incompetent Counsel: Appellant moved for relief from judgment on the grounds that his former attorney was suffering from severe emotional problems during the trial. Subsection (6), not subsection (1), is broad enough to permit relief when personal problems of counsel cause him to grossly neglect a case. Equity requires that a hearing be held to determine the matter. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Vacation of Judgment Under Rule 60(b)(5) and (6): Based on the decision in Fiscus v. Beartooth Elec. Co-op, Inc., 180 M 434, 591 P2d 196 (1979), known as Fiscus II, the Supreme Court found that the District Court exceeded its scope of authority under Rule 60(b)(5) and (6), M.R.Civ.P., in vacating summary judgment in the instant case. The District Court vacated the Judgment because Fiscus I (Fiscus v. Beartooth Elec. Co-op, Inc., 164 M 319, 522 P2d 87 (1974)) was overruled in Piper v. Lockwood Water Users Assoc., 175 M 242, 573 P2d 646 (1978). When a decisional law change occurs subsequent to final judgment in another case, that final judgment should not be altered. State ex rel Rhodes v. District Court, 183 M 394, 600 P2d 182 (1979).

EQUITABLE RELIEF

No Statutory Authority for Setting Aside Workers' Compensation Court Judgment — Equitable Relief: Although under some circumstances the Workers' Compensation Court may have inherent equitable power to set aside its judgment, as in cases under this rule, requiring equitable relief because of extrinsic fraud, in a case in which findings established at most intrinsic fraud, it was error for the court to set aside its judgment based on a petition filed more than 60 days after it was entered. The Supreme Court further declined to apply the civil procedure in 25-11-102 to an untimely motion to set aside a judgment based on newly discovered evidence in a workers' compensation case. St. Comp. Ins. Fund v. Chapman, 267 M 484, 885 P2d 407, 51 St. Rep. 1070 (1994).

Allegations Plaintiff and Its Lawyers Engaged in Perjury, Misrepresentations, Deception, Subversion of Justice, and Fictitious Theories of the Case — No Extrinsic Fraud: For purposes of relief from a judgment through an independent equitable action under this rule, extrinsic fraud is fraud that prevented the unsuccessful party from presenting the party's case, is collateral to the matters tried by the court, and is not fraud in the matters on which the judgment was rendered. Perjury and false or fraudulent allegations used in obtaining a judgment are not

extrinsic fraud. Appellants' claims that the bank and lawyers conspired to deceive the court and subvert justice, misrepresented facts, committed perjury, and used forceful arguments and artful pleading to develop a fictitious theory of the case that misled the court did not allege extrinsic fraud. Moreover, the allegations did not constitute fraud upon the court. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993).

Prospective Application Held Equitable: The portion of Rule 60(b), Fed.R.Civ.P., that states reversal may be based on the fact that it is no longer equitable that a judgment should have prospective application assumes that the propriety of the injunction as issued has passed beyond debate and requires some change in conditions that make continued enforcement inequitable. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions is required for relief. Defendant's claim that plaintiffs would not have standing if their case were to be brought after the judgment does not satisfy these requirements. Libby Rod & Gun Club v. Moraski, 519 F. Supp. 643, 38 St. Rep. 1213 (D.C. Mont. 1981).

Vacation of Judgment Under Rule 60(b)(5) and (6): Based on the decision in Fiscus v. Beartooth Elec. Co-op, Inc., 180 M 434, 591 P2d 196 (1979), known as Fiscus II, the Supreme Court found that the District Court exceeded its scope of authority under Rule 60(b)(5) and (6), M.R.Civ.P., in vacating summary judgment in the instant case. The District Court vacated the Judgment because Fiscus I (Fiscus v. Beartooth Elec. Co-op, Inc., 164 M 319, 522 P2d 87 (1974)) was overruled in Piper v. Lockwood Water Users Assoc., 175 M 242, 573 P2d 646 (1978). When a decisional law change occurs subsequent to final judgment in another case, that final judgment should not be altered. State ex rel Rhodes v. District Court, 183 M 394, 600 P2d 182 (1979).

Fraudulently Obtained Judgments — Time Limitation Inapplicable: Time within which trial court could set aside judgment on basis of fraud upon the court depended upon equity and discretion, not time limitation of this rule. In re Bad Yellow Hair, 162 M 107, 509 P2d 9 (1973), overruled in part in In re Marriage of Miller, 273 M 286, 902 P2d 1019, 52 St. Rep. 977 (1995).

Judgment Obtained by Fraud — Inherent Powers of Court: Court of equity has inherent power, independent of statute, to vacate judgment obtained by fraud in violation of last sentence of Rule 60(b) even though party seeking relief was not necessary party in original action, and motion to vacate was not made within liberal time limits prescribed by rule but was nevertheless timely, considering that aggrieved party engaged attorney to file motion to vacate within 30 days after discovery of existence of judgment. Selway v. Burns, 150 M 1, 429 P2d 640 (1967), distinguished in Kamp Implement Co. v. Amsterdam Lumber Co., 166 M 435, 533 P2d 1072 (1975).

Extrinsic Fraud — Remedy: A court of general jurisdiction has the right, entirely independent of statute, to grant relief against a judgment obtained by extrinsic fraud, and may grant that relief either on motion in the original cause or upon a separate equity suit. Cure v. Southwick, 137 M 1, 349 P2d 575 (1960).

Divorce by Fraud — Remedy: Where a divorce judgment was taken against defendant through plaintiff's extrinsic fraud on both the defendant and the court, the court could grant relief at any time either on motion in original suit or in a separate equity suit. Gillen v. Gillen, 117 M 496, 159 P2d 511 (1945), distinguished in Deich v. Deich, 136 M 566, 323 P2d 35 (1958).

Remedy for Fraud — Equitable Relief: Where fraud entered into the rendition of a judgment or it was brought about by the misconduct of the one in whose favor it was rendered, or, though fair on its face, there was a want of jurisdiction, or the statutory remedy for setting it aside is inadequate, or the aggrieved party has been deprived of his legal remedy without any fault of his own, equity will assume jurisdiction and set it aside, under such circumstances the statutory remedy being considered cumulative or concurrent. Meyer v. Lemley, 86 M 83, 282 P 268 (1929).

Law Review Articles

Montana Supreme Court Survey, Williams, 45 Mont. L. Rev. 335 (1984).

Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 323 (1983).

Collateral References

Judgment *key* 343, 362 through 379, 386.

49 C.J.S. Judgments §§266 through 281, 288.

47 Am. Jur. 2d Judgments §§777 through 785.

Fraud as to death of insured as extrinsic or intrinsic so as to affect right of life insurer to relief from judgment compelling payment under policy. 59 ALR 2d 1108.

Lack of authority of attorney to dismiss or otherwise terminate action as ground for relief from judgment. 56 ALR 2d 1299.

Right of successful party to have judgment in his favor vacated on grounds of mistake, inadvertence, excusable neglect, or the like. 40 ALR 2d 1127.

Motion to vacate judgment or order as constituting general appearance. 31 ALR 2d 262.

Conditioning the setting aside of judgment on payment of opposing attorney's fees. 21 ALR 2d 863.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant. 20 ALR 2d 1179.

Reliance by employee codefendant on promise or assumption that employer would defend in employee's behalf as ground for vacation of default judgment. 16 ALR 2d 1139.

Power of successor judge taking office during term time to vacate judgment entered by his predecessor. 11 ALR 2d 1117.

Remedy and procedure to avoid release or satisfaction of judgment. 9 ALR 2d 553.

Scope and character of meritorious defense as condition of relief from judgment. 174 ALR 10.

Misinformation by judge or clerk of court as to status of case or time of trial or hearing as ground for relief from judgment. 164 ALR 537.

Lapse of time as bar to action or proceeding for relief in respect of void judgment. 154 ALR 818.

Secreting witness or other conduct preventing summoning or appearance of witness as ground for relief from judgment. 131 ALR 1519.

Perjury as ground of attack on judgment. 126 ALR 390.

Who is "legal representative" within provision of Rule 60(b) of Federal Rules of Civil Procedure permitting court to relieve "party or his legal representative" from final judgment or order. 136 ALR Fed. 651.

When does delay by party's attorney in learning of court's judgment or order entitle party to relief under "excusable neglect" provision of Rule 60(b)(1) of Federal Rules of Civil Procedure. 101 ALR Fed. 572.

Construction and application of Rule 60(b)(6) of Federal Rules of Civil Procedure authorizing relief from final judgment or order for "any other reason". 15 ALR Fed. 193.

Relief from judicial error by motion under FRCP Rule 60(b)(1). 1 ALR Fed. 771.

Rule 60(c). Time for determining motions.

Advisory Committee Notes

Advisory Committee's Note to May 21, 1969, Amendment

Explanation of change: Since section 93-5606, R.C.M. 1947, is being superseded because of changes in Rules 46, 52 and 59, the change in Rule 60(c) is likewise required.

Advisory Committee's Note to October 9, 1984, Amendment

The amendment deletes the reference to subdivision (a) because it seems illogical to impose a time restriction on motions directed at clerical mistakes. The remainder of the amendment conforms the language to that now found in Rule 59(d).

Compiler's Comments

1995 Amendment: Extended time for appeal from 45 days to 60 days. Amendment effective October 1, 1995.

Amendments — Identity With Federal Rule: The amendment of May 21, 1969, substituted "Rule 59" for "section 93-5606 of the 1947 Revised Codes of Montana" and "trials" for "trial"; and added "and amendment of judgment". This rule has no counterpart in the Federal Rules.

The amendment of October 9, 1984, substituted "subdivision (b)" for "subdivisions (a) and (b)", before "determined" deleted "heard and", and inserted "and if the court shall fail to rule on the motion within the 45 day period, the motion shall be deemed denied".

Case Notes

Motion to Disqualify Other Party's Attorney Does Not Stay Sixty-Day Requirement for Judge to Rule on Motion to Vacate Default Judgment: Johnson's attorney obtained a default judgment on behalf of his client, and when an attorney appeared for the defendant and moved to have the default judgment set aside, Johnson's attorney moved to have the attorney disqualified because the trial court judge was related to a member of the defense attorney's law firm. The judge recused himself, and the new judge entered an order setting aside the default judgment. The Supreme Court held that the 60-day period for the lower court to rule on the motion to vacate ran from the time that the motion was filed, not from the time that the second judge assumed jurisdiction, and because the time had expired, the motion to vacate was considered denied. The lower court did not have jurisdiction over the issue and could not thereafter set aside the default judgment. Johnson v. Eagles Lodge Aerie 3913, 284 M 474, 945 P2d 62, 54 St. Rep. 984 (1997).

Lack of Subject Matter Jurisdiction Over Tribe — Motion for Relief From Judgment Not Subject to Time Constraints: After protracted litigation involving a tribal security interest in

cows of tribal members, the Blackfeet Tribe filed a motion for relief from judgment pursuant to Rule 60(b)(4), M.R.Civ.P., based upon a contention that the District Court lacked jurisdiction. No response to the motion was ever made by the District Court. Eighteen months later, the Blackfeet Tribe then filed a motion to dismiss for lack of subject matter jurisdiction, and the District Court granted the motion approximately 6 years later. The Supreme Court held that even though under normal circumstances the motion was considered denied after 45 days and the District Court would then have lost jurisdiction, the ability of a party to invoke the rules concerning subject matter jurisdiction transcend normal procedural consideration. Thus, the Blackfeet Tribe's motion to dismiss was not subject to time constraints. The fact that it was filed 18 months after judgment was entered and the fact that the District Court took 6 years to rule on the motion did not deprive the District Court of jurisdiction. Wippert v. The Blackfeet Tribe, 260 M 93, 859 P2d 420, 50 St. Rep. 973 (1993).

Denial of Motion for Extension of Time Allowed for Filing Notice of Appeal as Appealable Order — Applicability of Forty-Five-Day Rule: The denial of a motion made pursuant to Rule 5(a)(5), M.R.App.P. (Title 25, ch. 21), for an extension of the time allowed for filing a notice of appeal is an appealable order. However, the District Court did not abuse its discretion in denying plaintiff's extension request because the 45-day limit for filing a motion for relief from summary judgment, as set out in Rule 59(d), M.R.Civ.P., and this rule, had expired. It was the responsibility of plaintiff's counsel to be aware of the 45-day rule, and lack of knowledge of a clear rule of civil procedure is not an excuse for relief from the rules. Sadowsky v. Glendive, 259 M 419, 856 P2d 556, 50 St. Rep. 860 (1993), citing Shields v. Pirkle Refrigerated Freightlines, 181 M 37, 591 P2d 1120 (1979), and distinguishing Zell v. Zell, 172 M 496, 565 P2d 311 (1977).

Time Limit: The 45-day time limit in this rule did not begin to run until the motion for substitution of counsel, filed pursuant to Rule 60(b)(6), M.R.Civ.P., was granted. Saltzman v. Dept. of Transportation, 259 M 386, 856 P2d 965, 50 St. Rep. 845 (1993).

Power of Supreme Court to Consider District Court Proceedings Held Without Jurisdiction: After a default judgment was entered against Hardman for injuries caused to Maulding in a car accident, Hardman moved on May 22 to set aside the default, and the District Court scheduled a hearing for July 16. At the hearing, Maulding raised the timeliness of the hearing, contending that when this rule was read with Rules 59(d) and 59(g), M.R.Civ.P., the District Court had to rule on the motion within 45 days or it was considered denied. The District Court took that issue under advisement and heard testimony on the motion to set aside the default. Maulding argued on appeal that there was no evidence for the Supreme Court to consider on the issue of the default because the evidence taken by the trial court was taken at a hearing that was held without jurisdiction. The Supreme Court held that because those proceedings affect the substantial rights of the parties, consideration of the evidence developed at the hearing was within its powers under 3-2-204. Maulding v. Hardman, 257 M 18, 847 P2d 292, 50 St. Rep. 141 (1993).

Appeal of Grant of New Trial Made After Second Trial — Moot by Failure to Object or Timely Appeal: Following a trial on the distribution of marital property, wife requested and the District Court ordered a new trial. Husband waited until after the second trial to object to the order, contending that the court abused its discretion in granting a new trial because: (1) wife was incorrectly allowed to argue matters additional to those raised in the motion for a new trial; (2) the court did not rule on his motion to reconsider the order granting a new trial; and (3) the court did not state with particularity the reasons for granting a new trial. The Supreme Court held that husband's grounds for appeal must fail because he failed to object or bring an appeal in a timely fashion. The question of the propriety of the trial court's order is one that should have been considered earlier and was rendered moot by the fact that the second trial had already occurred. Husband's attempt to raise the issue for the first time on appeal was barred by the doctrine of laches. In re Marriage of Danelson, 253 M 310, 833 P2d 215, 49 St. Rep. 597 (1992).

Motion to Set Aside Enforcement of Unserved Warrant of Distraint as Independent Action — Not Subject to Time Limitation: The Department of Revenue was assigned the right of child support and attempted to recoup money paid by the state as Aid to Families With Dependent Children (now FAIM financial assistance) by filing warrants of distraint and Writs of Execution to attach any accounts in which the father had an interest, but the father was never served a notice of accruing debt or informed of his right to a hearing on each warrant. The father moved for relief from the warrants of distraint and for stay of execution, but the issue was not heard until 48 days after the motion, which the Department contended was sufficient to remove jurisdiction from the District Court. The Supreme Court disagreed, holding that the motion to set aside enforcement of the unserved warrants of distraint was an independent action and thus was not subject to the 45-day limitation of Rule 60(c), M.R.Civ.P. St. v. Frank, 226 M 283, 735

P2d 290, 44 St. Rep. 657 (1987), distinguished in Bechhold v. Chacon, 248 M 111, 809 P2d 586, 48 St. Rep. 357 (1991).

Motion Mistitled — Time for Filing Appeal: When the state filed a motion for rehearing of the District Court's order reinstating respondent's driver's license pursuant to Rule 60(b), M.R.Civ.P., on the basis that the Division of Motor Vehicles should be relieved from the order, even though the motion was mistitled, the state obviously was making a Rule 60(b) motion for relief from a District Court order. The request for a rehearing was tangential to the real purpose of the motion. The full time for appeal commences to run upon the granting or denying of the motion, rather than from the date of the order from which the state appeals. Despite defects in the motion, the state identified with particularity the grounds for its motion and the relief sought; therefore, the flaws are not grounds for dismissal of the appeal. In re Petition of Burnham, 217 M 513, 705 P2d 603, 42 St. Rep. 1342 (1985).

Time Limits of Rule 59(d) — Jurisdictional: Under the provisions of Rule 59(d), M.R.Civ.P., the District Court lacked jurisdiction to set aside a default judgment when no hearing had been held within 30 days from the date originally set for a hearing on the motion. At that time the motion is considered denied. Wallinder v. Lagerquist, 201 M 212, 653 P2d 840, 39 St. Rep. 2063 (1982).

Hearing on Motion to Vacate to Be Within Ten Days of Service: The District Court entered judgment on May 22, 1980. On May 22, 1981, the defendant served plaintiff with a motion to vacate the judgment. On June 3, 1981, the District Court set a hearing on the motion for June 30, 1981. Because the District Court failed to hold the hearing within 10 days after the motion was served as required by Rule 59(d), M.R.Civ.P., the motion was considered denied on June 1, 1981. Lerum v. Logue, 198 M 194, 645 P2d 418, 39 St. Rep. 873 (1982).

Disqualification of Judge After Entry of Findings and Conclusions — Ruling on Motions Prohibited: Defendants filed affidavits of disqualification of the District Judge in a property dispute case after the entry of the judge's findings of fact and conclusions of law. Defendants contended that this precluded the judge from entering judgment in accordance with his findings and conclusions. The disqualification was attempted under section 93-901, R.C.M. 1947 (since superseded), which was in effect at the time. The findings and conclusions entered by the judge prior to the filing of the affidavit of disqualification expressly directed that a judgment be prepared "in accordance with" the findings and conclusions. Under these circumstances, the judgment was a part of the findings and conclusions. Accordingly, although the disqualification prevented the District Judge from ruling on posttrial motions under Rules 59 and 60, M.R.Civ.P., and from withdrawing the findings and conclusions previously entered, it was not effective to prevent entry of judgment in favor of plaintiff in accordance with findings and conclusions entered prior to the filing of the affidavit for disqualification. Macpherson v. Smoyer, 191 M 53, 622 P2d 188, 37 St. Rep. 2079 (1980).

When Time Limits Inapplicable: The inherent power of the court to enter such orders as are necessary to enforce a judgment is not limited by the time limits in Rules 59 and 60, M.R.Civ.P., because such orders are interlocutory orders, not final ones. Smith v. Foss, 177 M 443, 582 P2d 329 (1978), followed in In re Marriage of Blair, 271 M 196, 894 P2d 958, 52 St. Rep. 401 (1995).

Time Limits Adhered To: Default judgment should not have been set aside when time extension limits of Rule 59, M.R.Civ.P., were exceeded. Sikorski & Sons, Inc. v. Sikorski, 162 M 442, 512 P2d 1147 (1973).

Law Review Articles

Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 323 (1983).

Rule 61. Harmless error.

Commission Notes

As of August 1, 1985, the above commission note was still applicable. The rule is identical with the Federal Rule.

Case Notes

General 1144
Manifest Justice 1147
Pleading Errors 1148
Fair Trial 1148
Evidentiary Rulings 1149
Instructions to Jury 1151
Jury Error 1153

GENERAL

Nonreversible Error in Not Allowing Attorney Serving as Guardian Ad Litem to Testify at Final Custody Hearing — Parent's Substantial Rights Not Affected: At a final custody hearing, the District Court refused to allow the testimony and cross-examination of an attorney who was acting as a guardian ad litem because attorneys are not normally allowed to testify under the Montana Rules of Professional Conduct for attorneys. The mother appealed on grounds that it was a denial of due process to give a guardian ad litem authority to investigate and report to the court and then prevent the guardian's testimony based on the Rules of Professional Conduct and that cross-examination was necessary to ensure that the children's best interests were protected. The Supreme Court held that when an attorney is appointed as a guardian ad litem, the guardian ad litem is not to act as an attorney unless directed to do so by the appointing court. Rather, the guardian ad litem is required to fulfill the statutory role to objectively aid the court in decisions regarding a child's best interests, which includes the duty to testify and be cross-examined if the guardian ad litem gives evidence concerning an investigation. Thus, the District Court in this case erred in not allowing the testimony of the guardian ad litem. However, the error did not require reversal because it was not so significant as to materially prejudice the mother, who was given numerous meaningful opportunities to examine the guardian ad litem during the 1 1/2 years of proceedings and to question the guardian ad litem's assertions and credibility. Jacobsen v. Thomas, 2004 MT 273, 323 M 183, 100 P3d 106 (2004).

Admission of Criminal Justice Information as Evidence in Tort Action Upheld: David, his wife Susan, their minor child, and the parties' defunct business sued Pierce Flooring and others for damages, including damages for emotional distress, stemming from criminal acts of vandalism taken against the plaintiffs' competing business. In the course of the trial, the District Court allowed the defendants to inspect, copy, and introduce evidence in police records concerning domestic violence complaints made by Susan against David. The Supreme Court held that the evidence was relevant because it showed that there may have been another cause for the Blacks' emotional distress other than the acts of vandalism. The Supreme Court also held that the record showed that the District Court properly exercised its discretion under Rule 403, M.R.Ev. (Title 26, ch. 10), in allowing the admission of some of the evidence but excluding other evidence because the Blacks' right to privacy exceeded the public's right to know. The Supreme Court held that the District Court's failure to make the written finding required by 44-5-303(1) was harmless error. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Argument — Comment on Lack of Testimony When Witness Testimony Barred by Court Order — Harmless Error: In a civil action for damages against Huggins and the Carpet Barn, stemming from criminal acts damaging plaintiffs David and Susan Black's automobiles, defendants made a motion in limine to exclude certain expert witnesses for the plaintiffs from testifying. After the motion was granted, defendants commented to the jury during final arguments that the plaintiffs had failed to produce any expert witnesses on the issue for which those witnesses had been excluded by the District Court's order and also commented on the fact that Susan had not testified, even though her deposition was not admitted by virtue of the District Court's ruling. The Supreme Court held that because the plaintiffs had violated a scheduling order that resulted in the expert witnesses' testimony being excluded, the defendants could properly comment upon the lack of evidence and, although the District Court erred in excluding Susan Black's deposition, that error was harmless error because the deposition was cumulative evidence. Rocky Mtn. Enterprises, Inc. v. Pierce Flooring, 286 M 282, 951 P2d 1326, 54 St. Rep. 1410 (1997).

Error as Basis for New Trial: For error to be the basis for a new trial, it must be so significant as to materially affect the substantial right of the complaining party. When the admission of evidence was clearly prejudicial and misleading, a new trial was warranted. Zeke's Distrib. Co. v. Brown-Forman Corp., 239 M 272, 779 P2d 908, 46 St. Rep. 1678 (1989), followed in Hansen v. Hansen, 254 M 152, 835 P2d 748, 49 St. Rep. 677 (1992), In re Marriage of Lopez, 255 M 238, 841 P2d 1122, 49 St. Rep. 890 (1992), In re Marriage of Truax, 271 M 122, 894 P2d 936, 52 St. Rep. 347 (1995), Houdashelt v. Lutes, 282 M 435, 938 P2d 665, 54 St. Rep. 420 (1997), and Unmack v. Deaconess Medical Center, 1998 MT 262, 291 M 280, 967 P2d 783, 55 St. Rep. 1080 (1998).

Voidable Judgment — No Reason to Set Aside: Although the District Court's summary judgment on issue of dissolution of marriage based on irretrievable breakdown was voidable for lack of a required hearing, it would not be set aside on appeal because the appellant failed to show that the premature judgment had denied her substantial rights. In re Marriage of Kraut, 220 M 267, 714 P2d 167, 43 St. Rep. 350 (1986).

Slight Dollar Amount Errors in Findings — Harmless Error: That certain monetary amounts in the findings varied slightly from the proof at the trial was harmless error not requiring reversal, when the variation had no effect on the outcome of the issues. Farmers St. Bank of Victor v. Imperial Cattle Co., 218 M 89, 708 P2d 223, 42 St. Rep. 1419 (1985).

Voir Dire — Jurors' Beliefs as Taxpayers — Harmless Error: Although taxpayer status is not a ground for juror disqualification, voir dire as to prospective jurors' beliefs, as taxpayers, concerning the financial outcome of a case in which the state is a defendant should be permitted if requested. Failure of the trial court to permit such voir dire is error. However, the error is harmless when the jury returns a verdict for the defendant and does not reach the question of damages. Goodnough v. St., 199 M 9, 647 P2d 364, 39 St. Rep. 1170 (1982).

Counsel's Remarks Concerning Evidence Not Given: The Supreme Court held that the defense counsel's remarks about the failure of the plaintiff to call his doctor to testify or to provide the doctor's records did not constitute misconduct amounting to reversible error. Gunnels v. Hoyt, 194 M 265, 633 P2d 1187, 38 St. Rep. 1492 (1981). See also Krueger v. Gen. Motors Corp., 240 M 266, 783 P2d 1340, 46 St. Rep. 2114 (1989).

Denial of Further Discovery as Harmless Error: In a case in which a Sheriff was charged with receiving a fee in violation of law, the State contended on appeal that the denial of a continuance to pursue discovery procedures to secure further facts from reluctant witnesses was error. The Supreme Court held that, because it had decided earlier in its opinion that the reward money received by the Sheriff was not a prohibited fee under 7-4-2519, the development of further facts could not change the result in the case and the State could not have been prejudiced by denial of further discovery of facts. The case turned on law, not on facts. St. v. DeMers, 192 M 367, 628 P2d 676, 38 St. Rep. 877 (1981).

Failure to Rule on Affirmative Defense as Harmless Error: Plaintiff, buyer of cattle from the defendant, signed a contract for delivery of cattle in mid-November, 45 days after weaning. The seller's wife actually owned the calves, but the seller alone executed the contract and received a downpayment. Subsequently, the seller informed the buyer he could not deliver until after January 1. Discussions about replacement calves ensued. Delivery by December 15 was demanded. The calves were sold in December, January, and February to others. The buyer prevailed in a suit against the seller, who appealed. The seller alleged as an affirmative defense that the buyer's action was barred for failure to register the name of his business under the fictitious name statute (now repealed). Because the seller failed to prove his allegations, the trial court's failure to rule on his motions resulted in, at most, harmless error. Miller v. Titeca, 192 M 357, 628 P2d 670, 38 St. Rep. 853 (1981).

When Contract Impossible or Void — Failure to Rule on Motion for Summary Judgment as Harmless Error: A seller argued on appeal from a verdict for a purchaser in a breach of contract action that the cattle sales contract was void because he did not own the calves at the time of execution of the contract. The seller claimed the contract was wholly impossible and unlawful under 28-2-603. The Supreme Court said that the mere fact that a party contracts to sell something he does not own did not raise the defense of impossibility. The burden of proving impossibility rested on the party asserting it, and he had to show he took virtually every action within his powers to perform his duties under the contract. Here, the seller offered no evidence why it was impossible for him to obtain his wife's consent to the sale or to buy her out. The object of a contract had to be lawful when the contract was made and possible by the time the contract was to be performed. The District Court's failure to rule on the seller's motion for summary judgment on this ground was harmless error because the motion should have been denied. Miller v. Titeca, 192 M 357, 628 P2d 670, 38 St. Rep. 853 (1981).

Motion Granted Without Notice Held Not Prejudicial — Doctrine of "Compensatory Error": In an action from which nonresident defendants were dismissed for lack of jurisdiction, the trial court's granting of plaintiffs' motions to add parties to the suits without prior notice to the defendants was held not prejudicial to the defendants. The issue was first raised on appeal, and the Supreme Court refused to consider it under the doctrine of "compensatory error". Knoepke v. SW. Ry., 190 M 238, 620 P2d 1185, 37 St. Rep. 1910 (1980).

Proof of Credit Purchase — Requisite Proof of Warranty Breach — Erroneous Disallowance of Counterclaims Not Prejudicial: In an action to collect the purchase price of tires purchased on credit, the defendant (buyer) filed a counterclaim for breach of warranty against the plaintiff (seller). The defendant's counterclaims were improperly denied but the defendant failed to prove a prima facie case. Defendant appealed, alleging that there was no proof of some of the purchases. The Supreme Court said that an open account between the seller and buyer can be proved by evidence that the seller's records show that the goods were sold, that invoices had been sent to the buyer who failed to object to them, and that the seller's records are accurate. Here the

buyer's rebuttal testimony was indefinite, and the credibility of the buyer's witness was a question for the District Court. No breach of warranty was proven; only the testimony of the buyer was given and no solid evidence, such as any tires, records of the amount of use of the tires, or maintenance records, was produced. This, with findings of possible alternative causes of the problems with the tires, was a sufficient record to support the finding that breach of warranty was not proved by sufficient evidence and the erroneous disallowance of the counterclaims was therefore not prejudicial. Defendant therefore was liable for the price of the tires. D & K Distrib. v. Ford, 189 M 505, 616 P2d 1097, 37 St. Rep. 1693 (1980).

Failure to Serve Attorney — Not Reversible Error: The defendant failed to serve the plaintiff's attorney in violation of Rule 5(b), M.R.Civ.P. Whether this is reversible error depends on the facts. The defendant's motion was set for hearing the same day as one of the plaintiff's motions. The two motions did not pertain to identical issues but both motions pertained to the same divorce decree and property settlement agreement. No attempt was made to get a continuance. The plaintiff was allowed to testify fully as to his financial affairs, and he has pointed to no evidence on appeal which was not before the trial court. The plaintiff was not prejudiced by the lack of service on his attorney. Phennicie v. Phennicie, 185 M 120, 604 P2d 787 (1979).

Error in Granting New Trial Where Objectionable Exhibit Never Admitted: In an action for damages for injuries suffered from an auto accident the lower court erred in granting a new trial to the State since its substantial rights were not affected by plaintiff's offer of an exhibit in the form of a petition signed by residents protesting conditions of the highway in the vicinity of the accident. No prejudice existed because the offered exhibit was never admitted as evidence. Giles v. Flint Valley Forest Prod., 179 M 382, 588 P2d 535 (1979).

Testimony in Probate Proceedings — Harmless Error: The admission of testimony relating to possible motives of individuals other than the decedent has no relevance to an appeal concerned with the sufficiency of evidence to support a jury verdict declaring the decedent competent, but such error is harmless. In re Holms, Holms v. Parsons, 179 M 375, 588 P2d 531 (1979).

Ruling on Motion — When: A District Court must rule on a motion to dismiss when made at the close of plaintiff's evidence or reserve its ruling until the close of all evidence, but a specific ruling must be made prior to final decision of the case; however, in this case failure to do so was harmless error. Brown v. Webb, 173 M 275, 567 P2d 450 (1977).

Instructions: The fact that the jury was charged orally and not in writing was harmless error. Seder v. Kiewit Sons Co., 156 M 322, 479 P2d 448 (1971).

Refusal to Poll Jury — Harmless Error: Lower court abused discretion in granting new trial based solely on ground that it had erred in refusing request for poll of jury since error, if any, was harmless in light of evidence affirmatively showing that verdict was rendered in open court in presence of all counsel, that in response to question by judge, foreman of jury advised him they had agreed upon verdict, and that following reading of verdict signed by foreman, judge inquired of jury if it was true verdict of at least eight of them and jury answered in affirmative. Martello v. Darlow, 151 M 232, 441 P2d 175 (1968).

Joint Enterprise: Court's rulings with respect to issue of joint enterprise, if error, was harmless error since driver was sole proximate cause of accident in which passenger suing owner of cattle was injured when car struck cattle on highway. Ratcliff v. Murphy, 150 M 31, 430 P2d 627 (1967).

Clerk's Error — Failure to Require Default Affidavit: Omission of clerk of court to require affidavit of amount due under Rule 55(b)(1) before entry of default judgment in favor of plaintiff is not fatal unless refusal to take action with respect to the omission appears to the court inconsistent with substantial justice. Interstate Counseling Serv. v. Emeline, 144 M 409, 396 P2d 727 (1964).

Inconsistent Findings — Judgment Not Void: In action by sellers of hotel business against buyers for balance due on contract, findings of District Court that damages found for buyers would never exceed amount owed to sellers, and denial of recovery to sellers, did not void judgment and it was modified on appeal giving judgment to sellers for difference between that owed on the contract and total damages that buyers would sustain. Swecker v. Badura, 141 M 329, 377 P2d 752 (1963).

Admission in Court — Conflicting Order as Harmless Error: Where defendant in divorce action admitted that certain stocks in her name belonged to plaintiff and that she would endorse them and turn them over to plaintiff if produced, any error in the order of the court quieting title to the stock in plaintiff and ordering defendant to transfer and convey the stock to plaintiff was harmless. Rogers v. Rogers, 123 M 52, 209 P2d 998 (1949), explained in Key v. Clements, 133 M 344, 323 P2d 603 (1958).

Jurisdiction Not Acquired — Rule Inapplicable: Section 93-3909, R.C.M. 1947 (superseded by Rule 61, M.R.Civ.P.), did not apply to an action where jurisdiction has not been properly acquired. In re Woodside-Florence Irrigation District, 121 M 346, 194 P2d 241 (1948); Choate v. Spencer, 13 M 127, 32 P 651 (1893), distinguished in Kipp v. Burton, 29 M 96, 74 P 85 (1903).

Clerical Error of Clerk: The entry of a default by the clerk under subsection (2) of section 93-4801, R.C.M. 1947 (superseded by Rule 55(a) and (b), M.R.Civ.P.), was purely ministerial, and the fact that it was not "properly signed" would at best be but a clerical error or mistake which could not affect the substantial rights of the parties and which the court must disregard. Galbreath v. Aubert, 116 M 490, 157 P2d 105 (1944).

Burden of Proof Placed on Defendant — Harmless Error: Where a temporary restraining order was issued upon the filing of the complaint to recover possession of lands in the hands of a cropper and order to show cause why an injunction pendente lite should not issue, and defendant moved to dissolve the temporary order, while court erred in placing the burden of proof upon defendant, the error, in absence of showing of prejudice, will be considered immaterial because order of proof is discretionary and on final analysis determination is dependent on where preponderance of the evidence lay. Gibbons v. Huntsinger, 105 M 562, 74 P2d 443 (1927).

Technical Errors in Findings Immaterial: Technical error in making an immaterial finding does not warrant reversal of a judgment. Averill Mach. Co. v. Taylor, 70 M 70, 223 P 918 (1924).

Directed Verdict Instead of Dismissal — Harmless Error: Where no evidence was introduced in a claim and delivery action, an order directing the jury to find in favor of defendant, instead of ordering a nonsuit or dismissal, was technical error. However, the error was harmless, the action taken by the court having placed plaintiff in no worse position than he would have been if the statute had been strictly pursued. Barrett v. Shipley, 63 M 152, 206 P 430 (1922).

Substantial Error in Verdict — Rule Inapplicable: Section 93-3909, R.C.M. 1947 (superseded by Rule 61, M.R.Civ.P.), had no application to substantial errors, as where the verdict in claim and delivery fails to find that there was an unlawful taking or detention. Olcott v. Gebo, 54 M 35, 166 P 300 (1917).

Discharge of Jury or Directed Verdict: It is not important whether the District Court directs the jury to render a verdict for either party, or discharges the jury and renders judgment. In either case the result is the decision of the District Court. If the District Court pursues the latter course it is at most a mere irregularity which will be disregarded by the Supreme Court. Consol. Gold & Sapphire Min. Co. v. Struthers, 41 M 565, 111 P 152 (1910).

Technical Irregularity of Pleadings as Harmless Error: Where, after a trial amendment, the case proceeded and was tried upon the issues formed by the amended complaint and answer, and it appeared that defendants were afforded every opportunity to present their entire case, the judgment should not be reversed upon the purely technical irregularity in the proceedings of the court with reference to the amendment. Christiansen v. Aldrich, 30 M 446, 76 P 1007 (1904).

Misjoinder of Causes: Where defendant rightly demurred (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) on the ground that two causes of action had been improperly united in the complaint, and the court, at the instance of the plaintiff without objection by the defendant, dismissed the complaint as to the second cause of action, at the same time overruling the demurrer, no costs being taxed to defendant, the overruling of the demurrer when considered with the dismissal did not affect any substantial right of the defendant requiring the judgment to be reversed. Caplice Commercial Co. v. Cassidy, 25 M 81, 63 P 799 (1901).

Judicial Sale: An order confirming a receiver's sale of partnership property will not be set aside on an appeal therefrom, where it is not shown that the property was not sold at its full value, or that the appellant was prejudiced thereby. Murphy v. Patterson, 24 M 591, 63 P 380 (1901).

MANIFEST JUSTICE

Grant or Denial of New Trial in Discretion of Court: Granting or refusing of a motion for a new trial rests in the trial court's discretion. Under this rule, the court must determine whether refusal to grant a motion would appear inconsistent with substantial justice. The Supreme Court will not overturn denial of a motion for a new trial absent a showing of manifest abuse of discretion. Hanzel v. Marler, 237 M 521, 774 P2d 426, 46 St. Rep. 1020 (1989).

Writ of Mandamus Manifestly Just: Where the issuing of a Writ of Mandamus restoring a policeman to office has been manifestly just, and the rights of the municipality against which the Writ is directed are not prejudicially affected, any errors committed at the hearing are to be disregarded on appeal. State ex rel. McDonald v. Getchell, 51 M 323, 152 P 480 (1915).

Judgment for Defendant Not to Be Reversed: A judgment for the defendant will not be reversed for error committed during the trial where the plaintiff is not, in any view of the case, entitled to a judgment. Howell v. Bent, 48 M 268, 137 P 49 (1913).

Purpose of Rule — Appellate Review: Section 93-3909, R.C.M 1947 (superseded by Rule 61, M.R.Civ.P.), was intended to put a speedy end to litigation when that object can be attained without injustice. Its design was to prevent reversals of causes wherein substantial justice has already been done. The Supreme Court was commanded by it to give judgment on appeal without regard to errors which do not affect the substantial rights of the parties. Copenhaver v. N. Pac. Ry., 42 M 453, 113 P 467 (1911).

PLEADING ERRORS

Harmless Error Rule Inapplicable to Substantial Defects: The rule that courts must at every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, has reference only to nonessential allegations or formative defects, and may not be relied upon by a plaintiff who failed to allege all facts in his complaint necessary to a cause of action. Dickason v. Dickason, 84 M 52, 274 P 145 (1929).

Defendant Not Misled — No Reversal for Defects in Complaint: Where defendant was not misled by any allegations or lack of allegations in the complaint but was fully prepared to defend the action upon the merits, the judgment in favor of plaintiff will not be reversed for mere technical defect in the pleading raised by general demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed). Davis v. Freisheimer, 68 M 322, 219 P 236 (1923).

Refusal of Motion to Strike: Error in refusing to grant a motion, in an action in conversion, to strike out a portion of the replication which, referring to proceedings on attachment had in a Justice's Court, was said to contain allegations argumentative in character and charging defendants with gross wrongdoing, was harmless, where, during the trial, the entire record of the proceedings had in the Justice's Court was on plaintiff's motion excluded, and where the court in its instructions submitted only the issues presented by the complaint and the denials in the answer. Shandy v. McDonald, 38 M 393, 100 P 203 (1909).

Count in Complaint Abandoned at Trial: Where, in an action to recover for services alleged to have been performed as brokers to sell real estate, plaintiffs at the opening of the trial abandoned a count in their complaint based upon a quantum meruit, introduced no proof in support of it, and the trial proceeded upon the issues presented by the answer to a count based on a written contract, and the instructions of the District Court were formulated accordingly, the error of the District Court in overruling a special demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to the count based upon the quantum meruit, if error, was harmless. Blankenship v. Decker, 34 M 292, 85 P 1035 (1906).

Technical Objection to Complaint After Judgment: A technical objection to a complaint in a suit for specific performance not affecting the substantial rights of the parties is not available after judgment. Christiansen v. Aldrich, 30 M 446, 76 P 1007 (1904).

FAIR TRIAL

Improper Argument Concerning Witness Not Called Not Requiring Reversal: Moralli sued Lake County for a back injury that resulted from slipping and falling in the Lake County jail. During the closing argument at trial, Moralli's counsel commented upon the failure of the county to call the jailer as a witness, saying that the jailer's testimony would have hurt the county badly. Upon objection by the county, the District Court gave a curative instruction, admonishing the jury that it could not consider what the jailer might or might not say. The Supreme Court held that the argument was less prejudicial than the argument based upon excluded testimony considered by the Supreme Court in Gunnels v. Hoyt, 194 M 265, 633 P2d 1187 (1981). As in Gunnels, the Supreme Court held that the argument was improper but was not so prejudicial that it could not be cured by the District Court's instruction to the jury. Moralli v. Lake County, 255 M 23, 839 P2d 1287, 49 St. Rep. 872 (1992). However, see Harne v. Deadmond, 1998 MT 22, 287 M 255, 954 P2d 732, 55 St. Rep. 80 (1998).

Permissible Use of Records of Juvenile Crimes — Impeachment: Before his trial on charges of sexual intercourse without consent and sexual assault, the defendant filed a motion to allow his counsel to inspect the Youth Court records of any complaining witnesses on the grounds that the records might have a bearing on the competency and veracity of those witnesses. The motion was denied, and the judge said he would examine the records to determine if any of the girls should be examined by a psychologist before testifying. The Supreme Court found that the judge's ruling denying the defendant's motion to inspect denied him the right to confront the witnesses against him. However, its review of the juvenile records convinced the Supreme Court that the error here

was harmless. It declined to adopt a rule allowing evidence of prior juvenile convictions to be used as evidence to attack the general credibility of a witness. The permissible use of those juvenile records was confined to demonstrating, by cross-examination, a witness' bias, prejudice, or motive. It was within the discretion of the trial judge to determine competency, and his findings would not be overturned absent an abuse of discretion. St. v. Camitsch, 192 M 124 , 626 P2d 1250, 38 St. Rep. 563 (1981).

Failure to Serve Attorney — Not Reversible Error: The defendant failed to serve the plaintiff's attorney in violation of Rule 5(b), M.R.Civ.P. Whether this is reversible error depends on the facts. The defendant's motion was set for hearing the same day as one of the plaintiff's motions. The two motions did not pertain to identical issues but both motions pertained to the same divorce decree and property settlement agreement. No attempt was made to get a continuance. The plaintiff was allowed to testify fully as to his financial affairs, and he has pointed to no evidence on appeal which was not before the trial court. The plaintiff was not prejudiced by the lack of service on his attorney. Phennicie v. Phennicie, 185 M 120, 604 P2d 787 (1979).

Fair Trial and Impartial Judge Required: The provisions for disregarding harmless error are not applicable where the substantial right of the litigants to have a fair trial before an impartial judge is involved. In re Woodside-Florence Irrigation District, 121 M 346, 194 P2d 241 (1948).

Prejudice Not Presumed — Substantial Rights to Be Affected: On appeal prejudice is not presumed, and in order to work a reversal it must be affirmatively made to appear that substantial rights have been affected by the errors assigned. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939); Lindeberg v. Howe, 67 M 195, 215 P 230 (1923).

Argument by Counsel: Even though the defendant, in a proceeding to condemn land for a power plant, had the right to open and close on the question of damages, which right, however, was given by the court to the plaintiff, he was not entitled to a new trial on this ground unless he could show that he had suffered some prejudice by reason of the court's action. Interstate Power Co. v. Anaconda Copper Min. Co., 52 M 509, 159 P 408 (1916).

Curing of Error: Error committed during a trial which is rendered harmless during its progress, and therefore cannot prejudice the complaining party, is insufficient to impeach a judgment. Fowlie v. Cruse, 52 M 222, 157 P 958 (1916).

EVIDENTIARY RULINGS

Admission of Hearsay Held Harmless Error — Refusal to Grant Mistrial Upheld: During the trial of a negligence action against the state for failure to properly supervise on parole a convicted execution-style murderer, the plaintiff testified that during the criminal trial of the parolee in another state, a firearms expert testified as to the age of the parolee's handgun. The state objected to the plaintiff's testimony but was overruled and later moved for a mistrial on the grounds that the plaintiff's counsel knowingly used false testimony because that counsel had a transcript of the previous criminal trial containing the expert's statements. The District Court reviewed the transcript from the criminal trial, concluded that the plaintiff's statements were based upon her own erroneous impressions from that trial, and refused to grant the mistrial. The Supreme Court held that the plaintiff's statement was hearsay and that it was error to admit the statement but, because the plaintiff's statement was cumulative, that admission of the statement was harmless error. The Supreme Court also noted that what the state was requesting by the motion for mistrial was that the Supreme Court substitute its judgment for that of the District Court concerning the District Court's findings that the testimony was presented knowing it was false, which the Supreme Court refused to do. Starkenburg v. St., 282 M 1, 934 P2d 1018, 54 St. Rep. 214 (1997).

Judicial Comment on Evidence — Harmless Error: In a trial for negligence in the death of the plaintiff's wife by carbon monoxide poisoning resulting from a faulty exhaust system on a used car sold by defendant, the District Court sustained defendant's objection to evidence regarding federal emission standards and, in the process, explained the reasons for sustaining the objection. Plaintiff appealed on the grounds that the judge had improperly commented on the evidence in the presence of the jury. The Supreme Court affirmed, holding that the statement did not constitute reversible error. Not every statement made by the court constitutes an impermissible comment on the evidence. Plaintiff failed to establish how the comments substantially prejudiced the case. Foley v. Harrison Ave. Motor Co., 267 M 200, 883 P2d 100, 51 St. Rep. 1042 (1994).

Incorrect Calculations Inappropriate for Judicial Notice — Harmless Error: The trial court took judicial notice of two calculations that proved incorrect. The inferences drawn from these figures were used to support the court's decision. The Supreme Court stated that the trial court erred by taking judicial notice of facts not appropriate for judicial notice, but the error was

harmless since other evidence supported the court's decision. Rose v. Myers, 223 M 13, 724 P2d 176, 43 St. Rep. 1493 (1986).

Admission of Hearsay Statements Harmless Error: Recollection by a witness of statements made by out-of-court declarants regarding paternity of an infant in a proceeding to terminate parental rights was hearsay, but was admissible to determine if the infant fell within the definition of "Indian child" under the Indian Child Welfare Act, and not to prove the truth of paternity. Other hearsay objections overruled by the trial court were properly raised, but the court failed to reverse the District Court since the erroneous admission of evidence was harmless. The objectionable statements were cumulative and amply corroborated by competent evidence. In re R.M.B., Youth in Need of Care, 213 M 29, 689 P2d 281, 41 St. Rep. 1925 (1984).

Lay Witness Opinion Testimony Conclusory and Lacking in Probative Value — Admission Harmless Error: The Supreme Court refused to find reversible error in the admission by the trial court of lay opinion testimony that was conclusory and lacked probative value, finding that the error was harmless in view of the voluminous record in the case. Barmeyer v. Mont. Power Co., 202 M 185, 657 P2d 594, 40 St. Rep. 23 (1983).

Denial of Further Discovery as Harmless Error: In a case in which a Sheriff was charged with receiving a fee in violation of law, the State contended on appeal that the denial of a continuance to pursue discovery procedures to secure further facts from reluctant witnesses was error. The Supreme Court held that, because it had decided earlier in its opinion that the reward money received by the Sheriff was not a prohibited fee under 7-4-2519, the development of further facts could not change the result in the case and the State could not have been prejudiced by denial of further discovery of facts. The case turned on law, not on facts. St. v. DeMers, 192 M 367, 628 P2d 676, 38 St. Rep. 877 (1981).

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Exception to Parol Evidence Rule — Harmless Error: The defendant appealed from a judgment granting specific performance of an option agreement to the plaintiff and ordering the property involved conveyed to the plaintiff. The defendant argued that the judgment should be reversed because the trial court erred in excluding his testimony on matters going to the validity of the contract. He claimed he had no authority to sign the agreement, he had no intent to sign a contract, and he raised the question whether anyone had directed that a writing be made. The trial court had excluded the offered evidence as a violation of the parol evidence rule. The offered testimony went to the validity of the contract and therefore constituted an exception to the rule under 28-2-905, but no prejudice occurred because such testimony was admitted later in the trial. Van Atta v. Schillinger, 191 M 472, 625 P2d 73, 38 St. Rep. 426 (1981).

Harmless Error — Consideration of Records Not Presented at Hearing — Workers' Compensation: Where no timely objection was made at the time the workers' compensation judge made known that he would consider an additional physical examination of the claimant after the close of the hearing, it was not error to include the results of the examination in the findings and conclusions filed by the judge. The judge also considered claimant's Veterans' Administration (now Department of Veterans Affairs) medical records, which were not presented at the hearing. Since these records corroborated claimant's testimony, however, it was harmless error to consider them. Hume v. St. Regis Paper Co., 187 M 53, 608 P2d 1063 (1980).

Error in Granting New Trial Where Objectionable Exhibit Never Admitted: In an action for damages for injuries suffered from an auto accident the lower court erred in granting a new trial to the State since its substantial rights were not affected by plaintiff's offer of an exhibit in the form of a petition signed by residents protesting conditions of the highway in the vicinity of the accident. No prejudice existed because the offered exhibit was never admitted as evidence. Giles v. Flint Valley Forest Prod., 179 M 382, 588 P2d 535 (1979).

Testimony in Probate Proceeding — Harmless Error: The admission of testimony relating to possible motives of individuals other than the decedent has no relevance to an appeal concerned with the sufficiency of evidence to support a jury verdict declaring the decedent competent, but such error is harmless. In re Holms, Holms v. Parsons, 179 M 375, 588 P2d 531 (1979).

Hypothetical Question: Defendant tractor owner was not prejudiced by the court's allowing highway patrolman to answer hypothetical questions which assumed, among other facts, that a driver in a position the same as that of plaintiff's decedent was watching the right side of the road as he passed the glare of the tractor headlights where it had been previously established that decedent could not have avoided hitting the tractor-trailer had he been looking directly ahead. Hurly v. Star Transfer Co., 141 M 176, 376 P2d 504 (1962).

Evidence as to Suicide: In an action to recover on a life insurance policy defended on the ground of suicide, admission of testimony on good reputation of decedent, that the Chief of Police had never known of a like case of suicide, identification of picture of deceased by his fiancee, and that of a firearms expert that a revolver could be accidentally discharged by intentionally pulling the trigger, if error, was harmless as not affecting the substantial rights of the parties. Lewis v. New York Life Ins. Co., 113 M 151, 124 P2d 579 (1942).

Improper Admission or Cross-Examination — Reversal Warranted: Errors in the admission of improper evidence or in the permission of improper cross-examination have been held in and of themselves sufficiently prejudicial to justify the reversal of a judgment. St. v. Patton, 102 M 51, 55 P2d 1290 (1936).

Evidence of Physical Condition — Lapse of Time: While it was error to admit evidence as to the condition of a tractor 2 years after its alleged wrongful seizure and return to the owner, in view of further testimony that it had in the interim been extensively used and repairs had been made on it, it may not be held of sufficient force to prejudice defendant in the eyes of the jury. Roper v. Caterpillar Tractor Co., 98 M 76, 37 P2d 812 (1934).

Failure to Rule on Evidence: Where all evidence offered in a condemnation proceeding was admitted, failure of the court to rule on an objection to appellant's evidence could not have adversely affected his rights, and therefore, while a ruling should have been made in order to preserve a proper record, its failure so to do was harmless error. St. v. Whitcomb, 94 M 415, 22 P2d 823 (1933).

Immaterial Testimony Admitted: Error in admitting immaterial testimony which could not have prejudiced appellant will be treated as harmless. Russell v. Sunburst Ref. Co., 83 M 452, 272 P 998 (1928).

Receipt of Evidence "Subject to Objection": Repeated failure of the trial court in a proceeding to vacate a decree of divorce to rule upon objections to offered evidence and its action in permitting it to be received "subject to the objections", thus depriving counsel of knowledge whether it was or was not before the trial court in arriving at its decision, if error, was nonprejudicial where the evidence in each instance was not of any substantial materiality and could not have affected the result. Hall v. Hall, 70 M 460, 226 P 469 (1924).

Presumption as to Reception of Incompetent Testimony: The rule that on appeal in an action tried without a jury it will be presumed that the trial court did not consider incompetent testimony in reaching its conclusion, applies only where nothing substantial appears in the record to the contrary or where the testimony was trifling and of no import. Therefore, where palpably incompetent testimony was of import and went to the very matter covered by the court's findings, the presumption cannot be indulged and the judgment will be reversed. State ex rel. Rankin v. Martin, 68 M 392, 219 P 632 (1923).

Error in Cross-Examination Permitted: Though the court permits a technical violation of the rule of cross-examination, the error is not prejudicial where it is not shown that substantial rights have suffered, and it will therefore be disregarded. Hanson Sheep Co. v. Farmers' & Traders' St. Bank, 53 M 324, 163 P 1151 (1917).

Technical Error Not Grounds for Reversal: Technical error in the admission of evidence is not grounds for reversal unless it appears that the rights of the party complaining have been prejudiced by it. Rea v. Alfalfa Prod. Co., 53 M 90, 161 P 708 (1917); White v. Chicago, Milwaukee & Puget Sound Ry., 49 M 419, 143 P 561 (1914).

INSTRUCTIONS TO JURY

Harmless Error Regarding General Verdict Form: Although several claims were submitted erroneously to the jury on the general verdict form, the error was not reversible error. Reversal of the verdict on the remaining proper claims would constitute substantial injustice. R.H. Grover, Inc. v. Flynn Ins. Co., 238 M 278, 777 P2d 338, 46 St. Rep. 1266 (1989).

Contract Dispute — Damages — Harmless Error: Plaintiffs, sellers of a motel, sued for repossession of the motel and the defendants counterclaimed for actual and punitive damages. The District Court jury awarded judgment in favor of the defendants. The plaintiffs appealed, claiming the District Court erred by instructing the jury that an oral waiver could alter a written contract and by submitting to the jury an issue of bad faith between the parties. The Supreme Court held that the defendants' testimony as to the plaintiffs' waiver was sufficient to uphold the jury decision and that the failure of the District Court to distinguish between damages arising from a breach of contract provision and damages for the tort of bad faith is in this case harmless in view of the jury verdict awarding only compensatory damages. Thiel v. Johnson, 219 M 271, 711 P2d 829, 42 St. Rep. 2010 (1985).

Horseback Riding Injury — Jury Instructions Properly Refused — Harmless Error: Where, as a result of an injury occurring prior to the effective date of the comparative negligence statute, the plaintiff sued the defendant for injuries received when the plaintiff was thrown from his horse, the District Court did not err in refusing to give the plaintiff's jury instructions relating to the defendant's negligence. Because the jury based its decision on the plaintiff's contributory negligence, the defendant's negligence could not have affected the result in this case. If any error occurred, it was harmless. Waatti v. Dollan, 193 M 329, 631 P2d 1279, 38 St. Rep. 1060 (1981).

Adverse Possession — Failure to Instruct on Permissive Use: In a case involving alleged adverse possession, one issue on appeal was the failure of the trial court to instruct the jury on permissive use in conjunction with adverse possession. The Supreme Court cited case law that implied acquiescence is not the same as permission. Possession may be adverse even though the owner does not interfere with entry and the possessor understands that there will be no future interference with his possession. Upon review of the trial evidence, the Supreme Court found no evidence of permissive use. It noted that the testator on whose behalf the case was brought had treated the land he possessed as his own, paid taxes on the property, and improved it. In the absence of any evidence supporting this portion of the defendant's case, the Supreme Court found no reversible error could have occurred as a result of the District Court's refusal to give a permissive use instruction. Cremer v. Cremer Rodeo Land and Livestock Co., 192 M 208, 627 P2d 1199, 38 St. Rep. 574 (1981).

Personal Injury — When Strict Liability Applies — Harmless Error: Plaintiffs purchased a used motorcycle from the defendant. Both plaintiffs were injured riding the motorcycle and brought an action in strict liability, and alternately, in negligence. The case was submitted to the jury on the negligence theory only. The jury found that the plaintiff's actions were the proximate cause of the accident in both cases and that the defendant was not negligent. On appeal, the plaintiffs alleged error in the failure of the court to instruct the jury on the theory of strict liability. The Supreme Court held that the plaintiffs could not have been prejudiced by the court's failure to instruct on strict liability because, in this particular case, the jury's findings of no negligence on the part of the defendant in adjusting the brakes would foreclose a finding of defect by reason of brake maladjustment and because the plaintiffs did not carry their burden to establish a causal relationship between brake maladjustment and the accident in that their testimony failed to prove that the accident was caused by defective brakes rather than caused by the bike hitting the ditch at a time the driver was unattentive. Likewise, since the jury found the defendant to be not negligent, any error in instructions on affirmative defenses was harmless. Therefore, the instructions pertaining to assumption of risk did not require review. Evangeline v. Billings Cycle Center, 192 M 106, 626 P2d 841, 38 St. Rep. 550 (1981).

Headlamp Illumination Requirements Erroneously Stated — Harmless Error: A jury instruction regarding the applicable statutory provisions governing the degree of illumination required of headlamps of motor vehicles, although erroneously stated by a judge, constituted only harmless error since the outcome of the verdict against defendant was not affected and since the statute that was erroneously involved actually helped defendant. Lauman v. Lee, 192 M 84, 626 P2d 830, 38 St. Rep. 499 (1981).

Oral Instructions as Harmless Error: The fact that the jury was charged orally and not in writing was harmless error. Seder v. Kiewit Sons Co., 156 M 322, 479 P2d 448 (1971).

Contributory Negligence Instruction as Harmless Error — No Evidence: In a wrongful death action by father of 8 ½-year-old boy, who while riding a bicycle was struck and killed by automobile, court's instruction that deceased boy was incapable of contributory negligence and court's refusal of defendant's offered instruction on contributory negligence was not reversible error, irrespective of question of boy's capacity, since there was no substantial credible evidence of contributory negligence in fact on part of deceased boy. Graham v. Rolandson, 150 M 270, 435 P2d 263 (1967).

Giving Issue to Jury as Harmless Error: Submitting issue of contributory negligence to jury was harmless error in light of substantial evidence showing that defendant was not negligent, and substantial evidence that even if defendant was negligent plaintiff was not injured in accident or injury was not result of defendant's negligence. Brown v. Reel, 148 M 381, 421 P2d 454 (1966).

Appeal After Favorable Verdict: Where, on appeal from a verdict in his favor, many of plaintiff's assignments of error related to instructions dealing only with matters affecting the question of liability and since their adoption or refusal could not have prejudiced the plaintiff, the jury having found in his favor, the instructions could not be considered on appeal. Dasinger v. Andersen, 136 M 277, 347 P2d 747 (1959).

No Injury From Inapplicable Instructions: Where no injury was caused the appellant by giving of inapplicable instruction, Supreme Court will disregard error. Maynard v. Helena, 117 M 402, 160 P2d 484 (1945).

Criminal Proceeding — Substantial Justice Done: The trial court in a criminal prosecution may neither instruct the jury as though a disputed fact had been proved, nor comment upon the weight of the evidence. But if its charge as a whole leaves the disputed facts to the determination of the jury, and it does not appear that the jurors have been misled by the assumption of a fact as true, and it appears from the whole case that substantial justice has been done, the technical error committed will not work a reversal of the judgment of conviction. St. v. Daems, 97 M 486, 37 P2d 322 (1934).

Correct Result Based on Improper Instructions — No Reversal Required: Where the correct result was reached in the trial of a law action, the judgment should be affirmed even though the jury was incorrectly instructed, such a case falling within the rule forbidding the Supreme Court from reversing a judgment because of any error or defect in the proceedings not affecting the substantial rights of the parties. Berthelote v. Loy Oil Co., 95 M 434, 28 P2d 187 (1933).

Condition of Sidewalk — No Prejudice Shown: In an action by a pedestrian based upon an accident on a city street in daytime, while it was error to instruct the jury that defendant city was required to keep its sidewalks in a reasonably safe condition "by night as well as day", in the absence of an affirmative showing of prejudice to defendant's substantial rights, the error must be considered harmless. Olson v. Butte, 86 M 240, 283 P 222 (1929).

Damages — Instruction Nonprejudicial: Where the jury had been advised that every element essential to a recovery must be established by a preponderance of the evidence, error in an instruction that if they found the issues in favor of plaintiff they might award damages in such amount as "they believed" would compensate her, etc., was nonprejudicial. Kelly v. John R. Daily Co., 56 M 63, 181 P 326 (1919).

Imputed Negligence Incorrect: Where an automobile collided with an engine at a railroad crossing, through the negligence of the driver of the automobile, judgment for the railroad in an action by a passenger in the automobile will not be reversed where the plaintiff was himself negligent, because of an erroneous instruction that the driver's negligence could be imputed to the plaintiff. Sherris v. N. Pac. Ry., 55 M 189, 175 P 269 (1918).

JURY ERROR

Incorrect Order Corrected on Appeal — New Trial Unnecessary: In an action for money had and received, where the jury verdict and judgment were in strict conformity to the prayer of the complaint, even though there was an additional order merging a note and mortgage changing the nature of the judgment from one for money had and received to one of foreclosure, the judgment could be corrected by the Supreme Court without a new trial. Puterbaugh v. Ash, 135 M 463, 342 P2d 742 (1959).

Verdict Exceeded Undisputed Damages — Modified Judgment: Where verdict of jury was for $10 more than proof showed loss to be and there was no conflict in the evidence, the judgment entered on such verdict would not be reversed but the judgment would be modified by reducing it by $10. Miller v. Emerson, 120 M 380, 186 P2d 220 (1947).

Verdict Larger Than Intended — Remand Proper: Where it is apparent from the record that the jury intended to fix the damages in an action in conversion at the limit fixed in the court's instructions, but either by clerical error or inadvertence returned a verdict for a larger amount, and the evidence shows clearly that plaintiff is entitled to recover, the judgment will not be reversed but the cause remanded with directions to modify the judgment to comport with the intention of the jury. Kane v. Oehler, 62 M 417, 205 P 245 (1922).

Collateral References

Appeal and Error *key* 1025 through 1074, 1170(1) through (13).

5 C.J.S. Appeal and Error §§824 through 830.

5 Am. Jur. 2d Appellate Review §§705 through 766.

Harmless or prejudicial error with respect to hypothetical question to expert witness on cross-examination. 71 ALR 2d 38.

Harmless or prejudicial error with respect to use of medical or other scientific treatises in cross-examination of expert witnesses. 60 ALR 2d 110.

Action involving motor vehicle accident, harmless error in admission of evidence as to manner in which participant was driving before reaching scene of accident. 46 ALR 2d 66.

Rule 62. Stay of proceedings to enforce a judgment

Case Notes

Rules 59 and 62 Distinguished: The denial of a motion for a new trial is not in effect a denial of a stay of proceedings to enforce a judgment. State ex rel. Dawson v. Butte, 145 M 316, 400 P2d 629 (1965).

Rule 62(b). Stay on motion for new trial or for judgment.

Commission Notes

Subdivision (b) of the rule is identical with the Federal Rule, except for the insertion of the word "district" before the word "court."

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Collateral References

Motion for new trial as suspension or stay of execution or judgment. 121 ALR 686.

Rule 62(c). Injunction pending appeal.

Commission Notes

In subdivision (c) the word "district" is again inserted [before the word "court"], and the last sentence of the Federal Rule, which deals with judgments of United States district courts of three judges, is omitted as inappropriate to state practice.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

No Basis Upon Which to Appeal Denial of Motion: When the District Court dismissed the plaintiff's complaint for a permanent injunction against the defendant, the plaintiff sought an injunction pending appeal. At the hearing, the plaintiff was not prepared to present evidence although the defendant indicated a willingness to proceed. At the suggestion of plaintiff, the court denied the motion, opening the way for an appeal. On appeal, the Supreme Court found from the record that plaintiff had no grounds upon which to appeal from a denial of the Rule 62(c), M.R.Civ.P., motion. The motion was therefore properly denied. Intermountain Tel. & Power Co. v. Mid-Rivers Tel. Co-op, Inc., 201 M 448, 655 P2d 491, 39 St. Rep. 2226 (1982).

Collateral References

Injunction *key* 193.

43A C.J.S. Injunctions §397.

Rule 62(e). Stay in favor of the state of Montana or agency thereof.

Commission Notes

Subdivision (e) is similar to the Federal Rule, but it has been written to fit our state government and its subdivisions and officers, and the last sentence has been added. Subdivision (f) of the Federal Rule is omitted as inapplicable to state practice.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Payment Pending Appeal: In eminent domain proceeding State was forced to deposit amount of award granted by condemnation commission pending appeal. Dept. of Highways v. Scrivani, 172 M 177, 561 P2d 1321 (1976).

Eminent Domain Proceeding — No Security Required: Where Highway Commission (now Transportation Commission) filed notice of appeal and perfected its appeal after Writ of Execution under 70-30-308 had been issued, the appeal stayed the judgment although no bond

was filed as required by section 93-8011, R.C.M. 1947 (superseded by Rules 6 and 7, M.R.App.P.), since under this rule no security was required from the State. Robertson v. Highway Comm'n, 148 M 275, 420 P2d 21 (1966).

Rule 62(g). Power of appellate court not limited.

Commission Notes

Subdivision (g) of the proposed rule is identical with the Federal Rule, except that the proposed rule refers to the Supreme Court of Montana only and thus conforms to the Montana court system.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Issuance of License — Stay of Writ of Mandate: Though there is no provision for a stay of execution in case a Writ of Mandate is issued by a District Court to compel the issuance of a license, the Supreme Court may nevertheless issue any appropriate writ to insure an appeal. Gill v. Rafn, 133 M 505, 326 P2d 974 (1958), distinguished in State ex rel. Ronish v. School District, 136 M 453, 348 P2d 797 (1960).

Transfer of Cause — Stay of Writ of Mandate: Though there is no provision for a stay of execution, in case a Writ of Mandate is issued by the District Court to compel the transfer of a cause from a police to a Justice's Court, the Supreme Court may nevertheless issue any appropriate writ to insure an appeal. State ex rel. Brass v. Horn, 36 M 418, 93 P 351 (1907).

Rule 62(h). Stay of judgment upon multiple claims.

Commission Notes

Subdivision (h) of the rule is identical with the Federal Rule.

Compiler's Comments

Identity With Federal Rule: The above commission note refers to the Federal Rule as it stood prior to a 1961 amendment thereof. The 1961 amendment of the Federal Rule deleted the words "on some but not all of the claims presented in the action". As of May 1, 1990, the preceding comment was still applicable.

VIII. Provisional and Final Remedies and Special Proceedings

Rule 64. Seizure of person or property.

Commission Notes

The rule is identical with the Federal Rule, except for parts of the rule having solely to do with federal questions.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Collateral References

Arrest *key* 1, et seq.; Attachment *key* 1 through 384.

6A C.J.S. Arrest §§71 through 98; 7 C.J.S. Attachment §§1 through 599.

5 Am. Jur. 2d Arrest §§73 through 91; 6 Am. Jur. 2d Attachment and Garnishment §§288 through 326.

Attachment statute as applicable to equity suits. 154 ALR 95.

Rule 65. Injunctions.

Commission Notes

The existing state statutes and practice with respect to the granting of restraining orders and injunctions are considered adequate and are therefore retained.

Compiler's Comments

Applicability of Commission Note: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Rule Different From Federal: This rule is different from its federal counterpart because statutes control the rules relating to injunctions. Therefore, former decisions remain in effect. Holtz v. Babcock, 143 M 341, 389 P2d 869 (1963).

Law Review Articles

Recent Developments in Montana Land Use Law, Goetz, 38 Mont. L. Rev. 97 (1977).

Collateral References

Injunction *key* 132 through 215.
43A C.J.S. Injunctions §§284 through 392.
42 Am. Jur. 2d Injunctions §23.
Mandatory injunction prior to hearing of case. 1 ALR 2d 213.

Rule 66. Receivers.

Commission Notes

The first and last sentences of the rule are identical with the Federal Rule. In the second sentence the phrase "appointment of and" has been added, and reference to the Montana statutes and practice has been substituted for references in the Federal Rule to practice.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Collateral References

Receivers *key* 1 through 220.
75 C.J.S. Receivers §§1 through 431.
65 Am. Jur. 2d Receivers §§1 through 183; 66 Am. Jur. 2d Receivers §§184 through 489.

Rule 67. Deposit in court.

Commission Notes

The rule is identical with the Federal Rule, except that reference is made to the provisions of the Montana Code rather than to the federal statutes.

Compiler's Comments

Identity With Federal Rule: As of July 31, 1983, the above commission note was still applicable. On August 1, 1983, an amendment to the Federal Rule became effective that authorizes the deposit, whether or not the depositing party claimed any interest in the deposit; requires that the deposit order be served on the Clerk of Court; and requires the deposit to be interest-bearing.

Case Notes

Partial Payment of Interest on Promissory Note Not Precluding Appeal: Plaintiff owed defendant $200,000 plus interest on a promissory note. The same day that plaintiff filed a claim for misrepresentation and failure to disclose, plaintiff also deposited the first promissory note payment with the Clerk of the District Court. Following judgment for plaintiff, the District Court ordered release of the funds, which defendant accepted. Plaintiff argued that by accepting the funds and the fruits of the judgment, defendant was prohibited from prosecuting an appeal to reverse the judgment. Defendant responded that because the judgment could not possibly affect the benefit that was accepted, the right to appeal was not waived. The long-recognized general rule is that the right to accept the fruits of a judgment and at the same time prosecute an appeal from it are not concurrent, but rather wholly inconsistent, rights and that the election of one excludes the enjoyment of the other (see Peck v. Bersanti, 101 M 6, 52 P2d 168 (1935)). The exception is that when reversal of the judgment cannot possibly affect the appellant's right to the benefit accepted under a judgment, then appeal may be taken and sustained despite the fact that the benefit was sought and secured (see Niles v. Carbon County, 174 M 20, 568 P2d 524 (1977)). The acceptance of payments that were not contested or that were irrevocably conceded as due by the opposing party does not preclude appeal. Here, when defendant accepted the funds, it simply accepted what plaintiff already conceded was due and no more than it conceded would be due in the event that the appeal was successful. Therefore, defendant did not waive the right to appeal. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Collateral References

Deposits in Court *key* 1 through 12.
26A C.J.S. Deposits in Court §§1 through 9.
23 Am. Jur. 2d Deposits in Court §§1 through 20.
Allowance of interest on interpleaded or impleaded disputed funds. 15 ALR 2d 473.

Rule 68. Offer of judgment.

Commission and Advisory Committee Notes

ORIGINAL COMMISSION NOTE

The rule is identical with the Federal Rule, except that the clause at the end of the second sentence of the Federal Rule, "the clerk shall enter judgment," has been changed to read "judgment shall be entered."

ADVISORY COMMITTEE'S NOTE
TO SEPTEMBER 29, 1967, AMENDMENT

Source: Fed.R.Civ.P. 68, as amended 1966.

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Amendments — Identity With Federal Rule: The above commission note was written prior to the 1967 amendment. The amendment of September 29, 1967, added the last sentence. As of May 1, 1990, the State Rule was, with the exception noted in the original commission note, still identical to the Federal Rule, which was itself amended in 1966.

The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Costs of Contested Employment Discrimination Administrative Hearing Not Allowed Absent Adoption of Rules of Civil Procedure by Agency: The Department of Labor and Industry conducted an administrative hearing to address plaintiff's employment discrimination claim. Defendants made an offer of judgment that plaintiff refused, but defendants ultimately prevailed and then contended that plaintiff was responsible for the costs of the hearing under 25-10-501, 49-2-505, and this rule. The Department determined that the general legislative mandate to follow the Montana Rules of Civil Procedure did not empower the agency to award costs in a contested case hearing. The District Court agreed, and on appeal, the Supreme Court affirmed. Under 49-2-505, the Montana Rules of Civil Procedure apply only in agency hearings to the extent that the rules are adopted by the agency. This rule, which allows recovery of costs after a judgment, has not been adopted by the Department to apply in agency-conducted administrative hearings related to employment discrimination. Absent a statutory basis, the award of costs was not proper. Pannoni v. Browning School District No. 9 Bd. of Trustees, 2004 MT 130, 321 M 311, 90 P3d 438 (2004).

Offer of Judgment to State That Attorney Fees Not Included to Effect Waiver of Discretionary Attorney Fees: Plaintiff, a nonprofit corporation formed to protect and increase equal housing opportunities, filed an administrative complaint against defendants for violating Title 49, ch. 2, commonly known as the Human Rights Act, by denying equal housing opportunities based on familial status, age, and marital status. Following an administrative investigation, the Commission for Human Rights found that plaintiff's allegations were supported by substantial evidence and that there was reasonable cause to believe that defendants violated state fair housing laws. Defendants ultimately served plaintiff an offer of judgment pursuant to this rule, which stipulated that judgment would be taken against defendants in the amount of $2,000 "together with costs only that accrued". Plaintiff accepted the offer, and judgment was entered against defendants. Plaintiff subsequently sought attorney fees as the prevailing party, but the request was denied by the District Court because the offer of judgment did not expressly include attorney fees, so plaintiff appealed. The Supreme Court noted that it is in the interests of both parties that an offer of judgment be clear and unambiguous in order to effect a waiver of attorney fees; however, the offer itself need not include the term "attorney fees" to effect a waiver. In the present case, the offer of judgment included costs, but it was not clear whether attorney fees were included, nor did the offer state that the sum to be paid was consideration for the resolution of all counts. Thus, it was ambiguous whether plaintiff, by accepting the offer, waived the right to attorney fees. The offer of judgment did not include a specific waiver of attorney fees, so the District Court erred in concluding that plaintiff's acceptance of the offer constituted a waiver of attorney fees. The Supreme Court remanded for a determination of whether to award plaintiff discretionary attorney fees under the Human Rights Act. Mont. Fair Housing, Inc. v. Barnes,

2002 MT 353, 313 M 409, 61 P3d 170 (2002), distinguished, with regard to an offer of full payment, in Wyant v. Kenda, 2004 MT 348, 324 M 342, 102 P3d 1260 (2004). See also Nordby v. Anchor Hocking Packaging Co., 199 F3d 390 (7th Cir. 1999).

Application of Rule 68, M.R.Civ.P., Does Not Preclude Award of Presettlement Offer Costs: In a contract dispute, the state had made a pretrial offer of settlement that was rejected by the plaintiff contractors. The recovery by the contractors was for less than the pretrial settlement offer, and the lower court awarded the state its postoffer costs as mandated by this rule. The lower court also awarded the state its presettlement offer costs. The contractors argued that the rule limits allowable costs to those incurred after the offer of settlement. The Supreme Court held that the rule mandates an award of postsettlement offer costs but that it does not limit the discretion granted a court under 25-10-103 to award presettlement offer costs. Idaho Asphalt Supply v. Dept. of Transportation, 2001 MT 27, 304 M 157, 18 P3d 1018 (2001).

"Costs" Held Not to Include Expenses of Deposition for Perpetuation of Testimony Incurred After Offer of Judgment: The Valeos sued Tabish for damage to the Valeos' road allegedly caused by Tabish's trucks. Tabish answered alleging contributory negligence. Thereafter, Tabish made an offer of judgment that the Valeos did not accept and subsequently incurred $609.29 for cost of airfare, hotel, and car rental in the taking of a deposition for perpetuation of testimony. The jury returned a verdict for Tabish, and the District Court entered judgment to include the $609.29 claimed by Tabish in his memorandum of costs. The Supreme Court reversed the District Court's opinion and held that "costs", as used in this rule, should not be construed more broadly than the same word in 25-10-201 and held that its previous opinion in Fisher v. St. Farm Ins. Co., 281 M 236, 934 P2d 163 (1997), supported that conclusion. The Supreme Court also rejected Tabish's argument that the word "costs", as used in this rule, must provide an independent right to receive costs other than as defined and provided in 25-10-101 and 25-10-102 or this rule would otherwise serve no independent purpose to encourage the settlement of litigation. The Supreme Court noted that Tabish provided no authority for that argument and that the language of 25-10-101 and 25-10-102 is significantly different from the language of this rule. Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

Taxation of Costs in Offer of Judgment — Disallowance of Deposition Expenses: Fisher sought to recover the costs of depositions taken in a case that was settled by offer of judgment pursuant to this rule, contending that costs should be allowable because they were necessary for the prosecution of the claim, even though it did not proceed to trial. Applying the definition of "costs" in 25-10-201, the Supreme Court noted that costs for depositions are allowed in only limited circumstances when the depositions are relied upon by the trial court or used in a trial setting. The court found that in the present case, acceptance of the offer of judgment averted a trial and that as a result, the depositions were not used as evidence, for purposes of impeachment, or in deciding a dispositive summary judgment motion. Denial of Fisher's request to recover deposition costs was proper. Fisher v. St. Farm Ins. Co., 281 M 236, 934 P2d 163, 54 St. Rep. 151 (1997), followed in Valeo v. Tabish, 1999 MT 146, 295 M 34, 983 P2d 334, 56 St. Rep. 579 (1999).

"Costs Incurred" — Attorney Fees Not Included: The "costs incurred" that may be awarded to an offeror under this rule do not include attorney fees. Schillinger v. Brewer, 215 M 333, 697 P2d 919, 42 St. Rep. 408 (1985). The general rule that costs do not include attorney fees was distinguished with regard to attorney fees chargeable as costs under 39-3-214 in a wage protection case, Delaware v. K-Decorators, Inc., 1999 MT 13, 293 M 97, 973 P2d 818, 56 St. Rep. 52 (1999).

Entry of Offer of Judgment — Liability Becomes Moot: Because this rule specifies that an offer of judgment made after a finding of liability but before determination of damages has the same effect as an offer made before trial, an offer of judgment made and entered prior to trial pursuant to this rule renders the issue of liability moot and hence nonappealable. Weston v. Kuntz, 194 M 52, 635 P2d 269, 38 St. Rep. 1691 (1981), followed in In re Certain Justice Court Expenses, 264 M 510, 872 P2d 795, 51 St. Rep. 372 (1994).

Offer in Same Amount as Subsequent Judgment: Costs of suit were properly awarded to defendant where defendant made an offer of judgment in the exact amount that was eventually recovered by plaintiff. Riefflin v. Hartford Steam Boiler Inspection & Ins. Co., 164 M 287, 521 P2d 675 (1974).

Fraud on Court — Remedy: Although proper procedure was followed under rule providing for offer of judgment, conduct of parties in perpetrating fraud on court required that judgment be vacated on motion of aggrieved beneficiary who was not party to suit against estate. Selway v. Burns, 150 M 1, 429 P2d 640 (1967).

Unaccepted Offer — Effect: An "offer to do equity" in the answer, when not accepted, cannot be used in evidence nor can it be regarded as an admission that defendants had waived any of their defenses. Rachou v. McQuitty, 125 M 1, 229 P2d 965 (1951).

Offer Required by Rule: Tender or payment after suit brought, to be effectual to prevent further costs, must be of the sum due with costs accrued up to that time, and interest if interest be due. Pape v. Chauvin-Fant Furniture Co., 25 M 417, 65 P 424 (1901).

Law Review Articles

Montana Offer of Judgment Rule: Let's Provide Bonafide Settlement Incentives, Fagg, 60 Mont. L. Rev. 39 (1999).

Collateral References

Judgment *key* 74 through 82.

49 C.J.S. Judgments §§179 through 182, 184.

Application and construction of state offer of judgment rule—determining whether offeror is entitled to award. 2 ALR 6th 279.

Disallowance of award under state offer of judgment rule due to lack of good faith. 121 ALR 5th 325.

State offer of judgment rule—construction, operation, and effect of acceptance and resulting judgment. 120 ALR 5th 559.

Allowance and determination of attorney's fees under state offer of judgment rule. 119 ALR 5th 121.

Construction of state offer of judgment rule—sufficiency of offer and contract formation issues. 118 ALR 5th 91.

Construction of state offer of judgment rule—issues concerning revocation and succession. 116 ALR 5th 433.

Construction of state offer of judgment rule—issues of time. 112 ALR 5th 47.

Rule 69. Execution.

Commission and Advisory Committee Notes

The rule is similar to subdivision (a) of the Federal Rule. However, the first sentence of the Federal Rule, which permits the court to direct enforcement of a judgment for the payment of money in some other manner than by a writ of execution, has been omitted. Apparently this first sentence in the Federal Rule is intended to permit the federal court to conform its procedure to that of some other states which provide for enforcement of such judgments other than by a writ of execution, and is not appropriate to Montana practice. Other changes are made to adapt the rule to Montana practice and conform it to the language of our statutes, which refer to proceedings "supplementary to execution." Subdivision (b) of the Federal Rule is omitted altogether as not appropriate to state practice.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

No Liability When Creditor Did Not Direct Wrongful Levy of Execution: In an action alleging wrongful execution and conversion, the defendant-creditor's motion for summary judgment was granted properly. The creditor was not liable for wrongful execution as it did not advise, direct, or assist in the commission of the wrongful execution upon the plaintiffs' bank account but merely obtained a Writ of Execution and forwarded it to the Sheriff. The general rule of law that an execution creditor who advises, directs, or assists in a wrongful execution is liable does not apply in this case. The creditor did not participate in or direct the wrongful execution. Foley v. Audit Serv., Inc., 214 M 403, 693 P2d 528, 42 St. Rep. 49 (1985).

Collateral References

Execution *key* 1 through 474; Judgment *key* 855.

33 C.J.S. Executions §§1 through 24; 49 C.J.S. Judgments §586.

30 Am. Jur. 2d Executions and Enforcement of Judgments §§47 through 382.

Rule 70. Judgment for specific acts — vesting title.

Commission Notes

The rule is identical with the Federal Rule, except that in the second sentence the clause, "the court may order the clerk to" is substituted for the clause in the Federal Rule that "the clerk shall," and in the fourth sentence the word "state" is substituted for the word "district."

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Deficiency Judgment — Order to Assign Future Proceeds From Separate Cause of Action to Judgment Creditor Not Erroneous: Andersen executed a promissory note in favor of the Alpine Buffalo, Elk and Llama Ranch, Inc. (Alpine), and secured the note with real property. When no payments were made, Alpine received a judgment and foreclosure decree. After Andersen's property was sold, Alpine also received a deficiency judgment in the amount still owing. Andersen neither appealed the judgment nor made payment. Alpine later learned that Andersen was plaintiff in a pending malpractice claim against her former attorney, so Alpine sought and received an assignment of the prospective proceeds from that action. Andersen appealed the assignment order, claiming that Alpine's reliance on this rule was misplaced because this rule is a civil contempt statute that applies only to a contemptuous party. Alpine conceded the inapplicability of this rule, but the Supreme Court pointed out that this rule was not the sole basis for Alpine's motion for assignment, citing Smith v. Foss, 177 M 443, 582 P2d 329 (1978), for the proposition that a District Court possesses jurisdiction to enter any necessary orders to enforce its judgments. The District Court's assignment order did not assign Andersen's legal malpractice cause of action to Alpine, nor did Alpine receive all legal rights and title to that action. Rather, the assignment order merely required Andersen to assign future proceeds from the other litigation to Alpine in an amount limited to the funds necessary to satisfy the deficiency judgment amount. Andersen failed to establish error in the District Court's order requiring Andersen, as judgment debtor, to assign future proceeds from the separate cause of action to Alpine, the judgment creditor. Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001), distinguishing Coty v. Cogswell, 100 M 496, 50 P2d 249 (1935), and Youngblood v. Am. St. Ins. Co., 262 M 391, 866 P2d 203 (1993).

Motion to Set Aside Easement for Lack of Subject Matter Jurisdiction Denied — Sanctions Imposed: After several hearings and appeals concerning the building of an airstrip, the appellants sought to have an easement grant set aside on the basis that the original judgment included no reference to an easement that could be enforced under this rule. The Supreme Court, citing Wellman v. Wellman, 198 M 42, 643 P2d 573 (1982), stated that the appellants had been afforded ample opportunity to contest all issues, including subject matter jurisdiction, and that public policy dictated that at some point litigation must cease. The court further held that the appellants were merely trying to relitigate settled issues and imposed damages of $500 on the appellants. Searight v. Cimino, 230 M 96, 777 P2d 335, 46 St. Rep. 1217 (1989).

Contradictory and Inconsistent Actions Warranting Sanctions: The District Court found an easement was warranted, and appellant testified that he intended to grant one, but later appellant informed respondent that no easement would be forthcoming. Respondent used Rule 70, M.R.Civ.P., as a basis for a motion for an easement. The District Court found appellant had acted in a contradictory and inconsistent manner with regard to the easement and that Rule 11, M.R.Civ.P., sanctions were proper. Respondent's use of Rule 70 was inappropriate because no judgment had been entered, but that did not defeat his motion because it was not unreasonable under the circumstances. Searight v. Cimino, 230 M 96, 748 P2d 948, 45 St. Rep. 46 (1988).

Aggrieved Parties: Because defendants were accorded full review in proceeding by plaintiff to dismiss defendants' motion to stay judgment pending appeal and to assess costs, defendants were no longer "aggrieved parties" entitled to further appeal rights. Morris v. Monk, 158 M 163, 489 P2d 1029 (1971).

Collateral References

Assistance, Writ of *key* 1, et seq.; Attachment *key* 12; Contempt *key* 20; Sequestration *key* 1, et seq.; Specific Performance *key* 131, 132.

7 C.J.S. Assistance, Writ of §1, et seq.; 7 C.J.S. Attachment §§18, 19; 17 C.J.S. Contempt §12; 79A C.J.S. Sequestration §1, et seq.; 81A C.J.S. Specific Performance §§215 through 219.

Jurisdiction to order performance of positive acts in another state. 71 ALR 1351.

Rule 71. Process in behalf of and against persons not parties.

Commission and Advisory Committee Notes

The rule is identical with the Federal Rule. No rule comparable to Federal Rule 71A is proposed, since a comprehensive rule governing condemnation cases involves substantive matters.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Collateral References

Judgment *key* 243, 854 through 855(2).
49 C.J.S. Judgments §§28, 585 through 591.
46 Am. Jur. 2d Judgments §107.

IX. Appeals

Rule 72. Appeal from a district court to the supreme court.

Commission and Advisory Committee Notes

COMMISSION NOTE

The rule is similar to the Federal Rule, adapted to appeals from Montana district courts to the Supreme Court of Montana pursuant to Montana statutes and rules of the Supreme Court.

ADVISORY COMMITTEE'S NOTE

Subdivision (a) of Rule 41, M.R.App.P. merely adapts the Montana Rules of Civil Procedure to these Appellate Rules.

Compiler's Comments

Amendment — Identity With Federal Rule: The 1965 amendment rewrote this rule. The Federal Rule to which the above commission note refers was abrogated December 4, 1967, effective July 1, 1968, and was, along with Federal Rules 73 through 76, superseded by the Federal Rules of Appellate Procedure, effective July 1, 1968. As of May 1, 1990, the preceding comment was still applicable.

Statutes Superseded: A table setting forth those statutes superseded by the Montana Rules of Appellate Procedure is set forth in the compiler's comment to Rule 43 (now Rule 53), M.R.App.P. (see Title 25, ch. 21).

Case Notes

No Showing of Damages or That Client Would Have Prevailed on Lost Appeal of Marital Dissolution Case — Failure of Legal Malpractice Claim: Richards brought a malpractice claim against an attorney who negligently failed to appeal Richards' marriage dissolution proceeding prior to the deadline for appeal. The District Court dismissed the claim, ruling that the court, rather than a jury, should decide the consequences of the attorney's failure to file the appeal and that the lost appeal would not have succeeded. Richards appealed, but the Supreme Court affirmed. Even though the attorney admitted malpractice by allowing the claim to expire, the attorney contended that no damages occurred. When a malpractice claim changes to the question of whether an attorney perfected an appeal, the analysis shifts from one of fact to one of law, which is properly considered by the court rather than a jury. The question of the probable outcome of a lost appeal also presents a question of law for the trial court to decide based on the special expertise required to analyze the relevant law and rules of appellate procedure, and the review is limited to the transcript and record of the underlying action and arguments presented by counsel. Here, there was substantial credible evidence regarding primary parenting time, valuation of the marital estate, and child support payments showing that Richards' lost appeal would not have resulted in a successful or favorable outcome. Further, one element of a legal malpractice claim requires a showing that the attorney's conduct proximately caused damages suffered by the claimant. Because Richards failed to show that the lost appeal would have been

successful, he also failed to show that the attorney's breach caused any damages, so the malpractice claim failed. Richards v. Knuchel, 2005 MT 133, 327 M 249, 115 P3d 189 (2005).

Time Bar on Writ of Certiorari to Review Contempt Proceedings: In a case of first impression, the Supreme Court was asked to establish a timeframe within which a petition for review of a contempt order must be filed. The issue was whether the time limitation should come from Title 25, which includes the Montana Rules of Civil Procedure and the Montana Rules of Appellate Procedure, or from Title 27, which prescribes the various statutes of limitation for the commencement of actions. The court noted that there is no appeal, as such, from an order of contempt in a civil proceeding and that the exclusive method of review of civil contempt orders (with certain exceptions) is through a writ of certiorari or writ of review. That review is generally limited to jurisdictional questions and whether evidence supports the contempt. Therefore, the issue of timeliness for filing a petition for a writ of certiorari or review is not a statute of limitations issue, and to mechanically characterize those writs for the review of contempt proceedings as original proceedings governed by the 5-year statute of limitations in 27-2-231 would be to deny the basic nature of appellate review. Further, petitions for writs of certiorari to review contempt proceedings are fundamentally different from other original proceedings commenced in the Supreme Court and from petitions for writs of supervisory control, which do not so much involve appellate review of and a decision on the underlying proceedings as they involve the court dealing with discreet questions of law during the pendency of the underlying proceedings. Because the timeframe in which to file petitions for writs of certiorari to review contempt proceedings is a procedural issue analogous to the procedure for filing a notice of appeal, the Supreme Court held that Rule 1, M.R.App.P. (Title 25, ch. 21), Rule 17, M.R.App.P., 27-25-103, and this rule require that the timeframe for those petitions be determined by the Montana Rules of Appellate Procedure. Specifically, pursuant to Rule 5, M.R.App.P., a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding. This may not be construed to limit the Supreme Court's power to grant writs of supervisory control or to consider applications for other types of original proceedings. The Supreme Court chose not to establish a precedent that allows contempt proceedings to be delayed until the underlying cause is resolved. Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), overruling Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102.

Filing Notice of Appeal — District Court Deprived of Jurisdiction: A judgment entered after filing of a notice of appeal was invalid because the notice of appeal deprived the District Court of further jurisdiction. In re Marriage of Carlson, 220 M 204, 714 P2d 116, 43 St. Rep. 295 (1986).

Granting Witness Air Fare Costs Following Appeal: The filing of a notice of appeal did not deprive the District Court of jurisdiction to grant a pending bill for costs. However, the court properly disallowed as a cost the air fares for witnesses. Powers Mfg. Co. v. Leon Jacobs Enterprises, 216 M 407, 701 P2d 1377, 42 St. Rep. 906 (1985).

Amending Notice of Appeal: Amendment of a notice of appeal to the Supreme Court after the time period for notice has run is not possible. Payne v. Mtn. States Tel. & Tel. Co., 142 M 406, 385 P2d 100 (1963).

Collateral References

Appeal and Error *key* 337 through 430.

4 C.J.S. Appeal and Error §§261 through 394.

5 Am. Jur. 2d Appellate Review §§285 through 361.

X. District Courts and Clerks

Rule 77. District courts and clerk

Rule 77(a). District courts always open.

Commission Notes

Subdivisions (a) and (b) of the rule are identical with the Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Faxed Return of Service of Summons Received on Evening of Final Day of Filing Considered Timely — Courts Always Open: White filed a complaint September 8, 1995, and summons was served on Klosterman September 8, 1998. The Sheriff's dispatcher faxed the return of service to the Clerk of Court at 8:23 p.m. the same day. The District Court held that the return of service was late because it was not filed with the Clerk of Court by 5 p.m. on the last day that filing was permitted. However, the Supreme Court found nothing in the plain language of the judicial rules of procedure or any Montana authority that provides those requirements. Rather, Rule 41(e), M.R.Civ.P., requires that return of service be filed within 3 years; Rule 5(e), M.R.Civ.P., allows filing by facsimile or other electronic means; 25-3-501 gives faxed documents the same force and effect as an original; this rule requires that District Courts always be open for filing; and 1-1-301 provides that each day ends at midnight. The District Court's decision was reversed on grounds that filing was timely. White v. Klosterman, 1999 MT 316, 297 M 259, 990 P2d 1249, 56 St. Rep. 1265 (1999).

Collateral References

Constitutional Law *key* 328.

16D C.J.S. Constitutional Law §§1429 through 1431.

Rule 77(b). Trials and hearings — orders in chambers.

Commission Notes

Subdivisions (a) and (b) of the rule are identical with the Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Time for Hearing: Notwithstanding that hearing on defendant's motion for summary judgment was held one day prior to scheduled date, such procedure was permissible under this section since hearing was held with consent of both court and counsel. Israelson v. Mtn. Tractor Co., 155 M 69, 467 P2d 149 (1970).

Collateral References

Judges *key* 27.

48A C.J.S. Judges §48.

Rule 77(c). Clerk's office and orders by clerk.

Commission and Advisory Committee Notes

In subdivision (c), the first sentence of the Federal Rule, which states the clerk's office hours, has been omitted because the matter is adequately controlled by statute; and the clause in the second sentence of the Federal Rule, "for entering defaults or judgments by default," has been omitted for better conformity to proposed Rule 55.

ADVISORY COMMITTEE'S NOTE
TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rules. No substantive change is intended.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Collateral References

Clerks of Courts *key* 66.

Rule 77(d). Notice of entry of judgment or order served.

Commission and Advisory Committee Notes

COMMISSION NOTE

Subdivision (d) of the rule changes the Federal Rule and is identical with the North Dakota rule.

ADVISORY COMMITTEE'S NOTE
TO OCTOBER 9, 1984, AMENDMENT

The amendment is made for the purpose of returning to the practice contemplated by the rule as originally adopted. The amendment modifies the original rule by changing the language "upon the adverse party" to "upon all parties who have made an appearance". The change eliminates any disagreement as to whether particular parties in a given case are "adverse". Also changed from the original rule is the last part of the amendment which allows any other party to serve notice of such entry, a provision found in the present rule. Because the present rule has led to so many complications, it is believed that the required service by counsel rather than by the clerk is preferable.

COMMISSION NOTE TO 1993 AMENDMENT

The amendment conforms the rule to the Federal Rule.

Compiler's Comments

1993 Amendment: Near beginning, after "judgment", inserted "or an order" and near middle, after "judgment", inserted "or order".

Amendments — Identity With Federal Rule: The amendment of December 31, 1975, completely rewrote this rule. As a result of the 1975 amendment, the rule was identical to the first two sentences of the Federal Rule.

The amendment of October 9, 1984, substituted present language for "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers."

As of May 1, 1990, the rule bears little resemblance to the Federal Rule.

Case Notes

No Loss of District Court Jurisdiction Upon Filing of Notice of Entry of Judgment — Amended Complaint Allowed: About 2 weeks after defendant filed a notice of entry of judgment, plaintiff filed a motion to amend the original complaint, and the District Court granted the motion. About 3 weeks after the amended complaint was filed, the court entered an order nunc pro tunc stating that it no longer had discretionary authority to grant leave to amend because it lost jurisdiction when defendant filed the notice of entry of judgment. The court held that the order allowing plaintiff's motion to amend was void and should be stricken. Plaintiff appealed the nunc pro tunc order, and the Supreme Court reversed. The filing of a notice of entry of judgment starts the clock running for the time to appeal, but does not divest the District Court of jurisdiction. Rather, the District Court loses jurisdiction when a notice of appeal is filed. Thus, the order issued nunc pro tunc was based on a mistaken interpretation of law because when the motion to amend was granted, the District Court still had jurisdiction. Kruckenberg v. Kalispell, 2004 MT 185, 322 M 177, 94 P3d 748 (2004). See also McCormick v. McCormick, 168 M 136, 541 P2d 765 (1975), Hankinson v. Picotte, 235 M 143, 766 P2d 242 (1988), and Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001).

Entry of Judgment Not Filed — Time for Filing Appeal Not Running Until Notice of Entry Issued: When no notice of entry of judgment is filed by a party, the time for filing an appeal does not begin to run until the Clerk of Court issues a notice of entry of judgment under this rule, nor does the time to request the court to modify or vacate an order begin to run. In the present case, the filing of a notice of entry of judgment was required under that rule as an action in which an appearance has been made, but neither party filed the notice. As a result, the 60-day filing period required under Rule 60(b), M.R.Civ.P., could not begin to run, so a subsequent motion for relief was not time-barred. In re Marriage of Bell, 2000 MT 88, 299 M 219, 998 P2d 1163, 57 St. Rep. 381 (2000).

Civil Procedure Rule That Notice of Entry of Order Be Served by Prevailing Party Inapplicable in Postconviction Relief Proceeding: In a case of first impression, the Supreme Court addressed whether the notice of entry of judgment requirement under this rule applied to postconviction relief proceedings governed by Title 46, ch. 21. The court previously held in cases unrelated to postconviction proceedings that only when the notice is served does a prospective appellant's time for filing a notice of appeal begin to run. (See In re Marriage of Robertson, 237 M 406, 773 P2d 1213 (1989), Buckley v. Wordal, 262 M 306, 865 P2d 240, 50 St. Rep. 1570 (1993), and Troglia v. Bartoletti, 266 M 240, 879 P2d 1169, 51 St. Rep. 783 (1994).) Here, Garner was convicted of forgery and felony theft and contended that because the state was the "prevailing

party", notice should have been provided to him of the entry of the District Court's order and that because notice was not provided, the 60 days within which to appeal could not have expired because it never commenced to run. However, the Montana Rules of Civil Procedure apply in a postconviction relief proceeding only when they are applicable and not inconsistent with postconviction statutes. Section 46-21-203 specifically requires that an appeal in postconviction proceedings be taken within 60 days of the entry of the order, which is inconsistent with the general notice rule in this rule. The Supreme Court applied the particular provision over the general provision and concluded that this rule has no application in postconviction relief proceedings, so the 60-day filing deadline in 46-21-203 commences in all instances and without more upon entry of the court's order granting or denying postconviction relief. St. v. Garner, 1999 MT 295, 297 M 89, 990 P2d 175, 56 St. Rep. 1180 (1999).

Motion for Reconsideration Held Not to Be Motion to Alter or Amend Judgment — Rule 5(a)(1), M.R.App.P., Held Applicable — Notice of Appeal Filed Before Receipt of Notice of Entry of Judgment Not Premature: In an action to enforce the Individuals With Disabilities Education Act (IDEA), the Shieldses filed a motion for reconsideration shortly after the District Court dismissed their first amended complaint. Before the District Court ruled on the motion for reconsideration, the Shieldses filed a notice of appeal. The defendants claimed that the motion for reconsideration should be treated as a motion to alter or amend judgment under Rule 59(g), M.R.Civ.P., and that because Rule 5(a)(4), M.R.App.P. (Title 25, ch. 21), specifies that a notice of appeal filed before the disposition of a motion to alter or amend judgment has no effect until the motion to alter or amend judgment is disposed of, the Shieldses' notice of appeal was ineffective. The Supreme Court noted that a motion for reconsideration is not one of the motions provided for or authorized by the Montana Rules of Civil Procedure. The Supreme Court reviewed the substance of the motion for reconsideration to determine whether, under Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364 (1996), the motion could be treated as a motion to alter or amend judgment and held that the motion could not be so treated. Because the motion could not be treated as a motion to alter or amend judgment, the time for the Shieldses to file a notice of appeal was governed by Rule 5(a)(1), M.R.App.P., and not Rule 5(a)(4), M.R.App.P. Under Rule 5(a)(1), the Shieldses had 30 days from the time of notice of entry of judgment under this rule in which to file their notice of appeal. However, the Supreme Court also noted that there was nothing in the Montana Rules of Civil Procedure that prevented the Shieldses from filing their notice of appeal earlier than provided under this rule, and for that reason, the Supreme Court held the filing of the notice of appeal to be effective. Shields v. Helena School District No. 1, 284 M 138, 943 P2d 999, 54 St. Rep. 815 (1997).

Time for Filing Appeal When Required Service of Notice of Entry of Judgment Not Made: As the prevailing party, defendants were required by this rule to serve plaintiffs with notice of entry of judgment. Under Rule 5, M.R.App.P. (Title 25, ch. 21), when such a notice is required, the time for filing a notice of appeal is within 30 days after service of the notice of entry of judgment. Because defendants failed to serve plaintiffs with a notice of entry of judgment, the 30 days never began to run. Therefore, notice of appeal filed on November 8, 1995, from an order filed on August 29, 1995, was timely. Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364, 53 St. Rep. 1024 (1996).

Invalidity of Default and Summary Judgments for Failure to Give Notice and Other Failures: Kenner's filing of two motions to dismiss constituted appearances in Moran's quiet title action, and Kenner was thus entitled to written notice of Moran's application for default judgment at least 3 days prior to the hearing on the application. The informal communications to Kenner's attorney by Moran's attorney, threatening to proceed with the quiet title action if Kenner did not fulfill the terms of a settlement agreement that the parties had signed, were not the equivalent of and could not substitute for the required notice. The failure to notify was compounded by failure to notify Kenner that the default judgment had been entered. Therefore, default judgment against Kenner was void, and Kenner's motion for summary judgment in Kenner's independent action to set aside the default judgment should have been granted. Furthermore, at the hearing in Kenner's action, Moran's request for summary judgment on Moran's counterclaim for specific performance of the settlement agreement should not have been granted because neither party had entered evidence on that issue, Moran had not moved for summary judgment, and Kenner had no notice of the request for summary judgment. Kenner v. Moran, 263 M 368, 868 P2d 620, 51 St. Rep. 94 (1994).

Notice of Entry of Default Judgment Unnecessary: After a default judgment was entered against defendant property management firm for conversion of plaintiffs' rentals, the defendants argued, inter alia, that they should be relieved of the default because they had not received notice of entry of the default judgment. The Supreme Court, citing Schmidt v. Jomac,

Inc., 196 M 323, 639 P2d 517 (1982), held that the default judgment should not be set aside because the defendants failed to receive notice of the entry of the default judgment since notice was not required to be sent by the Clerk of the District Court. Bd. of Directors of Edelweiss Owners' Ass'n v. McIntosh, 251 M 144, 822 P2d 1080, 48 St. Rep. 1131 (1991).

Time for Appeal — Begins to Run When Notice Filed: Notice of entry of judgment must be served by the prevailing party upon all parties who appeared, and the time for appeal does not begin to run until the notice is filed. Thus, even if the judge made oral comments during the hearing that left no doubt as to what he would order, the time for appeal did not begin to run on the date of the hearing, and the appeal was timely since no entry of judgment was served. In re Marriage of Robertson, 237 M 406, 773 P2d 1213, 46 St. Rep. 904 (1989), followed in Buckley v. Wordal, 262 M 306, 865 P2d 240, 50 St. Rep. 1570 (1993), and Troglia v. Bartoletti, 266 M 240, 879 P2d 1169, 51 St. Rep. 783 (1994).

Failure to File Notice of Entry of Judgment — Amended Complaint Allowed: Defendant, who was successful in having an action dismissed on a Rule 12(b) motion, failed to file a notice of entry of judgment. The plaintiffs' 30-day period for filing a notice of appeal did not run, the order of dismissal of the original complaint did not become final, and the District Court had jurisdiction to grant plaintiffs leave to file an amended complaint. The District Court had not lost subject matter jurisdiction. Hankinson v. Picotte, 235 M 143, 766 P2d 242, 45 St. Rep. 2259 (1988).

More Than One "Prevailing Party" — Effect of Failure to Timely File Notice of Entry of Judgment — Appeal Allowed: Where the plaintiff was successful in his claim for conversion and the defendant was successful in his counterclaim for trespass, both parties were considered to have prevailed and both parties were responsible for the failure to technically comply with the filing requirements of this rule. The defendant could not enforce technical compliance with the rule against the plaintiff when he had not complied with the same requirements. In this case, the time limitations for filing an appeal began to run on the date the plaintiff filed a notice of entry of judgment, 71 days after judgment on the posttrial motions. The appeal, filed on the same day, was timely filed, and the Supreme Court had jurisdiction to hear the appeal. Kenney v. Koch, 227 M 155, 737 P2d 491, 44 St. Rep. 960 (1987).

Prevailing Party — Proper Notice of Entry of Judgment: The prevailing party in an action has the duty of serving notice of entry of judgment, together with a copy of the judgment or a description of the nature and amount of relief and damages granted, on all parties who have made an appearance. If proper notice of entry of judgment is never served, the time for filing a notice of appeal never begins to run. El-Ce Storms Trust v. Svetahor, 223 M 113, 724 P2d 704, 43 St. Rep. 1575 (1986).

Judgment — Setoff Based on Stipulation: Plaintiff received a judgment against defendant. Defendant appealed, and the appeal was dismissed with prejudice when defendant advised the court that defendant did not wish to proceed with it. Defendant then filed a motion for a setoff of an amount that plaintiff and defendant were both liable to pay to a third party. Defendant's attorney and plaintiff's attorney had entered into a stipulation that plaintiff was primarily liable and defendant secondarily liable for that amount and that if defendant paid it, the payment would be set off against any judgment granted plaintiff against defendant. The lower court properly set off that amount as partial satisfaction of the judgment. Although the motion was not made within the time required by the rules, it was properly considered because the Clerk of Court did not give defendant notice of entry of the judgment against defendant; therefore, the time for filing the motion had not commenced to run, since the motion was to be made within a certain time from the notice of entry of judgment. AAR Constr., Inc. v. Fergus Elec. Co-op., Inc., 215 M 102, 695 P2d 819, 42 St. Rep. 214 (1985).

Technical Compliance With Rule on Notice of Entry of Judgment Required: It is the filing of the notice of entry of judgment that begins the running of the time limitations for filing a notice of appeal. Even though findings of fact, conclusions of law, and a decree were mailed to the parties by the Clerk of Court, no notice of entry of judgment was filed, and the time for filing a notice of appeal did not begin to run at that time. Morrison v. Higbee, 204 M 515, 668 P2d 1025, 40 St. Rep. 1031 (1983).

Appeal From Workers' Compensation Court — Starting Point for the Period for the Filing of Appeal: For an appeal from a final decision of the Workers' Compensation Judge to be filed in the manner provided by law for appeals from the District Court in civil cases, there must be a date that is the starting point for the period for filing notice of appeal under Rule 5, M.R.App.P. In that there is no judgment book in the Workers' Compensation Court in which to enter the judgment and therefore there can be no notice of entry of judgment, the court established, under the powers granted by Art. VII, sec. 2, Mont. Const., that the date on which a decision becomes

final under ARM 2.52.222 (now repealed) shall be the starting point for the period for filing the notice of appeal. In this case the court therefore had jurisdiction over the appeal. McMahon v. The Anaconda Co., 38 St. Rep. 1233 (1981) (apparently not reported in Pacific Reporter or Montana Reports).

New Trial Motion Untimely: The District Court erred in granting a motion for new trial because the requirements of Rule 59(b), M.R.Civ.P., were not complied with. The notice of entry of judgment, although prepared and signed by Gilbert, was served on the Gordons by the Clerk of the Court on July 25, 1979. The motion for a new trial, however, was not filed or served on opposing counsel until January 1980, some 6 months later. This court will not disregard the 10-day time limitation. Additionally, there is no requirement that the notice of entry of judgment be signed by the Clerk or be prepared and given to the Clerk by the "prevailing party". In re Gordon, 192 M 499, 628 P2d 1117, 38 St. Rep. 887 (1981).

Effect of Failure to Send Notice of Entry of Order in Formal Probate Proceeding: Under 72-3-318, the court may vacate orders in a formal probate proceeding within the time allowed for appeal. Since the clerk failed to send notice of entry of an order as required by Rule 77(d), M.R.Civ.P., the time allowed for appeal had not begun to run and the party was still entitled to request the court to modify or vacate its order. Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

Named Devisees Entitled to Notice of Entry of Order in a Formal Probate Proceeding: Named devisees are "interested persons" under 72-1-103 and must be given notice of the initiation of formal probate proceedings under 72-3-305, which indicates that the Legislature intended named devisees to be parties to formal probate proceedings and as such they are entitled to notice of the entry of an order in the proceeding as required by Rule 77(d), M.R.Civ.P. Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

Notice of Entry of Order in Formal Probate Proceeding: The notice required on the entry of an order in a formal probate proceeding is controlled by the M.R.Civ.P. Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

Computation of Time Limit for Appeal in Workers' Compensation Case — Civil Procedure Rules Applied: A person who appeals from a final decision of the workers' compensation court should in all fundamental fairness be given the same benefit of that provision of Rule 5, M.R.App.P., which states that ". . . except that in cases where service of notice of entry of judgment is required by Rule 77(d) of the M.R.Civ.P. the time shall be 30 days from the service of notice of entry of judgment". When service of notice of the final decision is made as mandated by 2-4-623 and that service is made by mail, the provisions of Rule 21(c), M.R.App.P., are automatically put into play, adding 3 days to the prescribed 30-day time limit for filing the notice of appeal set by Rule 4(a), M.R.App.P. However, when the final day of the period falls on a Sunday, Rule 21(a), M.R.App.P., comes into play extending the time limit to the next day. Dumont v. Aetna Fire Underwriters, 183 M 190, 598 P2d 1099 (1979).

Violation of Montana Rules of Civil Procedure — Effect: Since counsel for petitioner violated Rule 77(d), M.R.Civ.P., by giving notice of entry of judgment himself rather than having the clerk of court serve notice of entry of judgment, opposing counsel was not required to adhere to the 30-day period for filing of notice of appeal until proper service was made. Thus, the court committed no error in denying petitioner's motion to strike all posttrial motions as untimely. Pierce Packing Co. v. District Court, 177 M 51, 579 P2d 760 (1978).

Appeal Not Timely: When a motion to vacate and set aside a portion of a judgment was made 46 days beyond the authority of Rule 52, M.R.Civ.P., it did not suspend the running of time permitted to file appeal under Rule 5, M.R.App.P. Appellant's contention that Rule 60, M.R.Civ.P., was applicable did not operate to vest the Supreme Court with jurisdiction to hear the appeal. First Nat'l Bank of Lewistown v. Fry, 176 M 58, 575 P2d 1325 (1978).

Notice of Entry of Judgment Omitted: The date of service of notice of entry of judgment is the arbitrary point in time from which the time limits for appeal begin to run. If no notice of entry of judgment has been served upon the losing party, the right to appeal has not expired. Haywood v. Sedillo, 167 M 101, 535 P2d 1014 (1975).

Notice of Decree Conditioned Upon Defendants' Inaction: When defendants in quiet title action had notice through their attorney that decree quieting title in plaintiffs would be entered if defendants did not deposit sum to use of plaintiffs' tax purchasers by certain date, rule requiring service of notice of entry of judgment was not applicable to judgment entered for plaintiffs after defendants failed to make deposit, since Rule 81, M.R.Civ.P., is applicable. Rosen v. Midkiff, 164 M 116, 519 P2d 416 (1974).

Sufficiency of Notice: Notice sent to plaintiff's attorney that judgment had been entered in favor of defendant and stating that a copy of the order adjudging a dismissal with prejudice was

attached, was sufficient for compliance with this rule even though a copy of the order was not actually attached. Jackson v. Tinker, 161 M 51, 504 P2d 692 (1972).

Collateral References

Judgment *key* 276.
49 C.J.S. Judgments §112.
46 Am. Jur. 2d Judgments §§129, 130.

Rule 77(e). Transmittal of file on removal.

Advisory Committee Notes

To define procedure and avoid unnecessary duplication of papers in state and federal court files. The proposed amendment correlates with Rule 10, Revised Rules of Procedure of the United States District Court for the District of Montana effective January 1, 1968.

Compiler's Comments

Amendments: The 1971 amendment substituted "the filing of a copy of the petition for removal" for "being served with a notice of the removal" at the beginning of the rule; inserted "and a request in writing therefor"; inserted "and subsequently filed" after "theretofore issued"; substituted "shall keep in the state court file" for "subsequently file"; and substituted "copy of the petition for removal" and "request for removal" near the end of the rule for "notice of removal".

Collateral References

Removal of cases to federal District Courts, 28 U.S.C. §§1441 through 1451.

Rule 80. Stenographer — stenographic report or transcript as evidence.

Commission Notes

The rule is identical with Federal Rule 80(c).

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Case Notes

Property Disposition — Insufficient Evidence: Lack of a court reporter's record was not a fatal error. As substitute, a bystander's bill and exhibits admitted at trial disclosed insufficient credible evidence to support a property disposition because certain assets were not considered. Martinez v. Martinez, 175 M 280, 573 P2d 667 (1978).

Collateral References

Evidence *key* 582(3).
31A C.J.S. Evidence §399.

XI. General Provisions

Rule 81. Applicability in general

Rule 81(a). Special statutory proceedings.

Commission Notes

The rule changes the Federal Rule. It excepts inconsistent special statutory proceedings to the extent that they are governed by inconsistent statutes and it is impracticable to incorporate procedures provided by the rules.

Compiler's Comments

Table A: The Code Commissioner has not reprinted Table A in the MCA because it was never intended to be a complete listing, has not been updated since 1963, contains a high percentage of repealed sections, and is generally obsolete and not very useful. Interested persons may find it on page 1039 of the 1964 main volume of R.C.M. 1947, Vol. 7. Tables B and C of superseded statutes are reproduced as compiler's comments in the annotations to Rule 86(b), M.R.Civ.P.

Case Notes

Dual Nature of Habeas Corpus — Extradition: Habeas corpus is a civil proceeding when involved in child custody and related cases. Decisions made by the courts in those actions are appealable and res judicata as to certain matters heard at the District Court level. Habeas corpus is a criminal proceeding when the action in which it is originally brought is criminal in nature, such as extradition proceedings. In criminal actions denial of the Writ is not appealable but successive applications for the Writ may be brought directly to the Supreme Court until the judicial power of the State has been exhausted. In re Hart, 178 M 235, 583 P2d 411 (1978).

District Court Review of Police Commission Proceedings: District Court review of questions of law and fact arising from Police Commission proceedings is a special statutory proceeding when there is no right to a jury trial. Helena v. District Court, 166 M 74, 530 P2d 464 (1975).

Review of Police Commission Proceedings: District Court review of questions of law and fact arising from Police Commission proceedings is a special statutory proceeding when there is no right to a jury trial. Helena v. District Court, 166 M 74, 530 P2d 464 (1975).

Notice of Decree Conditioned Upon Defendants' Inaction: When defendants in quiet title action had notice through their attorney that decree quieting title in plaintiffs would be entered if defendants did not deposit sum to use of plaintiffs' tax purchasers by certain date, rule requiring service of notice of entry of judgment was not applicable to judgment entered for plaintiffs after defendants failed to make deposit, since Rule 81, M.R.Civ.P., is applicable. Rosen v. Midkiff, 164 M 116, 519 P2d 416 (1974).

Application to Public Service Commission: Rules are not applicable to special proceeding to review actions of the Public Service Commission. P.S.C. v. District Court, 162 M 225, 511 P2d 334 (1973).

Privileged Matter — Public Service Commission: Interrogatories which sought privileged material and were irrelevant were not required to be answered by the Public Service Commission. P.S.C. v. District Court, 162 M 225, 511 P2d 334 (1973).

Action to Remove Administrator — Rules Applicable: In statutory action for removal of administrator for misappropriation of funds of estate, administrator could be examined as adverse witness under Rule 43 notwithstanding provisions of Rule 81. In re Estate & Guardianship of Wyman, 149 M 525, 429 P2d 629 (1967).

Rule 81(b). Appeals to district courts.

Commission Notes

The rule changes the Federal Rule. It excepts appeals to and reviews by the district courts to the extent that they are governed by inconsistent statutes and it is impracticable to incorporate procedures provided by the rules.

Case Notes

Trial De Novo Allowed in District Court Despite Failure to Request Jury Trial in Justice's Court — No Waiver of Right to Jury Trial: The District Court erred in determining that under 25-33-301, a waiver of the right to a jury trial in Justice's Court waives the right to a jury trial de novo on appeal in District Court. The court disregarded the interplay of Rule 3, M.R.Civ.P., with Rule 38, M.R.Civ.P., and 25-33-301 in attempting to harmonize the statute and the rules. The language in 25-33-301, limiting appeals from Justice's Court to the pleadings filed in Justice's Court, does not limit jury trial demands in appeals from Justice's Court because jury trial demands are not pleadings. The plain meaning of this rule requires that Rules 3 and 38 be given meanings that are consistent with 25-33-301 and the right to trial by jury. Thus, when a party makes a jury trial demand under Rule 38 for a trial de novo on appeal in District Court, the action commences when the party serves and files notice of appeal pursuant to 25-33-102 and 25-33-103. In appeals from Justice's Court, jury trial demands must be made within 10 days of the filing of notice of appeal. Further, participation in a bench trial in District Court without objection does not constitute waiver of the right to a jury trial so long as a timely jury trial demand is made in District Court. Balyeat Law, P.C. v. Harrison, 1999 MT 144, 295 M 13, 983 P2d 902, 56 St. Rep. 566 (1999), following U.S. v. Calif. Mobile Home Park Management Co., 107 F3d 1374 (9th Cir. 1997), and Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998).

Rule 81(c). Rules incorporated into statutes.

Compiler's Comments

Identity With Federal Rule: This rule has no counterpart in the Federal Rules.

Case Notes

Rules of Civil Procedure Not Applicable to Informal Probate Proceeding: This rule does not interject the Montana Rules of Civil Procedure into other statutory schemes that provide different procedural requirements and thus does not make the rules applicable to informal probate proceedings. In re Estate of Spencer, 2002 MT 304, 313 M 40, 59 P3d 1160 (2002).

Personal Service on Defendant or Defendant's Counsel Not Required for Execution Sales: Mikelson argued that Rule 5(a) and this rule, when read together, required that notice of a Sheriff's sale of Mikelson's property be served personally on Mikelson or his counsel. However, those rules deal with notice within District Court proceedings and do not relate to notice in execution sales, which are governed by 25-13-701. Nothing in 25-13-701 requires that notice of

an execution sale be served personally on Mikelson or his counsel. Bank of Baker v. Mikelson Land Co., 1999 MT 76, 294 M 64, 979 P2d 180, 56 St. Rep. 315 (1999).

Collateral References

Courts *key* 85, et seq.

Rule 82. Jurisdiction and venue unaffected.

Commission Notes

The rule changes the Federal Rule to apply to state practice.

Case Notes

Time for Filing of Petition for Judicial Review — Time of "Service" of Final Agency Decision Defined: Following proceedings in an administrative action before the Public Service Commission, the Commission mailed a copy of its decision to MCI on May 19, 1992, but MCI did not receive the decision until May 21, 1992. On June 19, 1992, MCI filed its petition for judicial review under 2-4-702. The District Court dismissed the petition as being untimely filed. The Supreme Court held that 2-4-702 did not define the time of "service" at which the 30-day period for filing a petition for review began to run. Section 2-4-106 requires that Rule 6(e), M.R.Civ.P., be applied to define when service by mail is complete for administrative decisions. Rule 6(e) requires that when service is made by mail, an additional 3 days must be added to the time for taking action. Thus, the time for judicial review began to run on May 23, and MCI's petition was filed within the 30-day time period provided by 2-4-702. MCI Telecommunications Corp. v. Dept. of Public Service Regulation, 260 M 175, 858 P2d 364, 50 St. Rep. 989 (1993), distinguished in In re Support of McGurran, 1999 MT 192, 295 M 357, 983 P2d 968, 56 St. Rep. 741 (1999).

Class Action — Venue: Venue for a class action is determined just as it is for a comparable nonclass action. Thus, venue must be satisfied as to all named class representatives, just as it must be to all plaintiffs and defendants in a nonclass action. State ex rel. Kesterson v. District Court, 189 M 20, 614 P2d 1050 (1980).

Collateral References

Courts *key* 143.

21 C.J.S. Courts §130.

Rule 83. Rules by district courts.

Commission Notes

The rule changes the Federal Rule to apply to state practice.

Case Notes

Uniform Rules for District Courts — Time Limit for Filing Brief in Support of Rule 12 Motion: In an action for strict liability in tort for personal injuries, defendant filed a motion for change of venue on November 17, 1982, and a brief in support of the motion on November 24, 1982. The motion was denied by the District Court for failure to file a supporting brief within 5 days, the time limit allowed by Rule II of the Uniform Rules for District Courts of Montana. The Supreme Court reversed and remanded the case to District Court, ruling that under Rule 6(a), M.R.Civ.P., three of the days intervening between the time of filing of the motion and the time of filing of the brief are excluded from the calculation of the maximum permissible time, so the filing of the brief was timely. Tanniehill v. Remington Arms Co., 207 M 501, 675 P2d 948, 41 St. Rep. 103 (1984).

Local Rule as Conflicting With Montana Rules of Civil Procedure: Local court Rule 3, Park County District Court, states in part that a party opposing a motion has 10 days after the filing and service of the moving party's brief to serve and file a reply brief. When applied to a motion for summary judgment, local Rule 3 conflicts with Rule 56(c), M.R.Civ.P. Whenever a local rule conflicts with the M.R.Civ.P., the local rule must be set aside. Krusemark v. Hansen, 186 M 174, 606 P2d 1082 (1980).

Ex Parte Trial Briefs: A District Court rule allowing for the filing of ex parte trial briefs used solely by defendant to inform the trial court of complex arguments to be presented at trial does not violate the plaintiff's due process rights. Hill v. Squibb & Sons, 181 M 199, 592 P2d 1383 (1979).

Briefs Required on Preliminary Motion: Trial court rule requiring filing of briefs in support of preliminary motion is proper exercise of authority under this rule and may be enforced by summary denial of motion where brief has not been filed. Hansen v. Kiernan, 159 M 448, 499 P2d 787 (1972).

Collateral References

Courts *key* 78 through 80.

21 C.J.S. Courts §126.

Power of court to prescribe rules of pleadings, practice, or procedure. 158 ALR 705; 110 ALR 22.

Rule 84. Forms.

Commission Notes

The rule is identical with the Federal Rule.

Compiler's Comments

Identity With Federal Rule: As of May 1, 1990, the above commission note was still applicable.

Rule 85. Title.

Commission Notes

The rule adapts the Federal Rule to state procedure.

Rule 86. Effective date — statutes superseded

Rule 86(a). Effective date and application to pending proceedings.

Compiler's Comments

Amendment: The 1964 amendment divided subdivision (a) into two paragraphs; inserted the second, third, fourth, fifth, and sixth sentences of the first paragraph and the first and second sentences of the second paragraph; substituted "These rules and amendments" for "They" at the beginning of the third sentence of the second paragraph; inserted "or amendments" after "particular action pending when the rules" in the latter part of the third sentence of the second paragraph; and substituted "became effective" for "will take effect" in the first sentence of the first paragraph.

Case Notes

General 1171
Retroactive Application 1171

GENERAL

Relation Back of Complaint: Question of relation back of complaint amended after adoption of rules is governed by provisions of rules even though action originated prior to effective date of rules in absence of finding by court having jurisdiction that rules should not control. Rozan v. Rosen, 150 M 121, 431 P2d 870 (1967).

Failure to Serve Summons — Effect — Rule Not in Effect: Notwithstanding the fact that the rules were not in effect, the court exceeded its jurisdiction in denying motion to quash the service of summons when it was not served and returned within 3 years. State ex rel. Belwin, Inc. v. Davison, 148 M 345, 420 P2d 842 (1966).

Retroactivity of Rules of Procedure: Although legislative intent to give retrospective force to a statute must appear and all doubt will be resolved against retrospective application, the Rules of Civil Procedure apply retrospectively. State ex rel. Johnson v. District Court, 148 M 22, 417 P2d 109 (1966); Lumbermen's Mut. Cas. Co. v. Babcock & Wilcox Co., 34 F.R.D. 515 (D.C. Mont. 1964); Weber v. Hydroponics, Inc., 226 F. Supp. 177 (D.C. Mont. 1962).

RETROACTIVE APPLICATION

Service on Nonresident — Application of Rule: Rule 4B(1), M.R.Civ.P., applied to act of alleged malpractice occurring in Montana prior to effective date of the M.R.Civ.P., and doctor who had not resided in Montana since the effective date of the rules could properly be served with process, under Rule 4D(3), in California. State ex rel. Johnson v. District Court, 148 M 22, 417 P2d 109 (1966).

Discretion of Court — Application of Old Rule: District Court had the power to consider motion under procedure that was in effect when the motion was filed where the District Court believed application of amended rule would work an injury. State ex rel. Rozan v. District Court, 147 M 532, 416 P2d 19 (1966).

Application of Rules Not Prohibited — Retroactive Application: The giving effect to the service of summons provisions of Rule 4, subdivision B, M.R.Civ.P., when the operative facts of the case to which the rule applied had taken place prior to the effective date provided in this section, was not a prohibited retroactive application of Rule 4, subdivision B, within the meaning of 1-2-109. Weber v. Hydroponics, Inc., 226 F. Supp. 117 (D.C. Mont. 1962).

Rule 86(b). Statutes superseded.

Compiler's Comments

List of Statutes Superseded: The following two tables show those sections of R.C.M. 1947 superseded in whole or in part by the M.R.Civ.P.

Table B. List of Rules Superseding Statutes.

Rule	Statutes Superseded (R.C.M. 1947, sections)
4	53-204, 93-2816, 93-3004, 93-3006, 93-3007, 93-3009, 93-3010, 93-3013, 93-3014, 93-3015, 93-3019, 93-6206, 93-6207, 93-6208
4 (with Rule 12(a))	93-3003
4D(9), (10)	93-3018
4D(11)	93-3017
5	93-3819, 93-8501, 93-8502, 93-8503, 93-8507
5 (with Rule 6(e))	93-8504
6(b) (with Rules 15(a), 55(c), 60)	93-3905
6(d) and (e)	93-8403
6(e) (with Rule 5)	93-8504
7(a)	93-3101, 93-3102, 93-3103, 93-3201, 93-3601, 93-3603
7(b)	93-8401
7(c)	93-3301, 93-3302, 93-3303, 93-3306, 93-3501, 93-3502, 93-3503, 93-3504, 93-3505, 93-3506, 93-3604, 93-3907, 93-4902
8(a)	93-3202, 93-3412, 93-3808, 93-3812
8(b)	93-3401(1), 93-3410, 93-3411, 93-3813, 93-3816
8(c)	93-3401(2)
8(d)	93-3815, 93-3817, 93-4904
8(e)(1)	93-3202(2)
8(e)(2)	93-3410, 93-3602
8(f)	93-3801, 93-3909
9(a)	93-3301(2), 93-3505(2)
9(c)	93-3807
9(d)	93-3811
9(e)	93-3806
10(a)	93-3202(1)
10(b)	93-3410, 93-3602
10(c)	93-3820
11	93-3701
12(a) (with Rule 4)	93-3003
12(b)	93-2905, 93-3301, 93-3305, 93-3501, 93-3502, 93-3504, 93-3505, 93-3506, 93-3604, 93-4902
12(e)	93-3301(7)
12(f)	93-3802, 93-3803
12(h)	93-3306
13(a)	93-3408
13(b)	93-3402
13(c)	93-3402, 93-3404, 93-3405, 93-5703
13(g)	93-3415
14(a)	93-3415
15(a)	93-3304, 93-3904
15(a) (with Rules 6(b), 55(c), 60)	93-3905
15(b)	93-2303, 93-3901, 93-3902, 93-3903, 93-3909
15(d)	93-3818
17(a)	93-2801
17(b)	93-2805
18(a)	93-3203
19(a)	93-2821
19(b)	93-2828
20(a)	93-2811, 93-2812, 93-2818, 93-2822
20(b)	93-4906
22	93-2825

23 93-2821
24 . . . . . 93-2826, 93-2828
26 to 32, inclusive . . . . . 93-1801-1 to 93-1801-16, inclusive
26(a) 93-1801-2, 93-1801-3
26(b) 93-1801-2, 93-1801-3, 93-1801-4
26(c) 93-1801-10
26(d)(2) 93-1801-8
26(d)(3) 93-1801-3, 93-1801-10
26(d)(5) 93-1801-12
26(e) 93-1801-10
27(a) . . . . . 93-2301-1 to 93-2301-7, inclusive
28(a) 93-1801-4, 93-1801-9
28(b) 93-1801-4
28(d) 93-1801-13, 93-1801-14, 93-1801-15
29 . . . . . 93-1801-4, 93-1801-5, 93-1801-10
30(a) 93-1801-4, 93-1801-9
30(c) 93-1801-6, 93-1801-10
30(e) 93-1801-10, 93-1801-11
30(f)(1) 93-1801-6, 93-1801-10
31(a) 93-1801-5
31(b) 93-1801-5, 93-1801-6
31(d) 93-1801-5
32(a) 93-1801-11
32(b) 93-1801-11
32(c)(1) 93-1801-10
32(c)(2) 93-1801-10
32(c)(3) 93-1801-5
34 93-8301
38(d) 93-5301
39(a) 93-4905
39(b) 93-4905, 93-5301
40 . . . . . 93-4908, 93-4909
41(a)(1) . . . . . 93-4705(1), (2)
41(b) . . . . . 93-4705(3), (4), (5), 93-4708
42(a) 93-8705
42(b) 93-4906
43(b) 93-1901-9
45(c) 93-1501-5
46 93-5502
47(a) 93-5012
47(b) 93-5013, 93-5014
49 . . . . . 93-5111, 93-5201, 93-5202
51 . . . . . 93-5101(5)
52(a) 93-5303, 93-5411
53(a) 93-5403, 93-5407, 93-8607
53(b) 93-5401, 93-5402
53(c) 93-5401, 93-5402, 93-5406, 93-5407
53(d) 93-5405, 93-5406, 93-5410
53(e) 93-5410, 93-5411, 93-5412
54(a) 93-4701
54(b) 93-4703
54(c) 93-4704
54(d) 93-4709
55(a) . . . . . 93-4801(1), (2)
55(b)(1) . . . . . 93-4801(1)
55(b)(2) . . . . . 93-4120, 93-4801(2), (3), (4)
55(c) (with Rules 6(b), 15 (a), and 60) 93-3905
55(d) 93-3603
58 93-5701
59(b), (c) 93-5605
60 (with Rules 6(b), 15(a), and 55(c)) 93-3905

61 93-3909
62(d) 93-8007, 93-8008, 93-8009, 93-8010
68 93-8201

Table C. List of Statutes Superseded by Rules.

Statutes Superseded (R.C.M. 1947, sections)	Rules
53-204	4
93-2303	15(b)
93-2801	17(a)
93-2805	17(b)
93-2811	20(a)
93-2812	20(a)
93-2816	4
93-2818	20(a)
93-2821	19(a), 23
93-2822	20(a)
93-2825	22
93-2826	24
93-2828	19(b), 24
93-2905	12(b)
93-3003	4 and 12(a) together
93-3004	4
93-3006	4
93-3007	4
93-3009	4
93-3010	4
93-3013	4
93-3014	4
93-3015	4
93-3017	4D(11)
93-3018	4D(9), (10)
93-3019	4
93-3101	7(a)
93-3102	7(a)
93-3103	7(a)
93-3201	7(a)
93-3202	8(a)
93-3202(1)	10(a)
93-3202(2)	8(e)(1)
93-3203	18(a)
93-3301	7(c), 12(b)
93-3301(2)	9(a)
93-3301(7)	12(e)
93-3302	7(c)
93-3303	7(c)
93-3304	15(a)
93-3305	12(b)
93-3306	7(c), 12(h)
93-3401(1)	8(b)
93-3401(2)	8(c)
93-3402	13(b), 13(c)
93-3404	13(c)
93-3405	13(c)
93-3408	13(a)
93-3410	8(b), 8(e)(2), 10(b)
93-3411	8(b)
93-3412	8(a)
93-3415	13(g), 14(a)
93-3501	7(c), 12(b)
93-3502	7(c), 12(b)

93-3503 . . . . . 7(c)
93-3504 . . . . . 7(c), 12(b)
93-3505 . . . . . 7(c), 12(b)
93-3505(2) . . . . . 9(a)
93-3506 . . . . . 7(c), 12(b)
93-3601 . . . . . 7(a)
93-3602 . . . . . 8(e)(2), 10(b)
93-3603 . . . . . 7(a), 55(d)
93-3604 . . . . . 7(c), 12(b)
93-3701 11
93-3801 . . . . . 8(f)
93-3802 . . . . . 12(f)
93-3803 . . . . . 12(f)
93-3806 . . . . . 9(e)
93-3807 . . . . . 9(c)
93-3808 . . . . . 8(a)
93-3811 . . . . . 9(d)
93-3812 . . . . . 8(a)
93-3813 . . . . . 8(b)
93-3815 . . . . . 8(d)
93-3816 . . . . . 8(b)
93-3817 . . . . . 8(d)
93-3818 . . . . . 15(d)
93-3819 5
93-3820 . . . . . 10(c)
93-3901 . . . . . 15(b)
93-3902 . . . . . 15(b)
93-3903 . . . . . 15(b)
93-3904 . . . . . 15(a)
93-3905 . . . . . 6(b), 15(a), 55(c), and 60 together
93-3907 . . . . . 7(c)
93-3909 . . . . . 8(f), 15(b), 61
93-4120 . . . . . 55(b)(2)
93-4701 . . . . . 54(a)
93-4703 . . . . . 54(b)
93-4704 . . . . . 54(c)
93-4705(1), (2) . . . . . 41(a)(1)
93-4705(3), (4), (5) . . . . . 41(b)
93-4708 . . . . . 41(b)
93-4709 . . . . . 54(d)
93-4801(1) . . . . . 55(a), 55(b)(1)
93-4801(2) . . . . . 55(a), 55(b)(2)
93-4801(3) . . . . . 55(b)(2)
93-4801(4) . . . . . 55(b)(2)
93-4902 . . . . . 7(c), 12(b)
93-4904 . . . . . 8(d)
93-4905 . . . . . 39(a), 39(b)
93-4906 . . . . . 20(b), 42(b)
93-4908 40
93-4909 40
93-5012 . . . . . 47(a)
93-5013 . . . . . 47(b)
93-5014 . . . . . 47(b)
93-5101(5) 51
93-5111 49
93-5201 49
93-5202 49
93-5301 . . . . . 38(d), 39(b)
93-5303 . . . . . 52(a)
93-5401 . . . . . 53(b), 53(c)
93-5402 . . . . . 53(b), 53(c)

93-5403 . . . . . 53(a)
93-5405 . . . . . 53(d)
93-5406 . . . . . 53(c), 53(d)
93-5407 . . . . . 53(a), 53(c)
93-5410 . . . . . 53(d), 53(e)
93-5411 . . . . . 52(a), 53(e)
93-5412 . . . . . 53(e)
93-5502 46
93-5605 . . . . . 59(b), (c)
93-5701 58
93-5703. . . . . 13(c)
93-6206. 4
93-6207. 4
93-6208. 4
93-8007 . . . . . 62(d)
93-8008 . . . . . 62(d)
93-8009 . . . . . 62(d)
93-8010 . . . . . 62(d)
93-8201 68
93-8301 34
93-8401 . . . . . 7(b)
93-8403 . . . . . 6(d) and (e)
93-8501. 5
93-8502. 5
93-8503. 5
93-8504 . . . . . 5 and 6(e) together
93-8507. 5
93-8607 . . . . . 53(a)
93-8705 . . . . . 42(a)
93-1501-5 . . . . . 45(c)
93-1801-1 to 93-1801-16, inclusive. . . . . 26 to 32, inclusive
93-1801-2 . . . . . 26(a), 26(b)
93-1801-3 . . . . . 26(a), 26(b), 26(d)(3)
93-1801-4 . . . . . 26(b), 28(a), 28(b), 29, 30(a)
93-1801-5. . . . . 29, 31(a), 31(b), 31(d), 32(c)(3)
93-1801-6 . . . . . 30(c), 30(f)(1), 31(b)
93-1801-8 . . . . . 26(d)(2)
93-1801-9 . . . . . 28(a), 30(a)
93-1801-10 . . . . . 26(c), 26(d)(3), 26(e), 29, 30(c), 30(e), 30(f)(1), 32(c)(1), 32(c)(2)
93-1801-11 . . . . . 30(e), 32(a), 32(b)
93-1801-12 . . . . . 26(d)(5)
93-1801-13. . . . . 28(d)
93-1801-14. . . . . 28(d)
93-1801-15. . . . . 28(d)
93-1901-9 . . . . . 43(d)
93-2301-1 to 93-2301-7, inclusive. . . . . 27(a)

List of Statutes Superseded by Amendment: The following statutes listed below are additions to Tables B and C above, since they were superseded by amendments to the M.R.Civ.P. The 1965 amendment added sections 16-809, 93-3008, 93-3011, and 93-3012 to the list of sections superseded by Rule 4D; and added section 93-3002 to the list of sections superseded by Rule 41(e).

The 1969 amendment added section 93-5302 to the list of sections superseded by Rule 52(a); inserted sections 93-5305, 93-5306, and 93-5307 as being superseded by Rule 52(b); added section 93-5606 to the list of sections superseded by Rule 59(d).

Table B. List of Rules Superseding Statutes.

Rule	Statutes Superseded (R.C.M. 1947, sections)
4D	16-809, 93-3008, 93-3011, 93-3012
41(e)	93-3002

52(a) 93-5302, 93-5303, 93-5411
52(b) 93-5305, 93-5306, 93-5307
59(a), (b), (c), (d) 93-5605, 93-5606

Table C. List of Statutes Superseded by Rules.

Statutes Superseded (R.C.M. 1947, sections)	Rules
93-3002	41(e)
93-3008	4D
93-3011	4D
93-3012	4D
93-5302	52(a)
93-5305	52(b)
93-5306	52(b)
93-5307	52(b)
93-5606	59(d)
16-809	4D

Form 8. COMPLAINT FOR NEGLIGENCE.

Advisory Commission Note

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform forms 8 and 9 to 25-4-311, MCA, which precludes damage amounts to be stated in claims for relief for personal injury and wrongful death actions.

Form 9. COMPLAINT FOR NEGLIGENCE WHERE PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C.D. OR E.F. OR WHETHER BOTH ARE RESPONSIBLE AND WHERE PLAINTIFF'S EVIDENCE MAY JUSTIFY A FINDING OF WILLFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE.

Advisory Commission Note

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform forms 8 and 9 to 25-4-311, MCA, which precludes damage amounts to be stated in claims for relief for personal injury and wrongful death actions.

Form 15. Motion to Dismiss.

Compiler's Comments

2001 Amendment: In last paragraph substituted "20.." for "19.." to reflect the new millennium. Amendment effective October 23, 2001.

Form 18-A. NOTICE AND ACKNOWLEDGMENT FOR SERVICE BY MAIL.

Advisory Committee Notes

1988 Amendment: The amendment conforms the rule to the 1985 amendment of the Federal Rules.

Compiler's Comments

1988 Amendment: In last paragraph substituted "will have been mailed" for "was mailed". Amendment effective November 1, 1988.

CHAPTER 21
RULES OF APPELLATE PROCEDURE

Chapter Advisory Commission Notes

The procedure covering appeals in criminal cases to the supreme court of Montana from Montana district courts has heretofore been found in various statutes. It was decided that for convenience the rules governing procedure for appellate practice should be equally applicable to civil and criminal cases, the same as found in the Federal Rules of Appellate Procedure. Many of the proposed amendments [June 16, 1986; effective January 19, 1987] are minor, designed to make them applicable to criminal cases as well as civil. In such cases, no further advisory commission notes appear necessary.

Chapter Compiler's Comments

History of Montana Rules of Appellate Procedure: The Montana Rules of Appellate Procedure (M.R.App.P.) are the result of a study and recommendations by the Montana Supreme Court's Advisory Committee on Rules created pursuant to Ch. 16, L. 1963, to advise the court on matters pertaining to the form and adoption of rules of procedure. Notes which the Advisory Committee included on the proposed rules have been included under the heading "Advisory Committee Notes". The original M.R.App.Civ.P. were approved by the Montana Supreme Court on December 10, 1965, effective January 1, 1966, and supersede 25 sections of the 1947 Revised Codes of Montana, numerous Rules of the Supreme Court of Montana, and several of the earlier adopted Montana Rules of Civil Procedure. The Advisory Committee continues to advise the Supreme Court on proposed amendments to the M.R.Civ.P. and the M.R.App.P. under the authority of 3-2-702, MCA Notes of the Advisory Committee pertaining to amendments adopted since 1966 have also been included.

Identity With Superseded Statute — Case Notes Included: As noted in the compiler's comment above, the M.R.App.P. supersede many sections of the R.C.M. 1947. Because language from some of the superseded sections has been used in the M.R.App.P., some of the case notes previously annotated in the R.C.M. 1947 have been included in these annotations under the subheading "Cases Decided Under Statute". Cases decided under the provisions of the M.R.App.P. are annotated under the subheading "Cases Decided Under Rules". Only those cases decided under superseded statutes with language identical or clearly analogous to the language of a corresponding rule have been included. For the language of the superseded sections of the R.C.M. 1947, reference may be made to Tables B and C included as compiler's comments to Rule 43 (now Rule 53), M.R.App.P. and then to the appropriate section of Title 93, vol. 7, R.C.M. 1947.

Identity With Federal Rules: Some of the Montana Rules of Appellate Procedure (M.R.App.P.) are patterned after the Federal Rules of Appellate Procedure (Fed.R.App.P.). The Advisory Committee has occasionally compared the M.R.App.P. to the Fed.R.App.P. as contained in the "Federal Draft" of those rules proposed by the Standing Committee on Rules of Practice and Procedure, a committee reporting the form of the proposed Fed.R.App.P. and subsequent amendments to the Judicial Conference of the United States under the authority of 28 U.S.C. 331, 2072. The draft of the Fed.R.App.P. was adopted by the United States Supreme Court on December 4, 1967, effective July 1, 1968. As to the applicability of cases litigated under the F.R.App.P. to the corresponding M.R.App.P., see, e.g., [USF&G Co. v. Rodgers, 267 M 178, 882 P2d 1037, 51 St. Rep. 1023 (1994);] Petritz v. Albertsons, Inc., 187 M 102, 608 P2d 1089 (1980); St. Highway Comm'n v. Antonioli, 145 M 411, 401 P2d 563 (1965); Rambur v. Diehl Lumber, 144 M 84, 394 P2d 745 (1964).

Effect of Publishing Montana Rules of Appellate Procedure: Section 2, Ch. 1, L. 1979, provided: "(1) The legislature recognizes the supreme court's authority pursuant to Article VII, section 2, of the Montana constitution to make rules governing procedure and practice before the courts.

(2) The legislature also recognizes that the practice of printing such rules with the Montana statutes is of benefit to code users and facilitates implementation of Article VII, section 2(3), of the Montana constitution concerning disapproval by the legislature.

(3) Therefore, the Montana Rules of Civil Procedure, printed as chapter 20, Title 25, MCA; the Montana Rules of Appellate Civil Procedure [now Montana Rules of Appellate Procedure], printed as chapter 21, Title 25, MCA; and the Montana Rules of Evidence, printed as chapter 10, Title 26, MCA, appear only for the purpose of facilitating use of the code. Neither this act nor publication of the rules may be construed as an attempt to readopt or promulgate the rules."

Rules of Court Contained in Montana Rules of Appellate Procedure — Certification of Controlling Questions of Law by United States Courts: Rule I, entitled "Civil Matters", of the Rules of the Montana Supreme Court provides as follows: "All rules with respect to the operation of this Court, procedure and practice therein, are contained in the Montana Rules of Appellate Civil Procedure [now Montana Rules of Appellate Procedure], except that whenever in an action pending in a United States court it shall appear that there is a controlling question of Montana law as to which there is a substantial ground for difference of opinion, a party to such action may institute suit in the Montana Supreme Court for a declaratory judgment or decree, and, if the judge of the United States court wherein the action is pending shall certify that the question upon which adjudication is sought is controlling in the federal litigation and the adjudication by the Montana Supreme Court will materially advance ultimate termination of the federal litigation, a declaratory judgment or decree may be rendered. Rendition of a declaratory judgment or decree is discretionary with the Montana Supreme Court, and it may refuse to render such a judgment or decree if it appears that there is another ground for determination of

the case pending in the United States court, or if the question for adjudication is not clearly defined, or if the question is not adequately briefed or argued.

This amended Rule shall be in full force and effect from and after the first day of March, 1967."

Chapter Law Review Articles

Montana's Judicial System—A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (1967).

Cost of Appeal, Lessley, 27 Mont. L. Rev. 49 (1965).

Chapter Collateral References

The Montana Supreme Court: Operating Under the Internal Operating Rules, State Bar of Montana C.L.E. publication, April 1986. (For internal operating rules, see compiler's comments under Article VII, section 2, Mont. Const.)

I. Applicability of Rules

Rule 1. Scope of rules — from what judgment or order an appeal may be taken.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

Section 93-8003, R.C.M. 1947, is restated and clarified. The effect of section 93-8004(3)[, R.C.M. 1947], referring to "an order changing or refusing to change a place of trial," is limited by providing for appeals from orders re change of venue only in cases where the motion for change is based upon subdivision 1 of section 93-2906[, R.C.M. 1947; 25-2-201, MCA].

Since these rules only apply to appeals from district courts to the Montana supreme court, the provisions of sections 93-8001 and 93-8002[, R.C.M. 1947; 25-12-101, 25-12-102, MCA, respectively] are not superseded in so far as they refer to appeals in actions in police or justice's courts: a judgment or order in a civil action in police or justice's courts, except when expressly made final, may be reviewed as prescribed in R.C.M. 1947, sections 93-7901 to 93-7908[; 25-33-102 through 25-33-104, 25-33-201 through 25-33-205(1), 25-33-207, 25-33-301, 25-33-303 through 25-33-306, MCA].

NOTE TO SEPTEMBER 29, 1967, AMENDMENT

Source: None.

This adds to appealable orders an order under Rule 23(c)(1), Montana Rules of Civil Procedure, refusing to permit a class action to be maintained as such. It does not permit appeal from an order permitting a class action to be maintained as such. See Advisory Committee's Note to Rule 23 of the Montana Rules of Civil Procedure.

Compiler's Comments

1986 Amendment: The Supreme Court Order of June 16, 1986, in (a) inserted "and criminal" after "appeals in civil"; in (b) inserted "In civil cases" at beginning; inserted (d) relating to appeals taken in criminal cases; and reoutlined entire section.

Amendments: The amendment of September 29, 1967, in clause (b), inserted "or refusing to permit an action to be maintained as a class action;" near the beginning of the first sentence.

Case Notes

Cases Decided Under Rules
General 1180
Summary Judgment 1187
Injunctions 1188
Default Judgment 1189
Writ of Supervisory Control 1190
Final Judgment 1192
Standing to Appeal 1196
Cases Decided Under Statute
General 1201
Accounting Proceedings 1203
Amendment of Judgment 1203
Dismissal of Action 1204
Divorce Proceedings 1204
Findings and Verdict 1205

Injunctions and Restraining Orders. 1205
Justice Court Appeals to District Court. 1206
Probate Proceedings — Generally. 1206
Probate Proceedings — Distribution of Estate 1208
Probate Proceedings — Real Estate Conveyance. 1209
Receivership Proceedings 1209
Setting Aside Judgment 1209
Appeal From Order Denying New Trial. 1210

CASES DECIDED UNDER RULES

GENERAL

District Court Decision Regarding Constitutionality of One Issue Precluding Consideration of Other Constitutional Questions — Certification to Supreme Court Proper: Baumgardner raised numerous issues concerning the constitutionality of 2001 amendments to the Public Employees' Retirement System. The District Court decided that the amendments were an unconstitutional delegation of legislative power but did not consider other issues related to the amendments. The Public Employees' Retirement Board moved to certify the judgment as final, and the motion was granted. On appeal, Baumgardner contended that certification was improper because the District Court did not resolve all of the pending issues. The Supreme Court disagreed. Once the amendments were declared unconstitutional on the delegation question, there was no need for the District Court to consider other challenges to the constitutionality of the amendments, so certification was appropriate, and the case was properly submitted to the Supreme Court. Baumgardner v. Pub. Employees' Retirement Bd., 2005 MT 199, 328 M 179, 119 P3d 77 (2005).

Appeal Moot for Inability of Supreme Court to Grant Relief: Plaintiffs owned a ranch, but being in default and facing foreclosure, they made a deal with defendant Bell whereby Bell would borrow money to pay off plaintiffs' debt and plaintiffs would receive an ownership interest in Bell's company formed to manage the ranch. However, the mortgage was never transferred into the company, and plaintiffs sued Bell for fraud and breach of contract. A jury granted plaintiffs $500,000 in damages for Bell's breach of contract, and Bell appealed. Bell ultimately declared bankruptcy and sold the ranch to pay off the loan and to pay off the money judgment owed to plaintiffs, whereby plaintiffs' mortgage on the ranch was released. Plaintiffs moved that Bell's appeal be dismissed for mootness, and the Supreme Court agreed. The $500,000 judgment could not simply be reversed with plaintiffs retaining ownership because the ranch had been sold, and Bell would be considerably richer than he was at the beginning of the deal, having invested little of his own money, and plaintiffs would have nothing. Therefore, applying Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799 (1996), the Supreme Court held that Bell's claim was moot based on the court's inability to grant effective relief. Graveyard Creek Ranch, Inc. v. Bell, 2005 MT 172, 327 M 491, 116 P3d 779 (2005).

Appeal of Appointment of Personal Representative Not Timely: The District Court appointed a son as personal representative of his mother's estate and ordered that letters of administration be issued to him, and his sister appealed the appointment. Pursuant to In re Estate of Peterson, 264 M 104, 874 P2d 1230 (1994), the Supreme Court reviewed the appointment to determine whether the District Court correctly interpreted the law. Under this rule, an order granting letters of administration is appealable, but Rule 5, M.R.App.P., provides that an aggrieved party has 30 days from the date of entry of an order to file a notice of appeal. By the time that the sister appealed, her brother had been personal representative of the estate for 14 months, so the appeal was not timely. In re Estate of McMurchie, 2004 MT 98, 321 M 21, 89 P3d 18 (2004).

Power of Trial Court on Remand — No Provision Regarding Effect of Failure to Deny in Rules of Appellate Procedure: In 1993, Brown filed a petition for a writ of habeas corpus, arguing that prison officials had miscalculated his parole eligibility date. The Supreme Court denied that petition. In 1996, Brown filed a 42 U.S.C. 1983 complaint in District Court seeking to address alleged deprivations of his rights by prison officials under federal law, but the complaint was dismissed for failure to state a claim. The District Court concluded that the issues raised in the complaint were the same as those raised in the 1993 writ and were thus barred by collateral estoppel. Brown appealed, and in an unpublished opinion (Brown v. St., No. 96-651), the Supreme Court remanded, concluding that the District Court had mischaracterized the issues in the 1993 writ and that three of the claims were not barred by collateral estoppel. On remand, after an unexplained delay of 4 years, the District Court dismissed Brown's remaining claims, holding that they were not cognizable under federal law. Brown appealed again, arguing that the District Court erred by granting judgment to the state without first holding a hearing and asserting that under Rule 8(d), M.R.Civ.P. (Title 25, ch. 20), the state's failure to respond to the

issue in its brief constituted an admission that Brown was correct on the issue. However, Brown misapplied Rule 8(d) to these proceedings. The Montana Rules of Appellate Procedure do not contain a similar provision regarding the effect of failure to deny. Further, the remand order did not require the District Court to hold a hearing. On remand, the trial court is free to make any order or decision in further progress of the case that is not inconsistent with the appellate court's decision. The District Court was affirmed. Brown v. St., 2002 MT 58, 309 M 106, 46 P3d 42 (2002).

Appropriateness of Intervention in Action Challenging Enforcement of Ballot Initiative: Two sporting groups sought to intervene in an action challenging the enforcement of a ballot initiative that prohibited the shooting of alternative livestock for a fee. The District Court denied the motion, and the groups appealed. After accepting supervisory control, the Supreme Court noted that an application for intervention as a matter of right must satisfy each of the following factors: (1) timeliness; (2) interest in the subject matter of the litigation; (3) a showing that protection of the interest may be impaired by disposition of the action; and (4) a showing that the interest is not adequately represented by an existing party. In the present case, timeliness was not disputed. Regarding the second factor, the Supreme Court cited Idaho Farm Bureau Fed'n v. Babbitt, 58 F3d 1392 (9th Cir. 1995), for the proposition that a public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure that the group has supported. The District Court did not address the third factor because it determined that the groups had no legally protectable interest in the litigation. However, the Supreme Court found that an adverse decision in the suit would impair the groups' interest in the management and protection of Montana's game animals, so the third factor was met. Finally, the District Court determined that the groups failed to demonstrate that the Attorney General, on behalf of the Department of Fish, Wildlife, and Parks, would not zealously defend the groups' position in the suit. The Supreme Court concluded that the groups that actively drafted and supported the initiative may be in the best position to defend their interpretation of the resulting legislation and may not have been adequately represented by the Department. Thus, all four factors were met, and the Supreme Court ordered the District Court to permit the groups to intervene in the case. Sportsmen for I-143 v. District Court, 2002 MT 18, 308 M 189, 40 P3d 400 (2002).

Conflict of Interest of Personal Representative Cured by Court Supervision of Estate: Prior to Zempel's death, he executed his will, naming his daughter, Palmer, as his sole devisee and his neighbor, Newman, as personal representative of the estate. Zempel then entered into an agreement to sell his ranch to Newman, who, acting pursuant to the power of attorney, executed a contract for deed and lease that transferred the ranch property to Newman. Following Zempel's death, the District Court appointed Palmer as special administrator based on an ex parte application. Shortly thereafter, Newman filed a petition for formal probate and appointment of personal representative, in conjunction with a motion to set aside the ex parte order. The District Court terminated the ex parte order, appointed Newman as personal representative, and ordered that any real estate transaction be approved by the court after notice and hearing. Palmer appealed Newman's appointment as personal representative, citing the conflict of interest that arose from the documents purportedly transferring estate assets to Newman. A conflict of interest is sufficient for removal of a personal representative for cause, but does not mandate removal. As established in In re Estate of Goick, 275 M 13, 909 P2d 1165 (1996), a transaction involving a conflict of interest between a personal representative and an estate can be cured by a court-ordered supervision of the transaction. The District Court did not act arbitrarily in this case because it required its approval for the final transaction between the personal representative and the estate, protecting any objection or challenge by Palmer through supervision of the disputed transaction, which cured the conflict of interest. The court did not err when it appointed Newman as personal representative, and the appointment was affirmed. In re Estate of Zempel, 2000 MT 283, 302 M 183, 14 P3d 441, 57 St. Rep. 1182 (2000).

Interlocutory Order Granting Temporary Investigative Authority and Protective Services Not Appealable: An order for temporary investigative authority and protective services issued under 41-3-403 is not a "final judgement", a specified interlocutory order, or "an allowance for a widow or a child" and is not appealable under this rule. In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000).

Failure to File Bill of Costs Held Waiver of Recovery of Costs — Issue Addressed First Time on Appeal: Cenex, Inc., brought a declaratory judgment action against the Yellowstone County Board of Commissioners. Cenex, for the first time on appeal, raised an objection to the District Court's order that it pay the Board $852.75 in costs. The Supreme Court noted that while it generally does not address issues raised for the first time on appeal, the failure of the Board to file a bill of costs pursuant to 25-10-201 deprived Cenex of its opportunity to object to the

taxation of costs before the District Court. The Supreme Court therefore determined that Cenex cannot be considered to have waived its right to appeal the taxation of costs and held that the Board's failure to file the bill of costs constituted a waiver of its right to recover costs from Cenex. Cenex, Inc. v. Yellowstone County Bd. of Comm'rs, 283 M 330, 941 P2d 964, 54 St. Rep. 695 (1997).

Denial of Bond Pending Appeal — Method of Supreme Court Review — Jurisdiction: After conviction for negligent homicide and on related charges, Ingraham moved the District Court to continue bond pending appeal. The District Court denied the motion, finding that Ingraham was a danger to the community and therefore did not meet the requirements of 46-9-107. Ingraham then moved the Supreme Court, pursuant to Rule 22, M.R.App.P., to continue bond pending appeal or, in the alternative, to accept appeal of the District Court's order denying bond, pursuant to 46-20-104 and this rule. The Attorney General moved to dismiss, contending that there was no provision in law for appeal from a District Court order denying bond pending appeal and that Ingraham should have brought an original habeas corpus proceeding. The Supreme Court agreed with the Attorney General and dismissed Ingraham's motion or appeal, holding that Ingraham should have brought a petition for a writ of habeas corpus pursuant to 46-22-103. Ingraham then filed a petition for a writ of habeas corpus, which was filed with Justice Trieweiler pursuant to 3-2-212. Justice Trieweiler granted the petition to the extent necessary for the District Court to hold an evidentiary hearing as provided by statute, under the theory that the District Court was the more appropriate court for the hearing than was the Supreme Court. The Attorney General opposed the order by applying to the full Supreme Court for a writ of supervisory control, arguing, contrary to the state's previous position, that 46-22-103 does not really apply to persons convicted in a criminal case and that the more appropriate procedure was an original proceeding "in the nature of habeas corpus" before the full Supreme Court. The application for a writ of supervisory control was denied, was treated by the Supreme Court as a late-filed response to Ingraham's petition for a writ of habeas corpus, and was referred to Justice Trieweiler. Justice Trieweiler determined that it was inappropriate for him alone to determine the form of review of the District Court's denial of bond. Justice Trieweiler also determined that: (1) Ingraham had no constitutional right to bond pending appeal; (2) Ingraham did have a right to the proper exercise of the District Court's discretion in the application of 46-9-107; and (3) that right was a substantial right for the purposes of 46-20-104. For these reasons, Justice Trieweiler vacated his previous order granting Ingraham's petition for a writ of habeas corpus and referred the matter to the full Supreme Court for review of the District Court's order denying bond pending appeal. St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Section 1983 Action — Denial of Summary Judgment on Qualified Immunity Held Not Appealable — Lack of Supreme Court Jurisdiction — Sanctions Awarded: After a riot at the Montana State Prison (MSP) in which several prison inmates were killed or injured, inmates brought a negligence and section 1983 action against MSP officials. The MSP officials moved for summary judgment on the issue of qualified immunity from the section 1983 action. The District Court denied the motion, and the MSP officials appealed the denial. The Supreme Court held that the Supreme Court had no jurisdiction over the appeal from the District Court's denial of the summary judgment motion because the District Court order is not a final judgment within the meaning of subsection (b)(1) of this rule and that the appeal was likewise not authorized by subsection (b)(2) or (b)(3) of this rule. The Supreme Court noted that this result was not changed by the state's allegation that the record was "ripe for appeal" and was "easily reviewable". The Supreme Court also held that the case law of the federal courts interpreting 28 U.S.C. 1291, especially Mitchell v. Forsyth, 472 US 511 (1985), and Johnson v. Jones, 515 US 304, 132 L Ed 2d 238, 115 S Ct 2151 (1995), was not relevant because the Montana Supreme Court derives its authority over appeals from the state constitution and the Montana Rules of Appellate Procedure and not from 28 U.S.C. 1291. Because the appellants had not made any arguments in favor of their appeal, the Supreme Court determined that it was frivolous and, pursuant to Rule 32, M.R.App.P., awarded the respondents their attorney fees on appeal. In re Litigation Relating to Riot, 283 M 277, 939 P2d 1013, 54 St. Rep. 598 (1997).

Order Allowing Intervention Appealable With Final Judgment: DeVoe brought an action against the state, alleging that it had abandoned property to which DeVoe was the successor in interest. The District Court granted a motion by the city of Missoula that the city be allowed to intervene. After final judgment in favor of Missoula, DeVoe appealed the District Court's order allowing Missoula to intervene. The Supreme Court held that an order granting intervention is not separately appealable under this rule because the order is not individually listed in this rule as an appealable order, but held that the order is appealable after entry of final judgment. The Supreme Court noted that it had previously ruled to the same effect in Cont. Ins. Co. v. Bottomly,

233 M 277, 760 P2d 73 (1988), Estate of Schwenke v. Becktold, 252 M 127, 827 P2d 808 (1992), and In re Custody of R.R.K., 260 M 191, 859 P2d 998 (1993). DeVoe v. St., 281 M 356, 935 P2d 256, 54 St. Rep. 207 (1997).

Failure to Transfer Venue for Convenience and Justice Not Subject to Interlocutory Appeal: The Department of Health and Environmental Sciences (now Department of Environmental Quality) brought an action in Lewis and Clark County against Pegasus Gold Corporation (Pegasus) and Zortman Mining, Inc. (ZMI), for numerous violations of the Montana water quality laws at the Zortman and Landusky mines located in Phillips County. Defendant ZMI moved for change of venue under both 25-2-201(1) and (3). The District Court refused to transfer venue under subsection (1) without discussing the merits of ZMI's claim under subsection (3), and ZMI appealed. The Supreme Court refused to consider the merits of ZMI's claim under 25-2-201(3), holding that the language of subsection (b)(2) of this rule is intended to allow interlocutory appeals only of a District Court's refusal to change venue under 25-2-201(1). State ex rel. Dept. of Health and Environmental Sciences v. Pegasus Gold Corp., 270 M 32, 889 P2d 1197, 52 St. Rep. 64 (1995).

Grant of Motion for Extension of Time for Appeal as Appealable Order: The District Court granted Dvoraks's motion for an extension of time in which to file a notice of appeal. Northwest appealed from the District Court's order. Dvoraks claimed that the order was not appealable because it was not specifically set forth in this rule. Citing Sadowsky v. Glendive, 259 M 419, 856 P2d 556 (1993), the Supreme Court held that an order extending the time to file a notice of appeal was a "special order made after final judgment" within the language of this rule. NW. Truck & Trailer Sales, Inc. v. Dvorak, 265 M 327, 877 P2d 31, 51 St. Rep. 564 (1994).

Relitigation of Previously Resolved Issue Barred on Appeal: Under the doctrine of law of the case, a prior Montana Supreme Court decision resolving a particular issue between the same parties in the same case is binding and cannot be relitigated in a subsequent appeal. St. v. Smith, 261 M 419, 863 P2d 1000, 50 St. Rep. 1388 (1993). See also St. v. Van Dyken, 242 M 415, 791 P2d 1350 (1990).

Motion to Stay and Motion for Protective Order Not Subject to Interlocutory Appeal: During a dissolution proceeding, Lori filed a notice of appeal from a District Court order denying Lori's motion to stay proceedings and her motion for a protective order. The Supreme Court held that denial of a motion to stay and denial of a motion for a protective order are interlocutory in nature and are not appealable orders within the scope of this rule. For that reason, the Supreme Court held that Lori may not appeal denial of her motions until the District Court enters final judgment in her case. In re Marriage of Smith, 260 M 406, 860 P2d 159, 50 St. Rep. 1151 (1993).

Untimely Appeal From Denial of Motion for Change of Venue — Waiver: In the course of a dissolution proceeding, Lori appealed from the District Court's denial of her motion for a change of venue. The Supreme Court held that while a denial of a motion for a change of venue is an appealable order within the scope of this rule, the request for a change of venue must be timely made. Under Rule 12(b), M.R.Civ.P. (Title 25, ch. 20), a motion for a change of venue must be made within 20 days after the response to the pleading is filed. In this case, the dissolution proceeding was begun in 1985 and the husband's motion for custody was filed on June 5, 1991. However, the motion for a change of venue was not filed until March 18, 1993. In addition to the untimely motion, Lori made numerous appearances in the District Court of the Eighth Judicial District without challenging venue in that district. The Supreme Court therefore dismissed the appeal. In re Marriage of Smith, 260 M 406, 860 P2d 159, 50 St. Rep. 1151 (1993).

Elements of Prima Facie Case for Foreclosure Admitted in Pleadings — Controversion on Appeal Estopped: When a party admitted in the pleadings all elements necessary to establish a prima facie case for foreclosure sufficient to warrant summary judgment, the party was bound by the pleadings and estopped on appeal to controvert the admissions. Farm Credit Bank of Spokane v. Hill, 266 M 258, 879 P2d 1158, 50 St. Rep. 726 (1993).

Foreclosure Action — Appeal Not Moot Because of Owners' Failure to Post Bond or Stay Appeal: In a foreclosure action, the bank prevailed in District Court. The owners did not voluntarily relinquish the property. The bank foreclosed. The owners' failure to post a supersedeas bond or otherwise stay the proceedings in District Court did not render their appeal moot. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993), overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996).

Right to Appeal — Receipt of Damages: In a breach of contract suit relating to sale of real property, when plaintiffs had deposited funds with the District Court rather than make payments under the contract to defendants, acceptance of money from the court to cover survey

expenses did not preclude plaintiffs from pursuing an appeal. Maloney v. Heer, 257 M 500, 850 P2d 957, 50 St. Rep. 382 (1993).

Grants of Intervention Not Appealable: The plaintiff appealed the lower court's decision to let a third party intervene in the plaintiff's suit against the defendant. The Supreme Court held that granting intervention was interlocutory and not subject to appeal. Whitefish Credit Union Ass'n, Inc. v. Glacier Wilderness Ranch, Inc., 242 M 471, 791 P2d 1363, 47 St. Rep. 892 (1990).

Issues Related to Stipulated Facts or Law Not to Be Raised on Appeal: After the lower court had entered its judgment, the parties agreed that a certain portion of the judgment was valid and stipulated it was not subject to appeal. The Supreme Court refused to hear argument concerning the stipulated portion of the judgment, holding that after such a stipulation, a party could not raise issues relating to that subject matter on appeal. Westland Enterprises, Inc. v. Boyne USA, Inc., 237 M 186, 772 P2d 309, 46 St. Rep. 724 (1989).

Dismissal of Complaint With Prejudice Improper When Criminal Appeal Pending: On motion, the District Court dismissed with prejudice a pro se complaint while complainant's criminal conviction was on appeal before the Supreme Court. Noting that the claims could be barred under a theory of collateral estoppel, the Supreme Court amended the judgment to a dismissal without prejudice because a dismissal with prejudice while the conviction was on appeal would be premature and improper. Rudolph v. Dussault, 234 M 449, 763 P2d 1139, 45 St. Rep. 2039 (1988).

Motion to Intervene Not Denominated in Rule — Nonappealable: Appellants sought review of the District Court denial of a motion to intervene. This rule does not provide for appeals from either the granting or denial of motions to intervene, and as a matter not specifically denominated in the rule, it was not a proper subject for appeal. Cont. Ins. Co. v. Bottomly, 233 M 277, 760 P2d 73, 45 St. Rep. 1486 (1988), distinguished in Estate of Schwenke v. Becktold, 252 M 127, 827 P2d 808, 49 St. Rep. 180 (1992).

Order for Protection of Youth — Rules Suspended — Procedure on Appeal: A petition for temporary investigative authority and protective services was filed by the prosecutor under 41-3-402 (renumbered 41-3-427). Temporary custody of K.H. was later awarded to county welfare department under 41-3-403 (renumbered 41-3-423). The District Court found probable cause for state intervention and ordered temporary investigative authority, custody in the mother, and restrictions on the father's visitation. The parents appealed the order, an appealable order within Rule 1, M.R.App.P., but not an adequate remedy because of the time involved. Relief should properly be pursued through a Writ of Certiorari, Habeas Corpus, or Supervisory Control. The Supreme Court treated the matter as a Writ of Certiorari and denied it on the grounds that the District Court proceedings were in substantial compliance with law and that the petitioners were not prejudiced thereby. In re K.H., 216 M 267, 701 P2d 720, 42 St. Rep. 796 (1985). However, see In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000), in which it was held that because an interlocutory order granting temporary investigative authority and protective services is not appealable under this rule.

Appeal Not Moot Because Judgment Satisfied — Court Can Grant Effective Relief: Payment of a money judgment by the judgment debtor does not, by itself, render the cause moot for purposes of appeal. A defeated party's compliance with the judgment renders his appeal moot only where the compliance makes the granting of effective relief by the appellate court impossible. This basic rule on mootness was stated earlier in Mont. Nat'l Bank of Roundup v. St. Dept. of Revenue, 167 M 429, 539 P2d 722 (1975), followed in In re Marriage of Nevin, 284 M 468, 945 P2d 58, 54 St. Rep. 981 (1997), and overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996). In the present action to recover damages for breach of a construction contract, there is no reason the Supreme Court cannot grant effective relief. Martin Dev. Co. v. Keeney Constr. Co., 216 M 212, 703 P2d 143, 42 St. Rep. 752 (1985), followed and clarified, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996). On a later appeal, the parties were bound by the facts and law established in this prior case. Relitigation of issues was barred by collateral estoppel, and claims of legal malpractice were barred by the statute of limitations. Peschel v. Jones, 232 M 516, 760 P2d 51, 45 St. Rep. 1244 (1988). See also Sjoberg v. Kravik, 233 M 33, 759 P2d 966, 45 St. Rep. 1270 (1988), and Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Late Appeal — New Grounds for Argument Below — Failure to Argue on Appeal: The merits of appellants' arguments in support of removal of personal representative of an estate could not be considered on appeal from denial of final order denying motion to remove when: (1) since the

order was final and appealable, it had to be appealed within 30 days of notice of its entry; (2) appeal was filed 34 days after notice of entry of the order; and (3) though appellants had, within the 30 days prior to their notice of appeal, filed a second petition for removal that raised a new ground for removal, appellants did not argue that failure to raise the ground earlier was excusable because of inadvertence, excusable neglect, or newly discovered evidence, and the lower court found appellants had earlier been in possession of all the facts. The order was conclusive as to all matters that could have been raised under the issues raised in the original petition for removal. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984), distinguished in Wadsworth v. St., 275 M 287, 911 P2d 1165, 53 St. Rep. 146 (1996).

Issues Subject to Review on Appeal: Sorlie argued that the school district could not appeal a salary decision made by the Superintendent of Public Instruction because it did not directly petition the District Court for review. The Supreme Court disagreed. Issues brought before the agency proceeding automatically become subject to judicial review. The salary issue was raised at the agency level and reviewed by the District Court. The school district, as an aggrieved party, can appeal from the decision of the District Court. Sorlie's petition for judicial review raised the salary question, and the school district was aggrieved by the District Court decision on that question. Consequently the school district can appeal on that basis. Sorlie v. School District, 205 M 22, 667 P2d 400, 40 St. Rep. 1070 (1983).

No Finding of Juror Prejudice Due to Pretrial Publicity: The District Court did not err in denying defendant's motion for a change of venue and a motion for an individually sequestered voir dire when the allegations given for the requested change of venue failed to establish any possibility of jury prejudice due to pretrial publicity. The two jurors who heard anything about the case in the newspaper or radio were eliminated by peremptory challenge. Further, an alternate juror who read the articles but was not prejudiced did not sit as a juror in the deliberations. St. v. Hansen, 194 M 197, 633 P2d 1202, 38 St. Rep. 1541 (1981).

Supreme Court Ruling When No Trial Court Ruling: When a case is appealed to the Supreme Court that involves an issue not raised in the trial court, but which is based almost exclusively on depositions, the Supreme Court is in just as good a position as the trial court to assess the deposition testimony and to issue a ruling therefrom. Reid v. Park County, 192 M 231, 627 P2d 1210, 38 St. Rep. 631 (1981).

Involuntary Commitment — Mootness — Issues Not Raised in District Court: Where, after a brief interview with a mental health counselor-therapist, the appellant was involuntarily committed to a state mental hospital for a period of 3 months and then challenged the commitment in the District Court, the appellant's appeal would not be dismissed even though the appellant had been released prior to submission of the appeal. The important constitutional issues raised by the appellant were not rendered moot by his release because other persons would be involuntarily committed for 3 months of evaluation and testing. This time period renders a timely appeal impossible under the current rules of appellate procedure. Nor would the appeal be dismissed because of the appellant's failure to raise the constitutional issues in the District Court since the Supreme Court reserves to itself the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law. In re N.B., 190 M 319, 620 P2d 1228, 37 St. Rep. 2031 (1980). See also Cottrill v. Cottrill Sodding Serv., 229 M 40, 744 P2d 895, 44 St. Rep. 1762 (1987), and In re Klos, 284 M 197, 943 P2d 1277, 54 St. Rep. 843 (1997).

Multiple Claims and Parties — Certification Required for Appeal Because of Impleader of Third Party: Where the plaintiff corporation brought an action against the defendant insurance company to collect an account and the defendant impleaded a third-party defendant, a final judgment against the defendant insurance company was interlocutory in nature and could not be appealed absent an express determination by the court that there was no just reason for delay. Rule 14, M.R.Civ.P., expressly provides that an entry of judgment upon either the original claim or the third-party claim must comply with Rule 54(b), M.R.Civ.P. Because the court did not make the express determination required, the appeal is premature. Pioneer Concrete & Fuel, Inc. v. Apex Constr., Inc., 190 M 229, 620 P2d 854, 37 St. Rep. 2023 (1980).

Rights of Legal Heir Adequately Represented by Special Administrator — Intervention Denied: After a special administrator was appointed to continue prosecution of an action begun before the testatrix's death, the heir to the estate sought to intervene in the case but was denied. Although holding that ruling nonappealable, the Supreme Court did grant the heir's Writ of Supervisory Control. Nonetheless, it found the heir was not a proper intervenor in the suit because her interest was represented adequately by the special administrator, noting that the heir had no right to pursue the action herself unless the personal representative failed to act on the claim, which was not the case here. Further, an administrator could sue in his own name

without joining with him the party for whose benefit the action is brought. State ex rel. Palmer v. District Court, 190 M 185, 619 P2d 1201, 37 St. Rep. 1876 (1980).

Electronic Surveillance Based on Illegal Police Activity as Grounds for Appeal — Insufficient Evidence: Where the defendant was arrested as the result of an electronically recorded conversation with another offender who had previously consented to carrying a transmitting device for police officers, the allegations of the defendant that the recruitment of the other offender by police officers and the subsequent taping of the defendant's conversation were the result of previous illegal wire taps placed on the telephone of the other offender could not serve as grounds for reversal of the defendant's conviction since there was no direct evidence in the record to support the defendant's conjecture. Any issue built upon conjecture is weightless for purposes of appeal. St. v. Coleman, 189 M 492, 616 P2d 1090, 37 St. Rep. 1661 (1980).

Denial of Venue Change Appealable: An interlocutory order is normally not appealable unless there is a special provision making it so. By the terms of Rule 1(b), M.R.App.P., an order denying a change of venue is specifically appealable. It allows the party denied the change to take an immediate appeal so as not to jeopardize his right to appeal on that issue. State ex rel. Kesterson v. District Court, 189 M 20, 614 P2d 1050 (1980).

Obstruction of Access to Property — Interlocutory Decrees — Not Appealable: The Department of Highways (now Department of Transportation) appealed from an interlocutory decision of the District Court that plaintiffs were entitled to compensation for the loss of reasonable access to their property. The appeal was dismissed because interlocutory orders are not appealable. Bostwick v. Dept. of Highways, 188 M 313, 613 P2d 997 (1980).

Supreme Court — Acquisition of Appellate Jurisdiction: The time limits for filing an appeal are mandatory and jurisdictional. An appellant has a duty to perfect an appeal in the manner and within the time limits provided by law. Absent such compliance, the Montana Supreme Court does not acquire jurisdiction to entertain and determine an appeal. Price v. Zunchich, 188 M 230, 612 P2d 1296 (1980).

No Appeal on Issue of Joint Venture Not First Raised in District Court: Appellants cannot assert for a matter of review on appeal that their relationship with respondents was that of joint venturers because this issue was not first presented to the District Court and as such cannot be raised for the first time on appeal. Mont. Williams Double Diamond v. Royal Village, Inc., 186 M 359, 607 P2d 1120 (1980).

Second Appeal — "Law of the Case" Rule Applied: When the Supreme Court states a principle or rule of law necessary to the decision of a case, such pronouncement becomes the "law of the case" and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. Here, a previous case involving the same parties established the "law of the case" for this appeal. The former husband was estopped, in the previous case, from challenging monthly payments to the former wife, having successfully availed himself of the benefits of the property settlement provisions of the marriage dissolution decree (the monthly payments having been held to be a part of the property settlement). Therefore, the denial of the former husband's second petition to terminate the payments is affirmed on the "law of the case" of his first petition. Englund v. Englund, 184 M 488, 603 P2d 1048 (1979).

Order Requiring Payment by Personal Representative as Appealable Order: The District Court order requiring payment by the personal representative of decedent's estate to decedent's creditors is an appealable order under Rule 1, M.R.App.P. In re Estate of Murphy, 183 M 127, 598 P2d 612 (1979).

Right to Appeal — Fruits of Judgment: The instant appeal falls squarely within the exception to the general rule that the right to accept the fruits of a judgment and at the same time to prosecute an appeal from it are not concurrent. If the only possible outcome of a successful appeal by the plaintiff is an increase in the damage award, then there is nothing inconsistent about accepting the fruits of the original judgment and appealing from it. Ferguson v. Town Pump, Inc., 177 M 122, 580 P2d 915 (1978), followed in Maloney v. Heer, 257 M 500, 850 P2d 957, 50 St. Rep. 382 (1993).

Federal Courts — Reviewability of Montana Decisions: The U.S. District Court has no power to review the judgments of Montana courts. A litigant has no constitutional right to a correct result. Osburnsen v. Heller, 34 St. Rep. 193 (D.C. Mont. 1977) (apparently not reported in Federal Supplement).

Waiver of Appeal Right to Be Clear: In a child custody proceeding wherein the parties stipulated that they would be bound by the order of the District Court in order to resolve a jurisdictional conflict, the stipulation did not preclude them from taking an appeal. Groves v. Groves, 173 M 291, 567 P2d 459 (1977).

Order to Vacate Order Changing Venue: Defendant's appeal of the order denying his motion to vacate an order changing venue should be dismissed since an order to vacate is not appealable under Rule 1, M.R.App.P., and if treated as an appeal from the order for change of venue, it was not timely made. Myskewitz v. Berg, 173 M 46, 566 P2d 64 (1977).

Propriety of Review — Certification of State Question: When there was no clear precedent regarding the construction of the applicability of Statutes of Limitation, it was proper for the Supreme Court to give the U.S. District Court for Montana an opinion on the applicability of certain Statutes of Limitation upon the certification of questions by the U.S. District Court. Penrod v. Hoskinson, 170 M 277, 552 P2d 325 (1976).

Filing of Supersedeas Bond on Appeal Not to Suspend Decree's Provision Regarding Child Support: Supreme Court will not sanction nonpayment of support money decreed in District Court on appeal where need for such funds is shown but will require that such support payments be kept current until final determination of the appeal. Woolverton v. Woolverton, 169 M 490, 549 P2d 458 (1976).

Zoning Issue — Standing as Aggrieved Party: Appellant, who first raised issue of the zoning classification of property involved in condemnation proceeding, lacked standing as "a party aggrieved" to complain of the State's subsequent emphasis on the zoning of the property as misleading jury into reaching erroneous verdict. St. Highway Comm'n v. Vaughan, 155 M 277, 470 P2d 967 (1970).

Writ of Review When Appeal Available: Notwithstanding the fact that appeal was available as a remedy, the Supreme Court determined that a Writ of Review is available when children were made illegitimate and support was cut off by action which exceeded court's jurisdiction. Butler v. Brownlee, 152 M 453, 451 P2d 836 (1969).

Denial of Change of Venue: Specification of error arising from trial court's order denying motion for change of venue was not properly before Supreme Court because timely appeal was not made from order as required by rules. Sealey v. Majerus, 149 M 268, 425 P2d 70 (1967).

Denial of Motion Improper — Appeal Not Allowed: Where District Court exceeded its jurisdiction in denying motion to quash summons and dismiss action where the summons had not been served and returned within the 3 years required by Rule 41(e) (replaced with Rule 4E), M.R.Civ.P. (Title 25, ch. 20), the order was not appealable under this rule. State ex rel. Belwin, Inc. v. Davison, 148 M 345, 420 P2d 842 (1966).

Dismissal of Action Not Appealable: An order granting a motion to dismiss was not appealable under section 93-8003, R.C.M. 1947 (superseded by Rule 1, M.R.App.P.). Rambur v. Diehl Lumber Co., 143 M 432, 391 P2d 1 (1964); Payne v. Mtn. States Tel. & Tel. Co., 142 M 406, 385 P2d 100 (1963), both distinguished in Prentice Lumber Co., Inc. v. Hukill, 161 M 8, 504 P2d 277 (1972).

SUMMARY JUDGMENT

Partial Summary Judgment Not Appealable: All of the plaintiff's issues were not determined by the court's grant of partial summary judgment. Therefore, the appeal was premature and was dismissed for lack of jurisdiction. Kirchner v. W. Mont. Mental Health Center, 272 M 110, 899 P2d 1102, 52 St. Rep. 753 (1995), followed in In re Litigation Relating to Riot, 283 M 277, 939 P2d 1013, 54 St. Rep. 598 (1997).

Appeal of Judgment Involving Declaratory Judgment and Injunction: Defendant argued that an appeal that concerned declaratory judgment was premature because plaintiff did not seek Rule 54(b), M.R.Civ.P. (Title 25, ch. 20), certification of the court's order. However, because plaintiff's motion for partial summary judgment involved both the declaratory judgment and an injunction issue and because plaintiff validly exercised the right to appeal the court's denial of the request for an injunction, the appeal was not considered premature and the entire case was subject to review by the Supreme Court. Hennen v. Omega Enterprises, Inc., 264 M 505, 872 P2d 797, 51 St. Rep. 369 (1994).

Question of Statutory Applicability Preserved for Appeal: Defendant argued that by failing to include a violation of statute claim in a pretrial order, plaintiffs abandoned the claim on appeal. However, the issue was properly preserved through jury instructions when plaintiffs presented an instruction that stated the statutory language verbatim. Further, the statute was the subject of a motion for summary judgment. Notwithstanding certification, an order denying summary judgment is interlocutory; thus, the applicability of the statute was not waived insofar as it was presented in the motion for summary judgment. Whitehawk v. Clark, 238 M 14, 776 P2d 484, 46 St. Rep. 1053 (1989).

Denial of Summary Judgment Not Appealable Notwithstanding Certification: The defendant appealed the District Court's denial of a motion for summary judgment after the District Court

certified its order under Rule 54(b), M.R.Civ.P. The Supreme Court held that the order was not appealable notwithstanding the District Court's certification because under Rule 1, M.R.App.P., an order denying a motion for summary judgment is an interlocutory order, which fact cannot be changed by certification under Rule 54(b), M.R.Civ.P. Jackson v. Burlington N., Inc., 201 M 123, 652 P2d 223, 39 St. Rep. 1998 (1982).

Interlocutory Summary Judgment — No Appeal Allowed: Where an order of summary judgment is interlocutory, the case is not ripe for appellate review and any appeal thereon must be dismissed without prejudice. Knight & Co. v. Ft. Belknap Indian Agency Housing Authority, 188 M 218, 612 P2d 1290 (1980).

Summary Judgment Against Less Than All Defendants — Appeal Not Allowed: A summary judgment in favor of one of two defendants was not a final order under the provisions of Rule 54(b), M.R.Civ.P., and in the absence of compliance with the certification requirements of that rule, the summary judgment was not appealable. Roy v. Neibauer, 188 M 81, 610 P2d 1185 (1980).

Summary Judgment on Issue of Liability Alone Not Appealable: A summary judgment for plaintiff on the question of liability, reserving judgment as to the amount of damages is interlocutory in character under Rule 56(c), M.R.Civ.P., and hence is not appealable. Weston v. Kuntz, 187 M 453, 610 P2d 172 (1980).

Order Vacating Summary Judgment Not Appealable: This rule does not specifically mention an order vacating summary judgment as an appealable order. Therefore, the Supreme Court dismissed the appeal of such an order but without prejudice to the filing of an application for a Writ of Supervisory Control. Winter v. Rhodes, 180 M 217, 589 P2d 1021 (1979), following Stensvad v. Mont. Nat'l Bank, 168 M 167, 541 P2d 768 (1975).

Appealability and Appropriateness of Partial Summary Judgment: Although a partial summary judgment granting specific performance of an option contract was designated as interlocutory, it was a final and appealable transfer of property. Furthermore, the summary judgment was improperly granted when based upon a determination in a hearing on motion to dismiss that there were no issues of material fact, depriving defendant the opportunity to effectively resist the summary judgment motion. Graveley v. MacLeod, 175 M 338, 573 P2d 1166 (1978).

Appeal of Order Denying Summary Judgment: An order denying summary judgment is not an appealable order. Such an order is reviewable upon appeal from a final judgment. To permit review by an extraordinary writ would accomplish indirectly that which cannot be done directly. State ex rel. Kosena v. District Court, 172 M 21, 560 P2d 522 (1977).

Order Vacating Summary Judgment Not Appealable: Court held that District Court order vacating a previously entered summary judgment and setting the cause for trial was not an appealable order as an order vacating a summary judgment, and setting the cause for trial is interlocutory in nature and does not meet the requirement of a final judgment from which an appeal can be taken because the rights of the parties have not been adjudicated and will not be until trial. Stensvad v. Mont. Nat'l Bank, 168 M 167, 541 P2d 768 (1975).

Partial Summary Judgment — Writ of Supervisory Control Available: Although orders of District Court striking two defenses from relator's answer and granting plaintiff summary judgment on issue of liability were not directly appealable under this section, Writ of Supervisory Control was available as remedy. State ex rel. Great Falls Nat'l Bank v. District Court, 154 M 336, 463 P2d 326 (1969).

Order Denying Summary Judgment — Appealable After Final Judgment: Although order denying summary judgment is nonappealable at time it is made because of its interlocutory character, it is nonetheless reviewable under appellate rule providing that all nonappealable intermediate orders or decisions properly excepted or objected to which involve merits or necessarily affect judgment are reviewable on subsequent appeal from final judgment. Brown v. Midland Nat'l Bank, 150 M 422, 435 P2d 878 (1967), followed in Kirchner v. W. Mont. Regional Community Mental Health Center, Inc., River House Program, 261 M 227, 861 P2d 927, 50 St. Rep. 1299 (1993). Brown and Kirchner were followed in In re Litigation Relating to Riot, 283 M 277, 939 P2d 1013, 54 St. Rep. 598 (1997).

INJUNCTIONS

Injunction Appealable Before Final Ruling on Motion for Attorney Fees: An order granting an injunction is appealable under subsection (b)(2) of this rule even though the District Court has not made a final ruling on the plaintiff's motion for attorney fees. Christenot v. St., 272 M 396, 901 P2d 545, 52 St. Rep. 749 (1995).

Interpretation of Preliminary Injunction — Not Appealable: The District Court's application of an existing preliminary injunction, prohibiting use of a deceptively similar name, to appellant's newly acquired name was not an injunction in itself but merely an interpretation of a preliminary injunction and therefore an interlocutory order, not appealable. Am. Furniture, Inc. v. Am. Furniture Warehouse Co., 219 M 11, 709 P2d 1013, 42 St. Rep. 1804 (1985).

Continued Temporary Restraining Order Appealable: An order continuing a temporary restraining order appeared appealable because it had the effect of a permanent injunction. Boyer v. Karagacin, 178 M 26, 582 P2d 1173 (1978).

Temporary Injunction — Denial of Motion to Quash Appealable: Order denying County Commissioner's motion to quash temporary injunction against use of real property valuations made by private appraisal group and relied on by reclassification officer appointed by Commissioners to determine 1965 tax assessment rolls was appealable under section 93-8003, R.C.M. 1947 (superseded by Rule 1, M.R.App.P.). State ex rel. Keast v. Krieg, 145 M 521, 402 P2d 405, 19 ALR 3d 396 (1965), overruled on other grounds in Larson v. Dept. of Revenue, 166 M 449, 534 P2d 854 (1975).

DEFAULT JUDGMENT

Order Vacating or Refusing to Vacate Default Judgment Appealable as Special Order After Final Judgment: Empire Fire and Marine Insurance Company (Empire) moved to set aside a default judgment against the company. After the motion was granted, Roberts, the plaintiff, appealed the order setting aside the judgment and Empire contested the jurisdiction of the Supreme Court to hear the appeal. The Supreme Court clarified the issue whether such an order is appealable, holding that an order vacating or refusing to vacate a judgment is appealable under subsection (b)(2) of this rule as an appeal of a special order after final judgment. Roberts v. Empire Fire & Marine Ins. Co., 276 M 225, 915 P2d 872, 53 St. Rep. 359 (1996), followed in Wright Oil & Tire Co. v. Goodrich, 284 M 6, 942 P2d 128, 54 St. Rep. 811 (1997).

Attorney Withdrawal With No Notice to Client — Default Set Aside: The lower court granted defendants' attorney's motion to withdraw and ordered him to notify defendants. Defendants claimed on appeal that they received no notice. The record showed no evidence of notice by the attorney and no evidence of the notice that 37-61-405 required plaintiff to give. A default was issued against defendants at a time when they had no attorney and were not represented at the hearing. Defendants properly raised on appeal the lack of the lower court's power to proceed to default. The case was remanded with directions to set the default aside and grant a rehearing. Mont. Bank of Roundup, N.A. v. Benson, 220 M 410, 717 P2d 6, 43 St. Rep. 485 (1986).

Default Judgment on Issue of Liability Not Appealable: The District Court, as a discovery sanction, granted a default judgment for plaintiffs on the issue of liability but reserved determination of the amount of damages, and defendants appealed. The Supreme Court held that an order which grants a default judgment on the issue of liability, reserving determination of the amount of damages for a later hearing, is not a final, appealable order under Rule 1, M.R.App.Civ.P. (now M.R.App.P.). The appeal was dismissed. Stevens v. Abbott, 220 M 61, 712 P2d 1347, 43 St. Rep. 173 (1986).

Order Reopening Default Not Final Judgment — Appeal Dismissed for Lack of Jurisdiction: District Court ruled in wife's favor by default when husband's attorney failed to appear at hearing on wife's motion to modify decree of dissolution of marriage. Later after another hearing, District Court found excusable neglect on part of husband's attorney and reopened default. Wife appealed. Supreme Court held that since District Court had not entered a final judgment after either hearing, the appeal was premature and must be dismissed for lack of jurisdiction. Rex v. Rex, 199 M 328, 649 P2d 460, 39 St. Rep. 1432 (1982), followed in Kirchner v. W. Mont. Regional Community Mental Health Center, Inc., River House Program, 261 M 227, 861 P2d 927, 50 St. Rep. 1299 (1993).

Order Denying Motion for Relief From Default Judgment Properly Appealed — Special Appearance Abolished: When the defendant honey processing company twice moved to vacate and dismiss a default judgment obtained against it by the plaintiff honey producing company, the Supreme Court had jurisdiction over an appeal from the District Court's denial of the second motion to vacate and dismiss. The defendant's first motion was untimely filed, and the fact that it was brought to challenge the personal jurisdiction of the court and characterized as a "special appearance" is of no effect, as special appearances have been abolished and the same requirements for timely appeal applies to all appearances. The second motion was properly appealable as it is considered denied, which denial is a final order, if the court has not ruled on the motion within 15 days after submission. Foster Apiaries, Inc. v. Hubbard Apiaries, Inc., 193 M 156, 630 P2d 1213, 38 St. Rep. 1025 (1981).

Order Vacating Default Judgment Nonappealable — Supervisory Control Inappropriate: Where, after obtaining a default judgment in a breach of contract action against the defendant, the plaintiff sought a review, both by appeal and Writ of Supervisory Control, of the court's order setting aside the default judgment, the Supreme Court held that the order was interlocutory and nonappealable. The Supreme Court also held that a Writ of Supervisory Control was inappropriate to review the court's order, for to issue the Writ would be to allow the appellant to do indirectly what could not be done directly. Kinion v. Design Sys., 190 M 226, 620 P2d 852, 37 St. Rep. 2036 (1980).

Appeal by Defaulting Party: In the absence of an order of the District Court setting aside the default of the appealing defendants, they had no standing to file a notice of appeal from an adverse judgment against the plaintiff county. Carbon County v. Schwend, 182 M 89, 594 P2d 1121 (1979).

Order Setting Aside Default — Appealability: The Supreme Court adopted for Montana the rule followed in the majority of jurisdictions that an order granting a motion to vacate a default judgment is nonappealable but held that when a default judgment is vacated on jurisdictional grounds that are not correctable, the order of the District Court vacating the default judgment amounts to a final judgment from which an appeal can be taken. Shields v. Pirkle Refrigerated Freightlines, Inc., 181 M 37, 591 P2d 1120 (1979), overruled in part in Roberts v. Empire Fire & Marine Ins. Co., 276 M 225, 915 P2d 872, 53 St. Rep. 359 (1996).

Appeals — Order as to Entry of Default Not Final Order: An order setting aside or refusing to set aside an entry of default where judgment has not been entered is not a final order and is therefore not appealable. McClurg v. Flathead County Comm'rs, 179 M 518, 587 P2d 415 (1978); Blevins v. Kramer, 179 M 193, 587 P2d 28 (1978).

WRIT OF SUPERVISORY CONTROL

Supervisory Control Accepted When District Court Proceeding Under Mistake of Law Regarding Time Period for Substitution of Judge: The exercise of supervisory control was appropriate when the District Court was proceeding under a mistake of law regarding the period of time within which a motion must be filed for substitution of a judge pursuant to 3-1-804. State ex rel. Dusek v. District Court, 2003 MT 303, 318 M 166, 79 P3d 292 (2003).

Supervisory Control Denied to Address Discovery Issues: Petitioner sought a writ of supervisory control to address a District Court order directing petitioner to submit to discovery through an independent medical examination in an automobile accident negligence case. The Supreme Court declined to exercise supervisory control. Typically, orders pertaining to discovery are interlocutory in nature and are not generally reviewable in an original proceeding. Original jurisdiction will be exercised when an order places a party at a significant disadvantage in litigating a case. Supervisory control should issue when a District Court proceeds under a mistake of law, causing a gross injustice for which an appeal is not an adequate remedy, but supervisory control is an extraordinary remedy exercised only in extraordinary circumstances. Absent a showing that procedural protections were inadequate to control discovery in an independent medical examination, supervisory control was inappropriate. Hegwood v. District Court, 2003 MT 200, 317 M 30, 75 P3d 308 (2003).

Supervisory Control Appropriate to Address Res Judicata Claim: Following a dispute over the sale of irrigation equipment, H-D Irrigating and Lane sued Kimble Properties and Kimble for false representation of the irrigation equipment and damages. Kimble Properties and Kimble counterclaimed for the balance due on the equipment, alleging that H-D Irrigating was a sham and the alter ego of Lane. The alter ego claim was never pursued. The Supreme Court eventually decided the case in H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95 (2000), and remanded for judgment in favor of Kimble. In an effort to collect, Kimble sought to compel Lane to testify regarding the assets of H-D Irrigating, but rather than appear, Lane filed bankruptcy and received a stay on further proceedings. Kimble then filed an action to collect from Lane personally, again raising the alter ego issue. Lane asserted that the issue had been already decided in the prior litigation and sought supervisory control on res judicata grounds. The Supreme Court held that the case was appropriate for supervisory control because if the res judicata claim was correct, Lane was entitled to summary judgment, but if denial of the summary judgment motion was in error, Lane would be required to defend against the same claim a second time and incur the attendant delay and expense, resulting in a gross injustice. The case was remanded for further proceedings on the alter ego claim. Lane v. District Court, 2003 MT 130, 316 M 55, 68 P3d 819 (2003), following Plumb v. District Court, 279 M 363, 927 P2d 1011 (1996).

Dual Insurance Claims — Supervisory Control Proper to Facilitate Convenience and Judicial Economy: Following a vehicle accident, a couple sought recovery for injuries and loss of consortium and also alleged that the damages exceeded the limits of defendants' coverage, entitling them to recover from their own policy. The District Court bifurcated the claims, and the couple sought relief from the order on grounds that they would be prejudiced by having to prosecute two separate trials. The Supreme Court concurred with the couple and, in the interests of the convenience of the parties and judicial economy, agreed to exercise supervisory control. State ex rel. Gadbaw v. District Court, 2003 MT 127, 316 M 25, 75 P3d 1238 (2003), following Malta Pub. School District A & 14 v. District Court, 283 M 46, 938 P2d 1238 (1997).

Denial of Motion to Intervene — Supreme Court Use of Supervisory Control for Immediate Review of Interlocutory Order: Two sporting groups sought to intervene in an action challenging the enforcement of a ballot initiative that prohibited the shooting of alternative livestock for a fee. The District Court denied the motion, so the groups sought a writ of supervisory control, claiming that a direct appeal after a final judgment would be a wholly inadequate remedy. The Supreme Court noted that although an order denying a motion to intervene is not separately appealable under this rule, the proper appeal from such an interlocutory order lies after entry of final judgment. However, supervisory control may be used to immediately review an interlocutory order when: (1) there is no remedy by appeal or other remedial procedure and extraordinary circumstances are present; (2) an appeal from a final judgment would impose undue hardship on an applicant and be wholly inadequate as a remedy; and (3) necessary to prevent extended and needless litigation. This case presented the purely legal issue of whether the primary proponents of a ballot issue have a legally protectable interest sufficient to allow intervention in a case challenging the resulting statute. The Supreme Court considered this case to be extraordinary and of statewide importance, noting that appeal following a final judgment would come too late and would not allow the groups to participate in the defense of the initiative that they actively supported, and that if the groups successfully appealed the denial of their motion to intervene after final judgment, extended and needless litigation would result. Thus, the Supreme Court accepted supervisory control because appeal from a final judgment would be a wholly inadequate remedy. Sportsmen for I-143 v. District Court, 2002 MT 18, 308 M 189, 40 P3d 400 (2002).

Order Vacating Default Judgment Nonappealable — Supervisory Control Inappropriate: Where, after obtaining a default judgment in a breach of contract action against the defendant, the plaintiff sought a review, both by appeal and Writ of Supervisory Control, of the court's order setting aside the default judgment, the Supreme Court held that the order was interlocutory and nonappealable. The Supreme Court also held that a Writ of Supervisory Control was inappropriate to review the court's order, for to issue the Writ would be to allow the appellant to do indirectly what could not be done directly. Kinion v. Design Sys., 190 M 226, 620 P2d 852, 37 St. Rep. 2036 (1980), overruled in part in Roberts v. Empire Fire & Marine Ins. Co., 276 M 225, 915 P2d 872, 53 St. Rep. 359 (1996).

Immediate Appeal From Partial Judgment: This is a proper case for a Writ of Supervisory Control because relator wife has no plain, speedy, and adequate remedy at law by appeal. Neither 40-4-108 nor Rule 1, M.R.App.P. provide for immediate appeal from a partial judgment. Instead, the right of immediate appeal from a judgment on part but not all of the claims for relief in a single action is governed by Rule 54(b), M.R.Civ.P. State ex rel. Marlenee v. District Court, 181 M 59, 592 P2d 153 (1979).

Class Action — Writ of Supervisory Control Unjustified: Writ of Supervisory Control granting relief from District Court order permitting maintenance of class action was not justified since the order was subject to alteration or amendment as the matter progresses and since the question can be considered on appeal from final judgment. State ex rel. Anaconda Aluminum Co. v. District Court, 158 M 228, 490 P2d 351 (1971).

Appeal Inadequate — Writ of Supervisory Control Available: Although denial of Writ of Assistance, placing purchaser at Sheriff's sale under mortgage foreclosure into possession of lands involved, by District Court was appealable under rule either as "an order directing . . . surrender of property" or as "any special order made after final judgment", Writ of Supervisory Control to compel the District Court to issue Writ of Assistance was available as remedy since remedy by appeal was neither speedy nor adequate. State ex rel. Foss v. District Court, 152 M 73, 446 P2d 707 (1968).

Sustaining of Demurrer — Right to Supervisory Writ: Notwithstanding that former statute providing for appeals gave party against whom demurrer (abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) was sustained plain and speedy remedy by appeal, court would not dismiss application for Supervisory Writ where judgment sustaining demurrer also stayed

proceedings and expressly accorded losing party right to apply for Supervisory Writ. State ex rel. Cave Constr. Co. v. District Court, 150 M 18, 430 P2d 624 (1967).

Motion to Dismiss Improperly Denied — Writ of Supervisory Control Proper: Writ of Supervisory Control was proper where lessor's motion to dismiss sublessees' action for breach of lease agreement, to which sublessees were not parties, was denied by the District Court, the order denying the motion to dismiss not being appealable under this rule. State ex rel. Buttrey Foods, Inc. v. District Court, 148 M 350, 420 P2d 845 (1966).

Writ of Supervisory Control Denied: When appeal is available from a summary judgment, the Supreme Court will not issue a Writ of Supervisory Control without extremely extenuating circumstances. Circumstances here were insufficient. State ex rel. Kober v. District Court, 147 M 116, 410 P2d 945 (1966).

FINAL JUDGMENT

No Res Judicata Absent Final Judgment in Related Case: Brown was one of 64 prisoners who filed a complaint in 2002 alleging that the Department of Corrections improperly transferred prisoners to prisons where treatment, training, and rehabilitation opportunities were not available. While that case was pending, Brown filed suit in 2004 against the Department, alleging that his liberty interest in parole was violated because the Department transferred him to locations where he was unable to obtain the sex offender treatment required for parole eligibility. The District Court concluded that the 2004 case was barred by res judicata because Brown was a plaintiff in the 2002 case, which presented identical claims. Brown appealed, and the Supreme Court reversed and remanded. Under Audit Serv., Inc. v. Anderson, 211 M 323, 684 P2d 491 (1984), the primary requirement necessary to sustain a plea of res judicata is that there be a judgment on the merits. Because the 2002 case was still pending, dismissal of the 2004 case on res judicata grounds was error. Brown v. Dept. of Corrections, 2005 MT 58, 326 M 231, 108 P3d 498 (2005).

Relitigating Issues Raised in Bankruptcy Proceeding Barred by Res Judicata: In defendants' bankruptcy proceeding, they contended that notes issued by plaintiff contained a usurious interest rate and were prompted by fraud. The Bankruptcy Court determined that the notes were valid, enforceable, and unaffected by usury or fraud. During plaintiff's subsequent collection proceeding in District Court, defendants sought to amend their answer to allege usury, but the District Court held that the Bankruptcy Court's judgment barred defendants' claim under res judicata and granted summary judgment for plaintiff. On appeal, the Supreme Court affirmed. The Bankruptcy Court's judgment was accorded finality as to the issues raised or that could fairly have been raised in the adversary proceeding. Defendants were not precluded from litigating any of their defenses to the notes in the bankruptcy proceeding and thus were barred from relitigating the usury issue in District Court. Absent a genuine issue of material fact relating to defendants' default on the notes, summary judgment for plaintiff was proper. Olympic Coast Inv., Inc. v. Wright, 2005 MT 4, 325 M 307, 105 P3d 743 (2005), following Fox v. 7L Bar Ranch Co., 198 M 201, 645 P2d 929 (1982), and distinguishing Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604 (1993).

Retroactive Applicability of Decision Prohibiting Antistacking of Insurance Provisions to Pending Cases: In Hardy v. Progressive Specialty Ins. Co., 2003 MT 85, 315 M 107, 67 P3d 892 (2003), the Supreme Court decided that antistacking provisions in an underinsured motorist policy were unconstitutional. Plaintiffs brought a class action in federal court claiming that Hardy entitled them to additional payments from past insurance claims that were not previously allowed because their policies did not allow for stacking. The federal court certified the question to the Supreme Court as to whether Hardy applied prospectively only or retroactively to qualified claims arising before the Hardy decision. The Supreme Court agreed with the decision in Harper v. Va. Dept. of Taxation, 509 US 86 (1993), that limiting a rule of law to its prospective application creates an arbitrary distinction between litigants based merely on the timing of their claims and that in the interests of fairness and finality, the line should be drawn between claims that are final and claims that are not. The Supreme Court then decided that the retroactivity test in Chevron Oil Co. v. Huson, 404 US 97 (1971), still applies to Montana civil decisions if all three Chevron factors are met: (1) the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the court must weigh the merits and demerits in each case by looking at the prior history of the rule in question, its purpose and effect, and whether retroactive application will further or retard its operation; and (3) the inequity imposed by retroactive application has been weighed. However, the retroactive effect of a decision does not apply to cases that became final or that were settled

prior to a decision's issuance. Thus, Hardy applies retroactively in qualifying circumstances on open claims arising before its issuance and is limited to cases pending on direct appeal or not yet final. Dempsey v. Allstate Ins. Co., 2004 MT 391, 325 M 207, 104 P3d 483 (2004).

No Supreme Court Jurisdiction to Hear Appeal Absent Final Judgment: Reeder was convicted of DUI in Municipal Court. Reeder appealed to District Court, raising 22 issues. The District Court found that Reeder's due process rights were not violated, but held that the Municipal Court erroneously admitted the results of an Intoxilyzer test without proper foundation and remanded for a new trial. Reeder appealed the District Court's decision and raised other issues not addressed by the District Court. The Supreme Court held that because Reeder did not currently stand convicted of a criminal offense and because no final judgment of conviction had been entered, the Supreme Court lacked jurisdiction to hear the case, so the appeal was dismissed. St. v. Reeder, 2004 MT 244, 323 M 15, 97 P3d 1104 (2004).

Challenge to Equity of Sentence Properly With Sentence Review Division, Not Supreme Court: A challenge to the equity of a sentence, as opposed to the legality of a sentence, properly lies with the Sentence Review Division, not the Supreme Court, which does not review a sentence on appeal for mere inequity or disparity. In this case, defendant cloaked an equity challenge in the vestiges of a constitutional argument in seeking Supreme Court review, but the court declined to address it, leaving the matter to the Sentence Review Division. St. v. Legg, 2004 MT 26, 319 M 362, 84 P3d 648 (2004), following St. v. DeSalvo, 273 M 343, 903 P2d 202 (1995).

Multiple Claims — No Appeal Available Absent Final Judgment — Remand: Plaintiff brought several employment claims against the state. The District Court certified judgment for the state on one claim, and plaintiff moved for partial summary judgment on another, but the motion was denied. However, there was no final judgment certified on that claim, so no appeal on that issue was available. Because the motion for partial summary judgment was not final and appealable, the Supreme Court remanded for further proceedings on that claim. Losleben v. Oppedahl, 2004 MT 5, 319 M 269, 83 P3d 1271 (2004).

Temporary Custody Order Not Considered Final for Purposes of Appeal — Writ of Supervisory Control Appropriate Mechanism to Challenge Temporary Custody: The District Court ordered temporary legal custody for a child, and the child's mother appealed. The Supreme Court held that orders of temporary legal custody do not embrace a final determination of the rights of the parties contemplated in this rule that would subject the temporary order to direct appeal. Rather, temporary custody orders are considered interlocutory orders from which the Supreme Court will grant relief in extraordinary circumstances. This ensures the expeditious review of legal errors while still protecting children from the instability of protracted, piecemeal litigation. However, qualifying temporary custody orders as interlocutory does not leave a parent who is aggrieved by an erroneous order without a remedy. The parent may invoke the extraordinary remedy of a writ of supervisory control, which is the appropriate mechanism to challenge an order of temporary custody. In re D.A., 2003 MT 109, 315 M 340, 68 P3d 735 (2003). See also G.B. v. M.M.B., 670 A2d 714 (Pa. Sup. Ct. 1996).

No Final Judgment When Multiple Parties Involved but Summary Judgment Granted to Only One Party — Express Direction for Entry of Judgment Required: Purchasers of real property sued the seller and the seller's agent over an alleged access problem. The District Court granted summary judgment to the seller, but denied summary judgment for the seller's agent because material facts remained in dispute regarding the agent's disclosure of information pertaining to the access problem. Plaintiffs then appealed the summary judgment that was granted to the seller. The Supreme Court held that the order granting summary judgment to the seller was not a final judgment and thus was not appealable because in an action involving multiple parties, a final judgment as to one or more but not all of the parties may be entered only upon an express determination by the District Court that there is no just reason for delay and upon an express direction for entry of judgment. In this case, there was no indication or certification by the District Court that the matter should be certified as final, and absent a final judgment, no appeal was available. The appeal was dismissed without prejudice and remanded for further proceedings. Trombley v. Mann, 2001 MT 154, 306 M 80, 30 P3d 355 (2001). See also Shull v. First Interstate Bank of Great Falls, 262 M 355, 864 P2d 1268 (1993).

Partial Payment of Interest on Promissory Note Not Precluding Appeal: Plaintiff owed defendant $200,000 plus interest on a promissory note. The same day that plaintiff filed a claim for misrepresentation and failure to disclose, plaintiff also deposited the first promissory note payment with the Clerk of the District Court. Following judgment for plaintiff, the District Court ordered release of the funds, which defendant accepted. Plaintiff argued that by accepting the funds and the fruits of the judgment, defendant was prohibited from prosecuting an appeal to reverse the judgment. Defendant responded that because the judgment could not possibly affect

the benefit that was accepted, the right to appeal was not waived. The long-recognized general rule is that the right to accept the fruits of a judgment and at the same time prosecute an appeal from it are not concurrent, but rather wholly inconsistent, rights and that the election of one excludes the enjoyment of the other (see Peck v. Bersanti, 101 M 6, 52 P2d 168 (1935)). The exception is that when reversal of the judgment cannot possibly affect the appellant's right to the benefit accepted under a judgment, then appeal may be taken and sustained despite the fact that the benefit was sought and secured (see Niles v. Carbon County, 174 M 20, 568 P2d 524 (1977)). The acceptance of payments that were not contested or that were irrevocably conceded as due by the opposing party does not preclude appeal. Here, when defendant accepted the funds, it simply accepted what plaintiff already conceded was due and no more than it conceded would be due in the event that the appeal was successful. Therefore, defendant did not waive the right to appeal. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Order Granting Temporary Guardianship Held Final Order and Special Proceeding for Purposes of Appeal — Noncompliance With Rule 9, M.R.App.P., Excused — Expiration of Temporary Guardianship Held Not to Render Issue Moot: After a District Court twice appointed the same temporary guardians for Kathleen Klos pursuant to 72-5-317, once in writing and once by making an oral order with no documentation except a minute entry entered by the Clerk of Court, Klos filed a motion to set aside the second order of guardianship. The guardians argued that an order appointing a temporary guardian is not subject to appeal and that Klos had not complied with Rule 9, M.R.App.P., because she did not file a transcript of a hearing appointing the guardians. The Supreme Court held that in as much as subsection (b)(3) of this rule does not differentiate between a permanent order and a temporary order, a temporary order qualified as an appealable order. The Supreme Court also held that the temporary order is a "special proceeding", as defined by 27-1-102(2), for the purposes of subsection (b)(1) of this rule and therefore appealable for that reason as well. Concerning the argument on noncompliance with Rule 9, M.R.App.P., the Supreme Court noted that no transcript could be provided because none was ever made and held that Klos had substantially complied by notifying the Clerk of the Supreme Court of the lack of a transcript and by providing the District Court Clerk's minute entry. Citing Butte-Silver Bow Local Gov't v. Olsen, 228 M 77, 743 P2d 564 (1987), the Supreme Court also noted that just because the order had expired by operation of law did not mean that the issue of appealability was moot because the guardians had twice been appointed by a temporary order that expired by operation of law and could be appointed in the same manner again. Thus, if the order was not appealable, it would be "capable of repetition, yet evade review". In re Klos, 284 M 197, 943 P2d 1277, 54 St. Rep. 843 (1997).

Order Granting Motion for Relief From Judgment Held Appealable: The District Court granted Wright Oil's motion under Rule 60(b)(6), M.R.Civ.P. (Title 25, ch. 20), for relief from judgment, and Goodrich appealed. Wright Oil argued that the Supreme Court did not have jurisdiction over Goodrich's appeal. Citing Roberts v. Empire Fire & Marine Ins. Co., 276 M 225, 915 P2d 872 (1996), the Supreme Court held that an order granting a motion for relief from judgment is a special order made after final judgment and is appealable pursuant to this rule. Wright Oil & Tire Co. v. Goodrich, 284 M 6, 942 P2d 128, 54 St. Rep. 811 (1997).

Direct Appeal of Venue Question — Certification of Judgment Not Required: Following summary dismissal of all Missoula defendants, the trial court granted the motion of defendant Kalispell doctor for a change of venue to Flathead County, certifying the summary judgment order as final pursuant to Rule 54(b), M.R.Civ.P. (Title 25, ch. 20). When the venue question was appealed to the Supreme Court, the doctor asserted that the Supreme Court did not have jurisdiction to determine whether venue was properly transferred because the Rule 54(b) order did not mention the order changing venue. However, under this rule, direct appeal of an order changing or refusing to change venue is allowed, and as such, Rule 54(b), M.R.Civ.P., certification is not required. Emery v. Federated Foods, Inc., 262 M 83, 863 P2d 426, 50 St. Rep. 1454 (1993).

Order Denying Partition of Property Not Appealable: In a dispute over jointly owned recreational property, the District Court denied a motion to enforce an oral settlement for partition of the property and provided the parties an extension of time during which to resolve the controversy. On appeal, the Supreme Court dismissed the appeal, holding that the District Court order was not a final or interlocutory judgment or an order to determine the rights of the parties. Manley v. Grimes, 257 M 404, 849 P2d 215, 50 St. Rep. 330 (1993).

Qualified Domestic Relations Order Appealable: The District Court ordered husband to submit within 20 days a qualified domestic relations order (QDRO) that conformed with the parties' separation agreement, but instead husband filed an appeal with the Supreme Court.

Although on its face the order appeared interlocutory, the order constituted a special order made after final judgment. Failure to file a notice of appeal within 30 days would have closed husband's right to appeal. If the effect of an order is to destroy an appellant's right to appeal, then that order, though interlocutory, should be appealable. In re Marriage of Woodford, 254 M 501, 839 P2d 574, 49 St. Rep. 887 (1992).

Issue of Fees and Costs Not in Form of Final Order — Duty of Parties to Move for Dismissal: The District Court awarded certain fees and costs to plaintiffs pursuant to 37-61-421. However, the issue was not in the form of a final order, and thus the appeal was premature. There must be a final judgment from which an appeal may be taken before the Supreme Court is vested with jurisdiction. It is the duty of the attorneys involved in an appeal to bring the issue to the attention of the court. Tigart v. Thompson, 237 M 468, 774 P2d 401, 46 St. Rep. 974 (1989).

Default Judgment on Issue of Liability Not Appealable: The District Court, as a discovery sanction, granted a default judgment for plaintiffs on the issue of liability but reserved determination of the amount of damages, and defendants appealed. The Supreme Court held that an order which grants a default judgment on the issue of liability, reserving determination of the amount of damages for a later hearing, is not a final, appealable order under Rule 1, M.R.App.Civ.P. (now M.R.App.P.). The appeal was dismissed. Stevens v. Abbott, 220 M 61, 712 P2d 1347, 43 St. Rep. 173 (1986).

Order to Pay Attorney Fees Upon Proof of Amount — Not a Final Judgment:

An order of the District Court, not certified under Rule 54, M.R.Civ.P. (Title 25, ch. 20), entering summary judgment for one party, ruling that party entitled to attorney fees, and ordering a later hearing for the purpose of determining the amount of the attorney fees, was not a final order for the purpose of filing an appeal. Boles v. Ler, 213 M 266, 692 P2d 1, 41 St. Rep. 2106 (1984).

In a proceeding for modification of a divorce decree, the court ordered the respondent to pay the petitioner's attorney fees "in a reasonable amount to be determined upon proof thereof". Because this order was obviously not final, an appeal was premature. Baer v. Baer, 199 M 21, 647 P2d 835, 39 St. Rep. 1178 (1982).

Denial of Demand for Jury Trial — Interlocutory Order Not Appealable: Defendants, sued to recover money due on promissory notes, did not demand a jury trial in their original answer, but after several delays and withdrawal of counsel, defendants acting pro se filed an amended answer with a request for jury trial. Upon objection by plaintiffs and examination of the pleadings, the District Court denied the demand for jury trial. The Supreme Court dismissed the defendants' appeal of the denial as premature, holding that the denial of a request for a jury trial, whether the request was timely or belated, was not a final judgment appealable under Rule 1, M.R.App.P. Such an interlocutory order may be appealable only if specifically provided for in a rule or statute. Heidema v. First Bank, 211 M 178, 682 P2d 1374, 41 St. Rep. 1291 (1984).

Order Denying Joinder of Parties Not Appealable Absent Certification: In an action against the defendant real estate company for fraud and negligence in the sale of property to the plaintiffs, the District Court denied the plaintiffs' motion for joinder of the owners of the company as a party defendant, and on appeal the defendant challenged the jurisdiction of the Supreme Court, alleging that the notice of appeal should have been filed within 30 days after the order denying the motion for joinder. The Supreme Court held that absent certification under Rule 54(b), M.R.Civ.P., an order denying joinder of parties is not a final judgment. Thus, denial of the motion was not ripe for appeal until completion of the trial. White v. Lobdell, 208 M 295, 678 P2d 637, 41 St. Rep. 346 (1984).

Order Not Appealable When Judgment Never Docketed in Record: The District Court made an express order that the Clerk of Court enter final judgment in a case certified for appeal under Rule 54(b), M.R.Civ.P., but a final judgment was never docketed in the record. Under these circumstances the Supreme Court has no jurisdiction to decide an appeal. Jackson v. Burlington N., Inc., 201 M 123, 652 P2d 223, 39 St. Rep. 1998 (1982).

Order Reopening Default Not Final Judgment — Appeal Dismissed for Lack of Jurisdiction: District Court ruled in wife's favor by default when husband's attorney failed to appear at hearing on wife's motion to modify decree of dissolution of marriage. Later after another hearing, District Court found excusable neglect on part of husband's attorney and reopened default. Wife appealed. Supreme Court held that since District Court had not entered a final judgment after either hearing, the appeal was premature and must be dismissed for lack of jurisdiction. Rex v. Rex, 199 M 328, 649 P2d 460, 39 St. Rep. 1432 (1982), followed in Kirchner v. W. Mont. Regional Community Mental Health Center, Inc., River House Program, 261 M 227, 861 P2d 927, 50 St. Rep. 1299 (1993).

Conditional Notice of Appeal: Appellant filed a conditional notice of appeal conditioned upon the Supreme Court finding that the judgment being appealed was a final judgment. Because the notice was conditioned upon an action to be taken at an undetermined time in the future, it was totally ineffective. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Finality of Judgment — Award of Attorney Fees: A general contractor was awarded damages under a materials and labor bond. Attorney fees, an element of damages provided for in the bond, were to be determined at a later hearing. Because the attorney fees were based on the bond, the subject matter of the action, the judgment was not final and could not be appealed until actual determination of attorney fees. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Supreme Court Ruling When No Trial Court Ruling: When a case is appealed to the Supreme Court that involves an issue not raised in the trial court but which is based almost exclusively on depositions, the Supreme Court is in just as good a position as the trial court to assess the deposition testimony and to issue a ruling therefrom. Reid v. Park County, 192 M 231, 627 P2d 1210, 38 St. Rep. 631 (1981).

Final Child Custody Order Reviewable: A District Court's order determining which place of custody is in a child's best interest, assigning custody to the mother, and setting a support obligation of the father is a final determination of the child's custody and is reviewable by the Supreme Court of Montana. Korol v. Korol, 188 M 351, 613 P2d 1016 (1980).

Obstruction of Access to Property — Interlocutory Decrees — Not Appealable: The Department of Highways (now Department of Transportation) appealed from an interlocutory decision of the District Court that plaintiffs were entitled to compensation for the loss of reasonable access to their property. The appeal was dismissed because interlocutory orders are not appealable. Bostwick v. Dept. of Highways, 188 M 313, 613 P2d 997 (1980).

Interlocutory Summary Judgment — No Appeal Allowed: Where an order of summary judgment is interlocutory, the case is not ripe for appellate review and any appeal thereon must be dismissed without prejudice. Knight & Co. v. Ft. Belknap Indian Agency Housing Authority, 188 M 218, 612 P2d 1290 (1980).

Summary Judgment Against Less Than All Defendants — Appeal Not Allowed: A summary judgment in favor of one of two defendants was not a final order under the provisions of Rule 54(b), M.R.Civ.P., and in the absence of compliance with the certification requirements of that rule, the summary judgment was not appealable. Roy v. Neibauer, 188 M 81, 610 P2d 1185 (1980).

Summary Judgment on Issue of Liability Alone Not Appealable: A summary judgment for plaintiff on the question of liability, reserving judgment as to the amount of damages, is interlocutory in character under Rule 56(c), M.R.Civ.P., and hence is not appealable. Weston v. Kuntz, 187 M 453, 610 P2d 172 (1980).

Paternity Determination as Final Judgment: A jury verdict determining paternity is an appealable final judgment and in effect an action separate from a support determination. Borchers v. McCarter, 181 M 169, 592 P2d 941 (1979).

Appealable Order When Relief Denied: An order dismissing a count in a cause of action for breach of contract on the basis that the count failed to state a claim was appealable because it resulted in a party's being out of court and denied relief just as completely as if judgment had been entered against it. Tobacco River Lumber Co., Inc. v. Yoppe, 176 M 267, 577 P2d 855 (1978).

Order Denying Motion to Strike: An order denying a motion to strike is not an appealable order, it being interlocutory in nature. It is reviewable on appeal from a final judgment. Fitzgerald v. Aetna Ins. Co., 176 M 186, 577 P2d 370 (1978).

Order Granting Motion to Strike: Appeal from order granting a motion to strike certain portions of the complaint was dismissed as not being an appealable order. Phillips v. M.E.A., 173 M 43, 566 P2d 62 (1977).

Order Equivalent to Final Judgment: An order dismissing a complaint and denying leave to amend was equivalent to final judgment although judgment had not been entered. Deach v. Destination Enterprises, Inc., 165 M 152, 526 P2d 1382 (1974); Prentice Lumber Co., Inc. v. Hukill, 161 M 8, 504 P2d 277 (1972), distinguishing Payne v. Mtn. States Tel. & Tel. Co., 142 M 406, 385 P2d 100 (1963); Rambur v. Diehl Lumber Co., 143 M 432, 391 P2d 1 (1964).

STANDING TO APPEAL

Out-of-Time Appeal in Criminal Matters — Exclusive Jurisdiction With Supreme Court: Under 46-20-101, the only method for review in criminal cases is by notice of appeal. Time limits for filing an appeal are mandatory and jurisdictional. If a defendant takes no action to perfect an appeal within 90 days of judgment, the District Court loses its jurisdiction and the appeal is

out-of-time. However, an out-of-time appeal is a remedy that may be available to a criminal defendant who, through no fault of the defendant, misses a deadline for filing an appeal. Although Rule 21(b), M.R.App.P., precludes an out-of-time appeal in a civil case, the Supreme Court is not precluded from addressing a motion for an out-of-time appeal in a criminal case. Further, a District Court lacks jurisdiction to grant an out-of-time appeal. The Supreme Court has exclusive jurisdiction to grant a motion for an out-of-time appeal, and the motion is considered an original proceeding subject to the provisions of Rule 17, M.R.App.P. Upon a showing that the failure to timely notice a criminal appeal was excusable under the circumstances, the Supreme Court may conclude that an out-of-time appeal is the appropriate remedy pursuant to Rule 21(b), M.R.App.P. In that event, the matter will be remanded to the District Court with instructions to vacate and reenter judgment to afford the defendant a second opportunity to act within the statutory timeframes for filing notice of appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

Failure to Appeal Violative of Right to Counsel — "Anders" Procedure Applicable to Protect Defendant's Right to Effective Assistance of Counsel on Appeal: Rogers' counsel repeatedly refused Rogers' request to file a notice of appeal, asserting that there were no appealable issues. However, under Roe v. Flores-Ortega, 528 US 470 (2000), the failure to preserve defendant's right to appeal when requested is error, and when defendant would have appealed but for counsel's deficient performance, that error is prejudicial. In order to protect defendant's right to effective assistance of counsel on appeal, the Supreme Court has adopted the procedure in Anders v. Calif., 386 US 738 (1967), for when an attorney believes an appeal lacks meritorious issues. If counsel finds after conscientious examination that a case is wholly frivolous, counsel should so advise the court and request permission to withdraw. A defendant's right to appellate counsel must be safeguarded, and allowing appellate counsel to be the final judge of the merits of an appeal does not adequately safeguard this right. Thus, counsel's failure to appeal violated Rogers' right to counsel, constituting reversible error. St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001), following Smith v. Robbins, 528 US 259 (2000).

Proper Cross-Appeal of Adverse District Court Decision Regarding City Court Denial of Motion for Continuance: The established doctrine governing appeals to all appellate courts is that a party must cross-appeal if the party seeks to change any part of the judgment below. Further, the Montana Supreme Court follows the rule that it has jurisdiction only over those issues addressed in the appeal or in a properly filed cross-appeal, not jurisdiction over the entire case. Conversely, it is also the general rule that a cross-appeal is not necessary to enable a prevailing party to defend its judgment on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the court below. The proper way for a respondent to raise an issue before the Supreme Court, if the issue would support the decision below and is an issue that the court below did not address because it found another issue to be dispositive, is to assert the issue in the brief to the Supreme Court and fully discuss it. If a respondent does not assert and fully discuss the issue, the Supreme Court may in its discretion: (1) review the issue itself; (2) decide that the respondent has waived the right to review of the issue; or (3) remand to the court below for a decision on the issue. Here, issues raised by respondent that the District Court declined to address, having found another issue dispositive, undoubtedly supported the District Court's decision reversing the City Court's judgment. Thus, because the respondent sufficiently asserted the issues and both parties fully briefed each one, the Supreme Court concluded that the respondent had properly cross-appealed and that it was proper to review the respondent's issues on appeal. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000), following In Interest of Jamie L., 493 NW 2d 56 (Wis. 1992). See also Wash. v. Yakima Indian Nation, 439 US 463, 58 L Ed 2d 740, 99 S Ct 740 (1979).

Involuntary Satisfaction of Judgment — Request for Stay of Execution Not Required: Following entry and satisfaction of judgment in District Court, the parties were aware of a contemplated appeal, but no stay of execution was requested or supersedeas bond posted. After plaintiff acquired title to the disputed property pursuant to the judgment, defendant filed a notice of appeal and lis pendens, effectively preserving the status quo pending appeal. Plaintiff moved to dismiss, contending that by voluntarily satisfying the judgment, defendants waived their right to appeal. Applying Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996), the Supreme Court held that the parties' course of conduct illustrated the involuntary, rather than voluntary nature of the satisfaction of judgment. Because satisfaction was involuntary, the right to appeal was not waived. Further, under Rule 7, M.R.App.P., a party may request a stay of execution, but the request is not mandatory, even though a party choosing not to seek a stay runs the risk of having the appeal become moot. Plaintiff's motion to dismiss was denied. Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Appealability of District Court Order Granting Judgment as Matter of Law — Rules Suspension: Plaintiffs contended that an order granting judgment as a matter of law is not an appealable order because it is not among the enumerated orders listed in this rule. Following Ryan v. Bozeman, 279 M 507, 928 P2d 228 (1996), the Supreme Court, expressing concerns regarding judicial economy and the near certainty of future appeals following a new trial on damages, exercised its authority under Rule 3, M.R.App.P., to suspend the requirements of the rules of appellate procedure in the interest of expediting a decision and considered the appeal of the order granting judgment as a matter of law in the limited class of cases like this, when the order granting judgment as a matter of law is taken in conjunction with an order granting a new trial. Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160, 55 St. Rep. 198 (1998).

No Appeal, Based on Constitutionality of Offense Charged, From Judgment of Not Guilty by Reason of Mental Disease or Defect: Kaplan was charged with seven counts of stalking under 45-5-220, arising from her repeated contact with her former martial arts instructor. Kaplan moved to dismiss the charges on grounds that 45-5-220 is unconstitutional. Following a briefing, the motion was denied. By stipulation, Kaplan was subsequently found not guilty by reason of mental disease or defect. Because Kaplan was not convicted, there was no judgment of conviction from which to appeal. Therefore, the denial of her motion to dismiss, absent a judgment of conviction, was not itself an appealable order. The proper method of challenging a finding of mental disease or defect is found in 46-14-301 through 46-14-303. Appealing the constitutionality of the statute under which the person was charged is not an option. St. v. Kaplan, 275 M 108, 910 P2d 240, 53 St. Rep. 60 (1996).

Mootness as Separate From Question of Waiver of Appeal Rights — Voluntary Versus Involuntary Performance: The question of whether compliance with a judgment was voluntary or not has bearing on whether a party has waived the right to appeal, but it has no bearing on the question of mootness, which arises when an appellate court cannot grant effective relief. The issue of mootness is separate and distinct from the question of waiver of appeal rights. Complying with the judgment does not necessarily render the appeal moot. However, if compliance is voluntary, the party may be said to have waived any objection to the judgment. In deciding whether a case is moot, it must be determined whether effective relief is available. The fact that a party has not voluntarily waived the right to appeal does not necessarily mean that effective relief can still be provided on appeal, nor may a party claim an exception to the mootness doctrine when the case became moot through that party's own failure to seek a stay of judgment. Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996), following and clarifying State ex rel. Hagerty v. Rafn, 130 M 554, 304 P2d 918 (1956), and Martin Dev. Co. v. Keeney Co., 216 M 212, 703 P2d 143 (1985), overruling any contrary holding in Mont. Nat'l Bank of Roundup v. Dept. of Revenue, 167 M 429, 539 P2d 722 (1975), First Nat'l Bank in Eureka v. Giles, 225 M 467, 733 P2d 357 (1986), Moore v. Hardy, 230 M 158, 748 P2d 477 (1988), LeClair v. Reiter, 233 M 332, 760 P2d 740 (1988), and Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604 (1993), and followed in Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999). See also Gates v. Deukmejian, 987 F2d 1392 (9th Cir. 1993).

Denial of Motion to Set Aside Default as Final Judgment — Appeal Timely Filed: An order made after final judgment setting aside or refusing to vacate a default judgment is a special order that may be considered by the Supreme Court on appeal. During a hearing on a motion to set aside default, the District Court denied the motion, thus making a final determination of the parties' rights. An appeal perfected and filed within 30 days of dismissal of the motion was timely. In re Marriage of Martin, 265 M 95, 874 P2d 1219, 51 St. Rep. 443 (1994).

Right to Retain Lien — Substantive Property Right: Talcott Construction brought an action to foreclose on its construction lien on certain condominiums. Mountain Bank filed an irrevocable letter of credit with the District Court on behalf of the defendant, P&D Land Enterprises, and the court entered an order dissolving Talcott's lien. The defendant argued that Talcott could not appeal the dissolving of the lien because this rule refers only to writs of attachment. The Supreme Court held that an appeal was proper because the rule refers to "attachments" and the construction lien was an attachment and a property right, the release of which was the deprivation of a substantive right. James Talcott Constr., Inc. v. P&D Land Enterprises, 261 M 260, 862 P2d 395, 50 St. Rep. 1313 (1993).

Appeal of Grant of New Trial Made After Second Trial — Moot by Failure to Object or Timely Appeal: Following a trial on the distribution of marital property, wife requested and the District Court ordered a new trial. Husband waited until after the second trial to object to the order, contending that the court abused its discretion in granting a new trial because: (1) wife was incorrectly allowed to argue matters additional to those raised in the motion for a new trial; (2) the court did not rule on his motion to reconsider the order granting a new trial; and (3) the court

did not state with particularity the reasons for granting a new trial. The Supreme Court held that husband's grounds for appeal must fail because he failed to object or bring an appeal in a timely fashion. The question of the propriety of the trial court's order is one that should have been considered earlier and was rendered moot by the fact that the second trial had already occurred. Husband's attempt to raise the issue for the first time on appeal was barred by the doctrine of laches. In re Marriage of Danelson, 253 M 310, 833 P2d 215, 49 St. Rep. 597 (1992).

Failure to Appeal Not Fatal — Court Discretion to Reverse Judgment in Light of Statutory Changes: Koch chose not to appeal an adverse District Court decision regarding governmental immunity based on the case law developed on that issue by the Supreme Court. More than 1 year later, following substantive legislative revision of statutory immunity law, Koch sought relief under Rule 60(b), M.R.Civ.P. (Title 25, ch. 20). Generally, failure to appeal for almost any reason is fatal to a motion to reopen judgment under that rule because if allowed, it would in essence make a motion under that rule a substitute for appeal, which is an improper use of the motion. Even so, failure to appeal may not be fatal. Relief under Rule 60(b) is not inflexibly withheld in a case in which an appeal has been abandoned or not taken because of a clearly applicable adverse rule of law and in which there is a later clear and authoritative change in governing law. Therefore, in the present case, the existence of extraordinary circumstances created because of the substantive revision of statutory law was sufficient to warrant reversal of a final judgment under the "other reasons" rationale of Rule 60(b)(6), M.R.Civ.P. (Title 25, ch. 20). Having met the standards for relief under the rule, failure to appeal did not bar that relief. Koch v. Billings School District No. 2, 253 M 261, 833 P2d 181, 49 St. Rep. 517 (1992), following Polites v. U.S., 364 US 426, 5 L Ed 2d 173, 81 S Ct 202 (1960), and U.S. v. Wyle, 889 F2d 242 (9th Cir. 1989).

Party Not Injuriously Affected by Judgment: The defendant appealed the lower court's order allowing the Bureau of Land Management to maintain the road located on the defendant's property. The Supreme Court refused to rule on whether or not the lower court had the authority to enter the maintenance order but held that the defendant was not seriously prejudiced by the order and therefore was without standing to appeal. Granite County v. Komberec, 245 M 252, 800 P2d 166, 47 St. Rep. 2061 (1990).

Failure to Request Evidentiary Hearing or Raise Timely Objection — Issue of Attorney Fees Not Preserved for Appeal: The Supreme Court was precluded from reviewing the correctness of the computation of an award of attorney fees in a workers' compensation case because the defendant failed to either timely object or request an evidentiary hearing contesting the proposed order granting the fees. Defendant contended that there was no bar on appeal because: (1) the lower court abused its discretion; and (2) the plain error doctrine applied. However, the abuse of discretion standard is applied only when the usual requirements of preserving the issue at trial are met. Furthermore, the plain error exception will not be applied when failure or refusal to raise an issue in trial court is conscious and intentional on the part of trial counsel. Martinez v. Mont. Power Co., 239 M 281, 779 P2d 917, 46 St. Rep. 1684 (1989).

Court Order for Production of Witness — Failure to Preserve Issue for Appeal: Defendant claimed the jury might have been prejudiced by a District Judge's demeanor in ordering defense counsel to produce a witness for examination by the plaintiff. However, because defendant failed to move for mistrial or object at the time of the judge's action, there was no preservation of any issue of judicial misconduct for appeal. Phil-Co Feeds, Inc. v. First Nat'l Bank in Havre, 238 M 414, 777 P2d 1306, 46 St. Rep. 1380 (1989).

Constitutionality of Claim and Delivery Procedures: When presented with a claim that 27-17-203(2) is unconstitutional because it allows a court-ordered seizure of property without requiring notice of or opportunity for an immediate postseizure hearing, the Supreme Court held that Montana's claim and delivery procedure provides constitutional safeguards required by the state and federal constitutions. The procedure balances and protects the interests of both parties in the following ways: (1) a prehearing seizure may be obtained only if plaintiff swears to facts and posts a bond appropriate to protect defendant; (2) a delivery order must be obtained through a judge or Justice of the Peace rather than a court or administrative officer; (3) defendant may file a bond to immediately regain possession of the property; (4) defendant may immediately apply for a motion to quash the order; (5) defendant may promptly seek Supreme Court review under this rule; and (6) defendant may challenge the validity of the order at the final judicial determination of liability following seizure. First Bank W. Mont. Missoula v. Gregoroff, 236 M 345, 770 P2d 512, 46 St. Rep. 412 (1989). See also Mitchell v. W.T. Grant Co., 416 US 600, 40 L Ed 2d 406, 94 S Ct 1895 (1974).

Contention of Laches and Estoppel Appealable: The city built a pumphouse that was allegedly on land of another property owner. On appeal from a judgment verdict in an inverse condemnation case, the city was found to have actively contested the boundary at trial and

asserted its contention of laches and estoppel. The city could appeal these issues even though it did not present any witnesses at the first bifurcated trial, which concerned only the boundary line issue. Stidham v. Whitefish, 229 M 170, 746 P2d 591, 44 St. Rep. 1869 (1987).

Question of Mootness of Issue on Appeal — "Capable of Repetition, Yet Evading Review" Exception: In a dispute over whether a District Judge had the inherent power to establish by budget order the salaries for court staff, the judge maintained that the issue on appeal was moot because the local government "adopted its budget and included the budget order therein, and that once the budget was adopted, it could not be changed". The Supreme Court noted that in the absence of a decision, the judge could make a budget order in years following. Therefore, a "capable of repetition, yet evading review" exception to the mootness rule, as explained in Lee v. Schmidt - Wenzel, 766 F2d 1387 (9th Cir. 1985), was more tenable. Butte-Silver Bow Local Gov't v. Olsen, 228 M 77, 743 P2d 564, 44 St. Rep. 1356 (1987), followed in Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review, 282 M 255, 937 P2d 463, 54 St. Rep. 338 (1997), and In re Klos, 284 M 197, 943 P2d 1277, 54 St. Rep. 843 (1997). See also Heisler v. Hines Motor Co., 282 M 270, 937 P2d 45, 54 St. Rep. 345 (1997).

Party Not Aggrieved Not Entitled to Appeal: A party not aggrieved by a judgment may not appeal from it. Branstetter v. Beaumont Supper Club, Inc., 224 M 20, 727 P2d 933, 43 St. Rep. 1981 (1986), citing Carbon County v. Schwend, 182 M 89, 594 P2d 1121 (1979).

Involuntary Satisfaction of Judgment — Appeal Not Rendered Moot: If a judgment is satisfied by an involuntary payment or performance, the appeal from the judgment is not thereby rendered moot. First Nat'l Bank in Eureka v. Giles, 225 M 467, 733 P2d 357, 43 St. Rep. 1326 (1986), overruling Gallatin Trust & Sav. Bank v. Henke, 154 M 170, 461 P2d 448 (1969), and In re Black's Estate, 32 M 51, 79 P 554 (1905), and followed in LeClair v. Reiter, 233 M 332, 760 P2d 740, 45 St. Rep. 1531 (1988), Giles and LeClair were overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996). Turner was followed in Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Aggrieved Nonparties: Nonparties aggrieved by a lower court order may appeal from it. Lundgren v. Hoglund, 219 M 295, 711 P2d 809, 42 St. Rep. 2031 (1985).

Trustee's Right to Appeal Court Order When Trustee Not a Party: Trustee-bank could appeal from court order directing trustee to pay all income due beneficiary to beneficiary's judgment creditors, even though the trustee was not a party to the action between the beneficiary and creditors. The trustee had a fiduciary duty to preserve and protect the trust assets. Lundgren v. Hoglund, 219 M 295, 711 P2d 809, 42 St. Rep. 2031 (1985).

Standing of Attorney General to Appeal P.S.C. Order — P.S.C. Appeal Untimely: The Montana Power Company (M.P.C.) applied to the Public Service Commission (P.S.C.) for a rate increase of over $96.3 million. The P.S.C. granted only $4.1 million and denied in toto M.P.C.'s request to recover costs associated with Colstrip Unit 3. The M.P.C. appealed to District Court for review under 2-4-701. The judge reversed the P.S.C. order. The Attorney General filed notice of appeal. More than 60 days after the judge's order was entered, the P.S.C. also filed notice of appeal. The M.P.C. filed a motion to dismiss the appeal of the Attorney General for lack of standing and the appeal of the P.S.C. as untimely. The Supreme Court granted the motion, holding that the Attorney General had no standing to represent the state on appeal since it was not an aggrieved party or a party to the proceedings before the District Court and because, in his official capacity, the Attorney General may not appeal a decision that is within the discretion of the P.S.C. as a party to the action. The appeal of the P.S.C. was untimely, although within 7 days of the notice of appeal filed by the Attorney General. The latter appeal being invalid, the P.S.C. appeal would have to fall within the 60-day rule. Mont. Power Co. v. Dept. of Public Service Regulation, 218 M 471, 709 P2d 995, 42 St. Rep. 1750 (1985).

Third-Party Defendant Entitled to Appeal: A real estate broker brought an action against the seller who impleaded the buyer as a third-party defendant. Judgment was entered against the seller in favor of the broker and for the seller against the buyer. Under Rule 1, M.R.App.P., the buyer is entitled to appeal the judgment. Nardi v. Smalley, 197 M 321, 643 P2d 228, 39 St. Rep. 606 (1982).

Appeal by Defaulting Party: In the absence of an order of the District Court setting aside the default of the appealing defendants, they had no standing to file a notice of appeal from an adverse judgment against the plaintiff county. Carbon County v. Schwend, 182 M 89, 594 P2d 1121 (1979).

Standard for Standing to Bring Appeal — Public Versus Private Interest: To enable a party to appeal from a judgment or order he must have an interest in the subject matter of the litigation

which was injuriously affected by the judgment or order. A judgment by the District Court concerning the public interest in a right-of-way does not affect a party's private interest in the right-of-way. Carbon County v. Schwend, 182 M 89, 594 P2d 1121 (1979).

Aggrieved Parties: Because defendants were accorded full review in proceeding by plaintiff to dismiss defendants' motion to stay judgment pending appeal and to assess costs, defendants were no longer "aggrieved parties" entitled to further appeal rights. Morris v. Monk, 158 M 163, 489 P2d 1029 (1971).

CASES DECIDED UNDER STATUTE

GENERAL

Appeal of Damage Award — Scope of Review: In an action to recover a money judgment for personal injuries sustained in an automobile accident where the evidence was conflicting and the damages unliquidated, neither the trial court nor Supreme Court is authorized to enter an absolute judgment for any other sum than that assessed by the jury unless the parties litigant file their consent thereto, and the plaintiff cannot fix and limit the scope of the Supreme Court's review by appealing only from that part of the verdict and judgment assessing damages. Seibel v. Byers, 136 M 39, 344 P2d 129 (1959).

Order to Interplead Appealable: A judgment in an interpleader action dismissing plaintiff from the action and awarding it costs, enjoining defendants from prosecuting any action against the plaintiff involving a fund deposited, and ordering defendants to interplead in the action instituted by the plaintiff was appealable. Cent. Mont. Stockyards v. Fraser, 133 M 168, 320 P2d 981 (1957).

Alimony and Attorneys' Fees Award Appealable: An award of temporary alimony and attorneys' fees to a wife is a final judgment within the meaning of subdivision 1 of this section. Walker v. Walker, 129 M 295, 285 P2d 590 (1955).

Denial of Writ of Habeas Corpus Appealable: An order denying a Writ of Habeas Corpus is appealable. State ex rel. Veach v. Veach, 122 M 47, 195 P2d 697 (1948).

Order to Vacate Attachment Appealable: Fact that motion was to vacate or release attachment rather than to dissolve the attachment would not prevent the order denying the motion from being appealable. Stallinger v. Goss, 121 M 437, 193 P2d 810 (1948).

Order to Satisfy Judgment Appealable: An order, after final judgment, ordering plaintiff to satisfy judgment upon tender of specified amount by defendant was an appealable order. Galbreath v. Armstrong, 121 M 387, 193 P2d 630 (1948).

Taxation of Costs Not a "Special Order": An order taxing costs is in theory an intermediate order and the costs when taxed become a part of the judgment theretofore entered. Hence, it is not a special order made after final judgment within the meaning of subdivision 2 from which an appeal may be taken, but is reviewable only on appeal from the judgment, the time for appeal running from the date of judgment. An order taxing appeal costs becomes a part of the judgment of the Supreme Court, and not a part of the judgment upon retrial where one is had, over which the trial court has no jurisdiction but to enforce or to determine disputed items. State ex rel. Vaughn v. District Court, 111 M 552, 111 P2d 810 (1941).

Judgment Upon Remand Appealable: Where the Supreme Court remands a cause with direction to modify the judgment appealed from, the judgment as modified to stand affirmed, and the decree entered pursuant to remittitur in all substantial respects complies with the court's opinion, the modified judgment is in effect the judgment of the Supreme Court and from it an appeal does not lie and where taken, if groundless, and for delay court may order dismissal. Lloyd v. Great Falls, 107 M 588, 87 P2d 187 (1939).

Presumption of Correctness of Lower Court: On appeal the Supreme Court indulges the presumption that the judgment of the District Court appealed from is correct and will uphold it unless clearly shown to be erroneous, the burden of showing which rests upon the appellant. Dalbey v. Equitable Life Assurance Soc'y of the U.S., 105 M 587, 74 P2d 432 (1937).

Appeal From Part of Divisible Judgment: Where the judgment is divisible, an appeal may be taken from a part thereof. Wills v. Morris, 100 M 504, 50 P2d 858 (1935), overruling Lohman v. Poor, 68 M 579, 220 P 1094 (1923).

Void Order — Not to Determine Appealability: The appealability of an order does not rest upon what may be its operative effect, and therefore the question whether it is void cannot govern its appealability. State ex rel. Monteath v. District Court, 97 M 530, 37 P2d 567 (1934).

Denial of Mandate Not Appealable: An order of the District Court denying an application for an alternative Writ of Mandate is not one of the orders enumerated in subdivisions 2 and 3 of this section, from which an appeal may be taken, and hence an appeal therefrom does not lie. State ex rel. Bole v. Lay, 89 M 541, 300 P 238 (1931).

Conditional Interlocutory Order Not "Special Order": An appeal from an order sustaining a demurrer does not lie; nor may such an order made in a proceeding arising out of an action in which a judgment had been entered be treated as a special order made after final judgment, where such judgment was a conditional interlocutory determination, and not a final one. Heater v. Boston & Mont. Corp., 84 M 500, 277 P 11 (1929), distinguished in In re Day's Estate, 119 M 547, 177 P2d 862 (1947).

Alimony Award Appealable: An order requiring the payment of alimony pendente lite is one from which an appeal lies. State ex rel. McGrath v. District Court, 82 M 463, 267 P 803 (1928).

Insolvency Proceedings — Order Appealable: Under this section, a creditor of an insolvent bank seeking to have his claim against the bank established as a preferred one has an appeal from an adverse order of the court; where he fails to appeal within the time allowed, the order becomes final. State ex rel. Rankin v. Banking Corp. of Mont., 81 M 489, 264 P 106 (1928).

Habeas Corpus Proceedings Appealable: A proceeding in habeas corpus, the object of which is to determine the right to the custody of a minor, is a special proceeding of a civil nature to enforce private rights; the disposition made of it by the court is a judgment from which an appeal may be taken under this section. In re Thompson, 77 M 466, 251 P 163 (1926), distinguished in Ex parte Reinhardt, 88 M 282, 292 P 582 (1930).

Amendment of Affidavit — Order Not Appealable: An order permitting amendment of an affidavit for Writ of Attachment is not appealable. Hetrick v. Renwald, 73 M 426, 236 P 1089 (1925).

Denial of Leave to Amend Answer Not Special Order: An order denying defendant's motion for leave to amend his answer after judgment had been rendered and motion for new trial denied was not a special order made after final judgment within the meaning of this section, and was therefore not appealable. Apple v. Seaver, 70 M 65, 223 P 830 (1924).

"Special Order" Defined: The special order, made after final judgment, from which an appeal lies, must be an order affecting the rights of some party to the action, growing out of the judgment previously entered. It must be an order affecting rights incorporated in the judgment. Apple v. Seaver, 70 M 65, 223 P 830 (1924); Weed v. Weed, 55 M 599, 179 P 827 (1919); Chicago, Milwaukee & St. Paul Ry. v. White, 36 M 437, 93 P 350 (1908).

Denial of Intervention Not Appealable: An appeal from an order denying a motion for leave to file a complaint in intervention does not lie, this section not authorizing it. Equity Co-op Ass'n v. Equity Co-op Mill. Co., 63 M 26, 206 P 349 (1922).

Grant or Denial of Prohibition Appealable: Under this section, an appeal lies from the final, or formal, judgment granting (or denying) a peremptory Writ of Prohibition, but does not lie from an order entered in the minutes of the District Court directing the peremptory Writ to issue. State ex rel Lalonde v. Lemkie, 62 M 51, 202 P 1109 (1921).

Statutory Basis for Appeal: An appeal is authorized by statute only, and unless the judgment or order which it is sought to have reviewed in this mode falls fairly within the enumeration of appealable orders or judgments made by the statute, the appeal does not lie. Weed v. Weed, 55 M 599, 179 P 827 (1919); Taintor v. St. John, 50 M 358, 146 P 939 (1915); State ex rel. Jackson v. Kennie, 24 M 45, 60 P 589 (1900); In re Tuohy's Estate, 23 M 305, 58 P 722 (1899).

Confiscation Proceedings Appealable: Under this section, either the State or the claimant could appeal from the judgment rendered in a proceeding under the Enforcement Act of 1917 (Ch. 143, L. 1917), relative to searches, seizures, and forfeitures of intoxicating liquors. State ex rel. Prato v. District Court, 55 M 560, 179 P 497 (1919).

Bail Bond Proceedings — Summary Judgment Not Appealable: No appeal lies from a summary judgment against sureties in proceedings for the forfeiture of a bail bond, though the judgment is final; it is not "a judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court". State ex rel. Van v. District Court, 54 M 577, 172 P 540 (1918).

Striking of Pleadings Not Appealable: An appeal does not lie from an order striking from the files a pleading or other document constituting a part of the record of a cause. State ex rel. Smotherman v. District Court, 50 M 119, 145 P 724 (1914).

Mandate — Order Overruling Motion to Quash Not Appealable: An order overruling a motion to quash an alternative Writ of Mandate is not an appealable one. State ex rel. Frost v. Barnett, 49 M 252, 141 P 287 (1914).

Order Authorizing Payment Not One Directing Delivery: An order authorizing the payment of a fund deposited in court in condemnation proceedings to the person entitled thereto is not one directing the delivery, transfer, or surrender of property within the meaning of this section, and is therefore not appealable. Chicago, Milwaukee & St. Paul Ry. v. White, 36 M 437, 93 P 350 (1908).

Writ of Prohibition — Order to Quash Not Appealable: Neither an order sustaining a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) nor an order sustaining a motion to quash an alternative Writ of Prohibition is appealable. State ex rel. Allen v. Hawkins, 33 M 177, 82 P 952 (1905).

Entry Noting Stipulation Not Appealable: An entry noting the filing of an agreement to dismiss is not a dismissal from which an appeal can be taken. A pretended judgment of dismissal, which was not in fact a dismissal, is not appealable. Kinman v. Scheuer, 30 M 73, 75 P 690 (1904).

Substitution of Parties Not Appealable: An order substituting a claimant of property, on application of defendant in a claim and delivery action, in lieu of defendant, is not a final determination from which an appeal is allowable. State ex rel. Weinstein Co. v. District Court, 28 M 445, 72 P 867 (1903).

Judgment Required to Be Shown: Where the record does not show that any judgment has been entered in the case in the court below, an appeal from the judgment will be dismissed. Lisker v. O'Rourke, 28 M 129, 72 P 416 (1903).

Order Directing Judgment Not Appealable: A minute entry directing judgment to be entered for defendant is not a judgment. Lisker v. O'Rourke, 28 M 129, 72 P2 416 (1903).

Interlocutory Judgments — Extent of Relief: The statutes do not limit the right of appeal from final judgment or the power of the Supreme Court on such appeals but merely provide for independent appeals from interlocutory judgments and the extent of relief to be granted thereon. Finlen v. Heinze, 27 M 107, 69 P 829, 70 P 517 (1902).

Denial of New Trial Motion Appealable: When made after entry of final judgment, an order striking out the statement on motion for a new trial is an order from which an appeal may be taken. State ex rel. Finlen v. District Court, 26 M 372, 68 P 465 (1902); Beach v. Spokane Ranch & Water Co., 25 M 367, 65 P 106 (1901).

Statute Not Applicable to Criminal Cases: This section provides only for appeals in civil cases, and has no application to any matter contained in the Penal Code. State ex rel. Jackson v. Kennie, 24 M 45, 60 P 589 (1900).

Removal of Trustee Appealable: A judgment declaring a trust and removing the trustee is a final order from which an appeal will lie, notwithstanding that it directs the trustee to file an inventory and an account of all property received by him as trustee. Bryant v. Davis, 22 M 534, 57 P 143 (1899).

Denial of Modification of Irregular Order Appealable: An appeal can be taken from an order refusing a motion to modify a former order, even though the original order is appealable, when the original order was irregularly issued, or was made without notice. Beach v. Spokane Ranch & Water Co., 21 M 7, 52 P 560 (1898). See also Butte Consol. Min. Co. v. Frank, 24 M 506, 62 P 922 (1900).

Refusal to Allow Amendment of Pleadings Not Appealable: An appeal does not lie from an order refusing to allow an amendment to the complaint, or striking the complaint from the files. Owen v. McCormick, 5 M 255, 5 P 280 (1884). See also Murphy v. King, 6 M 30, 9 P 585 (1886).

ACCOUNTING PROCEEDINGS

Order for Accounting Not Appealable: An order for an accounting is not an appealable order under this section. Corcoran v. Fousek, 125 M 223, 233 P2d 1040 (1951).

Action for Partnership Accounting as Final Order: In an action for a partnership accounting in which defendants claimed that plaintiff had purchased certain lands with partnership funds, the judgment, which determined all the material issues involved, and which left nothing undetermined except the title to a homestead patented to plaintiff also claimed as partnership property, was final in the sense used in this section, authorizing an appeal from a "final judgment". Wilson v. Wilson, 64 M 533, 210 P 896 (1922).

Order of Sale as Special Order Made After Final Judgment: Where a decree determining partnership accounts is rendered after the dissolution of the firm, and the receiver therefor is thereafter ordered to sell the partnership property, an appeal from an order confirming such sale does not raise any question concerning the order of sale, since such order is a special order, made after final judgment, from which an appeal is authorized. Murphy v. Patterson, 24 M 591, 63 P 380 (1901).

AMENDMENT OF JUDGMENT

Order Modifying Judgment Not Reviewable by Supervisory Control: Since an appeal may be taken from a special order made after judgment which modifies a judgment theretofore entered and adversely affects the rights of a party to the litigation, an application for a Writ of

Supervisory Control will be denied. State ex rel. Ferris v. District Court, 126 M 623, 255 P2d 687 (1953).

Judgment After Remittitur Not Reviewable by Appeal: A judgment entered in the District Court after remittitur is the Supreme Court's judgment, and where it is contended that such judgment is not in compliance with the remittitur, the remedy is by special proceeding in the Supreme Court and not by motion in the trial court, nor by appeal from either the new judgment or from the trial court's order denying the modification thereof. In re Anderson's Estate, 113 M 125, 122 P2d 832 (1942).

Appealable Order Not Reviewable by Certiorari: An order amending a judgment entered 4 months prior thereto was a special order made after final judgment and as such appealable under subdivision 2 of this section; therefore its correctness may not be reviewed on certiorari. State ex rel. Monteath v. District Court, 97 M 530, 37 P2d 567 (1934).

Order Amending Judgment Appealable: An order amending a judgment already entered is a special order after final judgment, and therefore appealable. State ex rel. Boston & Mont. Consol. Copper & Silver Min. Co. v. District Court, 32 M 20, 79 P 410 (1905).

DISMISSAL OF ACTION

Failure to State Claim for Relief: Court properly dismissed with prejudice a complaint filed on the Daly Ditch decision because it appeared to be an interlocutory appeal and thus failed to state a claim on which relief may be granted. Swift v. St., 226 M 439, 736 P2d 117, 44 St. Rep. 786 (1987).

Motion to Dismiss for Lack of Jurisdiction Appealable: A District Court order granting a motion to dismiss for lack of jurisdiction is appealable. State ex rel. Austin v. Austin, 221 M 488, 719 P2d 429, 43 St. Rep. 998 (1986).

Judgment of Dismissal Appealable: An appeal to the Supreme Court may be taken from a judgment dismissing an action which is based on an order sustaining a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and by 25-31-503, now repealed) to the complaint. Cahill-Mooney Constr. Co. v. Ayres, 140 M 464, 373 P2d 703 (1962); Monarch Lumber Co. v. Haggard, 139 M 105, 360 P2d 794 (1961).

Order of Dismissal Appealable — Effect: An order dismissing an action is a final judgment from which an appeal can be perfected if the order has the effect of finally determining the rights of the parties. Kelly v. Harris, 158 F. Supp. 243 (D.C. Mont. 1958).

Dismissal for Lack of Jurisdiction Not Appealable: The order of the District Court refusing to take jurisdiction of the application for Writ of Review was neither a judgment from which an appeal could have been taken nor an appealable order, even if it had contained a positive direction that the proceeding be dismissed. The general rule is that a judgment of dismissal for want of jurisdiction is not one from which an appeal lies; hence relator's right to relief by mandate was not barred by any right of appeal. State ex rel. Musselshell County v. District Court, 89 M 531, 300 P 235, 82 ALR 1158 (1931).

Minute Entry Sustaining Dismissal Not a Judgment: A minute entry of an order sustaining a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and by 25-31-503, now repealed) to the plaintiff's complaint, and directing the dismissal of his action, is not an order from which an appeal can be taken; the order is not a judgment. Pentz v. Corscadden, 49 M 581, 144 P 157 (1914), distinguished in Kelly v. Harris, 158 F. Supp. 243 (D.C. Mont. 1958).

Order Dismissing Action Not Final Judgment: An order dismissing an action for failure of defendant to demand and have entered a judgment in its favor, within 6 months after rendition of verdict, is not a final judgment nor an order from which an appeal may be taken. Hovey v. N. Pac. Ry., 39 M 40, 101 P 146 (1909).

DIVORCE PROCEEDINGS

Stay of Custody Decree: An appeal from an order modifying a decree as to custody of children can be stayed only by an application for a stay made and granted under subdivision 2 of this section. Application of Nelson, 132 M 252, 316 P2d 1058 (1957).

Appeals From Divorce Generally: Appeals lie from final judgments in divorce action as in other actions. Judson v. Anderson, 118 M 106, 165 P2d 198 (1945), followed in In re Marriage of Butler, 243 M 521, 795 P2d 467, 47 St. Rep. 1376 (1990).

Suspension of Alimony Appealable: Under the rule that certiorari does not lie where appeal is available, an order so modifying a decree of divorce as to suspend payment of alimony and awarding the custody of a minor child to the father upon remarriage of the mother was a special order made after final judgment and appealable, and therefore the Writ of Review was not

available to review the correctness of the order. State ex rel. Gates v. District Court, 69 M 322, 221 P 543 (1923).

Order Overruling Motion on Affidavit Not Appealable: An appeal does not lie from an order overruling a motion to strike an affidavit filed in support of a motion for the modification of a decree granting a divorce, such order not being one of the orders made appealable by this section, nor a special order made after final judgment from which an appeal may be taken. Weed v. Weed, 55 M 599, 179 P 827 (1919), distinguished in State ex rel. Monteath v. District Court, 97 M 530, 37 P2d 567 (1934).

Order Quashing Execution Not Special Order: An order quashing an execution issued by a Clerk of the District Court on an abstract of a Justice's judgment, filed with and docketed by him under 25-31-912 (now repealed) and striking such abstract from the files, is not a special order after final judgment made appealable by this section. Pierson v. Daly, 49 M 478, 143 P 957 (1914).

Order Supplemental to Execution as Special Order: An order made in proceedings supplemental to execution is a special order made after final judgment, and is therefore appealable. Hayes v. District Court, 11 M 225, 28 P 259 (1891); Barber v. Briscoe, 9 M 341, 23 P 726 (1890).

Order Refusing to Stay Execution as "Special Order": An order refusing to stay an execution upon a judgment is a "special order made after final judgment" and appealable. Clarke v. Gonu, 2 M 538 (1877).

FINDINGS AND VERDICT

Findings and Conclusions Not Orders or Judgment: Findings of fact and conclusions of law are not a judgment nor are they an order, as known to our practice; they are the court's statement on which he will base his order or judgment. Sheridan County Elec. Co-op v. Anhalt, 127 M 71, 257 P2d 889 (1953).

Orders Not Appealable Generally: Appeals do not lie under this section, from orders rejecting findings of the jury, from conclusions of law, or from the action of the court in adopting certain findings of the jury and making findings of its own, the questions thus sought to be raised being reviewable on appeal from the judgment. Bode v. Rollwitz, 60 M 481, 199 P 688 (1921).

Order Correcting Verdict Not Appealable: An order of the District Court correcting the verdict in a civil action is not one from which an appeal may be taken. Frank v. Symons, 35 M 56, 88 P 561 (1907).

Denial of Motion to Reject Findings Not Appealable: An order overruling a motion to reject findings made by the jury is not appealable. Johns v. Barnes, 31 M 426, 78 P 703 (1904).

Denial of General Verdict Not Appealable: An appeal from an order denying a motion to adopt a general verdict and special findings and to set aside the special verdict in a suit in equity must be dismissed where the record shows no judgment of dismissal or other final judgment. Kinman v. Scheuer, 30 M 73, 75 P 690 (1904).

INJUNCTIONS AND RESTRAINING ORDERS

Order Refusing to Dissolve Temporary Restraining Order Not Appealable: A temporary restraining order is not an injunction within the meaning of this section, and an order refusing to dissolve such temporary restraining order is not appealable. Guardian Life Ins. Co. v. St. Bd. of Equalization, 134 M 526, 335 P2d 310 (1959).

Interpleader Action — Injunction Appealable: A judgment and order granting an injunction in an interpleader action was appealable. Cent. Mont. Stockyards v. Fraser, 133 M 168, 320 P2d 981 (1957).

Order to Show Cause and Injunction Appealable: Where temporary injunction to abate nuisance under 45-8-112 was quashed the same day issued upon presentation of affidavit of defendant under 27-19-401 and in its stead was issued an order to show cause why an injunction should not issue and enjoining defendant from operating "contrary to the laws of the State of Montana", such order was appealable. State ex rel. Olsen v. 30 Club, 124 M 91, 219 P2d 307 (1950).

Restraining Order as Constituting Right to Injunction — Appeal Allowed: In action by public utility against Public Service Commission to enjoin it from putting into effect new rates fixed by it, upon petition for restraining order until final determination, order was granted, its action amounted to adjudication of plaintiff's right to an injunction pendente lite, from which an appeal lies under this section. State ex rel. Pub. Serv. Comm'n v. District Court, 103 M 563, 63 P2d 1032 (1936).

Dissolution of Temporary Restraining Order Not Reviewable Upon Appeal of Judgment: An order denying a motion to dissolve a temporary injunction is an appealable order, and if not appealed from, the correctness of the order may not, under section 93-8022, R.C.M. 1947 (superseded by Rule 2, M.R.App.P.), be reviewed on appeal from the judgment in the action in which the order was made. Little Horn St. Bank v. Gross, 89 M 472, 300 P 277 (1931).

Dissolution of Restraining Order Appealable: Where a motion to dissolve a temporary restraining order was heard at once and the matter of propriety of its issuance presented to the court as fully as it could have been on hearing of an order to show cause issued, and the court in denying the motion, instead of preserving the status quo, authorized one party to the action to harvest and sell crops (the subject in controversy) while restraining his opponent from interfering with him, its order was an adjudication of the right of the former to an injunction pendente lite, from which an appeal lay under this section. Labbitt v. Bunston, 80 M 293, 260 P 727 (1927), explained in Guardian Life Ins. Co. of Am. v. St. Bd. of Equalization, 134 M 526, 335 P2d 310 (1959).

Denial of Injunction Appealable: An appeal lies from an order denying an injunction. Bown v. Somers, 55 M 434, 178 P 287 (1919), followed in Colstrip Faculty Ass'n, MEA/NEA v. Trustees, School District No. 19, 251 M 309, 824 P2d 1008, 49 St. Rep. 43 (1992).

Denial or Grant of Orders Not Appealable: There is no appeal from an order granting or refusing a restraining order pending the hearing of an order to show cause why an injunction should not issue. Wetzstein v. Boston & Mont. Consol. Copper & Silver Min. Co., 25 M 135, 63 P 1043 (1901), distinguished in Jordan v. Andrus, 26 M 37, 66 P 502 (1901); Maloney v. King, 25 M 256, 64 P 668 (1901).

JUSTICE COURT APPEALS TO DISTRICT COURT

Order Dismissing Appeal From Justice Appealable: An order dismissing an appeal from Justice Court is a final judgment and as such is appealable. If the "order" has the effect of finally determining the rights of the parties, it is a "judgment", the title to the instrument being not conclusive; it is to be judged by its contents and substance. Ross v. Greenwald, 112 M 324, 115 P2d 290 (1941), following State ex rel. Meyer v. District Court, 102 M 222, 57 P2d 778 (1936), and overruling Palmer v. Spaulding, 34 M 1, 85 P 369 (1906).

Denial of Motion to Dismiss Appeal From Justice Not Appealable: An order of the District Court, overruling a motion to dismiss an appeal to that court from a judgment of a Justice of the Peace, is not a final judgment or a special order made after final judgment, so as to be appealable under this section. Raymond v. Raymond, 32 M 170, 79 P 1056 (1905).

"Final Judgment" Not by Justice: The "final judgment" referred to in this section is a judgment rendered by the District Court, and not that rendered by a Justice of the Peace from which an appeal is prosecuted. Raymond. v. Raymond, 32 M 170, 79 P 1056 (1905).

Order for Bond on Appeal Not Appealable: This section and the following section (section 93-8005, R.C.M. 1947, superseded by Rules 4 and 5, M.R.App.P.) being exclusive, an appeal will not lie from an order of a District Court requiring that appellee on an appeal from Justice's Court give the bond required of a plaintiff, not a resident of the state, since such an order is not designated therein. State ex rel. Allen v. Napton, 24 M 450, 62 P 686 (1900). See also Threlkeld v. O'Neal, 26 M 209, 66 P 940 (1901); State ex rel. Prescott v. District Court, 27 M 179, 70 P 516 (1902).

PROBATE PROCEEDINGS — GENERALLY

Appointment or Removal of Personal Representative and Renunciation of Right to Appointment — Standards of Review: Whether a party has a statutory priority for appointment as a personal representative in Montana as a result of appointment as a personal representative in another state, as well as a coincident right to obtain removal of a special administrator, is a legal question that the Supreme Court will review to determine whether the District Court correctly interpreted the law (see In re Estate of Peterson, 264 M 104, 874 P2d 1230 (1994)). A question of whether a person has renounced the right to appointment as a personal representative involves the interpretation and application of the statute governing renunciation and will be reviewed for correctness (see In re Inquiry Into A.W., D.G., & M.G., Jr., 1999 MT 42, 293 M 358, 975 P2d 1250 (1999)). Whether a District Court has erred in refusing to appoint a person as a personal administrator, because that person has a conflict with another that prevents that person from being appointed a personal administrator, will be reviewed to determine whether there has been an abuse of the District Court's discretion (see In re Estate of Obstarczyk, 141 M 346, 377 P2d 531 (1963)). In re Estate of Kuralt, 2001 MT 153, 306 M 73, 30 P3d 345 (2001).

Standing of Decedent's Relatives to Appeal Settlement and Distribution Agreements: Decedent's mother, brother, and sister sought to appeal a contested settlement agreement and a distribution agreement ordered by the District Court, but decedent's surviving spouse, Barbara, contended that there was no standing for an appeal. The Supreme Court held that: (1) Barbara was not precluded from raising the issue of standing for the first time on appeal, even though she failed to object in District Court, because objections to standing cannot be waived; (2) decedent's mother, as a creditor of the estate, had standing to appeal the appointment of Barbara as personal representative, but a brother and sister, who were neither creditors nor heirs of the estate, lacked standing; (3) because decedent's mother, brother, and sister were not successors to the estate, they had no legal interest or personal stake in the distribution of the estate and thus lacked standing to claim that the distribution agreement was improper; and (4) decedent's mother, brother, and sister were parties to the contested settlement agreement and were directly affected by the validity of the agreement and thus had standing to appeal that issue. In re Estate of Goick, 275 M 13, 909 P2d 1165, 53 St. Rep. 12 (1996), following Holmstrom Land Co. v. Newlan Creek Water District, 185 M 409, 605 P2d 1060 (1979), Grossman v. Dept. of Natural Resources and Conservation, 209 M 427, 682 P2d 1319 (1984), and Olson v. Dept. of Revenue, 223 M 464, 726 P2d 1162 (1986). Goick was followed, as to prerequisites for standing, in In re Paternity of Vainio, 284 M 229, 943 P2d 1282, 54 St. Rep. 858 (1997).

Order Sustaining Dismissal to Petition for Revocation of Probate Appealable: An order sustaining a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to petition for revocation of the probate of a subsequent will is an appealable order under this section as amended by Ch. 41, L. 1941. In re Maricich's Estate, 140 M 319, 371 P2d 354 (1962).

Petition for Revocation of Testimentary Letters — Supervisory Control Applicable: An order dismissing a petition for revocation of letters testamentary is not one refusing to revoke such letters and is not appealable. Hence, the Writ of Supervisory Control may properly be resorted to to annul such order. State ex rel. Biering v. District Court, 115 M 174, 140 P2d 583 (1943).

Settlement of Executor's Accounts — No Appeal From Order: Neither an order denying a motion to reopen and amend an amended order of the District Court sitting in probate settling accounts of an executor, nor one to set such order aside is among court orders made appealable by subdivision 3; hence the Supreme Court has no jurisdiction of appeals taken therefrom. In re Sullivan's Estate, 112 M 496, 118 P2d 137 (1941).

Erroneous Order Sustaining Dismissal Not Appealable: An erroneous order sustaining a demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to a petition for the probate of a will and dismissing the petition is neither a judgment nor an order made appealable by this section, and therefore an attempted appeal therefrom will be dismissed on motion. There is no provision in the statute for a demurrer to the petition for probate. In re Augestad's Estate, 107 M 619, 88 P2d 32 (1939).

No Appeal From Order Vacating Decree of Settlement: The provision for an appeal from an order made after judgment does not apply to probate proceedings, and as a corollary it would seem that no appeal lies from an order vacating decree of settlement, just as no appeal lies from an order refusing to vacate a decree of settlement of final account and distribution of an estate. State ex rel. Regis v. District Court, 102 M 74, 55 P2d 1295 (1936).

Order Setting Administration and Legal Fees Appealable: Action of the District Court, sitting in probate, in approving an agreement between an administratrix and attorneys who had acted for the executrix whom she succeeded in the administration of the estate as well as for herself, under which she had promised to pay them a fee of $5,000 for their services, and in fixing her fee as administratrix, was reviewable on appeal under this section, and not on application for Writ of Supervisory Control. State ex rel. Brophy v. District Court, 97 M 83, 33 P2d 266 (1934).

Order Dismissing Petition for Revocation of Probate Not Appealable: Under this section, subdivision 3, only such orders in probate proceedings as therein enumerated are appealable. Hence, an order dismissing a petition for the revocation of the probate of a will—in effect an order refusing to revoke its probate—not being included in the enumeration, is not appealable. In re Ferguson's Estate, 73 M 596, 237 P 1105 (1925).

Inheritance Tax — Appeal of Order Barred: An order of the District Court fixing the amount of an inheritance tax due from an estate and directing its payment is appealable. Hence, failure to appeal barred the State from calling in question the correctness of the order on appeal from the decree allowing the final account of the executor, after payment of the tax. In re Sattes' Estate, 59 M 220, 195 P 1033 (1921).

"Final Judgment" Defined: The term "final judgment", as used in subdivision 2 of this section, refers only to those judgments known at common law as final judgments, and has no

application to the statutory determinations and orders termed "orders or judgments" in probate proceedings. In re Roberts' Estate, 48 M 40, 135 P 909 (1913); In re Klein's Estate, 35 M 185, 88 P 798 (1907); In re Dougherty's Estate, 34 M 336, 86 P 38 (1906); In re Kelly's Estate, 31 M 356, 78 P 579, 79 P 244 (1905); In re Tuohy's Estate, 23 M 305, 58 P 722 (1899).

"Final Judgments" Not to Include Orders: The expression "final judgment", as used in subdivision 1 of this section, refers only to those judgments known at common law as final judgments, as defined in section 93-4701, R.C.M. 1947 (repealed). It does not include statutory determinations termed "orders" or "judgments" in probate proceedings. In re Roberts' Estate, 48 M 40, 135 P 909 (1913).

Order to Disclose Assets Not Appealable: An order to disclose assets of a decedent's estate is not a "final judgment", within the meaning of subdivision 1 of this section, from which an appeal lies. In re Roberts' Estate, 48 M 40, 135 P 909 (1913).

Order Determining Inheritance Tax Appealable: The action of the court in fixing the amount of an inheritance tax, and in directing its payment, may be reviewed on appeal, either from the order itself or from the decree directing the delivery. State ex rel. Floyd v. District Court, 41 M 357, 109 P 438 (1910).

Order Granting Widow's Allowance Appealable: An order granting an allowance to a widow out of the estate of her intestate is appealable, and, where an appeal therefrom is not taken within the time allowed, it becomes final and conclusive, and may not thereafter be attacked collaterally. In re Dougherty's Estate, 34 M 336, 86 P 38 (1906).

Order Confirming Account Not Appealable: An order confirming a guardian's account, being appealable under this section, and no appeal having been taken therefrom, questions respecting its settlement cannot be considered on a subsequent appeal from an order of sale of the ward's real estate. In re Scheuer's Estate, 31 M 606, 79 P 244 (1905).

Order Disallowing Claims Against Estate: An order disallowing a claim against an estate is not appealable. In re Barker's Estate, 26 M 279, 67 P 941 (1902).

Appeals From Judgments or Orders in Probate Generally: Appeals from judgments or orders in probate proceedings are allowed only under the provisions of subdivision 3 of this section, except in the single case of an order granting or refusing a new trial, which may be taken under subdivision 2. Tuohy's Estate, 23 M 305, 58 P 722 (1899).

PROBATE PROCEEDINGS — DISTRIBUTION OF ESTATE

Untimely Affidavit Void: Where a decree of distribution was entered on an estate and no appeal was taken from such decree, an affidavit thereafter filed and recorded, stating that the affiant was an heir and devisee of the will and claiming an interest in the real estate distributed, was void on its face and constituted no cloud on the title to the land. Hart v. Barron, 122 M 350, 204 P2d 797 (1949).

Order Amounting to Partial Distribution Appealable: Where, under will, widow of decedent was granted life estate in all his property, and upon her death the remaindermen, in an intermediary proceeding against executor of her separate estate, petitioned to strike from inventory of widow's separate estate an amount equal to one-half the cost of a bookkeeper for both estates and the cost of repairing property belonging to her separate estate, the "order and judgment" made therein amounted to partial distribution of the property, appealable as a final judgment. In re Yergy's Estate, 106 M 505, 79 P2d 555 (1938).

Order Refusing to Vacate Settlement Not Appealable: Under subdivision 3 of this section, orders refusing to vacate a decree of distribution and settlement of final account, and refusing to vacate an order settling an administrator's account and discharging him, are not appealable. State ex rel. Regis v. District Court, 102 M 74, 55 P2d 1295 (1936); In re Kelly's Estate, 31 M 356, 78 P 579, 79 P 244 (1905).

Erroneous Order — Supervisory Control Applicable: An erroneous order overruling a motion to vacate a decree of distribution of an estate not being an appealable one, and relatrix not having any other plain, speedy, and adequate remedy, supervisory control lies to annul the order. State ex rel. Rubin v. District Court, 62 M 60, 203 P 860 (1921).

Portion of Order or Judgment of Distribution Appealable: An appeal may be taken from a part of an order or judgment decreeing certain persons to be entitled to share in the distribution of an estate under a will. In re Klein's Estate, 35 M 185, 88 P 798 (1907).

Order Granting Motion to Strike Not Appealable: An order granting a motion to strike out objection to the final account of an executrix and to a petition for distribution of the estate is not appealable. State ex rel. Cotter v. District Court, 34 M 303, 87 P 614 (1906).

Denial of New Trial Appealable: An appeal lies from an order denying a motion for a new trial in proceedings for the distribution of an estate under section 91-3706, R.C.M. 1947 (since repealed). In re Davis' Estate, 27 M 235, 70 P 721 (1902).

Order for Partial Distribution Appealable: An appeal lies from an order for the partial distribution of an estate. State ex rel. Leyson v. District Court, 26 M 378, 68 P 411 (1902).

PROBATE PROCEEDINGS — REAL ESTATE CONVEYANCE

Order Directing Conveyance Appealable: An order entered by court sitting in probate directing conveyance of realty by administrator upon payment of specified sum was a final order and was also appealable as an "order directing conveyance of real property" though, upon a showing that payment had been made, the administrator was later directed to execute a deed. In re Day's Estate, 119 M 547, 177 P2d 862 (1947).

Refusal to Confirm Sale Appealable: Under subdivision 3 of this section, authorizing an appeal from a judgment or order made by the District Court sitting in probate "against . . . directing . . . the sale or conveyance of real property", an appeal lies from an order refusing to confirm an administrator's sale of such property. In re McLure's Estate, 76 M 476, 248 P 362 (1926).

"Conveyance" Not to Include Lease: An appeal will not lie from an order directing the execution of a lease of realty under subdivision 3 of this section, as the word "conveyance", as used in the statute, does not include a lease. In re Tuohy's Estate, 23 M 305, 58 P 722 (1899).

Order to Execute Lease Not Final Judgment: An order of the District Court directing an executor to execute a lease of certain realty belonging to his testator's estate is not a "final judgment in a special proceeding" from which an appeal will lie. In re Tuohy's Estate, 23 M 305, 58 P 722 (1899).

RECEIVERSHIP PROCEEDINGS

Ex Parte Appointment Appealable: An ex parte order appointing a receiver is appealable. Rock Island Plow Co. v. Cut Bank Implement Co., 101 M 117, 53 P2d 116 (1935); Rumney v. Donovan, 28 M 69, 72 P 305 (1903).

Portion of Appointment Appealable: Where, on motion to vacate an order appointing a receiver made some 7 years prior thereto, the court, in addition to vacating the order, directed the clerk of court to pay to defendants the funds collected by the receiver, the latter part of the order, appealed from as a whole, was appealable under this section. Burgess v. Lasby, 94 M 534, 24 P2d 147 (1933).

Order Annulling Appointment Not Appealable: An order annulling an order appointing a receiver is not appealable, but may be reviewed on appeal from the final judgment. Taintor v. St. John, 50 M 358, 146 P 939 (1915).

Application for Receiver Not a "Special Proceeding": An application for the appointment of a receiver to work a mining claim pending a suit to settle a controversy as to the title is not a "special proceeding" within the meaning of this section. State ex rel. Heinze v. District Court, 28 M 227, 72 P 613 (1903), distinguished in State ex rel. Weinstein Co. v. District Court, 28 M 445, 72 P 867 (1903).

Appointment of Receiver — Refusal to Vacate Appealable: This statute should be understood as creating the right to appeal from an order refusing to vacate the order of appointment of a receiver where the motion to vacate is based, not upon the conditions existing when the order was made, but upon facts occurring subsequently to the making of the original order. Forrester v. Boston & Mont. Consol. Copper & Silver Min. Co., 24 M 148, 60 P 1088, 61 P 309 (1900).

SETTING ASIDE JUDGMENT

Use of Appeal, Certiorari, and Supervisory Control: Where no judgment has been entered in a civil action at the time the court without authority strikes the entry of default from the files, certiorari lies to correct the error. Where the court makes such an order within jurisdiction, and no judgment has been entered, supervisory control lies. Where such order is made after judgment, certiorari does not lie even though the court exceeded its jurisdiction, since then an appeal lies from the order as from a special order made after final judgment. State ex rel. Hahn v. District Court, 83 M 400, 272 P 525 (1928).

Refusal to Vacate Default Not Appealable: An order, made before final judgment, refusing to set aside a default, is not appealable. Bullard v. Zimmerman, 82 M 434, 268 P 512 (1928); Bowen v. Webb, 34 M 61, 85 P 739 (1906).

Refusal to Vacate Judgment Appealable: An order, made after judgment, denying a motion to set aside a default and judgment, is appealable under this section. Hence, where no appeal was

taken, the alleged error in refusing the motion was not reviewable on appeal from the judgment. Batchoff v. Butte Pac. Copper Co., 60 M 179, 198 P 132 (1921).

Order to Set Aside Findings and Judgment Appealable: Since denial of an order to set aside the findings and judgment in an action in ejectment was a special order made after final judgment, it was appealable, and failure to appeal therefrom bars review on appeal from the judgment. Stack v. Coyle, 59 M 444, 197 P 747 (1921).

Refusal to Set Aside Judgment Appealable: An order refusing to set aside a judgment is a special one made after final judgment; and, as such, is appealable under this section. It cannot be reviewed on appeal from a new trial order, as the two proceedings are separate and distinct from each other. Canning v. Fried, 48 M 560, 139 P 448 (1914).

APPEAL FROM ORDER DENYING NEW TRIAL

Order in Criminal Cause Not Appealable:

Chapter 225, L. 1921, which added the provision abolishing the appeal from an order denying a new trial, does not offend against the provision of Art. V, sec. 23, 1889 Mont. Const. (now Art. V, sec. 11, 1972 Mont. Const.), that an act containing a subject not embraced in the title shall be void as to that subject. Kline v. Murray, 79 M 530, 257 P 465 (1927).

An order denying a new trial in a criminal cause is not reviewable on appeal from the judgment. St. v. English, 71 M 343, 229 P 727 (1924).

Appeal From Order Denying New Trial Abolished: By this section, the appeal from an order denying a new trial is abolished. Dever v. Girson, 75 M 412, 243 P 812 (1926); Schmuck v. Beck, 72 M 606, 234 P 477 (1925); Lappin v. Martin, 71 M 233, 228 P 763 (1924); Frost v. Long & Co., 71 M 141, 228 P 75 (1924); Tripp v. Silver Dyke Min. Co., 70 M 120, 224 P 272 (1924).

Law Review Articles

Scope of Review of Equity Decrees: These notes review the cases of Beard v. Myers, 136 M 350, 347 P2d 719 (1959) and Reynolds v. Reynolds, 123 M 303, 317 P2d 856 (1957) in which the Supreme Court affirmed decrees in equity in cases in which the evidence was in sharp conflict, on the grounds that the trial court was better able to evaluate the credibility of the witnesses. 20 Mont. L. Rev. 123 (1958), 21 Mont. L. Rev. 226 (1959).

Appeals From Parts of Judgments in Montana, Jones, 7 Mont. L. Rev. 40 (1946).

Progress of Workmen's Compensation in Montana During 1940, Toelle, 2 Mont. L. Rev. 38 (1941).

Collateral References

Appeal and Error *key* 24 through 135.

4 C.J.S. Appeal and Error §40, et seq.

4 Am. Jur. 2d Appellate Review §84, et seq.

Appealability of state court's order or decree compelling or refusing to compel arbitration. 6 ALR 4th 652.

Appealability of state court's order granting or denying motion to disqualify attorney. 5 ALR 4th 1251.

Appealability of order dismissing counterclaim. 86 ALR 3d 944.

Right to review of decision refusing motion for summary judgment. 15 ALR 3d 899.

Finality of order setting aside, or refusal to set aside, default judgment. 8 ALR 3d 1272.

Void judgment, appealability of. 81 ALR 2d 537.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable. 79 ALR 2d 1352.

Order vacating, or refusing to vacate, approval of settlement of infant's tort claim. 77 ALR 2d 801.

Reference, appealability of order with respect to. 75 ALR 2d 1007.

Formal requirements of judgment or order as regards appealability. 73 ALR 2d 250.

Receiver, appealability of order discharging, or vacating appointment of, or refusing to discharge, or vacate appointment of. 72 ALR 2d 1075.

Receiver, appealability of order appointing, or refusing to appoint. 72 ALR 2d 1009.

Right to appellate review of consent judgment. 69 ALR 2d 755.

Appealability of order, of court possessing probate jurisdiction, allowing or denying tardy presentation of claim to personal representative. 66 ALR 2d 659.

Ruling on motion to quash execution as ground of appeal or writ of error. 59 ALR 2d 1198.

Appealability of order denying motion for judgment notwithstanding verdict where movant has been granted new trial. 57 ALR 2d 1198.

Appealability of order or judgment awarding or denying costs but making no other adjudication. 54 ALR 2d 927.

Appealability of order overruling motion for directed verdict, or for judgment or the like, where the jury has disagreed. 40 ALR 2d 1284.

Appealability of order on application for removal of personal representative, guardian, or trustee. 37 ALR 2d 751.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers, or the like. 37 ALR 2d 586.

Right to appellate review, on single appellate proceedings, of separate actions consolidated for trial in lower court, as affected by failure to object seasonably to appellate procedure. 36 ALR 2d 849.

Appealability, prior to final judgment, of order discharging or vacating attachment or refusing to do so. 19 ALR 2d 640.

Substitution of parties, appealability of order granting or denying. 16 ALR 2d 1057.

Intervention, appealability of order granting or denying right of. 15 ALR 2d 336.

Appealability of order overruling motion for judgment on pleadings. 14 ALR 2d 460.

Provision for future accounting as affecting finality of judgment or decree for purpose of review. 3 ALR 2d 342.

Appealability of order entered on motion to strike pleading. 1 ALR 2d 422.

Alien enemy's right to appeal. 154 ALR 1447; 150 ALR 1418; 149 ALR 1452; 148 ALR 1384; 147 ALR 1298; 137 ALR 1345.

Failure, due to fraud, duress, or misrepresentations by adverse parties, to file notice of appeal within prescribed time. 149 ALR 1261.

Power to extend time for appeal by permitting amendment of assignment of errors. 149 ALR 740; 89 ALR 944.

Divorce suit as abated by death of party pending appeal. 148 ALR 1111.

Lower court's consideration, on the merits, of unseasonable application for new trial, rehearing, or other reexamination, as affecting time in which to apply for appellate review. 148 ALR 795.

Outbreak of war pending appeal. 137 ALR 1335, supplemented by 154 ALR 1447, 150 ALR 1418, 149 ALR 1452, 148 ALR 1384, and 147 ALR 1298.

First decision of intermediate court as law of the case on appeal to court of last resort from subsequent decision. 118 ALR 1286.

Dismissal of action as against one defendant as subject of appeal or error before disposition of case as against codefendant. 114 ALR 759; 80 ALR 1186.

Right to appeal from decision of registration board in proceedings for purging of voters' registration list. 96 ALR 1051.

Finality of declaratory judgment for purpose of appeal. 87 ALR 1249, and subsequent annotations.

Appellate jurisdiction of action on war risk insurance policy. 81 ALR 966, and subsequent annotations.

Effect of death of party pending appeal. 68 ALR 265.

Necessity and sufficiency of election to stand on demurrer to support appeal from decision overruling. 21 ALR 264.

Waiver of constitutional question by submitting cause to appellate court having no jurisdiction over such question. 2 ALR 1363.

Rule 2. What the court may review on an appeal from a judgment.

Advisory Committee Notes

This rule incorporates R.C.M. 1947, section 93-8022.

Compiler's Comments

1986 Amendment: The Supreme Court Order of June 16, 1986, in (a) inserted "in a civil case" near beginning; and inserted (b) relating to the scope of review in criminal cases.

Case Notes

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CASES DECIDED UNDER RULES

GENERAL

Misinterpretation of Testimony Regarding Alleged Relinquishment of Claim — Reversible Error: Kane sued Morgan to recover the costs of two wells that Kane drilled on Morgan's property for which payment was not made. At one point in his testimony, Kane stated that he charged Morgan for the first 150 feet of drilling, but gave Morgan the rest of the 400-foot hole, and then said, "Yeah, I give it to him. I think I'd give it all to him." The District Court interpreted the statement as a relinquishment by Kane for payment of the entire well and compensated Kane only for the cost of the other well. Kane appealed. The Supreme Court applied the test in In re Marriage of Kotecki, 2000 MT 254, 301 M 460, 10 P3d 828 (2000), to determine if the finding was clearly erroneous: (1) whether the finding was supported by substantial evidence in the record; (2) whether the trial court misapprehended the effect of the evidence; and (3) if the first two factors are met, the Supreme Court is still left with a definite and firm conviction that a mistake was made. In this case, it was held that the District Court committed a mistake and misinterpreted Kane's testimony, so the Supreme Court reversed. Neither party interpreted the remark as a gift by Kane of the entire well. The comment was not followed up by either party during direct or cross-examination. Counsel for Morgan continued questioning both Kane and other witnesses as if Kane had not relinquished his claim, nor did Morgan assert relinquishment in the proposed findings of fact and conclusions of law. Kane v. Morgan, 2001 MT 182, 306 M 207, 32 P3d 747 (2001).

Motion In Limine Sufficient to Preserve Objection for Appeal: Defendant's motion in limine to exclude testimony regarding certain chemicals in his blood and bottles of prescription medication found in his car was sufficient to preserve the objection for appeal. The propriety of the admission of the evidence is a proper issue for the Supreme Court on appeal. St. v. Ingraham, 1998 MT 156, 290 M 18, 966 P2d 103, 55 St. Rep. 611 (1998).

Insufficient Evidence for Finding Relating to Mother's Mental State: In an action to modify custody (now parenting plan), the District Court denied the mother's motion and in addition found that the mother was hysterical and distressed with severe emotional problems of her own. The Supreme Court held that there was no evidence to support the lower court's impressions and that therefore it erred by entering such statements into the permanent record. In re Marriage of Nevin, 284 M 468, 945 P2d 58, 54 St. Rep. 981 (1997).

Denial of Motion to Dismiss — Matter of Law: Danichek appealed the lower court's refusal to grant his motion to dismiss, which he based on the argument that double jeopardy prohibited him from being prosecuted for driving under the influence because he had already been convicted and punished for refusing to take the Breathalyzer test. The Supreme Court held that the standard of review for the District Court's conclusion of law was plenary and that it would review the decision to determine whether the lower court's conclusion of law was correct. Helena v. Danichek, 277 M 461, 922 P2d 1170, 53 St. Rep. 767 (1996), following St. v. Hansen, 273 M 321, 903 P2d 194 (1995).

General Objection to Judicial Notice Insufficient to Preserve Issue on Appeal: Loh was charged with criminal possession of a controlled substance and sought to have her confession suppressed. The District Court denied the motion to suppress, and Loh was tried on the charge. At the trial, the prosecution requested the District Court to take judicial notice of the testimony of several firefighters given at the suppression hearing. The District Court agreed, over Loh's objection, saying that judicial notice of that former testimony was the very purpose contemplated by Rule 201, M.R.Ev. (Title 26, ch. 10). The Supreme Court held that the general objection made by Loh's counsel at the suppression hearing was an insufficient objection. The Supreme Court also noted that if there was error, it was harmless error and that Loh failed to make a further objection as to the sufficiency of any evidence offered at trial. St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996).

Standard of Review of Ruling on Motion to Suppress Evidence: The Supreme Court reviews a District Court ruling on a motion to suppress evidence to determine whether: (1) there is substantial credible evidence to support the court's findings of fact; (2) the court's interpretation and application of the law are correct; and (3) the court correctly applied the findings as a matter of law. St. v. Stubbs, 270 M 364, 892 P2d 547, 52 St. Rep. 232 (1995), following St. v. Rushton, 264

M 248, 870 P2d 1355 (1994), and St. v. Pastos, 269 M 43, 887 P2d 199, 51 St. Rep. 1441 (1994). See also St. v. Devlin, 1999 MT 90, 294 M 215, 980 P2d 1037, 56 St. Rep. 383 (1999).

DNA Evidence — General Objection in Motion In Limine Insufficient to Preserve Objection for Purposes of Appeal: Weeks was convicted of sexual intercourse without consent with his stepdaughter. The conviction was based in part upon DNA evidence that was combined with standard serological evidence to provide a combined statistical estimate of the probability that Weeks was the father of a child of his stepdaughter. Weeks objected to the combined evidence but not on a foundation basis. The state argued that Weeks waived any objection that he had to the combined evidence, but Weeks contended that his motion in limine preserved an objection to the evidence. The Supreme Court held that Weeks's motion in limine, which did not specify any reasons or authorities why the evidence should be excluded, did not contain an objection to the combined statistical evidence but simply concluded that the DNA evidence was prejudicial. The Supreme Court held that this objection was insufficient to preserve the issue for appeal. St. v. Weeks, 270 M 63, 891 P2d 477, 52 St. Rep. 78 (1995), followed in St. v. Loh, 275 M 460, 914 P2d 592, 53 St. Rep. 226 (1996), and followed in St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996).

Ruling Regarding Arbitrability Subject to Appellate Review: The defendants argued that the lower court's ruling that the claims of the suit were subject to arbitration under the parties' contract was interlocutory and not subject to appeal. The Supreme Court ruled that the District Court, in ordering arbitration, had made a final determination at the state court level regarding the parties claims, and therefore the decision was appealable. Larsen v. Opie, 237 M 108, 771 P2d 977, 46 St. Rep. 660 (1989).

No Ruling on Motion In Limine Prior to Trial — Waiver of Objection: Plaintiff presented District Court with a motion in limine during pretrial conference, seeking to preclude defendant's mention at trial of a collateral source of insurance. The court reserved ruling on the matter. Plaintiff did not request a ruling prior to trial, object during trial, or present the court with any motions for mistrial or to strike the alleged testimony when insurance was first mentioned by defendant at trial. Failure to object or request corrective action after the subject was mentioned constituted a waiver of objection on the issue. Stewart v. Fisher, 235 M 432, 767 P2d 1321, 46 St. Rep. 116 (1989).

Sufficient Evidence Supporting Jury Verdict Against Union Officials for Misappropriation of Funds: A union sued former officers and business managers, alleging, among other things, misappropriation and conversion of union funds and constructive fraud. The union prevailed, and money damages were awarded to the union. On appeal, the Supreme Court ruled that the evidence supported the award of money damages even though no one had testified at trial as to the specific amount of money defendants allegedly owed to the union. The jury heard evidence on mismanagement and self-dealing with regard to union property and on the financial losses of the union during defendant Bosh's administration. Testimony of the union indicated that defendants had not kept adequate financial records. The evidence may have contained contradictions, but it was substantial and adequate. Local Union No. 400 v. Bosh, 220 M 304, 715 P2d 36, 43 St. Rep. 388 (1986).

Substantial Credible Evidence of Medical Malpractice — Ingrown Toenail — Amputation of Leg: Substantial credible evidence supported a jury verdict of medical malpractice when treatment of a state prison inmate's ingrown toenail resulted in the amputation of his leg, even though the attending physicians contended that the inmate suffered from a preexisting condition of arteriosclerosis of the blood vessels of the legs which was the cause of the amputation. Kyriss v. St., 218 M 162, 707 P2d 5, 42 St. Rep. 1487 (1985).

Workers' Compensation Court Order Supported by Substantial Credible Evidence: In ruling that substantial evidence supported the Workers' Compensation Court's decision, the Supreme Court noted: (1) the claimant, the decedent's surviving spouse, was found to be a credible witness; (2) the claimant's hypothetical question presented to each party's expert was found to be accurate; (3) the claimant's medical expert was found to be more qualified and his opinion was accorded greater weight; and (4) the nature of decedent's work and the particular activity he was engaged in at the time the initial heart attack occurred supported the Workers' Compensation Court's order. Davis v. Jones, 216 M 300, 701 P2d 351, 42 St. Rep. 840 (1985).

Special Master's Report — Standard of Review: The same standard of review, that findings and conclusions will be overturned only if clearly erroneous, will be applied to a special master's report adopted by a District Court as is applied to any other District Court order. Schmidt v. Colonial Terrace Associates, 215 M 62, 694 P2d 1340, 42 St. Rep. 182 (1985).

Defective Service — Persons Entitled to Raise Issue: Questions of defective service may be raised only by a person upon whom the allegedly defective service was made, a rule that applies

equally to parties and intervenors. Hull v. D. Irvin Transp., Ltd., 213 M 75, 690 P2d 414, 41 St. Rep. 1954 (1984).

Defects in Issuance — Persons Entitled to Raise Issue: Defects in the issuance of Writs of Attachment may be raised only by those named as defendants in the attachment proceeding. A third party not named as a defendant may assert its interest in the attached property but may not raise defects in the Writs. Hull v. D. Irvin Transp., Ltd., 213 M 75, 690 P2d 414, 41 St. Rep. 1954 (1984).

Application of Administrative Rule: The alleged application of an administrative rule would not be considered on appeal where it was not argued below. Hanley v. Dept. of Revenue, 207 M 302, 673 P2d 1257, 40 St. Rep. 2054 (1983).

No Fraud Found in Sale of Real Property — Theory of Negligent Misrepresentation Abandoned — Findings and Conclusions Not Clearly Erroneous: Where the plaintiffs agreed to purchase a bar and restaurant from the defendant seller and later brought an action for damages against the county and the county sanitarian, claiming that the sanitarian misrepresented the capacity of the sewer system and conditions of a county license, the findings and conclusions of the District Court were supported by substantial evidence and were not clearly erroneous. The District Court found that the plaintiffs failed to prove their claim of fraud and that the theory of negligent misrepresentation had been abandoned by the plaintiffs. The record contained conflicting evidence but showed that there could have been a misunderstanding between the parties, and a misunderstanding will not support a claim for fraud in the inducement. The statements made by the defendant may have been negligent, but the District Court properly concluded that by failing to argue the theory of negligent misrepresentation, the plaintiffs evidenced an intention to abandon that theory. Lacey v. Herndon, 205 M 379, 668 P2d 251, 40 St. Rep. 1375 (1983).

Methodology of Determination Substantiated by Record — Failure to Object in Administrative Proceeding: The Public Service Commission (P.S.C.) did not commit error in the application of the "rate of return" methodology, rather than the "market value" methodology, in determining the reasonableness of contract cost for the purchase of coal by the Montana Power Company (MPC) from a wholly-owned subsidiary. While the Supreme Court stated a preference for the "market value" methodology in Montana-Dakota Util. Co. v. Bollinger, 193 M 508, 632 P2d 1086 (1981), the court did not prohibit the P.S.C. from using a different methodology if the evidence warrants its use. In this case, the evidence introduced by the P.S.C. was not challenged by MPC. Rather, MPC seeks to do so for the first time on appeal. Limited review of the administrative record is appropriate, and that record supports the findings of the Commission. Mont. Power Co. v. Dept. of Public Service Regulation, 204 M 224, 665 P2d 1121, 40 St. Rep. 805 (1983).

Evidence Insufficient for Involuntary Commitment: Testimony at trial did not clearly and convincingly establish that respondent, due to his mental condition, was unable to protect his life or health at the time of the trial. Therefore, the evidence that respondent was "seriously mentally ill" within the meaning of 53-21-102 was insufficient as a matter of law, and the District Court commitment order was vacated. In re R.T., 204 M 493, 665 P2d 789, 40 St. Rep. 1025 (1983).

Dissolution of Marriage — Appeal From Original Judgment Amending Order Preserves Issues of Both: Respondent husband raised the issue of the scope of the wife's notice of appeal from the District Court's order amending the decree made on dissolution of the marriage. The husband argued that the appeal should be limited solely to issues arising from the amending order. The Supreme Court said that the contention ignored the interdependent nature of the amending order and the original decree. Finality of the original judgment had to await a determination in the lower court of motions to amend or alter that judgment. The interrelationship of an amending order and an original judgment necessitated review of all issues contained in both, and thus an appeal from either incorporated all issues of both for review. This was in accord with the idea that technical defects of procedure should not bar a party from access to the court. This was distinguished from the situation in which a party appealed from one order in a series or separate and distinct orders or from one part of a divisible judgment. An amending order and an original judgment could not be viewed as separate and distinct or divisible. The notice of appeal was therefore sufficient to preserve all issues for review. Tefft v. Tefft, 192 M 456, 628 P2d 1094, 38 St. Rep. 837 (1981), distinguishing St. v. Todd, 117 M 80, 158 P2d 299 (1945), and Sperling v. Calfee, 7 M 514, 19 P 204 (1888), in accord with J.C. Penney and Woolworth v. Employment Sec. Div., 192 M 289, 627 P2d 851, 38 St. Rep 694 (1981).

Property Held Prior to Enactment Tax Payment Requirement — No Adverse Possession Established — Court Presumed Correct Despite Lack of Finding: Plaintiffs were properly denied

adverse possession of yard space on the basis of nonpayment of taxes even though no finding was made regarding whether the property was held prior to enactment of the statute requiring payment of taxes to establish adverse possession. The District Court's judgment is presumed correct, and the Supreme Court will draw every legitimate inference to support that presumption. Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981).

Involuntary Commitment — Mootness — Issues Not Raised in District Court: Where, after a brief interview with a mental health counselor-therapist, the appellant was involuntarily committed to a state mental hospital for a period of 3 months and then challenged the commitment in the District Court, the appellant's appeal would not be dismissed even though the appellant had been released prior to submission of the appeal. The important constitutional issues raised by the appellant were not rendered moot by his release because other persons would be involuntarily committed for 3 months of evaluation and testing. This time period renders a timely appeal impossible under the current rules of appellate procedure. Nor would the appeal be dismissed because of the appellant's failure to raise the constitutional issues in the District Court since the Supreme Court reserves to itself the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law. In re N.B., 190 M 319, 620 P2d 1228, 37 St. Rep. 2031 (1980), followed in In re Mental Health of R.M., 270 M 40, 889 P2d 1201, 52 St. Rep. 68 (1995). See also Cottrill v. Cottrill Sodding Serv., 229 M 40, 744 P2d 895, 44 St. Rep. 1762 (1987), and In re Klos, 284 M 197, 943 P2d 1277, 54 St. Rep. 843 (1997).

Military Pension as Marital Property — Previous Ruling Requiring Remand: Where, following entry of the court's order dissolving the marriage of the appellant and respondent, who was eligible for retirement under a military pension plan, but before the parties filed their appellate briefs, the Supreme Court held in In re Marriage of Miller, 187 M 286, 609 P2d 1185 (1980), that a military pension is marital property to be considered as part of the marital estate, the appellant's case had to be remanded to the District Court for additional findings of fact. Because of the many factors that could be affected by inclusion of the pension in the marital estate, the Supreme Court should not fashion a formula for disposition of the pension until the District Court has done so. Ebert v. Ebert, 189 M 477, 616 P2d 379, 37 St. Rep. 1674 (1980).

Failure to Regulate Discovery as Grounds for Reversal: Massaro failed to respond to written interrogatories, a request to produce documents, and requests for admissions, although he asked for additional time and his counsel gave assurance that a response would be forthcoming. Dunham did not move for an order compelling discovery but at trial objected to and sought restriction of certain expected proof that he had not had an opportunity to inspect. The Supreme Court reversed the judgment of the District Court because it failed to regulate the discovery process and accorded an unfair advantage to Massaro. Massaro v. Dunham, 184 M 400, 603 P2d 249 (1979). See also In re Marriage of Deichl, 239 M 425, 781 P2d 254, 46 St. Rep. 1801 (1989).

Clerk's Affidavit Not Acceptable as to Variant Date of Service: A District Court Clerk's affidavit should not be accepted to prove that service was made on a date other than the date shown on the certificate of mailing on the notice of entry of judgment because the affidavit is not part of the record on appeal. Flathead Hay Cubing, Inc. v. Moore, 35 St. Rep. 1260 (1978) (apparently not reported in Pacific Reporter or Montana Reports).

Order Equivalent to Final Judgment: An order dismissing a complaint and denying leave to amend was equivalent to final judgment although judgment had not been entered. Prentice Lumber Co., Inc. v. Hukill, 161 M 8, 504 P2d 277 (1972).

Correction of Erroneous Judgment: Case would be remanded to District Court for purpose of amending, by incorporating appropriate terms, a judgment which omitted defaulting codefendant who was jointly and severally liable on obligation. White v. Nollmeyer, 151 M 387, 443 P2d 873 (1968).

Denial of Change of Venue: Specification of error arising from trial court's order denying motion for change of venue was not properly before Supreme Court because timely appeal was not made from order as required by rules. Sealey v. Majerus, 149 M 268, 425 P2d 70 (1967).

SCOPE OF APPELLATE REVIEW

Counsel's Act or Omission Not Considered Trial Strategy Reviewable on Direct Appeal: Lucero contended that he received ineffective assistance of counsel because his attorney did not adequately explain the nature and terms of the state's plea bargain offer. Applying the Strickland test for ineffective assistance claims, the Supreme Court noted that before an ineffective assistance claim will be considered on direct appeal, the record must adequately document the reason why counsel acted in a particular manner, and if the record does not supply the reason, the claim is more appropriately raised in a petition for postconviction relief. However, the claimed act or omission in this case was not considered trial strategy because

counsel's communication of the oral plea offer to Lucero was obligatory, not strategic. Thus, the question was not why counsel acted in a particular manner but whether counsel acted and, if so, whether counsel acted adequately, and review of an obligatory action may be reviewed on direct appeal. Lucero was fully informed of the offer and chose to go to trial anyway. Counsel's conduct in communicating the plea offer did not fall below the standard of reasonable representation,. Lucero's claim failed to meet the first prong of the Strickland test and was properly denied. St. v. Lucero, 2004 MT 248, 323 M 42, 97 P3d 1106 (2004). See also Hans v. St., 283 M 379, 942 P2d 674 (1997), St. v. Harris, 2001 MT 231, 306 M 525, 36 P3d 372 (2001), and St. v. Jefferson, 2003 MT 90, 315 M 146, 69 P3d 641 (2003).

Repealed Statute Regarding Sale or Lease of School Trust Lands to School Districts — No Justiciable Controversy or Action Upon Which Relief Could Be Granted: Former 20-6-621(4) allowed the Board of Land Commissioners to sell, for appraised value, or to lease, for $1 a year, school trust lands to a school district. The Department of Natural Resources and Conservation stipulated that the provision was unconstitutional because it made state lands available for less than full market value. The District Court agreed, noting that leasing school trust lands to some school districts would favor only some of the beneficiaries and not the school trust as a whole. The Legislature concurred and repealed the subsection in 1999. Plaintiff subsequently sued the Department, the Board, and the state, contending that the Department unlawfully determined that the provision was unconstitutional and failed to defend the constitutionality of the provision. The state moved to dismiss the complaint on grounds that no justiciable controversy existed and that the complaint alleged no cause of action upon which relief could be granted. The District Court granted summary judgment for the state, and on appeal, the Supreme Court affirmed. Any determination that the Department exceeded its authority would have had no bearing on the existing rights or interests at issue, and a judgment granting the relief sought would not have effectively operated to resolve any issue in the case. Thus, there was no justiciable case or controversy, and the claim was properly dismissed. Advocates for Educ., Inc. v. Dept. of Natural Resources and Conservation, 2004 MT 230, 322 M 429, 97 P3d 553 (2004), following Mont.-Dak. Util. Co. v. Billings, 2003 MT 332, 318 M 862, 80 P3d 1247 (2003).

No Appellate Review of Trial Court's Refusal to Allow Expert Testimony Absent Contemporaneous Objection: During Olsen's arson trial, Olsen sought to introduce testimony from a chemical engineer who had concluded that a faulty junction box was the cause of the fire. After voir dire to determine the engineer's qualifications to testify, the District Court granted the state's motion to exclude the engineer's testimony on grounds that he lacked the necessary expertise to testify on the subject of forensic electrical engineering. Olsen made no offer of proof regarding the witness's qualifications to testify or the substance of the testimony, nor did Olsen object to the refusal to allow the testimony. Nevertheless, on appeal, Olsen contended that the trial court erred in disallowing the testimony. The Supreme Court held that Olsen's failure to make a contemporaneous objection at trial constituted waiver of the objection, so the issue was not subject to appellate review. St. v. Olsen, 2004 MT 158, 322 M 1, 92 P3d 1204 (2004).

Issues Subsumed in First Appeal Res Judicata on Second Appeal: In a noncite opinion (St. v. Kallowat, 2000 MT 354N), the Supreme Court affirmed defendant's Sanders County convictions for felony DUI, driving with a suspended or revoked license, and felony bail-jumping. Kallowat's petition for postconviction relief was denied, and Kallowat appealed. The issue decided in the first appeal was whether the arresting officer had probable cause, given that the officer was a prior felon. The Supreme Court held that even if the officer's employment status was questionable, he still had probable cause to make the arrest as a private citizen. Kallowat devoted most of the motion for postconviction relief reiterating the same arguments, and because the postconviction arguments were subsumed in the issues considered in the first appeal, the issue was res judicata and the Supreme Court declined further consideration. Kallowat v. St., 2004 MT 152, 321 M 501, 92 P3d 1176 (2004).

Preservation of Right to Argue Sufficient Evidence of Negligence on Appeal From Judgment as Matter of Law: Plaintiffs' mother was a domestic violence victim who was killed by her husband. Plaintiffs sued the County Sheriff for negligently failing to take action to protect the victim. A jury found for the plaintiffs. The Sheriff moved for judgment as a matter of law, and the District Court granted the motion and vacated the jury verdict, finding that the domestic violence statutes did not trigger mandatory legal duties upon the Sheriff regarding arrest and seizure. On appeal, the Sheriff argued that because plaintiffs did not specifically appeal from the District Court's refusal to instruct the jury that violations of the arrest and weapon seizure provisions of the domestic violence law were negligence per se, plaintiffs could not argue on appeal that evidence that the statutes were violated supported the verdict. The Supreme Court examined the definitions of common-law negligence and negligence per se, noting that the jury was given the

full panoply of instructions on common-law negligence and that despite the fact that negligence per se instructions were not given, plaintiffs nevertheless argued that violation of the statutes was evidence of negligence. Pursuant to Nehring v. LaCounte, 219 M 462, 712 P2d 1329 (1986), even if a violation of a statute does not constitute negligence per se, the violation may nonetheless be considered as evidence of negligence. Because plaintiffs appealed from the judgment as a matter of law, they preserved their right to argue on appeal that the jury had before it sufficient evidence of negligence. Massee v. Thompson, 2004 MT 121, 321 M 210, 90 P3d 394 (2004).

Standard of Review of Family Law Contempt Decisions: Because contempt is intended as a discretionary power necessary to enforce the dignity and authority of the court, in a family law matter, the Supreme Court will review the findings and decision not to hold a party in contempt for a blatant abuse of discretion. In the present case, the husband was essentially in compliance with previous orders regarding payment of child support, so the District Court's dismissal of contempt charges was not a blatant abuse of discretion. In re Marriage of Winters, 2004 MT 82, 320 M 459, 87 P3d 1005 (2004), following In re Marriage of Baer, 1998 MT 29, 287 M 322, 954 P2d 1125 (1998).

Limited Scope of Supreme Court Review of Jury Verdict: The Supreme Court's scope of review of a jury verdict is very limited, and the court will not reverse a jury verdict that is supported by substantial credible evidence. It is within the province of the jury to determine the weight and credibility afforded to the evidence, and it is not the court's function to agree or disagree with the jury's verdict. The Supreme Court will view evidence in the light most favorable to the prevailing party. Byers v. Cummings, 2004 MT 69, 320 M 339, 87 P3d 465 (2004). See also Magart v. Schank, 2000 MT 279, 302 M 151, 13 P3d 390 (2000), and Satterfield v. Medlin, 2002 MT 260, 312 M 234, 59 P3d 33 (2002).

Standard of Review of Refusal to Issue Proposed Jury Instruction: The standard of review of a District Court's refusal to issue a proposed jury instruction is whether the court abused its discretion. In reviewing for abuse of discretion, the Supreme Court does not determine whether it agrees with the District Court, but rather whether the District Court abused its discretion by acting arbitrarily without employment of conscientious judgment or by exceeding the bounds of reason in view of all the circumstances. Byers v. Cummings, 2004 MT 69, 320 M 339, 87 P3d 465 (2004). See also Finstad v. W.R. Grace & Co., 2000 MT 228, 301 M 240, 8 P3d 778 (2000), and Schuff v. A.T. Klemens & Son, 2000 MT 357, 303 M 274, 16 P3d 1002 (2000).

Submission of Written Motions Regarding Enforceability of Oral Marital Separation Agreement Sufficient to Preserve Issue for Appeal: The parties' oral separation agreement was read into the record but not reduced to writing before the wife moved out of state. The wife moved the District Court to enforce the oral agreement, but because 40-4-201 requires a written agreement for enforcement, the court declined and instead held a hearing on the merits. The wife claimed error in the refusal to enforce the oral agreement, but the husband contended that the issue was not preserved for appeal because the wife did not raise the issue at the hearing. The Supreme Court disagreed. The wife's written motions regarding enforceability and the District Court's refusal to enforce the oral agreement were sufficient to preserve the issue for appeal. In re Marriage of Killpack, 2004 MT 55, 320 M 186, 87 P3d 393 (2004).

Standard of Review of Motion In Limine: The Supreme Court reviews a District Court's grant or denial of a motion in limine for an abuse of discretion. A District Court abuses its discretion when it acts arbitrarily without conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice. St. v. Brasda, 2003 MT 374, 319 M 146, 82 P3d 922 (2003).

Standard of Review of Grant or Denial of Injunction — Manifest Abuse of Discretion: For more than 100 years, the Supreme Court has applied two different standards of review when an injunction has been granted or denied. The first standard, applied in Nelson v. O'Neal, 1 M 284 (1871), was an abuse of discretion standard. Later, in Craver v. Stapp, 26 M 314, 67 P 937 (1902), a manifest abuse of discretion standard was introduced. To rectify the disparity, the Supreme Court decided that the high degree of discretion vested in District Courts to maintain the status quo through injunctive relief warranted application of the more appropriate deferential manifest abuse of discretion standard. A manifest abuse of discretion is one that is obvious, evident, or unmistakable. Nelson and any other cases that did not apply the manifest abuse standard were overruled to the extent of their inconsistency with this holding. Shammel v. Canyon Resources Corp., 2003 MT 372, 319 M 132, 82 P3d 912 (2003).

Standard of Review of Motion to Suppress Statements: The Supreme Court reviews a District Court's ruling on a motion to suppress to determine whether the District Court's findings of fact are clearly erroneous and whether its interpretation and application of the law are correct. A finding of fact is clearly erroneous if it is not supported by substantial evidence, if the District

Court misapprehended the effect of the evidence, or if the Supreme Court has a definite or firm conviction that the District Court has committed a mistake. St. v. Reavley, 2003 MT 298, 318 M 150, 79 P3d 270 (2003).

Standard of Review of Contractual Stipulated Damages Provision — Enforceable Liquidated Damages Versus Unenforceable Penalty: Whether a stipulated damages provision in a contract constitutes enforceable liquidated damages or an unenforceable penalty is a question of law, and if the underlying facts are not in dispute, the Supreme Court will review a determination of this conclusion of law for correctness. Arrowhead School District No. 75 v. Klyap, 2003 MT 294, 318 M 103, 79 P3d 250 (2003). See also Lake River Corp. v. Carborundum Co., 769 F2d 1284 (7th Cir. 1985).

Standard of Review of Denial of Motion for Directed Verdict in Criminal Case: The Supreme Court reviews a denial of a motion for a directed verdict in a criminal case to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. The decision is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. Helena v. Kortum, 2003 MT 290, 318 M 77, 78 P3d 882 (2003), following St. v. Landis, 2002 MT 45, 308 M 354, 43 P3d 298 (2002).

Appellate Mediation Rule Mandatory and Self-Executing in Actions for Money Damages: Plaintiff sued for money damages, and the District Court issued an order on motion for a change of venue. Plaintiff's notice of appeal from that order stated that the appeal was subject to mediation required under Rule 54, M.R.App.P. Nevertheless, 5 days later, plaintiff filed an unopposed motion to dispense with mediation. The Supreme Court dismissed the motion to dispense with mediation and ordered mediation. It is the nature of the underlying action, not the type of order or judgment on appeal, that determines whether the appeal is subject to mediation under Rule 54, M.R.App.P., and because the underlying action sought money damages, which is clearly within the rule, mediation was mandatory. Rule 54, M.R.App.P., is self-executing, and the Supreme Court will not entertain motion practices on the rule. Liang v. Lai, 2003 MT 281, 317 M 524, 78 P3d 1212 (2003), following Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71 (2000).

Standard of Review of Evidentiary Rulings: The Supreme Court reviews a District Court's evidentiary rulings for an abuse of the lower court's broad discretion, and absent a showing of an abuse of discretion, the lower court will not be overruled. Sufficiency of evidence to support a jury verdict is reviewed to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. St. v. Runs Above, 2003 MT 181, 316 M 421, 73 P3d 161 (2003). See also St. v. Stevens, 2002 MT 181, 311 M 52, 53 P3d 356 (2002), and St. v. Bingman, 2002 MT 350, 313 M 376, 61 P3d 153 (2002).

Insurer's Breach of Duty to Indemnify — Recovery of Attorney Fees by Injured Third-Party Claimant Who Prevails in Insurance Coverage Action Against Motor Vehicle Liability Insurer — Modification of Insurance Exception — Standard of Review of Question of Law: Following remand in Christensen v. Mtn. W. Farm Bureau Mut. Ins. Co., 2000 MT 378, 303 M 493, 22 P3d 624 (2000), the Christensens requested attorney fees incurred in the declaratory judgment action. The District Court denied the request, and the Christensens appealed. Generally, under the American rule, a party in a civil action is not entitled to attorney fees absent a specific contractual or statutory provision, although equitable exceptions are recognized. Here, the parties agreed that there was no contractual authority to support an award of attorney fees, although the Supreme Court held in Trustees of Ind. Univ. v. Buxbaum, 2003 MT 97, 315 M 210, 69 P3d 663 (2003), that 27-8-313 authorizes a District Court to award attorney fees when the court, in its discretion, considers such an award to be necessary or proper. The Christensens submitted that the defendant insurer was obligated to reimburse them based on the insurance exception rationale articulated in Home Ins. Co. v. Pinski Bros., Inc., 160 M 219, 500 P2d 945 (1972), which approved an award of attorney fees in cases in which an insurer breaches its obligation to defend an insured. The Supreme Court noted that the issue presented a question of law, so the standard of review was whether the District Court's interpretation of law was correct. The Supreme Court held that an insurer that breaches its duty to indemnify is liable for attorney fees when an insured is forced to assume the burden of legal action to obtain the full benefit of the insurance contract, regardless of whether the insurer's duty to defend is at issue. However, in this case, the Christensens were third-party beneficiaries, and the Supreme Court declined to extend the insurance exception to third-party claimants because that would sanction attorney fee awards for simply demonstrating the existence of any insurance contract from which a third-party claimant successfully established coverage, which would undermine the American

rule. Thus, although the Christensens were precluded from recovering attorney fees under the obligatory insurance exception, the case was remanded for a determination of whether attorney fees were necessary or proper under 27-8-313 and Trustees of Ind. Univ. v. Buxbaum. Mtn. W. Farm Bureau Mut. Ins. Co. v. Brewer, 2003 MT 98, 315 M 231, 69 P3d 652 (2003), overruling Yovish v. United Serv. Auto. Ass'n, 243 M 284, 794 P2d 682 (1990).

Acquiescence in Assessment of Interest on Unpaid Portion of Criminal Fine — Waiver of Right to Appeal: As part of a plea agreement on a felony drug charge, Micklon was fined $55,000. After hearing testimony on Micklon's financial status, the sentencing court agreed to allow five annual payments of $11,000, but assessed interest at 10% a year on the unpaid balance. Micklon appealed the interest charges on grounds that there was no statutory authority for requiring interest on a criminal fine. The state responded that appeal was waived by Micklon's failure to object to the interest provisions at the time of sentencing. The Supreme Court recognized that a defendant often must remain silent even in the face of invalid conditions to guard against the possibility that the sentencing court may forego a more lenient sentence if the defendant objects to one of the conditions, and that in those circumstances a defendant's failure to object does not necessarily constitute a waiver of the right to appeal. However, during sentencing Micklon did not remain silent, but in fact affirmatively agreed to inclusion of the interest condition in the sentence. Without addressing the legality of interest charges, the Supreme Court concluded that Micklon waived the right to appeal the issue and affirmed the sentencing court's assessment of interest on the unpaid portion of Micklon's criminal fine. St. v. Micklon, 2003 MT 45, 314 M 291, 65 P3d 559 (2003).

Voluntariness of Confession — Totality of Circumstances: When a defendant moves to suppress a confession or admission on grounds that it was given involuntarily, the prosecution must prove by a preponderance of the evidence that it was voluntary. On appeal, the Supreme Court will review denial of a suppression motion to determine whether findings of fact were clearly erroneous and correctly applied as a matter of law. A finding of fact is clearly erroneous if: (1) it is not supported by substantial evidence, which must be more than a scintilla of evidence but may be less than a preponderance of the evidence; (2) the trial court misapprehended the effect of the evidence; or (3) the Supreme Court has a definite or firm conviction that a mistake was made. When a determination of voluntariness depends on the credibility of witnesses, the Supreme Court will defer to the trial court. The emphasis in determining voluntariness is on whether the confession was the product of free choice or compulsion, which must take into account the totality of the circumstances, including the defendant's age and education, whether the defendant was advised of Miranda rights, the defendant's prior experience with the criminal justice system and police interrogation, the defendant's background, experience, demeanor, coherence, articulateness, and capacity to make full use of faculties, the length and method of interrogation, and whether the confession or admission was extracted through force, violence, or improper influence or by direct or implied promises. If the confession or admission was involuntary, its use violates self-incrimination and due process. Here, the Supreme Court considered the totality of the circumstances and found substantial credible evidence that Hoffman's confession was voluntary. St. v. Hoffman, 2003 MT 26, 314 M 155, 64 P3d 1013 (2003).

Standard of Review of Denial of Petition for Postconviction Relief: The correct standard of review of a District Court's denial of a petition for postconviction relief is whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. A different standard of review, namely whether substantial evidence supports the findings and conclusions of the District Court, as set out in St. v. Coates, 241 M 331, 786 P2d 1182 (1990), Walker v. St., 261 M 1, 862 P2d 1 (1993), St. v. Moorman, 279 M 330, 928 P2d 145 (1996), and similar cases, is overruled. Porter v. St., 2002 MT 319, 313 M 149, 60 P3d 951 (2002), following St. v. Wright, 2001 MT 282, 307 M 349, 42 P3d 753 (2001).

Failure of Counsel to Preserve Defendant's Request for Appeal Prejudicial Per Se — Out-of-Time Appeal Appropriate Remedy: Despite a request to do so, Tweed's counsel failed to file a timely appeal of Tweed's sexual abuse conviction. Counsel did not intentionally abandon the appeal; rather, the failure was unintentional and resulted from a filing oversight and miscommunication. Nevertheless, the error was prejudicial per se and constituted ineffective assistance of counsel in violation of Tweed's constitutional rights. The failure to timely appeal was excusable, and because postconviction proceedings were considered an inadequate remedy, the Supreme Court decided that an out-of-time appeal was the appropriate remedy and, being in possession of a sufficient record, proceeded to consider the merits of the appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002), following St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Out-of-Time Appeal in Criminal Matters — Exclusive Jurisdiction With Supreme Court: Under 46-20-101, the only method for review in criminal cases is by notice of appeal. Time limits for filing an appeal are mandatory and jurisdictional. If a defendant takes no action to perfect an appeal within 90 days of judgment, the District Court loses its jurisdiction and the appeal is out-of-time. However, an out-of-time appeal is a remedy that may be available to a criminal defendant who, through no fault of the defendant, misses a deadline for filing an appeal. Although Rule 21(b), M.R.App.P., precludes an out-of-time appeal in a civil case, the Supreme Court is not precluded from addressing a motion for an out-of-time appeal in a criminal case. Further, a District Court lacks jurisdiction to grant an out-of-time appeal. The Supreme Court has exclusive jurisdiction to grant a motion for an out-of-time appeal, and the motion is considered an original proceeding subject to the provisions of Rule 17, M.R.App.P. Upon a showing that the failure to timely notice a criminal appeal was excusable under the circumstances, the Supreme Court may conclude that an out-of-time appeal is the appropriate remedy pursuant to Rule 21(b), M.R.App.P. In that event, the matter will be remanded to the District Court with instructions to vacate and reenter judgment to afford the defendant a second opportunity to act within the statutory timeframes for filing notice of appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

De Novo Review of Excised Search Warrant Application by Supreme Court — Standard of Review: Supreme Court review of an application for a search warrant grants great deference to the issuing magistrate's determination that probable cause existed for issuing the warrant. However, when information has been excised from an application after the fact, that deference will not be paid to the magistrate's probable cause determination and the court will review the excised application de novo to determine whether probable cause supported the issuance of the search warrant. The Supreme Court's standard of review has often been articulated as whether the magistrate had a substantial basis to issue the search warrant, while the court's conclusions tended to be focused on whether sufficient probable cause existed. For purposes of review, the phrase "substantial basis for probable cause" has the same meaning as the phrase "sufficient probable cause". St. v. St. Marks, 2002 MT 285, 312 M 468, 59 P3d 1113 (2002). See also St. v. Kuneff, 1998 MT 287, 291 M 474, 970 P2d 556 (1998).

Supreme Court Decision Binding — Relitigation of Same Issues on Subsequent Appeal Inappropriate: When a decision has been rendered by the Supreme Court on a particular issue between the same parties in the same case, whether the decision is right or wrong, that decision is binding on the parties and the courts and cannot be relitigated in a subsequent appeal. When a case is reversed and remanded, the trial court may not ignore the mandate and opinion of the reviewing court, but must proceed in conformity with the views expressed by the appellate court. In the present case, the District Court's amended conclusion was in conformity with the Supreme Court's decision in Grenfell v. Anderson, 1999 MT 272, 296 M 474, 989 P2d 818 (1999), and with the law of the case, and the District Court did not exceed its jurisdiction in its amended conclusions regarding Grenfell's claim for unlawful detainer or in addressing Grenfell's other claims in the original complaint. Grenfell v. Anderson, 2002 MT 225, 311 M 385, 56 P3d 326 (2002).

Unsupported and Incomprehensible Issues Raised by Pro Se Appellant Dismissed: The wife appealed from a marital property distribution by filing a pro se brief that alluded to libelous conduct, unscrupulous activity regarding trial documents, false testimony, judicial bias, and erroneous calculation of marital assets. The Supreme Court found that the brief contained general contentions of impropriety, but no citations to the record or supporting legal authority. Although the Supreme Court has shown some willingness to make accommodations for pro se parties by relaxing technical requirements that do not impact fundamental bases for appeal, in this case, the appeal was dismissed because of an utter failure to comply with the Montana Rules of Appellate Procedure by filing a brief that could be comprehended by the court and realistically responded to by the opposing party. In re Marriage of McMahon, 2002 MT 198, 311 M 175, 53 P3d 1266 (2002).

Failure to Properly Raise Issue in Opening Appellate Brief — Case Dismissed: In five issues presented for appeal, the appellant pro se set forth little or no argument and no citations in support of the argument in the opening brief. Instead, after setting forth the issue, the appellant simply stated that the issue was presented at face value without argument. Pursuant to Rule 23(a), M.R.App.P., in order for an appellant to properly raise an issue in an opening brief, the appellant's contentions must be listed as to the issues presented and the reasons for presenting the arguments, along with citation to the authorities relied upon. The Supreme Court will not consider unsupported issues or arguments, conduct legal research on an appellant's behalf, guess an appellant's precise position, or develop legal analysis in support of an appellant's

position. The opening brief violated the Montana Rules of Appellate Procedure and was therefore dismissed. In re Marriage of Snow, 2002 MT 143, 310 M 260, 49 P3d 610 (2002).

Standard of Review for Statutes Applicable to Administrative Rules — Rules of Statutory Construction Inapplicable Absent Ambiguity in Statute or Rule — Deference Afforded Longstanding Agency Interpretation of Administrative Rule: The Supreme Court generally applies the same principles in construing administrative rules as it applies to statutes. If the plain meaning of a statute or rule can be determined from the language used, the court is not at liberty to add or detract from the language, and absent ambiguity in the language, the court may not consider legislative history or other means of statutory construction. When an agency's interpretation of an administrative rule or statute has stood unchallenged for a considerable length of time, it will be regarded as having great importance in arriving at the proper construction. However, even when a particular meaning has been ascribed to a statute by an agency through a long and continuous course of consistent interpretation, that interpretation will be afforded respectful consideration but is still not binding on the courts. Glendive Medical Center, Inc. v. Dept. of Public Health and Human Services, 2002 MT 131, 310 M 156, 49 P3d 560 (2002).

Standard of Appellate Review of Administrative Decision in Contested Case: When reviewing a District Court order affirming or reversing an administrative decision in a contested case, the Supreme Court employs the same standard applied by the District Court to determine whether the findings of fact are clearly erroneous and whether the agency correctly interpreted the law. O'Neill v. Dept. of Revenue, 2002 MT 130, 310 M 148, 49 P3d 43 (2002), followed in Ostergren v. Dept. of Revenue, 2004 MT 30, 319 M 405, 85 P3d 738 (2004). See also Glendive Medical Center, Inc. v. Dept. of Public Health and Human Services, 2002 MT 131, 310 M 156, 49 P3d 560 (2002).

Issue of Counsel's Effective Use of Peremptory Juror Challenges More Appropriate When Raised as Petition for Postconviction Relief Rather Than on Direct Appeal When Record Silent: Russell was convicted of attempted deliberate homicide and appealed claiming ineffective assistance of counsel during jury selection. Russell contended that counsel failed to challenge for cause a relative of the victim and used two peremptory challenges to strike jurors who were outside the jury pool. Under the Strickland test for ineffective assistance of counsel, challenged actions of counsel are presumed to be matters of trial strategy and a silent record cannot rebut the strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Pursuant to St. v. St. John, 2001 MT 1, 304 M 47, 15 P3d 970 (2001), when the record does not illuminate the basis for the challenged acts or omissions of counsel, a claim of ineffective assistance is more appropriately raised in a petition for postconviction relief so that a supplemental record may be made. Here, the record was silent as to why Russell's counsel acted or failed to act regarding the juror challenges. Thus, the Supreme Court declined to discuss the issue on direct appeal. St. v. Russell, 2001 MT 278, 307 M 322, 37 P3d 678 (2001).

Standard of Review of District Court Jurisdictional Questions: Whether a District Court has jurisdiction to rule on a matter is a question of law that the Supreme Court will review to determine whether the District Court had authority to act. A court exceeds jurisdiction through acts that exceed the defined power of the court, whether the power is defined by constitutional provisions, express statutes, or court rules. In re Marriage of Richards, 2001 MT 183, 306 M 212, 31 P3d 1002 (2001), following Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389 (2000), and Gen. Constructors, Inc. v. Chewculator, Inc., 2001 MT 54, 304 M 319, 21 P3d 604 (2001).

Claims Raised on Direct Appeal Barred by Statute or Res Judicata on Petition for Postconviction Relief: Dawson was convicted of robbery, four counts of aggravated kidnapping, and three counts of deliberate homicide and sentenced to death for each of three counts of aggravated kidnapping that resulted in the death of the victim. His conviction was appealed and affirmed (St. v. Dawson, 233 M 345, 761 P2d 352 (1988)). Dawson filed for postconviction relief, alleging 30 separate grounds for relief, but all except one claim, ineffective assistance of counsel, were summarily dismissed. Although res judicata prevents claims raised on appeal from being raised again in a petition for postconviction relief, Dawson argued that three of his claims for postconviction relief could not have been raised on direct appeal because they required evidence not found in the record and thus should not have been subject to summary judgment. The District Court concluded that the issues could have been raised on direct appeal and were not preserved through objection at trial and so were barred by res judicata and 46-21-105. The Supreme Court examined all three of Dawson's claims before affirming that 46-21-105 was properly applied to two of the claims and that no prejudice resulted from the application of res judicata to the third. Lastly, Dawson raised Kills On Top v. St., 279 M 384, 928 P2d 182 (1996), as grounds for reconsideration of several other claims based on serving the "ends of justice". The

Supreme Court felt no compulsion to reconsider any of Dawson's claims to serve those ends because the claims were barred by res judicata. Dawson v. St., 2000 MT 219, 301 M 135, 10 P3d 49, 57 St. Rep. 883 (2000).

Partial Payment of Interest on Promissory Note Not Precluding Appeal: Plaintiff owed defendant $200,000 plus interest on a promissory note. The same day that plaintiff filed a claim for misrepresentation and failure to disclose, plaintiff also deposited the first promissory note payment with the Clerk of the District Court. Following judgment for plaintiff, the District Court ordered release of the funds, which defendant accepted. Plaintiff argued that by accepting the funds and the fruits of the judgment, defendant was prohibited from prosecuting an appeal to reverse the judgment. Defendant responded that because the judgment could not possibly affect the benefit that was accepted, the right to appeal was not waived. The long-recognized general rule is that the right to accept the fruits of a judgment and at the same time prosecute an appeal from it are not concurrent, but rather wholly inconsistent, rights and that the election of one excludes the enjoyment of the other (see Peck v. Bersanti, 101 M 6, 52 P2d 168 (1935)). The exception is that when reversal of the judgment cannot possibly affect the appellant's right to the benefit accepted under a judgment, then appeal may be taken and sustained despite the fact that the benefit was sought and secured (see Niles v. Carbon County, 174 M 20, 568 P2d 524 (1977)). The acceptance of payments that were not contested or that were irrevocably conceded as due by the opposing party does not preclude appeal. Here, when defendant accepted the funds, it simply accepted what plaintiff already conceded was due and no more than it conceded would be due in the event that the appeal was successful. Therefore, defendant did not waive the right to appeal. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Lack of Meritorious Argument on Appeal of Summary Judgment: Kinsey-Cartwright and Burleson had a dispute over an easement across Kinsey-Cartwright's property. Burleson took his attorney, Brower, to investigate the disputed easement, during which time a confrontation occurred, resulting in a complaint against Brower for assault and trespass. The District Court granted Brower's request for summary judgment, and Kinsey-Cartwright appealed. With the exception of four sentences in her reply brief, Kinsey-Cartwright's entire argument was devoted to arguing that no easement burdened her land. However, the appeal was related to the complaint of assault and trespass, not the validity of an easement. The four sentences were simply a collection of conclusions and contained no discussion of the law relating to trespass or assault, no citation to legal authority or to the record, and no application of the law to the facts. It is not the obligation of the Supreme Court to formulate arguments or locate authorities for parties who appeal. Thus, absent any meritorious argument to consider on appeal, the Supreme Court affirmed the District Court award of summary judgment. Kinsey-Cartwright v. Brower, 2000 MT 198, 300 M 450, 5 P3d 1026, 57 St. Rep. 769 (2000). See also St. v. Blackcrow, 1999 MT 44, 293 M 374, 975 P2d 1253 (1999).

Offer of Proof Necessary to Enable Supreme Court Review of Ruling on Admissibility of Evidence: At Raugust's trial, he attempted to question witnesses regarding his prearrest statements, but the prosecution objected on grounds of hearsay and the trial court sustained the objections. On appeal, Raugust argued that the statements were offered to prove his state of mind rather than for the truth of the matter asserted and that he was thus denied the opportunity to present a defense because of the exclusion of evidence reflecting a reasonable doubt as to his guilt. However, when an objection to evidence is sustained and the answer of a witness is not apparent, an offer of proof is necessary to enable the Supreme Court to review the ruling. Raugust made no offer of proof or argument at trial with respect to why he felt the objection should be overruled and therefore waived his argument on appeal by failing to make an offer of proof once the objections were sustained. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Jennings, 96 M 80, 28 P2d 448 (1934).

Failure to Object to Conduct of Psychological Evaluation or to Continuation of Sentencing Hearing — Waiver of Right to Consideration on Appeal: Osterloth was convicted of felony sexual assault and was required to undergo a sexual offender evaluation by a therapist of his choice at county expense. His scheduled sentencing was continued to allow the evaluation. On appeal, Osterloth contended that the District Court erred by sentencing him without an evaluation prepared by a qualified therapist, pursuant to 46-18-111, and by continuing sentencing instead of conducting a sentencing hearing without delay, as required in 46-18-115. The Supreme Court noted that under 46-20-104, it is precluded from considering an alleged error unless a timely objection was made or the criteria of 46-20-701 are met. Osterloth did not object to the evaluation being conducted by his own evaluator or to the sentencing continuation, nor did he assert that he could satisfy any of the requirements of 46-20-701. Thus, Osterloth waived the right to have the

Supreme Court consider these alleged errors on appeal. St. v. Osterloth, 2000 MT 129, 299 M 517, 1 P3d 946, 57 St. Rep. 533 (2000).

Clarification of Family Law Exception to Supreme Court Review of District Court Contempt Orders — When Writ of Certiorari Required — Ancillary Order Exception: Seeking to narrow and clarify the judicially created family law exception to the writ of certiorari requirement of 3-1-523 that was expressly extended to dissolution of marriage contempt proceedings in In re Marriage of Smith, 212 M 223, 686 P2d 912 (1984), and In re Marriage of Sessions, 231 M 437, 753 P2d 1306, 45 St. Rep. 744 (1988), and to balance the exception with the statute and longstanding Montana case law generally allowing no direct appeal from a contempt order unless the writ is granted, the Supreme Court concluded that it would be poor public policy to create circumstances whereby a District Court's contempt powers are diminished in any manner by one party's ability to file a direct appeal that in turn frivolously and needlessly delays that party's compliance with the lower court's judgments and orders. To cover contentious disputes that arise in family law, the court created the ancillary order exception, establishing that the family law direct appeal exception applies only when the judgment appealed from includes an ancillary order, meaning an order that determines the rights of the parties as a result of the contemptuous conduct—all under one judgment, that affects the substantial rights of the parties. The ancillary order may result from the proper exercise of the court's jurisdiction, in which case a writ of certiorari would necessarily be denied. However, a lone contempt order, regardless of the underlying law of the case, cannot be reviewed by the Supreme Court on direct appeal. Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), followed in In re Marriage of DeLude, 2000 MT 75, 299 M 123, 999 P2d 306, 57 St. Rep. 331 (2000). See also State ex rel. Zosel v. District Court, 56 M 578, 185 P 1112 (1919), and Milanovich v. Milanovich, 200 M 83, 655 P2d 959, 39 St. Rep. 1554 (1982).

Standard for Review of Family Law Contempt Orders — Jurisdiction and Evidence — Family Law Exception Clarified: The standard for review of contempt orders, pursuant to the granting of a writ of certiorari, is, first, to determine whether the court that found contempt acted within its jurisdiction. For a court to have acted within its jurisdiction: (1) it must have cognizance of the subject matter; (2) it must have presence of the proper parties; and (3) its action must be invoked by proper pleadings and the judgment must be within the issues raised. A court lacks or exceeds jurisdiction by any act that exceeds the defined power of the court, whether that power is defined by constitutional provision, statute, or court rule or under the doctrine of stare decisis. The second part of the standard for review of contempt orders is to determine whether substantial evidence exists to support the court's findings. The family law exception relevant to review on direct appeal of a District Court judgment and orders made in cases of contempt is subject to the same standard of review. Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000), following State ex rel. Porter v. First Judicial District, 123 M 447, 215 P2d 279 (1950), and Kauffman v. District Court, 1998 MT 239, 291 M 122, 966 P2d 715, 55 St. Rep. 1001 (1998), and followed in In re Marriage of Coward, 2000 MT 128, 300 M 1, 2 P3d 822, 57 St. Rep. 531 (2000). See also In re Marriage of Sullivan, 258 M 531, 853 P2d 1194, 50 St. Rep. 648 (1993).

Proper Cross-Appeal of Adverse District Court Decision Regarding City Court Denial of Motion for Continuance: The established doctrine governing appeals to all appellate courts is that a party must cross-appeal if the party seeks to change any part of the judgment below. Further, the Montana Supreme Court follows the rule that it has jurisdiction only over those issues addressed in the appeal or in a properly filed cross-appeal, not jurisdiction over the entire case. Conversely, it is also the general rule that a cross-appeal is not necessary to enable a prevailing party to defend its judgment on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the court below. The proper way for a respondent to raise an issue before the Supreme Court, if the issue would support the decision below and is an issue that the court below did not address because it found another issue to be dispositive, is to assert the issue in the brief to the Supreme Court and fully discuss it. If a respondent does not assert and fully discuss the issue, the Supreme Court may in its discretion: (1) review the issue itself; (2) decide that the respondent has waived the right to review of the issue; or (3) remand to the court below for a decision on the issue. Here, issues raised by respondent that the District Court declined to address, having found another issue dispositive, undoubtedly supported the District Court's decision reversing the City Court's judgment. Thus, because the respondent sufficiently asserted the issues and both parties fully briefed each one, the Supreme Court concluded that the respondent had properly cross-appealed and that it was proper to review the respondent's issues on appeal. Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000), following In Interest of Jamie L., 493 NW 2d 56 (Wis. 1992). See also Wash. v. Yakima Indian Nation, 439 US 463, 58 L Ed 2d 740, 99 S Ct 740 (1979).

Motion In Limine to Prevent In-Court Identification Considered Motion to Suppress — Standard of Review: A motion in limine to prevent an in-court identification is essentially a motion to suppress, and the standard of review of a District Court's denial of a motion to suppress is whether the court's findings of fact are clearly erroneous and whether the findings were correctly applied as a matter of law. St. v. Clark, 2000 MT 40, 298 M 300, 997 P2d 107, 57 St. Rep. 185 (2000).

Speculative Future Use of Bridge Easement Not Within Scope of Appeal — Cross-Appeal Denied: The District Court defined the scope and extent of a bridge easement, limiting what use could be made of the bridge based on use during the prescriptive period. Appellants cross-appealed, requesting the Supreme Court to direct an amendment to the lower court judgment specifying what future uses might be permitted within the scope of the adjudicated easement. The Supreme Court held that to foreclose speculative future uses would overreach its role in considering whether the District Court erred in its decision and declined to do so. Kelly v. Wallace, 1998 MT 307, 292 M 129, 972 P2d 1117, 55 St. Rep. 1271 (1998).

California Rule Regarding Certain Issues Raised for First Time on Appeal Rejected: The corporate appellant argued that even if it was arguing for the first time on appeal that it had not transacted business in this state, that issue fell within the general exception to the rule adopted by California courts. The California cases provided that a court may address an issue raised for the first time on appeal when the facts are not disputed and the issue merely raises a new question of law. The Supreme Court held that it would not adopt the California approach and declined to review the issue raised by the appellant for the first time on appeal. Unified Indus., Inc. v. Easley, 1998 MT 145, 289 M 255, 961 P2d 100, 55 St. Rep. 574 (1998), followed in Pearson v. Virginia City Ranches Ass'n, 2000 MT 12, 298 M 52, 993 P2d 688, 57 St. Rep. 65 (2000).

Review of Board of Adjustment Decision — Scope Broader Than General: A District Court's scope of review upon a writ of certiorari ordinarily cannot be extended further than to determine whether an inferior tribunal, board, or officer has regularly acted within its authority. However, under 76-2-327, a District Court has a broader scope of review of an appeal from a decision by the Board of Adjustment. The court may hold a hearing and reverse, modify, or affirm a Board decision. In reviewing a District Court decision involving the exercise of the statutory option to take additional evidence, the standard applied by the Supreme Court is whether the District Court abused its discretion and whether the decision was supported by substantial evidence. In re Petition of Sutey Oil Co., Inc. v. Anaconda-Deer Lodge County Planning Bd., 1998 MT 127, 289 M 99, 959 P2d 496, 55 St. Rep. 499 (1998). See also Lambros v. Bd. of Adjustment, 153 M 20, 452 P2d 398 (1969), Cutone v. Anaconda-Deer Lodge County, 187 M 515, 610 P2d 691 (1980), and Whistler v. Burlington N. RR Co., 228 M 150, 741 P2d 422 (1987).

Decision Regarding Preindictment Delay as Constitutional Question: A speedy trial analysis, which focuses on postindictment delay, involves an inquiry similar to that which the Supreme Court engages in when analyzing preindictment delay. Therefore, on appeal, the Supreme Court will review a District Court decision regarding preindictment delay as a question of constitutional law. The District Court's conclusions of law are reviewed to determine whether its interpretation of the law is correct. St. v. Taylor, 1998 MT 121, 289 M 63, 960 P2d 773, 55 St. Rep. 481 (1998). However, see St. v. Goltz, 197 M 361, 642 P2d 1079 (1982), in which the Supreme Court held that speedy trial guarantees do not extend to the period prior to formal accusation or arrest.

Review of Record for Substantial, Not Contrary, Evidence: When the Supreme Court reviews the record of a trial court to determine whether the trial court's findings are supported by substantial evidence, the review is a determination of whether there is substantial evidence to support the trial court's decision, not whether evidence was presented that might have supported contrary findings. St. v. Mont. Power Co., 284 M 59, 943 P2d 1251, 54 St. Rep. 747 (1997), following Buckentin v. St. Comp. Ins. Fund, 265 M 518, 878 P2d 262 (1994).

Search Warrant Issued by Unqualified Substitute Judge Invalid — Supervisory Control Necessary to Preclude Further Proceedings: In a case in which a search warrant issued by a previously qualified but legally unauthorized substitute judge was held to be void ab initio, the Supreme Court accepted supervisory control and assumed jurisdiction in order to forestall further needless and expensive litigation. The court determined that it would be fundamentally unfair and prejudicial, not to mention a waste of time and a waste of the limited resources of the court and counsel, to proceed further. Potter v. District Court, 266 M 384, 880 P2d 1319, 51 St. Rep. 853 (1994).

Agreement by County Commission to Pay Justice's Court Expenses — Failure to Object — Appeal Precluded: A Justice of the Peace requested approval of funds from the County Commission for employment of a temporary clerical assistant. The County Commission initially

refused to approve the funds. The claim was then submitted for certification pursuant to Browman v. Wood, 168 M 341, 543 P2d 184 (1975), and was subsequently certified as an actual and necessary expense incurred in the performance of actual duties of the Justice's Court. When the bill was still not paid, the Justice of the Peace filed a petition for a contempt order against the County Commissioners for failure to pay the certified claim. The order was amended to include attorney fees. The County Commission then agreed to pay the claim and did not oppose the motion to amend, nor did it file a responsive brief. However, it later alleged error. The Supreme Court held that the County Commission waived the right to appeal by agreeing to pay the claim and then failing to object to the District Court order to pay the claim and taking no further action to challenge the claim. In re Certain Justice Court Expenses, 264 M 510, 872 P2d 795, 51 St. Rep. 372 (1994).

Appeal of Judgment Involving Declaratory Judgment and Injunction: Defendant argued that an appeal that concerned declaratory judgment was premature because plaintiff did not seek Rule 54(b), M.R.Civ.P. (Title 25, ch. 20), certification of the court's order. However, because plaintiff's motion for partial summary judgment involved both the declaratory judgment and an injunction issue and because plaintiff validly exercised the right to appeal the court's denial of the request for an injunction, the appeal was not considered premature and the entire case was subject to review by the Supreme Court. Hennen v. Omega Enterprises, Inc., 264 M 505, 872 P2d 797, 51 St. Rep. 369 (1994).

Objection Raised in Trial Brief but Never Ruled Upon Not Preserved for Appeal: Defendant claimed it adequately preserved its objection by raising the issue of speculative damages for plaintiff's lost future profits in its trial briefs. However, at no time did defendant solicit a ruling from the trial court on the issue of speculative future damages. Mere inclusion of the issue in the trial brief did not preserve the objection for appeal. Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993).

District Court Findings in Quiet Title Action Not Clearly Erroneous — Standard of Review: Cowles brought an action against Sheeline to quiet title to a Montana mining claim. The District Court awarded both Cowles and Sheeline 50% of the shares in the mining company. Sheeline appealed, claiming that nearly all of the District Court's 56 findings of fact were incorrect. The Supreme Court applied the three-part test for review of findings and conclusions announced in Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285 (1991), followed in Aasheim v. Reum, 277 M 471, 922 P2d 1167, 53 St. Rep. 771 (1996). Using that test, the Supreme Court found that the District Court correctly concluded that: (1) the evidence showed an intent by the two founders of the mining company that each own equal shares in the company; and (2) that an attempt to transfer most of the stock to Sheeline's predecessors in interest was fraudulent and should not be enforced. Cowles v. Sheeline, 259 M 1, 855 P2d 93, 50 St. Rep. 653 (1993).

Sufficiency of Evidence — Standard of Review: When sufficiency of the evidence or elements of the offense issues are presented on appeal, the standard of review applied by the Supreme Court will be whether, after review of the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. St. v. Bower, 254 M 1, 833 P2d 1106, 49 St. Rep. 586 (1992), overruling the portion of St. v. Cope, 250 M 387, 819 P2d 1280 (1991), that holds that a "clearly erroneous" standard is to be applied to judge-made findings of fact on the substantive elements of a criminal offense, but leaving intact the Cope standard for review of findings of fact on other issues in criminal proceedings, distinguishing Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285 (1991), and followed, with regard to findings of fact regarding suppression hearing evidence, in St. v. Kaluza, 262 M 360, 865 P2d 263, 50 St. Rep. 1596 (1993). See also St. v. Riley, 252 M 469, 830 P2d 549, 49 St. Rep. 408 (1992), and St. v. Carter, 285 M 449, 948 P2d 1173, 54 St. Rep. 1235 (1997).

Substantial Evidence of Negligence:

Although in conflict with defendant's version of facts, substantial evidence existed to support plaintiff's claim. It was foreseeable that a freestanding light standard could fall and injure anyone in its path and that someone could act with a minimal amount of force in a manner to intervene with the standard's stability. The Supreme Court will not retry a case simply because the jury chooses to believe one side's evidence to the exclusion of the other and will not disturb a jury's negligence findings unless the results are inherently impossible to believe. Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158, 49 St. Rep. 473 (1992).

In reviewing the trial of a suit for damages suffered in a car accident, the Supreme Court refused to overturn a jury verdict of no negligence by respondent when the evidence indicated the following: (1) the respondent was traveling at a reasonable rate of speed; (2) respondent's headlamps were on and aimed properly; and (3) appellant and his companion were walking on

the road, facing away from traffic, and wearing dark clothes on a dark night. Kukuchka v. Ziemet, 219 M 155, 710 P2d 1361, 42 St. Rep. 1916 (1985).

Evidence of Adequate Medical Care — Jury Finding of Lack of Medical Malpractice Affirmed: On appeal from judgment based on a jury verdict finding no medical malpractice for injuries sustained by a premature infant, the Supreme Court affirmed, finding sufficient evidence derived from expert testimony to establish a reasonable basis for the jury conclusion that medical care met or exceeded the applicable standard of care under the circumstances. Silvis v. Hobbs, 251 M 407, 824 P2d 1013, 49 St. Rep. 62 (1992).

Conflicting Evidence of Existence of Covenant of Good Faith and Fair Dealing: The Supreme Court refused to set aside a jury verdict compensating an employee for his firing. The court held that while there was conflicting evidence as to whether the employer breached the covenant of good faith and fair dealing, there was sufficient evidence to support the verdict. Barrett v. Asarco, 245 M 196, 799 P2d 1078, 47 St. Rep. 1980 (1990).

Contention of Laches and Estoppel Appealable: The city built a pumphouse that was allegedly on land of another property owner. On appeal from a judgment verdict in an inverse condemnation case, the city was found to have actively contested the boundary at trial and asserted its contention of laches and estoppel. The city could appeal these issues even though it did not present any witnesses at the first bifurcated trial, which concerned only the boundary line issue. Stidham v. Whitefish, 229 M 170, 746 P2d 591, 44 St. Rep. 1869 (1987).

Jury Verdict — Substantial Credible Evidence: A jury verdict will not be overturned when the record contains substantial credible evidence to support the verdict. Flynn v. Siren, 219 M 359, 711 P2d 1371, 43 St. Rep. 10 (1986), followed in Melotz v. Scheckla, 245 M 327, 801 P2d 593, 47 St. Rep. 2165 (1990). See also Simchuk v. Angel Island Community Ass'n, 253 M 221, 833 P2d 158 (1992), Arnold v. Boise Cascade Corp., 259 M 259, 856 P2d 217 (1993), and Schulke v. Gemar, 264 M 184, 870 P2d 1378, 51 St. Rep. 220 (1994).

Verdict Forms — No Finding of "Plain Error": Counsel did not commit "plain error" when, in summation to the jury, he explained to the jury two verdict forms that favored his client and incidentally explained that they should use the other two verdict forms if they found for the other party. Hill v. Turley, 218 M 511, 710 P2d 50, 42 St. Rep. 1783 (1985).

Evidence of Emancipation of Minor Child: When evidence in a URESA action indicated that the minor child lived away from the obligee but was not earning enough money to support herself, the District Court's determination that the minor child was not emancipated was not clearly erroneous. State of Oregon ex rel. Worden v. Drinkwalter, 216 M 9, 700 P2d 150, 42 St. Rep. 599 (1985).

No Indication of Weight Trial Court Placed on Inadmissible Evidence — New Trial: In the appeal of a conviction under 61-8-401 for driving under the influence of alcohol, the Supreme Court ruled inadmissible blood test results entered into evidence by the trial court. The Supreme Court further ruled that it could not decide whether there was sufficient evidence to convict the defendant without the blood test results because the Supreme Court had no indication of the weight the trial court placed upon the test in its decision. The case was remanded for a new trial. St. v. McDonald, 215 M 340, 697 P2d 1328, 42 St. Rep. 414 (1985).

District Court Findings Presumed Correct: The appellate standard for review is clear. The findings of the trial court are presumed to be correct if supported by substantial evidence. Robinson v. Schrade, 215 M 326, 697 P2d 923, 42 St. Rep. 401 (1985).

Standard of Review in Pro Se Appeal: The Supreme Court's powers of appellate review are the same whether or not a defendant appealing from a criminal conviction is represented by counsel on the appeal. St. v. Green, 212 M 20, 685 P2d 370, 41 St. Rep. 1562 (1984).

Summary Judgment Without Evidence or Jury — Broad Review: When a case is disposed of below on motion for summary judgment before a judge sitting without a jury and no testimony is taken as the facts are relatively uncontested, the scope of review is much broader than in other appeals. The Supreme Court is free to make its own examination of the entire case and reach a conclusion in accordance with its findings. Furthermore, the court will uphold the result below if it is correct, regardless of the reasons given below for the result. Shimsky v. Valley Credit Union, 208 M 186, 676 P2d 1308, 41 St. Rep. 258 (1984), followed in In re Estate of Pelzman, 261 M 461, 863 P2d 1019, 50 St. Rep. 1408 (1993).

Methodology of Determination Substantiated by Record — Failure to Object in Administrative Proceeding: The Public Service Commission (P.S.C.) did not commit error in the application of the "rate of return" methodology, rather than the "market value" methodology, in determining the reasonableness of contract cost for the purchase of coal by the Montana Power Company (MPC) from a wholly-owned subsidiary. While the Supreme Court stated a preference for the "market value" methodology in Montana-Dakota Util. Co. v. Bollinger, 193 M 508, 632 P2d 1086

(1981), the court did not prohibit the P.S.C. from using a different methodology if the evidence warrants its use. In this case, the evidence introduced by the P.S.C. was not challenged by MPC. Rather, MPC seeks to do so for the first time on appeal. Limited review of the administrative record is appropriate, and that record supports the findings of the Commission. Mont. Power Co. v. Dept. of Public Service Regulation, 204 M 224, 665 P2d 1121, 40 St. Rep. 805 (1983).

Issues Not Argued on Appeal — Issues Merged in Claims: Though not specifically argued by either side on appeal, equal protection issue was considered on appeal where it appeared to be merged in the other considerations before the Supreme Court, which included due process claims. Akhtar v. Van De Wetering, 197 M 205, 642 P2d 149, 39 St. Rep. 470 (1982).

Review of Substantial Credible Evidence — Property Settlement — Accounting: The husband brought an action to enforce the property settlement. The wife sought modification. The property settlement provided that the wife was to provide an accounting for all sums paid. The trial judge found that the wife had made an adequate accounting. The wife testified that she made what she thought was an adequate accounting, and the husband testified that the accounting he received was not sufficient. On appeal, the Supreme Court said that it will not substitute its judgment for that of the trier of fact but rather will only consider whether substantial credible evidence supports the finding and conclusions. Those findings will not be overturned by the court unless there is a clear preponderance of the evidence against them. The court will view the evidence in a light most favorable to the prevailing party, recognizing that substantial evidence may be weak or conflicting with other evidence, yet still support the findings. The findings are affirmed since there is not a clear preponderance of evidence against the findings. Phennicie v. Phennicie, 185 M 120, 604 P2d 787 (1979).

Abuse of Discretion by Trial Court: A reviewing court is never justified in substituting its discretion for that of the trial court. In determining whether the trial court abused its discretion, the question is, did the trial court act arbitrarily without the use of conscientious judgment or exceed the bounds of reason, in view of all the circumstances, ignoring recognized principles resulting in substantial injustice. Jermunson v. Jermunson, 181 M 97, 592 P2d 491 (1979).

"Plain Error": In adopting the "plain error" doctrine appellate courts have a duty to determine whether the parties before them have been denied substantial justice by the trial court, and when that has occurred they can, within sound discretion, consider whether the trial court has deprived a litigant of a fair and impartial trial, even though no objection was made to the conduct during the trial. Such was the case when appellant was denied his day in court by the trial judge's recess and failure to reconvene. Halldorson v. Halldorson, 175 M 170, 573 P2d 169 (1977). See also Graham v. Clarks Fork Nat'l Bank, 204 M 141, 663 P2d 320, 40 St. Rep. 726 (1983).

Amendment of Judgment From Which No Appeal Taken: The Supreme Court exercised its power to correct the judgment against one party defendant as an incident to affording another party defendant relief upon appeal. White v. Nollmeyer, 151 M 387, 443 P2d 873 (1968).

NEW ISSUES RAISED ON APPEAL

Use of Nontestimonial Intoxilyzer Certification Reports in DUI Trial Not Violative of Defendant's Right to Confront Witnesses — Crawford Rule: At Carter's DUI trial, the state introduced three certification reports in order to demonstrate that an Intoxilyzer 5000 was working properly when Carter was tested. The officers who prepared the reports did not testify at trial. Carter initially contended that the reports were hearsay, but on appeal, Carter asserted that admission of the reports violated his right to confront witnesses. Although the Supreme Court will generally not address new arguments raised on appeal, the court applied the exception in Cottrill v. Cottrill Sodding Serv., 229 M 40, 744 P2d 895 (1987), in this case because of the new confrontation clause jurisprudence set out in Crawford v. Wash., 541 US 36 (2004), which was decided while Carter's case was pending. In Crawford, the U.S. Supreme Court for the first time distinguished testimonial and nontestimonial out-of-court statements, delineating testimonial statements, at a minimum, as applying to prior testimony at a preliminary hearing, before a grand jury, or at a former trial as well as to police interrogations. States are allowed flexibility in the development of hearsay law when nontestimonial hearsay is at issue. In Carter's case, the state asserted that the certification reports used at Carter's trial were nontestimonial evidence because they did not fall within the core group of statements that the confrontation clause was meant to address. The Supreme Court held that the certification reports were nontestimonial in that they were not substantive evidence of a particular offense, but rather constituted foundational evidence necessary for the admission of substantive evidence. Thus, Carter's confrontation right was not implicated despite the fact that the authors were not present to testify or be confronted. The court noted that a defendant is always free to

subpoena authors of such reports if the defendant's pretrial investigation reveals that the reports are erroneous or are otherwise subject to attack. Therefore, in conformance with the Crawford rule, the Supreme Court exempted the certification reports from confrontation clause scrutiny and affirmed Carter's conviction. St. v. Carter, 2005 MT 87, 326 M 427, 114 P3d 1001 (2005).

Placement of Children With Noncustodial Parent Proper — Parental Rights Not Terminated: A mother contended that her due process rights were violated when the children were adjudicated as youths in need of care and the state placed the children with their father. The Supreme Court declined to address the due process claims because they were raised for the first time on appeal, and the court affirmed the placement. The mother's parental rights were not terminated; rather, the District Court followed the statutory procedure in 41-3-438 after finding that placement with the father was in the children's best interests. The state took the necessary steps to ensure safe placement as required in the Interstate Placement of Children Compact, and the state was properly relieved of any further obligation once the concern for the children being youths in need of care was eliminated by the placement. In re A.C., T.C., & C.W., 2004 MT 320, 324 M 58, 101 P3d 761 (2004).

Failure to Request Jury Instruction on Sudden Emergency Doctrine — Appeal Precluded: Payne's son was killed while transporting an antique tractor purchased from defendants. The jury found that more than 51% of the negligence was attributable to Payne's son. Payne appealed on grounds that under the sudden emergency doctrine set out in Simonson v. White, 220 M 14, 713 P2d 983 (1986), the son was not negligent as a matter of law. Defendants argued that the sudden emergency doctrine is no longer a recognized doctrine in Montana negligence law. Without ruling on whether the doctrine is still viable, the Supreme Court dismissed the issue because Payne failed to request a jury instruction on sudden emergency, thereby failing to preserve the issue for appeal. Payne v. Knutson, 2004 MT 271, 323 M 165, 99 P3d 200 (2004).

Unfounded and Unpleaded Speculative Argument Not Considered for First Time on Appeal: Kallowat contended for the first time on appeal that if the jury in his DUI case had known that the arresting officer had been convicted of a felony and was employed under questionable status, the case would in all probability have had a different outcome. However, Kallowat failed to properly plead the issue as required in 46-21-104, nor was this speculative contention supported by the record. Therefore, the Supreme Court declined to address Kallowat's unsupported argument raised for the first time on appeal. Kallowat v. St., 2004 MT 152, 321 M 501, 92 P3d 1176 (2004).

Failure to Raise Double Jeopardy Objection at Settling of Jury Instructions or to Object to Verdict Form in Which Offenses Listed as Separate Counts — Appeal Precluded: Minez was convicted of both criminal possession and criminal production of dangerous drugs. On appeal, Minez argued that conviction of both offenses, which arose out of the same transaction, constituted double jeopardy. However, at trial, Minez abandoned a request for jury instructions on double jeopardy and never returned to the issue, failed to raise a double jeopardy objection at the settling of jury instructions, and did not object to the verdict form in which both offenses were listed as independent counts. Having abandoned the constitutional double jeopardy objections at trial, Minez was precluded from raising the issue on appeal, and the convictions were affirmed. St. v. Minez, 2004 MT 115, 321 M 148, 89 P3d 966 (2004).

Failure to Raise Issue of Court Bias at Trial — Consideration of Issue Precluded on Appeal — Plain Error Doctrine Inapplicable: Following conviction for felony stalking, defendant contended on appeal that there was bias against him at trial because the victim worked for the County Attorney's office where the District Court was located, so both the office and the District Court Judge should have recused themselves. However, the plain error doctrine did not apply under the limited exceptions in St. v. Finley, 276 M 126, 915 P2d 208 (1996), and because the issue was not raised at trial, the Supreme Court declined to address it for the first time on appeal. St. v. Adgerson, 2003 MT 284, 318 M 22, 78 P3d 850 (2003).

Theory of Erroneous Jury Instruction Raised for First Time on Appeal — No Plain Error: At trial, the District Court instructed the jury to view with distrust the testimony of a witness who was legally accountable for the same crime as Daniels. Daniels objected to the instruction on grounds that the witness's testimony had changed and was no longer inculpatory, so the instruction was unnecessary. On appeal, Daniels argued that the instruction violated his right to a fair trial because it could have been construed to instruct the jury to distrust his exculpatory statements given to police immediately after his arrest, having implicated the witness in those statements. The Supreme Court found no prejudicial effect in the jury instruction, and Daniels could not argue on appeal a theory of error that was changed from the theory raised in trial court.

St. v. Daniels, 2003 MT 247, 317 M 331, 77 P3d 224 (2003), followed in St. v. Rinkenbach, 2003 MT 348, 318 M 499, 82 P3d 8 (2003).

Waiver of Constitutional Issues Related to No-Bond Hold by Failure to Object in Trial Court: Hendricks contended that his constitutional right to due process and the right against excessive bail were violated when he was held without bond for more than 72 hours in violation of 46-23-1012. However, there was no factual record to support the allegations, nor did Hendricks object to the asserted constitutional violations at a revocation hearing or move to dismiss the proceedings. Failure to adequately raise the issue in District Court and to create a factual record constituted a waiver of objection and precluded review of the issue on appeal. Further, Hendricks' assertion of error in the District Court's reliance on hearsay testimony at the revocation hearing failed on the same grounds. St. v. Hendricks, 2003 MT 163, 316 M 296, 71 P3d 1212 (2003), following St. v. Azure, 2002 MT 22, 308 M 201, 41 P3d 899 (2002).

No Consideration on Appeal of Objection to Testimony Not Raised at Trial: At trial, Ely objected to the admission of expert testimony regarding the fact that Ely refused to provide a urine sample for drug testing and that the state was required to obtain a warrant to obtain one, on grounds that the probative value of the testimony would be outweighed by its prejudicial effect. On appeal, Ely asserted that the acquisition of a urine sample constituted a search and that it was impermissible for the state to use the fact that Ely exercised the constitutional right to refuse to consent to a search as evidence to establish guilt. The Supreme Court held that the objection to the testimony at trial was premised on different bases than those raised on appeal. An appellant may not change legal theories on appeal or raise issues that were not raised in the trial court. Thus, Ely abandoned the objections made at trial, and the Supreme Court declined to consider the new legal theory on appeal. St. v. Ely, 2003 MT 140, 316 M 169, 69 P3d 1189 (2003).

Termination of Parental Rights — Fundamental Fairness Issues Not Considered When Raised for First Time on Appeal: On appeal, the father raised numerous issues to support his claim that he was denied fundamental fairness in procedures resulting in the termination of his parental rights. However, by failing to raise the objections in District Court, the father failed to properly preserve the issues for appeal and waived the right to have the issues considered by the Supreme Court. A District Court cannot correct statutory deficiencies if those concerns are not brought to its attention during the course of the proceedings, and the court will not be faulted for failing to address issues not raised before it. The District Court properly considered the best interests of the children in this case, and termination of the father's parental rights was affirmed. In re T.E., M.E., & M.E., 2002 MT 195, 311 M 148, 54 P3d 38 (2002), following In re D.H., 2001 MT 200, 306 M 278, 33 P3d 616 (2001), and In re M.W., 2002 MT 126, 310 M 103, 49 P3d 31 (2002).

Alleged New Evidence Not Extending Statutory Time Bar for Postconviction Relief: Abe was found guilty of accountability for deliberate homicide and was sentenced to 60 years in prison. One year and 14 days after the deadline, Abe filed a petition for postconviction relief on grounds of newly discovered evidence. Allegedly, two jurors from Abe's trial sat in on the trial of Abe's coconspirator and heard two of the state's witnesses testify differently than they did in Abe's trial. The Supreme Court applied the factors to be considered when a District Court evaluates a motion for a new trial based on newly discovered evidence as set out in St. v. Sullivan, 285 M 235, 948 P2d 215 (1997) (see also St. v. Greeno, 135 M 580, 342 P2d 1052 (1959)), including the requirement that the evidence must have come to the knowledge of the defendant since trial and the requirement that the evidence must not be such as will tend only to impeach the character or credit of a witness. Here, Abe's counsel knew about the alleged discrepancies after Abe's trial but prior to Abe's appeal, so the discrepancies in testimony could have been raised on direct appeal. Further, the petition for postconviction relief alleged that the discrepancies undermined the credibility of the witnesses but did not establish that Abe did not engage in the criminal conduct for which he was convicted. Thus, the District Court concluded, and the Supreme Court agreed, that the alleged new evidence did not serve to extend the statutory bar for filing a petition for postconviction relief beyond the 1-year period in 46-21-102. Although Abe correctly pointed out that the state did not raise the issue of the statutory bar in District Court and that the District Court did not rule on the issue, the general rule that the Supreme Court will not address issues raised for the first time on appeal did not apply in this case because that rule does not apply when the issue is jurisdictional. The 1-year statute of limitations for postconviction relief is a jurisdictional limit, and lack of subject matter jurisdiction may be raised at any time under Rule 12(h), M.R.Civ.P. (Title 25, ch. 20). Dismissal of Abe's petition for postconviction relief was affirmed as procedurally barred. St. v. Abe, 2001 MT 260, 307 M 233, 37 P3d 77 (2001).

Issues Not Raised in District Court Precluded From Consideration on Appeal: The Timises sued the Youngs, alleging negligence and negligent supervision in the operation of the Youngs'

day-care center. A voluntary settlement conference resulted in an oral agreement to settle the case. The Timises later repudiated the agreement and refused to sign the settlement documents. After lengthy negotiations failed to resolve the impasse, the Youngs moved to enforce the settlement agreement and dismiss the underlying case. The Timises did not respond, so the District Court granted the Youngs' motions without objection. The District Court held that the Timises' subsequent motion to set aside the order dismissing the case was denied pursuant to the 60-day limit in Rules 59 and 60(c), M.R.Civ.P. (Title 25, ch. 20). The Timises appealed, raising two new legal theories that were never raised, briefed, or argued in the District Court. Whatever the merits of the new issues, because they were not raised below, the Supreme Court refused to address them on appeal. Timis v. Young, 2001 MT 63, 305 M 18, 22 P3d 112 (2001).

Failure to Raise Sentencing Objections Before District Court — Issue Not Preserved for Appeal: Tucker pleaded guilty to attempted aggravated assault with a weapon. At the sentencing hearing, Tucker argued that one of the sentencing exceptions applied to him because his mental capacity was impaired because of his transsexualism combined with the stress of his fiance's custody battles. The District Court disagreed and added the minimum 2-year weapon enhancement to his sentence. At no time did Tucker complain to the court that its findings were inadequate under 46-18-223 or allege that the sentence was illegal, excessive, or improper. Instead, Tucker argued on appeal that the sentencing court erred as a matter of law in failing to state the reasons why the sentencing exception did not apply. The Supreme Court refused to remand for resentencing because Tucker failed to bring the allegations of sentencing error to the attention of the District Court in a timely manner. The purpose of the contemporaneous objection requirement is to give the District Court the first opportunity to correct any error. Failure to do so constitutes a waiver of the right to appeal the issue. St. v. Tucker, 2000 MT 255, 301 M 466, 10 P3d 832, 57 St. Rep. 1046 (2000).

Jury Instruction Disallowing Evidence of Intoxication in Determining State of Mind Not Error — Full and Fair Instructions on Law: Following Raugust's criminal trial, the court instructed the jury that it could not consider evidence of intoxication for any purpose, pursuant to 45-2-203. Raugust maintained on appeal that the instruction was in error because depriving him of the ability to admit intoxication evidence lessened the state's burden of proof and confused the jury, in violation of his due process rights. However, the error urged on appeal was not contained in the objection made to the instruction during the final settling of jury instructions, constituting waiver of the argument on appeal. Moreover, the plain error doctrine did not apply because review under that doctrine was requested for the first time on appeal. Here, the jury was instructed regarding: (1) the elements of each offense charged and the state's burden of proving each element beyond a reasonable doubt; (2) the definition of the applicable mental states—purposely and knowingly; (3) the fact that the existence of a mental state may be inferred from the acts of the accused and from the facts and circumstances connected with the offense; (4) the difference between direct and circumstantial evidence; (5) witness credibility; and (6) the need for a unanimous verdict. Read as a whole, these instructions fairly and fully instructed the jury on the law applicable to the case, and giving the instruction disallowing the defense of intoxication was not erroneous. St. v. Raugust, 2000 MT 146, 300 M 54, 3 P3d 115, 57 St. Rep. 570 (2000). See also St. v. Hagen, 283 M 156, 939 P2d 994 (1997).

Failure to Request Continuance of Trial Date — Issue Not Properly Raised or Preserved for Appeal: At a change of plea hearing 1 day before trial, Root requested that the public defender be removed and informed the court that he was seeking private counsel. The court postponed trial for 1 week, informing Root that if private counsel were retained, counsel must be ready for trial as scheduled. In the notice of substitution of counsel, Root's new counsel expressly stated an awareness of the trial date and the intention to be prepared to proceed that day. Root was convicted. On appeal, Root alleged error in the court's failure to grant a continuance of the trial. The Supreme Court noted that the trial court, either on its own motion or by granting what it considered a motion for continuance, did postpone the trial for an additional week upon learning that Root was seeking substitute counsel. Further, Root never requested a continuance, so the trial court could not be put in error on appeal regarding an issue that it had no opportunity to address. St. v. Root, 1999 MT 203, 296 M 1, 987 P2d 1140, 56 St. Rep. 792 (1999). See also St. v. Rodgers, 257 M 413, 849 P2d 1028, 50 St. Rep. 335 (1993).

Complaint Claiming Insurer Had Duty to Notify Insureds of Policy Change — Raising Statutory Duty to Inform for First Time on Appeal: Although the insureds did not raise in the District Court the statutory obligation of an insurer to inform an insured of a policy change on renewal of the policy, the insureds' complaint alleged that the insurer had a duty to notify the insureds of the policy change. Thus, the insurer's claim that the statutory obligation could not be raised on appeal because it was not raised in District Court was rejected. The statute was simply

legal support for the complaint's claim of duty to notify, not a new liability theory. Thomas v. NW. Nat'l Ins. Co., 1998 MT 343, 292 M 357, 973 P2d 804, 55 St. Rep. 1388 (1998).

Newspaper Articles Improperly Attached to Opening Brief Set Aside: Counsel for the Franks attached several irrelevant newspaper articles to an opening brief, contending that it was permissible to supplement the record on appeal with judicially recognizable material. The Supreme Court found that the articles were not judicially recognizable under this rule and were improperly attached to the brief. Affirming the District Court decision to set aside a default judgment, the Supreme Court cited Downs v. Smyk, 185 M 16, 604 P2d 307 (1979), in cautioning counsel against attempting to introduce extraneous evidence by the back door via attachment to briefs, a practice that is not tolerated. Frank v. Harding, 1998 MT 215, 290 M 448, 965 P2d 254, 55 St. Rep. 903 (1998), distinguishing In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

Stipulation of Law or Fact as Precluding Appeal: It is improper to raise an issue on appeal as to a question of law or fact after the parties have entered into a stipulation as to that law or fact. Topco, Inc. v. St., 275 M 352, 912 P2d 805, 53 St. Rep. 175 (1996). See also Penn v. Burlington N., Inc., 185 M 223, 605 P2d 600 (1980), and St. v. Spotted Blanket, 1998 MT 59, 288 M 126, 955 P2d 1347, 55 St. Rep. 253 (1998).

Issue of Proper Protection of Children by Guardian Ad Litem Not Raised at Trial Precluded on Appeal: Mother whose parental rights were terminated contended that the guardian ad litem compromised the rights of the children by failing to conduct an independent investigation regarding alleged abuse and neglect. However, the issue was not raised at trial and so was not properly before the Supreme Court when raised for the first time on appeal. In re B.T.B. & B.B., 254 M 449, 840 P2d 558, 49 St. Rep. 594 (1992).

Failure to Object to Character Evidence and Impeachment Testimony at Trial — Appeal Precluded: Defendant alleged District Court error in allowing evidence of other crimes or acts and certain impeachment testimony of a defense witness. However, because the transcript showed that no objections were made at trial to either the evidence or testimony, defendant was precluded from raising the errors for the first time on appeal. St. v. Webb, 252 M 248, 828 P2d 1351, 49 St. Rep. 236 (1992).

Issue for Appeal — Not Preserved by Failure to Object Dismissal Not Res Judicata: An employee sued her employer a second time, alleging damages for wrongful discharge, violation of constitutional rights, and infliction of emotional distress. The District Court held that the employee conceded that the wrongful discharge and emotional distress claims were barred by the Wrongful Discharge From Employment Act. The Supreme Court held that those two claims were not properly before the Supreme Court, inasmuch as they were not properly preserved for appeal, but that retrial of the issues was not barred by the doctrine of res judicata. Dagel v. Manzer, 251 M 176, 823 P2d 874, 48 St. Rep. 1166 (1991).

Water Rights Question Not Raised in Complaint or Pretrial Order and Waived at Trial Properly Excluded: Plaintiff requested the District Court to refer determination of his water rights to the Water Court. However, he did not raise the water rights question in his complaint; the District Court specifically excepted the issue from trial; the issue was not raised in the pretrial order; and the issue was expressly waived by plaintiff at the start of the trial. His request was properly denied. The Supreme Court will not hold the District Court in error for a procedure in which plaintiff acquiesced at trial. Boylan v. Van Dyke, 247 M 259, 806 P2d 1024, 48 St. Rep. 188 (1991).

Agency — Issue Raised for First Time on Appeal Not Considered: The Supreme Court will not determine the existence of an agency relationship for the first time on appeal. Serv. Funding, Inc. v. Craft, 234 M 431, 763 P2d 1131, 45 St. Rep. 2030 (1988).

Claim Lower Court's Construction of Statute at Issue in Case Violates Federal Constitution's Supremacy Clause: Plaintiff's argument that the lower court's construction of statute violated the supremacy clause of the federal constitution could be advanced for the first time on appeal. It was not an independent constitutional attack on the statute, under which his workers' compensation benefits were offset by half his social security disability benefits, but rather an attack on how the lower court construed the statute at issue. Watson v. Seekins, 234 M 309, 763 P2d 328, 45 St. Rep. 1931 (1988).

Custody Petition Withdrawn at Trial Nonappealable: Father's counsel withdrew at trial the portion of father's petition seeking sole custody. Because the custody motion was excised from the petition at hearing, the issue constituted new grounds and could not be asserted on appeal. In re Marriage of West, 233 M 47, 758 P2d 282, 45 St. Rep. 1281 (1988).

New Questions of Timeliness of Motions and Affidavits Not Proper on Appeal: The Supreme Court refused to consider, for the first time on appeal, questions of timeliness of service of a

motion for partial summary judgment, service of an amended notice of deposition, and filing of affidavits. Eitel v. Ryan, 231 M 174, 751 P2d 682, 45 St. Rep. 521 (1988).

Accusation of District Court Judge Misconduct Raised on Appeal — Supreme Court Not to Consider: In reviewing a child custody modification determination, the Supreme Court refused to consider an affidavit submitted to the Supreme Court alleging an improper ex parte communication between the District Court judge and a person interested in the proceeding. Appellant had made no motion for a mistrial or to remove the District Court judge from the case, nor had appellant mentioned the alleged misconduct on the record. In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

Judicial Notice of Maps and Descriptions on Appeal: In a dispute over control of an irrigation district's headgate, the Supreme Court permitted submission on appeal of government survey descriptions and maps that had not been introduced as evidence at trial. The court reasoned: first, that the commission comments to Rule 201, Montana Rules of Evidence, indicate that published maps or charts are included within the Rule's scope; and second, that maps and descriptions are acceptable articles of evidence by which to show a water right in the adjudication process. In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985), distinguished in Frank v. Harding, 1998 MT 215, 290 M 448, 965 P2d 254, 55 St. Rep. 903 (1998).

No Evidence in Record on Factual Issue — No Ruling by Court: The defendant was convicted of driving under the influence of alcohol and sentenced to serve time in the county jail. She argues that imprisonment in the county jail is cruel and unusual punishment because of conditions allegedly existing there. The record contains no evidence of conditions existing at the jail. As appeals may be taken only on the record made, not on the record which should have been made, the court will not rule. In the absence of any record concerning conditions at the jail, the court will not determine whether confinement there constitutes cruel and unusual punishment. St. v. Bruns, 213 M 372, 691 P2d 817, 41 St. Rep. 2178 (1984).

Laches Defense Unavailable — First Raised on Appeal: Laches could not be raised for the first time on appeal as a defense to action for rescission of contract for the sale of a ranch because it is an affirmative defense that must be set forth in the answer. Deist v. Wachholz, 208 M 207, 678 P2d 188, 41 St. Rep. 286 (1984).

Equity Theory Raised Below but Not Argued at Length Until Appeal: The broad standard of review used in equitable cases was needed where appellant had raised two legal theories below but essentially argued only the first, the court and respondent had concentrated on the first, appellant conceded on the first theory on appeal and argued the second theory, an equitable one, at length, and the lower court's memo in support of its dismissal of the action related only to the first theory. Shimsky v. Valley Credit Union, 208 M 186, 676 P2d 1308, 41 St. Rep. 258 (1984).

Application of Administrative Rule: The alleged application of an administrative rule would not be considered on appeal where it was not argued below. Hanley v. Dept. of Revenue, 207 M 302, 673 P2d 1257, 40 St. Rep. 2054 (1983).

Methodology of Determination Substantiated by Record — Failure to Object in Administrative Proceeding: The Public Service Commission (P.S.C.) did not commit error in the application of the "rate of return" methodology, rather than the "market value" methodology, in determining the reasonableness of contract cost for the purchase of coal by the Montana Power Company (MPC) from a wholly-owned subsidiary. While the Supreme Court stated a preference for the "market value" methodology in Montana-Dakota Util. Co. v. Bollinger, 193 M 508, 632 P2d 1086 (1981), the court did not prohibit the P.S.C. from using a different methodology if the evidence warrants its use. In this case, the evidence introduced by the P.S.C. was not challenged by MPC. Rather, MPC seeks to do so for the first time on appeal. Limited review of the administrative record is appropriate, and that record supports the findings of the Commission. Mont. Power Co. v. Dept. of Public Service Regulation, 204 M 224, 665 P2d 1121, 40 St. Rep. 805 (1983).

Sufficiency of Evidence: When a motion for a new trial on ground of insufficiency of the evidence to justify the verdict was not made in the lower court, the Supreme Court will review the evidence to determine whether there is any substantial evidence to justify the verdict. Johnson v. Murray, 201 M 495, 656 P2d 170, 39 St. Rep. 2257 (1982), followed in Federated Mut. Ins. Co. v. Anderson, 1999 MT 288, 297 M 33, 991 P2d 915, 56 St. Rep. 1152 (1999).

Issues First Raised on Appeal — Prejudicial Comment to Jury — Disqualification of Witnesses: Supreme Court would not review claims of defendant that prosecutor made prejudicial comment to jury and that two witnesses should have been disqualified because the claimed errors had not been previously raised or presented to the trial court. St. v. Johns, 201 M 192, 653 P2d 494, 39 St. Rep. 2049 (1982).

Issue Not in Pretrial Order: Appellant raised for the first time, on appeal, an issue that was not included on the pretrial order as an issue in dispute. The Supreme Court refused to review that issue since it was not raised in the trial court. Morse v. Cremer, 200 M 71, 647 P2d 358, 39 St. Rep. 1162 (1982).

Interlocutory Review — Issue Not Presented to District Court: In suit for damages arising out of railroad accident, issue regarding the admission of evidence of other accidents was not presented to the District Court upon application of one party for a Writ of Supervisory Control and a motion of the other party for a stay of proceedings, and thus the issue would not be addressed by Supreme Court in deciding the application and motion. Henry v. District Court, 198 M 8, 645 P2d 1350, 39 St. Rep. 430 (1982).

Issue Not in Complaint but in Brief, Proposed Conclusions, and Findings: Due process issue was sufficiently raised at trial to allow consideration of it on appeal where, although complaint did not refer to it, appellant's trial brief and proposed conclusions of law referred to it extensively and a finding of fact stated that plaintiff alleged that he was not accorded due process. Akhtar v. Van De Wetering, 197 M 205, 642 P2d 149, 39 St. Rep. 470 (1982).

Issues First Raised on Appeal — Exemption From Execution: The issue of whether certain items judgment debtor claimed were exempt from execution as necessary for support of his family were in fact not necessary would not be considered on appeal where it was not raised below. White v. White, 195 M 470, 636 P2d 844, 38 St. Rep. 2041 (1981).

Denial of Substantial Justice Below: Though objective urged for the first time on appeal will not normally be considered, the Supreme Court has the duty to determine whether parties were denied substantial justice below and can consider, within its sound discretion, whether the lower court deprived a party of a fair and impartial trial, even if an objection based on the mandate of a statute or an established precedent should have been made and was not. McAlpine v. Midland Elec. Co., 194 M 154, 634 P2d 1166, 38 St. Rep. 1577 (1981).

Involuntary Commitment — Mootness — Issues Not Raised in District Court: Where, after a brief interview with a mental health counselor-therapist, the appellant was involuntarily committed to a state mental hospital for a period of 3 months and then challenged the commitment in the District Court, the appellant's appeal would not be dismissed even though the appellant had been released prior to submission of the appeal. The important constitutional issues raised by the appellant were not rendered moot by his release because other persons would be involuntarily committed for 3 months of evaluation and testing. This time period renders a timely appeal impossible under the current rules of appellate procedure. Nor would the appeal be dismissed because of the appellant's failure to raise the constitutional issues in the District Court since the Supreme Court reserves to itself the power to examine constitutional issues that involve broad public concerns to avoid future litigation on a point of law. In re N.B., 190 M 319, 620 P2d 1228, 37 St. Rep. 2031 (1980), followed in In re Mental Health of R.M., 270 M 40, 889 P2d 1201, 52 St. Rep. 68 (1995). See also Cottrill v. Cottrill Sodding Serv., 229 M 40, 744 P2d 895, 44 St. Rep. 1762 (1987).

Mutual Assent on Elements of Contract — Raising at Trial Level: Plaintiff and defendants entered a buy-sell agreement for a parcel of land owned by defendants. From the filing of the complaint to the time of trial, both parties contended that the buy-sell was valid and enforceable against the other. The issue at trial was not the validity of the contract but whether it included certain alleged easements. Plaintiff was granted specific performance. On appeal, defendants contended that the parties had never agreed on the same terms, that there was no mutual assent or meeting of the minds, and therefore no enforceable contract. Because this contention had not been raised at the trial level, it could not be considered on appeal. Chadwick v. Giberson, 190 M 88, 618 P2d 1213, 37 St. Rep. 1723 (1980).

Laches — Issue Raised for First Time on Appeal Not Considered: The Supreme Court will consider for review only those questions raised in the trial court hearing or in the pleadings, and the doctrine of laches therefore cannot be raised for the first time on appeal. Huggans v. Weer, 189 M 334, 615 P2d 922 (1980), followed in St. v. Bruns, 213 M 372, 691 P2d 817, 41 St. Rep. 2178 (1984).

No Appeal on Issue of Joint Venture Not First Raised in District Court: Appellants cannot assert for a matter of review on appeal that their relationship with respondents was that of joint venturers because this issue was not first presented to the District Court and as such cannot be raised for the first time on appeal. Mont. Williams Double Diamond v. Royal Village, Inc., 186 M 359, 607 P2d 1120 (1980); Chamberlain v. Evans, 180 M 511, 591 P2d 237 (1979).

Workers' Compensation: In an appeal from the award of workers' compensation benefits, where the only issue raised before the workers' compensation court was whether there should be

a trial de novo, the issue of sufficiency of the evidence to support the award could not be raised on appeal. Johnston v. Nat'l Auto. & Cas. Ins. Co., 184 M 538, 604 P2d 297 (1979).

Appeals — New Theories Not to Be Heard: When a decision did not involve a certain theory of law, that theory of law may not be examined on appeal. A party may not change his theory on appeal to the Supreme Court from that advanced in the trial court. Chamberlain v. Evans, 180 M 511, 591 P2d 239 (1979), affirmed in Peters v. Newkirk, 194 M 223, 633 P2d 1210, 38 St. Rep. 1526 (1981).

Offer of Proof — Effect on Appeal: The Supreme Court refused to review various documents attached to appellant's brief in an appeal pro se when no offer of proof was made at trial because, as such, they were not a part of the record on appeal. Jerome v. Jerome, 175 M 429, 574 P2d 997 (1978).

Objections First Raised on Appeal: The issue of failure to appoint counsel for a dependent minor child lacked merit because it was not raised at trial. Easton v. Easton, 175 M 416, 574 P2d 989 (1978).

Condemnation Proceedings — Objections First Raised on Appeal Not to Be Heard: In condemnation proceedings by the Highway Commission (now Transportation Commission) to condemn a right-of-way for an interstate highway which divided ranch into two large tracts making an underpass necessary, alleged error of trial court in its preliminary order of condemnation of ordering Commission at its own expense to install, construct, and maintain the underpass on the ground that the Commission had previously agreed to install the underpass could not be raised for the first time on appeal where the question was not raised at the time of the trial in the lower court. State ex rel. St. Highway Comm'n v. Wheeler, 148 M 246, 419 P2d 492 (1966).

INTERLOCUTORY ORDERS

Summary Judgment for Third Party Affecting Final Judgment Reviewable on Appeal: A tennis club filed a negligence and breach of contract action against a contractor who constructed a tennis facility for the club. The contractor in turn filed a third-party negligence and breach of contract action against the subcontractor who prepared the ground surface and laid the asphalt for the tennis courts. The District Court granted summary judgment for the subcontractor, and the contractor appealed. The subcontractor contended that the judgment was not appealable because it was not designated in the notice of appeal, as required by Rule 4(c), M.R.App.P. The Supreme Court noted that summary judgments are generally interlocutory and not appealable until final judgment is rendered, but also noted that under this rule, any intermediate order or decision properly objected to that involves the merits or that necessarily affects the judgment, except a decision or order from which an appeal may be taken, is subject to review. The summary judgment in this case preceded and affected the final judgment, and because the contractor's objection was preserved, the summary judgment was reviewable on appeal. Glacier Tennis Club at The Summit, LLC v. Treweek Constr. Co, Inc., 2004 MT 70, 320 M 351, 87 P3d 431 (2004).

Appropriateness of Intervention in Action Challenging Enforcement of Ballot Initiative: Two sporting groups sought to intervene in an action challenging the enforcement of a ballot initiative that prohibited the shooting of alternative livestock for a fee. The District Court denied the motion, and the groups appealed. After accepting supervisory control, the Supreme Court noted that an application for intervention as a matter of right must satisfy each of the following factors: (1) timeliness; (2) interest in the subject matter of the litigation; (3) a showing that protection of the interest may be impaired by disposition of the action; and (4) a showing that the interest is not adequately represented by an existing party. In the present case, timeliness was not disputed. Regarding the second factor, the Supreme Court cited Idaho Farm Bureau Fed'n v. Babbitt, 58 F3d 1392 (9th Cir. 1995), for the proposition that a public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure that the group has supported. The District Court did not address the third factor because it determined that the groups had no legally protectable interest in the litigation. However, the Supreme Court found that an adverse decision in the suit would impair the groups' interest in the management and protection of Montana's game animals, so the third factor was met. Finally, the District Court determined that the groups failed to demonstrate that the Attorney General, on behalf of the Department of Fish, Wildlife, and Parks, would not zealously defend the groups' position in the suit. The Supreme Court concluded that the groups that actively drafted and supported the initiative may be in the best position to defend their interpretation of the resulting legislation and may not have been adequately represented by the Department. Thus, all four factors were met, and the Supreme Court ordered the District Court to permit the groups to intervene in the case. Sportsmen for I-143 v. District Court, 2002 MT 18, 308 M 189, 40 P3d 400 (2002).

Order Allowing Intervention Appealable With Final Judgment: DeVoe brought an action against the state, alleging that it had abandoned property to which DeVoe was the successor in interest. The District Court granted a motion by the city of Missoula that the city be allowed to intervene. After final judgment in favor of Missoula, DeVoe appealed the District Court's order allowing Missoula to intervene. The Supreme Court held that an order granting intervention is not separately appealable under Rule 1, M.R.App.P., because the order is not individually listed in Rule 1 as an appealable order, but held that the order is appealable after entry of final judgment. The Supreme Court noted that it had previously ruled to the same effect in Cont. Ins. Co. v. Bottomly, 233 M 277, 760 P2d 73 (1988), Estate of Schwenke v. Becktold, 252 M 127, 827 P2d 808 (1992), and In re Custody of R.R.K., 260 M 191, 859 P2d 998 (1993). DeVoe v. St., 281 M 356, 935 P2d 256, 54 St. Rep. 207 (1997).

Denial of Summary Judgment to One Party Reviewable Upon Appeal by Another Party: An order denying summary judgment to one party is reviewable upon the appeal of a final judgment by another party. Riley v. Carl, 191 M 128, 622 P2d 228, 38 St. Rep. 83 (1981).

Order Denying Motion to Strike: An order denying a motion to strike is not an appealable order, it being interlocutory in nature. It is reviewable on appeal from a final judgment. Fitzgerald v. Aetna Ins. Co., 176 M 186, 577 P2d 370 (1978).

Appeal of Order Denying Summary Judgment: An order denying summary judgment is not an appealable order. Such an order is reviewable upon appeal from a final judgment. To permit review by an extraordinary writ would accomplish indirectly that which cannot be done directly. State ex rel. Kosena v. District Court, 172 M 21, 560 P2d 522 (1977).

Order Denying Summary Judgment Reviewable With Final Judgment: Although order denying summary judgment is nonappealable order at time it is made because of its interlocutory character, it is nonetheless reviewable under appellate rule providing that all nonappealable intermediate orders or decisions properly excepted or objected to which involve merits or necessarily affect the judgment are reviewable on subsequent appeal from final judgment. Brown v. Midland Nat'l Bank, 150 M 422, 435 P2d 878 (1967).

CASES DECIDED UNDER STATUTE

Common-Law Plain Error — Case-by-Case Review: Despite the passage of 46-20-701, Montana's plain error statute restricting the review of errors not objected to at trial, the doctrine of common-law plain error review by the Montana Supreme Court continues to exist to allow correction of errors not objected to at trial but that affect the fairness, integrity, and public reputation of judicial proceedings. The Supreme Court retains the inherent power and obligation to interpret the constitution, protect individual rights, prevent manifest injustice, and correspondingly review lower court decisions and actions for error. The power of such review is inherent in the appellate process itself. Thus, while acknowledging the constraints of 46-20-701, the Supreme Court will discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights even if no contemporaneous objection is made and notwithstanding the statutory criteria, in the class of cases when failure to conduct the review may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of trial proceedings, or compromise the integrity of the judicial process. The doctrine will be applied sparingly and on a case-by-case basis. Nevertheless, the necessity for contemporaneous objection to claimed error remains because 46-20-701 will be applied, except in the class of cases mentioned above. St. v. Finley, 276 M 126, 915 P2d 208, 53 St. Rep. 310 (1996), followed in St. v. Monaco, 277 M 221, 921 P2d 863, 53 St. Rep. 604 (1996), St. v. Patton, 280 M 278, 930 P2d 635, 53 St. Rep. 1402 (1996), St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), St. v. Pizzichiello, 1999 MT 123, 294 M 436, 983 P2d 888, 56 St. Rep. 499 (1999), St. v. Hanson, 1999 MT 226, 296 M 82, 988 P2d 299, 56 St. Rep. 891 (1999), and Columbus v. Harrington, 2001 MT 258, 307 M 215, 36 P3d 937 (2001). See also Halldorson v. Halldorson, 175 M 170, 573 P2d 169 (1977), St. v. Wilkins, 229 M 78, 746 P2d 588 (1987), Seyferth v. St., 277 M 377, 922 P2d 494, 53 St. Rep. 698 (1996), and their progeny.

Order Appointing Receiver to Be Appealed: An order appointing a receiver in a mortgage foreclosure suit being an appealable one, may not under this section be reviewed on appeal from the judgment. Rock Island Plow Co. v. Cut Bank Implement Co., 101 M 117, 53 P2d 116 (1935).

Denial of Injunction — Not Reviewable if Not Appealed: An order denying a motion to dissolve a temporary injunction is an appealable order, and if not appealed from, the correctness of the order may not, under this section, be reviewed on appeal from the judgment in the action in which the order was made. Little Horn St. Bank v. Gross, 89 M 472, 300 P 277 (1931).

Order Denying Injunction Reviewable Upon Appeal of Judgment: On appeal from an order denying an injunction pendente lite where the only question presented is whether in denying it

the court erred, matters of pleading and practice subsequent to settlement of bill of exceptions, or rulings upon questions of law, will not be determined, they being reviewable on appeal from the final judgment, under this section. Nat'l Bank of Mont. v. Bingham, 83 M 21, 269 P 162 (1928).

No Application to Grant of New Trial: This section has no application on appeal from an order granting a new trial. Parsons v. Rice, 81 M 509, 264 P 396 (1928).

Correction of Verdict Appealable: An order of the District Court correcting the verdict in a civil action may be reviewed on appeal from the judgment. Frank v. Symons, 35 M 56, 88 P 561 (1907).

Previously Appealable Order Not Reviewable With Judgment: The Supreme Court cannot, on appeal from the judgment, review an order from which an appeal could have been taken. Great Falls Meat Co. v. Jenkins, 33 M 417, 84 P 74 (1906), followed in Carl v. Chilcote, 255 M 526, 844 P2d 79, 49 St. Rep. 1109 (1992).

Nonappealable Orders Determined by Statute: If a particular order is not enumerated in the statute among those from which an independent appeal may be taken, it must be reviewed on appeal from the judgment. Raymond v. Raymond, 32 M 170, 79 P 1056 (1905); Finlen v. Heinze, 27 M 107, 69 P 829, 70 P 517 (1902).

Substitution of Parties — Certiorari Not Applicable: An intermediate order substituting a claimant of property for defendant in a claim and delivery action may be reviewed on appeal from the final judgment, on exception reserved, and certiorari will not lie to have the order annulled as in excess of jurisdiction. State ex rel. Weinstein Co. v. District Court, 28 M 445, 72 P 867 (1903).

Postponement of Trial — Reviewable Upon Appeal of Judgment: While the statute does not provide for an independent appeal from an order denying a postponement of a trial, such an order may be reviewed upon appeal if an exception to it is properly preserved. State ex rel. Shores v. District Court, 27 M 349, 71 P 159 (1903).

CASES DECIDED WITHOUT REFERENCE TO RULES OR STATUTE

STANDARD OF REVIEW

Hybrid Standard of Supreme Court Review of Sentencing When Offender Ineligible for Review by Sentence Review Division: In St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937 (1999), the Supreme Court held that it will review a criminal sentence only for legality, discarding the previous two-tiered approach of reviewing sentences for both legality and abuse of discretion, which was considered a carryover from the days before the creation of the Sentence Review Division when the court reviewed all sentencing challenges. However, Montoya created a "no review" window once the Sentence Review Division came into being, which left offenders with unreasonable sentencing conditions, but no term of incarceration and thus no eligibility for Sentence Review Division consideration, without a remedy. Therefore, the court fashioned a hybrid standard of review to close the "no review" window. If an offender is sentenced to 1 year or more of actual incarceration and is eligible for review by the Sentence Review Division, the court will apply the Montoya standard and review the sentence for legality only, but if the offender is ineligible for review by the Sentence Review Division, the court will review a sentence for both legality and abuse of discretion, applying the two-tiered approach used prior to creation of the Sentence Review Division. St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004), followed in St. v. Ruiz, 2005 MT 117, 327 M 109, 112 P3d 1001 (2005).

Standard of Review of Denial of Motion to Suppress Evidence of Investigatory Stop: The Supreme Court reviews the denial of a motion to suppress evidence from an investigatory stop to determine whether the trial court's finding that the officer involved had a particularized suspicion to justify the investigatory stop was clearly erroneous. The trial court's conclusions of law are reviewed to determine whether the court's interpretation of the law was correct. St. v. Lovegren, 2002 MT 153, 310 M 358, 51 P3d 471 (2002).

School District Not Liable for Injury of Child on Playground — Witness Credibility as Question for Jury — Limited Review of Jury Verdict: The Morgans complained that the school district was liable for a teacher's negligence because their daughter, who needed close supervision, was injured on playground equipment at recess. The jury found in favor of the teacher. The Morgans sought a new trial on grounds of insufficient evidence to support the verdict. The Supreme Court's review of a jury verdict is necessarily very limited, and a jury verdict will not be reversed if it is supported by substantial credible evidence. The gist of the Morgans' appeal concerned the credibility and consistency of statements made by the only witness to the accident—the teacher. Witness credibility is a matter for determination by the jury after proper instruction from the court. Thus, the Supreme Court deferred to the properly instructed jury's evaluation of the teacher's credibility and affirmed the verdict. Morgan v. Great Falls School District No. 1, 2000 MT 28, 298 M 194, 995 P2d 422, 57 St. Rep. 134 (2000), following

Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991), Lee v. Kane, 270 M 505, 893 P2d 854, 52 St. Rep. 268 (1995), and Sandman v. Farmers Ins. Exch., 1998 MT 286, 291 M 456, 969 P2d 277, 55 St. Rep. 1165 (1998). Morgan was followed, with regard to the limited scope of review of a jury verdict and the test for substantial credible evidence, in Benson v. Diverse Computer Corp., 2004 MT 114, 321 M 140, 89 P3d 981 (2004).

Statutes Presumed Constitutional — Burden of Proof — Standard of Review: In deciding whether certain statutes violated the mandates of the Montana Constitution and The Enabling Act regarding use of school trust lands, the Supreme Court eschewed standards of review suggested by both parties, holding that the proper standard was whether the District Court's conclusions of law were correct. Statutes are presumed to be constitutional, and the Supreme Court will avoid an unconstitutional interpretation if possible. A party challenging the constitutionality of a statute has the burden of proving it unconstitutional beyond a reasonable doubt, and any doubt will be resolved in favor of the statute. Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Comm'rs, 1999 MT 263, 296 M 402, 989 P2d 800, 56 St. Rep. 1065 (1999), following Steer, Inc. v. Dept. of Revenue, 245 M 470, 803 P2d 601, 47 St. Rep. 2199 (1990), St. v. Martel, 273 M 143, 902 P2d 14, 52 St. Rep. 873 (1995), Davis v. Union Pac. RR Co., 282 M 233, 937 P2d 27, 54 St. Rep. 328 (1997), and St. v. Nye, 283 M 505, 943 P2d 96, 54 St. Rep. 766 (1997), and followed in Montanans for Responsible Use of School Trust v. Darkenwald, 2005 MT 190, 328 M 105, 119 P3d 27 (2005).

Standard of Review of Criminal Sentence Clarified — Supreme Court Review of Legality of Sentence Only: In an effort to clear up a prevalent inconsistency in Montana case law regarding the appropriate standard of review of criminal sentences, the Supreme Court held that it will review a criminal sentence only for legality, i.e., whether the sentence is within the parameters provided by statute, which in turn implies de novo review—a sentence is either legal or it is not. The court overruled St. v. Davison, 188 M 432, 614 P2d 489 (1980), St. v. White, 200 M 123, 650 P2d 765, 39 St. Rep. 1619 (1982), St. v. Graveley, 275 M 519, 915 P2d 184 (1996), St. v. Gunderson, 282 M 183, 936 P2d 804, 54 St. Rep. 283 (1997), and any other Montana decision that suggests that the Supreme Court will also review criminal sentences for an abuse of discretion. St. v. Montoya, 1999 MT 180, 295 M 288, 983 P2d 937, 56 St. Rep. 706 (1999), followed in St. v. Shreves, 2002 MT 333, 313 M 252, 60 P3d 991 (2002). However, see St. v. Herd, 2004 MT 85, 320 M 490, 87 P3d 1017 (2004), wherein the Supreme Court fashioned a hybrid standard of review for offenders with unreasonable sentencing conditions but no term of incarceration who are ineligible for review by the Sentence Review Division. In reviewing those sentences, the court will review a sentence for both legality and abuse of discretion, applying the two-tiered approach used prior to creation of the Sentence Review Division.

Denial of Motion to Dismiss — Matter of Law: Danichek appealed the lower court's refusal to grant his motion to dismiss, which he based on the argument that double jeopardy prohibited him from being prosecuted for driving under the influence because he had already been convicted and punished for refusing to take the Breathalyzer test. The Supreme Court held that the standard of review for the District Court's conclusion of law was plenary and that it would review the decision to determine whether the lower court's conclusion of law was correct. Helena v. Danichek, 277 M 461, 922 P2d 1170, 53 St. Rep. 767 (1996), following St. v. Hansen, 273 M 321, 903 P2d 194 (1995).

Standard of Review of Grant or Denial of New Trial — Jury or Bailiff Misconduct: In the two most recent cases in which jury or bailiff misconduct was the basis for granting or denying a new trial, the Supreme Court stated that the standard is that the decision is within the sound discretion of the trial judge, whose decision will not be disturbed absent a showing of manifest abuse of that discretion. The Supreme Court reaffirmed this standard and overruled those cases with a different standard. Allers v. Riley, 273 M 1, 901 P2d 600, 52 St. Rep. 920 (1995).

Standard of Review for Factfindings Made by Workers' Compensation Court: The following are principles applicable to a Supreme Court review of findings of fact made by the Workers' Compensation Court: (1) the Supreme Court cannot substitute its judgment for that of the trial court regarding the weight of evidence on questions of fact; (2) when there is substantial evidence to support the Workers' Compensation Court, the Supreme Court cannot overturn the decision; (3) the Supreme Court will not substitute its judgment for that of the Workers' Compensation Court in matters of witness credibility and the weight of witness testimony; and (4) it is not the responsibility of the Supreme Court to determine whether sufficient evidence supports a contrary finding—rather, review entails a determination of whether substantial evidence supports the decision of the Workers' Compensation Court. Stevens v. St. Comp. Mut. Ins. Fund, 268 M 460, 886 P2d 962, 51 St. Rep. 1396 (1994). See also Wood v. Consol. Freightways, Inc., 248 M 26, 808 P2d 502 (1991), Nave v. St. Comp. Mut. Ins. Fund, 254 M 54,

835 P2d 706 (1992), Houts v. Kare-Mor, Inc., 257 M 65, 847 P2d 701 (1993), Walls v. Travelers Indem. Co., 281 M 106, 931 P2d 712, 54 St. Rep. 82 (1997), and Paterson v. Mont. Contractor Comp. Fund, 1999 MT 158, 295 M 120, 983 P2d 300, 56 St. Rep. 623 (1999).

Confusing Medical Testimony That May Have Misled Jury — Other Evidence Sufficient to Support Verdict: Although disputed medical testimony tended to confuse the issues and may have misled the jury in a motor vehicle accident case, the police testimony and photographs alone provided sufficient evidence to support the verdict for defendant. The Supreme Court will not disturb a jury verdict when substantial credible evidence supports it, especially when the record has conflicting evidence and the jury resolves the conflict. Mason v. Ditzel, 255 M 364, 842 P2d 707, 49 St. Rep. 986 (1992).

Failure to Object to Alleged Improper Closing Comments: Failure to object at trial to alleged improper closing comments of counsel precludes an appellant from raising that issue on appeal. Whiting v. St., 248 M 207, 810 P2d 1177, 48 St. Rep. 396 (1991), followed in Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996).

No Appeal of Issue Not Tried in Lower Court: Objections to the admissibility of evidence may not be raised for the first time on appeal because a defendant may not appeal an issue not tried at District Court level. St. v. Long, 223 M 502, 726 P2d 1364, 43 St. Rep. 1948 (1986), citing St. v. Powers, 198 M 289, 645 P2d 1357 (1982), and St. v. Patton, 183 M 417, 600 P2d 194 (1979).

Review of Judgment Paid Under Legal Coercion: If a judgment has been paid voluntarily, it amounts to an accord and satisfaction; however, if a judgment has been paid under legal coercion, that judgment remains a proper subject for judicial review. Twenty-Seventh Street, Inc. v. Johnson, 220 M 469, 716 P2d 210, 43 St. Rep. 534 (1986).

No Objection to Instructions — Law of the Case: An instruction given without objection becomes the law of the case. Nicholson v. United Pac. Ins. Co., 219 M 32, 710 P2d 1342, 42 St. Rep. 1822 (1985).

Substantial Credible Evidence: A trial court's proper function is to assess the evidence, ascertain the credibility of the witnesses, and render findings based upon substantial credible evidence; and if that is accomplished, the Supreme Court cannot overturn the decision of the trial court. Rose v. Rose, 201 M 86, 651 P2d 1018, 39 St. Rep. 1971 (1982), followed in Searight v. Cimino, 221 M 277, 718 P2d 652, 43 St. Rep. 810 (1986).

REVIEW NOT TIMELY

Advisory Comments on Summary Judgment Appeal: On appeal from and reversal of grant of summary judgment, it was premature for the court to advise the parties and the trial court on the possible application of Montana law. The case was not completely before the Supreme Court, and when all pertinent facts are known, the trial court is the forum for initial application of the law. Hull v. D. Irvin Transp., Ltd., 213 M 75, 690 P2d 414, 41 St. Rep. 1954 (1984).

ISSUES CONSIDERED

Failure to Record Voir Dire Examination — Britt Test to Determine Whether Failure to Record Portions of Criminal Trial Violative of Due Process: Deschon argued that his right to a meaningful appeal of his deliberate homicide conviction was violated because he had tenable appellate theories, such as possible juror prejudice, that could not be determined without a transcript of the voir dire proceedings, and that there was no alternative to a transcript available. The state pointed out that Rule 9(d), M.R.App.P., provides a procedure whereby a party can submit its version of unrecorded portions of the record to the District Court, and then the court can generate a written summary to be included in the appeal. However, the state contended that Deschon made no effort to recreate the circumstances of voir dire and thus could not claim that the lack of a record was reversible error. The Supreme Court noted that a trial court should order its court reporter to record the voir dire examination and that diligent defense counsel should demand recording of voir dire proceedings (St. v. Seitzinger, 180 M 136, 589 P2d 655 (1979)). However, when the trial court fails to record portions of a criminal trial, Britt v. N.C., 404 US 226 (1971), is applied to determine whether due process has been violated, and two criteria are relevant to the determination: (1) the value of the transcript to defendant in connection with the appeal or trial for which it is sought; and (2) the availability of alternative devices that would fulfill the same function as a transcript, such as an evidentiary hearing to reconstruct the unrecorded portions of the trial. Here, Deschon established the first part of the Britt test by showing that a transcript was valuable in determining whether any jurors were prejudiced by pretrial publicity. The second part of the Britt test would be satisfied by a written summary prepared pursuant to Rule 9(d), M.R.App.P., but lacking that summary, the Supreme Court remanded for an evidentiary hearing to reconstruct the unrecorded portions of the voir

dire proceedings. St. v. Deschon, 2002 MT 16, 308 M 175, 40 P3d 391 (2002). Following remand and an evidentiary hearing to reconstruct the unrecorded voir dire portions of Deschon's trial, Deschon appealed again on grounds that the hearing was insufficient to provide information to determine whether jurors were biased. The Supreme Court concluded that, taken as a whole, the combined testimony from jurors, attorneys, and Deschon, together with the trial notes in exhibit, created a record of sufficient completeness to ensure that Deschon's right to due process was not violated and that the reconstruction hearing comprised an adequate alternative to the verbatim voir dire transcript to establish a fair and accurate picture of what transpired that was sufficiently complete to accord review of Deschon's issues on appeal, satisfying the second part of the *Britt* test. St. v. Deschon, 2004 MT 32, 320 M 1, 85 P3d 756 (2004). See also U.S. v. Cashwell, 950 F2d 699 (11th Cir. 1992), and U.S. v. Preciado-Cordobas, 981 F2d 1206 (11th Cir. 1993).

Failure to Present Issue to First Level Appellate Court as Precluding Consideration at Second Appellate Level: At their initial trial in Municipal Court, defendants raised an issue of reliance on treaties entered into by the United States, but the issue was not raised at the first level of appeal when the case was considered by the District Court pursuant to 3-6-110. As a result, the issue was held to be not properly before the Supreme Court at the second level of appeal. Missoula v. Asbury, 265 M 14, 873 P2d 936, 51 St. Rep. 383 (1994), followed in Missoula v. Robertson, 2000 MT 52, 298 M 419, 998 P2d 144, 57 St. Rep. 250 (2000).

Failure to Object to Evidence at Trial — No Right to Claim Error on Appeal: By failing to object to admission of evidence at trial, defendant waived his right to claim error on appeal. Moore v. Hardy, 230 M 158, 748 P2d 477, 45 St. Rep. 108 (1988). See also Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993).

Consent to Retroactive Increase in Judgment — Merits of Increase Waived: Wife obtained an increase in child support and maintenance after claiming the original amounts were not correctly determined. Husband consented to retroactively apply the increase back to the date of the original decree. This consent made it unnecessary for the Supreme Court to consider the merits of the wife's request for modification. The consent indicated the original decree was not correct. In re Marriage of Wilson, 216 M 392, 701 P2d 1372, 42 St. Rep. 894 (1985).

Collateral References

Appeal and Error *key* 836 through 876.

4 C.J.S. Appeal and Error §§96, et seq., 202, et seq.; 5 C.J.S. Appeal and Error §§702, et seq., 735, et seq.

4 Am. Jur. 2d Appellate Review §135, et seq.; 5 Am. Jur. 2d Appellate Review §690, et seq.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable. 79 ALR 2d 1352, supplemented by 8 ALR 2d 787.

Scope of review upon appeal from consent judgment. 69 ALR 2d 765.

Order as to joinder of additional parties as reviewable on appeal from final judgment. 16 ALR 2d 1043.

Rule 3. Suspension of the rules.

Advisory Committee Notes

This rule is taken from Rule 2 of the Federal Draft. Its purpose is explained by the Federal Advisory Committee's Note. Adjusted to state practice, this purpose is to make clear the power of the supreme court to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the supreme court to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 21(b) prohibits the supreme court from extending the time for taking appeal.

Case Notes

Order for Protection of Youth — Rules Suspended: Although an interlocutory order granting temporary investigative authority and protective services is not appealable, the Supreme Court suspended the Montana Rules of Appellate Procedure based on the facts that both parties apparently relied on the Court's statement in a prior case that the issue may be appealable, a significant period of time had passed with resulting uncertainty in the children's lives, and if the appeal was dismissed, there was a likelihood of a petition for writ of certiorari, habeas corpus, or supervisory control concerning the same issues. In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000).

Appealability of District Court Order Granting Judgment as Matter of Law — Rules Suspension: Plaintiffs contended that an order granting judgment as a matter of law is not an appealable order because it is not among the enumerated orders listed in Rule 1, M.R.App.P.

Following Ryan v. Bozeman, 279 M 507, 928 P2d 228 (1996), the Supreme Court, expressing concerns regarding judicial economy and the near certainty of future appeals following a new trial on damages, exercised its authority under this rule to suspend the requirements of the rules of appellate procedure in the interest of expediting a decision and considered the appeal of the order granting judgment as a matter of law in the limited class of cases like this, when the order granting judgment as a matter of law is taken in conjunction with an order granting a new trial. Durden v. Hydro Flame Corp., 1998 MT 47, 288 M 1, 955 P2d 160, 55 St. Rep. 198 (1998).

Order for Protection of Youth — Rules Suspended — Procedure on Appeal: A petition for temporary investigative authority and protective services was filed by the prosecutor under 41-3-402 (renumbered 41-3-427). Temporary custody of K.H. was later awarded to county welfare department under 41-3-403 (renumbered (41-3-423). The District Court found probable cause for state intervention and ordered temporary investigative authority, custody in the mother, and restrictions on the father's visitation. The parents appealed the order, an appealable order within Rule 1, M.R.App.P., but not an adequate remedy because of the time involved. Relief should properly be pursued through a Writ of Certiorari, Habeas Corpus, or Supervisory Control. The Supreme Court treated the matter as a Writ of Certiorari and denied it on the grounds that the District Court proceedings were in substantial compliance with law and that the petitioners were not prejudiced thereby. In re K.H., 216 M 267, 701 P2d 720, 42 St. Rep. 796 (1985). However, see In re B.P. & A.P., 2000 MT 39, 298 M 287, 995 P2d 982, 57 St. Rep. 179 (2000), in which it was held that because an interlocutory order granting temporary investigative authority and protective services is not appealable under Rule 1, M.R.App.P.

Failure to Timely Transmit Transcript — Refusal to Dismiss Appeal: Although the Supreme Court received the transcript 12 days beyond the 40-day deadline and the transcript lacked pertinent documents, the court refused to dismiss the appeal. The court noted that the procedural violation was not one that would affect the validity of the appeal, caused no substantive harm, and was not intended to mislead the court. Garza v. Peppard, 213 M 25, 689 P2d 279, 41 St. Rep. 1922 (1984).

Appeal Allowed Despite Failure to Comply With Procedural Rules: A seller was granted summary judgment against a buyer. Several months later, the court amended its order nunc pro tunc and certified the case for appeal under Rule 54(b), M.R.Civ.P. Despite failure to comply with the M.R.App.P., the Supreme Court chose to hear the appeal under Rules 3, 10, and 21, M.R.App.P. Marcus Daly Mem. Hosp. v. Borkoski, 191 M 366, 624 P2d 997, 38 St. Rep. 322 (1981).

"Plain Error": In adopting the "plain error" doctrine appellate courts have a duty to determine whether the parties before them have been denied substantial justice by the trial court, and when that has occurred they can, within sound discretion, consider whether the trial court has deprived a litigant of a fair and impartial trial, even though no objection was made to the conduct during the trial. Such was the case when appellant was denied his day in court by the trial judge's recess and failure to reconvene. Halldorson v. Halldorson, 175 M 170, 573 P2d 169 (1977).

Failure to File Timely Notice of Appeal: The Supreme Court has no authority to permit an appeal to be taken after the expiration of the time fixed by Rule 5, M.R.App.P. If an extension of time is sought, the proper forum to make such a request is the District Court. An appellant must request any extension no later than 60 days from service of notice of entry of judgment. Zell v. Zell, 174 M 216, 565 P2d 311 (1977).

Emergency Restraining Order Denied: Petition by female minor who was denied injunction prohibiting rodeo from refusing to allow her to participate as a bareback bronc rider was not such an emergency as to invoke the extraordinary remedies of the Supreme Court, ex parte, without notice, without bond, and without hearing. State ex rel. Reno v. District Court, 165 M 289, 529 P2d 1407 (1974).

II. Appeals From Judgments and Orders of District Courts

Rule 4. How taken.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule is patterned after Rule 3 of the Federal Draft, but excludes references to criminal cases, habeas corpus proceedings and bankruptcy. Nothing other than the filing of a notice of appeal in the district court is required for the perfecting of an appeal. In the interest of providing

the supreme court with prompt notice that its jurisdiction has been invoked, the rule directs the clerk of the district court to forward a copy of the notice of appeal to the clerk of the supreme court. The requirement that the appellant furnish the clerk with the necessary number of copies of the notice of appeal and that the clerk endorse on each copy served the date on which the notice was filed are for the convenience of the clerk and litigants respectively.

NOTE TO JUNE 16, 1986, AMENDMENT

The amendments have been adopted in part from Rule 3 of the Federal Rules of Appellate Procedure.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1997 Amendment: In (a) deleted former second sentence that read: "Concurrent with filing the notice of appeal, appellant shall provide a copy to the clerk of the supreme court"; inserted (c)(1) concerning filing of certification; and inserted (c)(2) concerning notice pursuant to (c)(1). Amendment effective October 1, 1997.

1996 Amendment: In (a) inserted second sentence concerning filing with Clerk of the Supreme Court; and in (c) substituted second sentence concerning compliance with Form 1 in the Appendix of Forms to Rule 54 for former text that read: "Form 1 in the Appendix of Forms is a suggested form of notice of appeal" and in last sentence inserted last clause concerning information contained in Form 1 in the Appendix of Forms to Rule 54. Amendment effective October 1, 1996.

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, in (b), in catchline, inserted "or consolidated", in first sentence inserted "timely" and "and they may thereafter proceed on appeal", and inserted second sentence relating to consolidation of appeals; in (c), in first sentence, inserted "or part thereof" and inserted third sentence relating to dismissal for informality; and made minor changes in grammar and punctuation.

Case Notes

Cases Decided Under Rules
General 1241
District Court Deprived of Jurisdiction After Appeal Filed 1245
Cases Decided Under Statute 1246

CASES DECIDED UNDER RULES

GENERAL

Summary Judgment for Third Party Affecting Final Judgment Reviewable on Appeal: A tennis club filed a negligence and breach of contract action against a contractor who constructed a tennis facility for the club. The contractor in turn filed a third-party negligence and breach of contract action against the subcontractor who prepared the ground surface and laid the asphalt for the tennis courts. The District Court granted summary judgment for the subcontractor, and the contractor appealed. The subcontractor contended that the judgment was not appealable because it was not designated in the notice of appeal, as required by Rule 4(c), M.R.App.P. The Supreme Court noted that summary judgments are generally interlocutory and not appealable until final judgment is rendered, but also noted that under Rule 2, M.R.App.P., any intermediate order or decision properly objected to that involves the merits or that necessarily affects the judgment, except a decision or order from which an appeal may be taken, is subject to review. The summary judgment in this case preceded and affected the final judgment, and because the contractor's objection was preserved, the summary judgment was reviewable on appeal. Glacier Tennis Club at The Summit, LLC v. Treweek Constr. Co, Inc., 2004 MT 70, 320 M 351, 87 P3d 431 (2004).

Failure to Address Applicability of Alternative Dispute Resolution Process in Appeal of Child Support Case Not Grounds for Automatic Dismissal — Complicity of Clerk of District Court in Appellant's Failure to Follow Statutory Requirements: A father appealed a District Court determination of past-due child support amounts, but failed to address the applicability of alternative dispute resolution in the appeal notice, as provided in Rule 54, M.R.App.P., and subsection (c) of this rule. The Clerk of the District Court subsequently failed to notify the father of the necessity to file an amended notice of appeal within 7 days. The mother contended that the appeal should be dismissed, citing Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d

71 (2000), for the proposition that failure to comply with applicable appellate rules will result in dismissal. The Supreme Court held that a court may dismiss an appeal for failure to comply with Rule 54, M.R.App.P., and subsection (c) of this rule, but overruled Dobrocke to the extent that failure to comply will result in automatic dismissal. The court found the Dobrocke rule to be too severe, particularly when the Clerk of Court is complicit in the appellant's failure to abide by the statutory requirements, because it is unfair for all the consequences to fall on the appellant when the Clerk of Court also fails to adhere to the statutes. Rather, the Supreme Court will look at all circumstances surrounding the appeal before deciding whether to dismiss for failure to comply with Rule 54, M.R.App.P., and subsection (c) of this rule. In this case, dismissal was not proper because the Clerk of Court never issued the father the proper notice to file an amended appeal. Roberts v. Nickey, 2002 MT 37, 308 M 335, 43 P3d 263 (2002).

Failure to Certify Applicability of Arbitration in Appeal of Case Seeking Monetary Damages to Result in Dismissal of Case: Plaintiff appealed a summary judgment dismissing her negligence suit against the city of Columbia Falls, but totally failed to address the requirements of Rule 54, M.R.App.P., and subsection (c) of this rule regarding the use of alternative dispute resolution procedures. The city argued that the rules applied because plaintiff was seeking monetary damages, so failure to address dispute resolution was indefensible and the appeal should be dismissed. Plaintiff pointed out that the appeal was from a summary judgment holding that no cause of action existed, rather than from a monetary judgment. The Supreme Court concluded that the determining factor was the relief sought and not the order or judgment being appealed. Plaintiff sought damages, so the rules applied. However, because it was a case of first impression and part of the blame for not addressing dispute resolution lay with the District Court Clerk, who failed to direct plaintiff to file an amended notice of appeal containing the necessary certification, the Supreme Court did not dismiss this plaintiff's appeal, concluding that dismissal would be too harsh a remedy. Nevertheless, in the future, the consequence of failing to comply with Rule 54, M.R.App.P., and subsection (c) of this rule will be to subject the appeal to dismissal. Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71, 57 St. Rep. 718 (2000), overruled in Roberts v. Nickey, 2002 MT 37, 308 M 335, 43 P3d 263 (2002), to the extent that failure to comply will result in automatic dismissal.

Indian Defendant — Failure to Challenge Transfer to District Court and Failure to Reserve Right to Appeal Issues — District Court Jurisdiction Upheld: After the state filed an amended petition in Youth Court to have Spotted Blanket declared a delinquent youth and a serious juvenile offender, the state and Spotted Blanket stipulated to transferring the case to District Court. Later, Spotted Blanket objected to the jurisdiction of the District Court, arguing that the Youth Court abused its discretion in making the transfer because there was insufficient evidence that the juvenile facilities were inadequate, as required by 41-5-206(1)(d)(ii) (see 1997 amendment), and because the District Court failed to make a finding of probable cause concerning some of the counts against him, as required by the same statute. The Supreme Court declined to address those issues, noting that: (1) Spotted Blanket's notice of appeal was limited to the District Court order denying his motion to dismiss and did not include the order transferring the case to District Court; (2) Spotted Blanket never challenged the propriety of the transfer to District Court and, citing the requirements of 46-12-204, St. v. Weeks, 270 M 63, 891 P2d 477 (1995), and St. v. Swoboda, 276 M 479, 918 P2d 296 (1996), holding that claims of error not properly preserved in the trial court are barred from appellate review; (3) Spotted Blanket stipulated to the transfer and that a probable cause hearing would not be necessary; and (4) Spotted Blanket pleaded guilty to the felony counts and noting that the plea acts as a waiver of nonjurisdictional defects under the Supreme Court's prior opinions in St. v. Butler, 272 M 286, 900 P2d 908 (1995), and Stilson v. St., 278 M 20, 924 P2d 238 (1996). St. v. Spotted Blanket, 1998 MT 59, 288 M 126, 955 P2d 1347, 55 St. Rep. 253 (1998).

Time for Appeal Not Tolled During Extra Time Granted to File Brief in Support of Posttrial Motion: A District Court cannot grant extensions under Rule 59(g), M.R.Civ.P. (Title 25, ch. 20), for additional briefing time and must rule on a Rule 59(g) motion to amend a judgment within the time allotted without regard to the status of the briefing. If the court does not rule on the motion within the allotted time, the motion is considered denied. The court's grant of a 16-day extension of time in which to file a brief in support of the motion did not suspend for 16 days the time allotted for appeal. Failure to file a notice of appeal within the allotted time was an absolute jurisdictional bar to Montana Supreme Court consideration of the appeal. Challinor v. Glacier Nat'l Bank, 283 M 342, 943 P2d 83, 54 St. Rep. 520 (1997).

Use of "Et Al." in Notice of Appeal as Sufficient Identification of Appellants: Appellants' notice of appeal, filed on behalf of 152 discharged employees, was headed "Larry Deeds, et al.", which respondent contended was insufficient to convey notice under the decision in Torres v.

Oakland Scavenger Co., 487 US 312, 101 L Ed 2d 285, 108 S Ct 2405 (1988), wherein the U.S. Supreme Court found that Rule 3(c), Fed.R.App.P. (identical to this rule), was jurisdictional in nature and required the listing of all parties taking part in the appeal. The Montana Supreme Court distinguished Torres and chose instead to adopt the holding in Nat'l Center for Immigrants' Rights v. I.N.S., 892 F2d 814 (9th Cir. 1989), that the use of "et al." in the caption of the notice clearly indicated that all defendants were appealing the decision below. To require all 152 appellants in this action to be named in the appeal would take two full pages and would be onerous. Rather, the use of "et al." as a common informality constituted sufficient notice of appeal under this rule. Deeds v. Decker Coal Co., 246 M 220, 805 P2d 1270, 47 St. Rep. 1902 (1990).

Technical Defect Not Bar to Appeal: The claimant in a workers' compensation case appealed the lower court's denial of his motion for a rehearing. The Supreme Court held that although he should have appealed from the findings and conclusions of the lower court in order to place the proper issues before it, technical defects of procedure should not bar a party from access to the courts. Wilhelm v. Owens Enterprises, Inc., 242 M 285, 790 P2d 467, 47 St. Rep. 699 (1990).

Effect of Failure to Designate Dismissed Charge as Subject of Appeal: State's argument that it was error to dismiss a charge had merit, but the issue was not properly before the court and would not be considered because the notice of appeal did not designate an appeal from the dismissal of that charge. St. v. Delap, 237 M 346, 772 P2d 1268, 46 St. Rep. 856 (1989), followed in St. v. Spotted Blanket, 1998 MT 59, 288 M 126, 955 P2d 1347, 55 St. Rep. 253 (1998), and Lewis v. Puget Sound Power & Light Co., 2001 MT 145, 306 M 37, 29 P3d 1028 (2001).

Cross-Appeal: Respondent raised two issues on appeal not addressed by appellant. The court did not consider the issues because respondent had not perfected a cross-appeal. Mydlarz v. Palmer/Duncan Constr. Co., 209 M 325, 682 P2d 695; 41 St. Rep. 738 (1984). See also Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Supreme Court Equally Divided on Sufficiency of Notice of Appeal — Judgment Appealed From Affirmed: When the Supreme Court was equally divided on the issue of whether a defendant's notice of appeal was legally sufficient, three justices having voted that the notice was sufficient, three justices having voted that it was not sufficient, and one justice having abstained, the court ruled that there had not been a determination by the majority of the court that the notice was sufficient and that therefore the court did not have jurisdiction to hear the appeal. Doll v. Major Muffler Centers, Inc., 208 M 401, 687 P2d 48, 41 St. Rep. 429 (1984).

Time Limits to Be Followed — Jurisdictional Requirement: The parties' marriage was dissolved on April 14, 1980, and a portion of the decree provided that the wife was to receive monthly payments equal to one-half the value of stock. On April 23, 1980, the wife moved under Rule 52(b), M.R.Civ.P., to amend the findings and judgment to correct the valuation of the stock. The motion was properly noticed for hearing under Rule 59(g), M.R.Civ.P. On May 1, 1980, the judge continued the hearing for 30 days upon written stipulation of counsel. The hearing was held on June 5, 1980, but no order was entered. The court finally held a later hearing after the wife again moved on May 4, 1981, and in an order dated October 7, 1981, denied her request. On appeal, the Supreme Court held that once the Rule 52(b) motion was made, the time limits of Rule 59(g) applied and a hearing had to be held within 10 days or the court could continue the hearing not to exceed 30 days. In this case, the court held the hearing 5 days later than the extended date and thereby lost jurisdiction of the motion. Further, the court did not rule on the motion within the required 15 days. Because the time for the wife's appeal began to run on the last day that the District Court could have ruled on the Rule 52 motion, her appeal was not timely and the Supreme Court had no jurisdiction. In re Marriage of Winn, 200 M 402, 651 P2d 51, 39 St. Rep. 1831 (1982).

Conditional Notice of Appeal: Appellant filed a conditional notice of appeal conditioned upon the Supreme Court finding that the judgment being appealed was a final judgment. Because the notice was conditioned upon an action to be taken at an undetermined time in the future, it was totally ineffective. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Joint and Several Liability — Failure to Include Issue in Notice of Appeal: Where codefendant's notice of appeal did not include a certain item of damages, the Supreme Court must assume the other defendant was not informed by the notice of an intention to challenge responsibility for those damages, found below to be joint and several. The issue whether appellant was liable was not properly before the Supreme Court, and finding of joint and several liability must stand. McPherson v. Kerr, 195 M 454, 636 P2d 852, 38 St. Rep. 2021 (1981).

Appeal From Workers' Compensation Court — Starting Point for the Period for the Filing of Appeal: For an appeal from a final decision of the Workers' Compensation Judge to be filed in the manner provided by law for appeals from the District Court in civil cases, there must be a date

that is the starting point for the period for filing notice of appeal under Rule 5, M.R.App.P. In that there is no judgment book in the Workers' Compensation Court in which to enter the judgment and therefore there can be no notice of entry of judgment, the court established, under the powers granted by Art. VII, sec. 2, Mont. Const., that the date on which a decision becomes final under ARM 2.52.222 (now repealed) shall be the starting point for the period for filing the notice of appeal. In this case the court therefore had jurisdiction over the appeal. McMahon v. The Anaconda Co., 38 St. Rep. 1233 (1981) (apparently not reported in Pacific Reporter or Montana Reports but consolidated for purposes of appeal with second case filed by plaintiff against Anaconda Co. and reported at 678 P2d 661 (1984)).

Dissolution of Marriage Appeal From Original Judgment or Amending Order to Preserve Issues of Both: Respondent husband raised the issue of the scope of the wife's notice of appeal from the District Court's order amending the decree made on dissolution of the marriage. The husband argued that the appeal should be limited solely to issues arising from the amending order. The Supreme Court said that the contention ignored the interdependent nature of the amending order and the original decree. Finality of the original judgment had to await a determination of the lower court regarding motions to amend or alter. The intertwining of an amending order and an original judgment necessitated review of all issues contained in both, and thus an appeal from either incorporated all issues of both for review. This was in accord with the idea that technical defects of procedure should not bar a party from access to the court. This was distinguished from the situation in which a party appealed from one order in a series or separate and distinct orders or from one part of a divisible judgment. An amending order and an original judgment could not be viewed as separate and distinct or divisible. The notice of appeal was therefore sufficient to preserve all issues for review. Tefft v. Tefft, 192 M 456, 628 P2d 1094, 38 St. Rep. 837 (1981), distinguishing St. v. Todd, 117 M 80, 158 P2d 299 (1945), and Sperling v. Calfee, 7 M 514, 19 P 204 (1888), in accord with J.C. Penney and Woolworth v. Employment Sec. Div., 192 M 289, 627 P2d 851, 38 St. Rep. 694 (1981).

Computation of Time Limit for Appeal in Workers' Compensation Case — Civil Procedure Rules Applied: A person who appeals from a final decision of the Workers' Compensation Court should in all fundamental fairness be given the benefit of that provision of Rule 5, M.R.App.P., which states that ". . . except that in cases where service of notice of entry of judgment is required by Rule 77(d) of the M.R.Civ.P. the time shall be 30 days from the service of notice of entry of judgment". When service of notice of the final decision is made as mandated by 2-4-623 and that service is made by mail, the provisions of Rule 21(c), M.R.App.P., are automatically put into play, adding 3 days to the prescribed 30-day time limit for filing the notice of appeal set by Rule 4(a), M.R.App.P. However, when the final day of the period falls on a Sunday, Rule 21(a), M.R.App.P., comes into play, extending the time limit to the next day. Dumont v. Aetna Fire Underwriters, 183 M 190, 598 P2d 1099 (1979).

Series of Proceedings — Jurisdiction on Appeal: The Supreme Court was without jurisdiction to review a series of legal proceedings surrounding a divorce decree other than the last decision and judgment because the appellant failed to give timely notice of appeal of the prior proceedings. Easton v. Easton, 175 M 416, 574 P2d 989 (1978).

Extraordinary Relief Denied: When petitioner for Writ of Supervisory Control had filed notice of appeal from a judgment 9 days prior to application for Writ, without showing of extenuating circumstances, the Supreme Court would not issue an extraordinary writ as a method to shortcut appeal. In re Crist, 172 M 38, 560 P2d 531 (1976).

Determining Propriety of Appeal — Excusable Neglect: Court was without jurisdiction to dismiss an appeal because Supreme Court has sole jurisdiction to determine propriety of appeal. A change of mind is not "excusable neglect". McCormick v. McCormick, 168 M 136, 541 P2d 765 (1975).

Failure to File Timely Notice of Appeal — Jurisdictional Defect: Failure to comply with rule relating to filing notice of appeal creates a jurisdictional defect which the Supreme Court will alter only on most extenuating circumstances. Leitheiser v. Mont. St. Prison, 161 M 343, 505 P2d 1203 (1973).

Untimely Appeal From Motion for New Trial: When motion for new trial was filed without notice of hearing, the motion was automatically denied 10 days after service notwithstanding letter from clerk notifying movant of denial on some other date. Appeal filed later than 60 days after denial of the motion was untimely. Leitheiser v. Mont. St. Prison, 161 M 343, 505 P2d 1203 (1973).

Failure to Serve Notice of Appeal — Appellate Jurisdiction Never Acquired: Where notice of appeal was not served on the respondent party within 6 months of the date of judgment, the

Supreme Court could not acquire jurisdiction even though notice was filed with the District Court within the statutory period. Seiffert v. Police Comm'n, 144 M 52, 394 P2d 172 (1964).

Amending Notice of Appeal: Amendment of a notice of appeal to the Supreme Court after the time period for notice has run is not possible. Payne v. Mtn. States Tel. & Tel. Co., 142 M 406, 385 P2d 100 (1963).

DISTRICT COURT DEPRIVED OF JURISDICTION AFTER APPEAL FILED

Deficiency Judgment Embraced Within Assignment Order Seeking to Enforce That Judgment — Appeal of Assignment Order Divesting District Court of Jurisdiction to Address Motion to Set Aside Deficiency Judgment: Andersen executed a promissory note in favor of the Alpine Buffalo, Elk and Llama Ranch, Inc. (Alpine), and secured the note with real property. When no payments were made, Alpine received a judgment and foreclosure decree. After Andersen's property was sold, Alpine also received a deficiency judgment in the amount still owing. Andersen neither appealed the judgment nor made payment. Alpine later learned that Andersen was plaintiff in a pending malpractice claim against her former attorney, so Alpine sought and received an assignment of the prospective proceeds from that action. Andersen appealed the assignment order, and on the same day moved to set aside the deficiency judgment pursuant to Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), claiming that the judgment was improperly based on the value of the property from the Sheriff's sale rather than the fair market value of the property. The District Court declined to address Andersen's Rule 60(b) motion on grounds that the appeal of the assignment order divested the court of jurisdiction. The Supreme Court affirmed. The assignment order and the motion to set aside the deficiency judgment were inextricably intertwined. The Rule 60(b) motion challenged the validity of the very deficiency judgment on which the appealed assignment order was based and that the assignment order sought to enforce. The District Court did not err in finding that appeal of the assignment order divested the court of its jurisdiction to address the motion to set aside the deficiency judgment. Alpine Buffalo, Elk & Llama Ranch, Inc. v. Andersen, 2001 MT 307, 307 M 509, 38 P3d 815 (2001), following McCormick v. McCormick, 168 M 136, 541 P2d 765 (1975).

Child Custody — District Court Order Issued After Appeal Vacated: Following mother's appeal of a District Court decision to the Supreme Court, the District Court ordered a temporary change in child custody, a temporary restraining order, and an order to show cause. The long-established rule in Montana is that when a notice of appeal has been filed, jurisdiction passes from the District Court and vests with the Supreme Court. Although some exceptions apply, none were applicable to the present situation. The District Court, though arguably acting in the child's best interests, was without jurisdiction to generate any orders relating to issues on appeal to the Supreme Court, and those orders were vacated. Because of the sensitive nature of the case, power was reinvested with the District Court, the case was remanded for the limited purpose of determining custody, and a hearing on the matter was required to be expedited. In re Marriage of Dreesbach, 265 M 216, 875 P2d 1018, 51 St. Rep. 374 (1994).

Filing Notice of Appeal — District Court Deprived of Jurisdiction: A judgment entered after filing of a notice of appeal was invalid because the notice of appeal deprived the District Court of further jurisdiction. In re Marriage of Carlson, 220 M 204, 714 P2d 116, 43 St. Rep. 295 (1986).

Granting Witness Air Fare Costs Following Appeal: The filing of a notice of appeal did not deprive the District Court of jurisdiction to grant a pending bill for costs. However, the court properly disallowed as a cost the air fares for witnesses. Powers Mfg. Co. v. Leon Jacobs Enterprises, 216 M 407, 701 P2d 1377, 42 St. Rep. 906 (1985).

Perfected Appeal Despite Attempted "Withdrawal" — No District Court Jurisdiction Unless Properly Dismissed: The father filed a notice of appeal after the District Court denied his motion for a change of custody. He then filed a document entitled "Withdrawal of Appeal" with the District Court. Later the father filed a petition for change of custody and a motion to consolidate his petition with a dependency and neglect action filed by the State. After a trial, the mother appealed. On appeal, the Supreme Court stated that when a notice of appeal has been filed, jurisdiction passes to the Supreme Court. All that is required to perfect an appeal is the timely filing of a notice of appeal. The District Court could have dismissed the appeal before it was docketed upon motion and notice. The record discloses no motion or notice. The District Court was therefore without jurisdiction to hear the case. In re M.L.Y. & M.Y., 201 M 467, 655 P2d 499, 39 St. Rep. 2238 (1982).

Notice of Appeal Divests Trial Court of Jurisdiction to Amend Judgment: After respondent moved to amend the judgment of the District Court, appellant filed a notice of appeal. The filing of the notice of appeal deprived the trial court of jurisdiction to amend the judgment. However,

under 3-2-204, the Supreme Court can return jurisdiction to the trial court. United Farm Agency v. Blome, 198 M 435, 646 P2d 1205, 39 St. Rep. 1115 (1982).

Same Day Filing of Appeal and Motion for Rehearing: The filing of an appeal to the Supreme Court stays proceedings in the lower court, thereby removing jurisdiction to proceed further in the matter from the lower court; thus, the Supreme Court denied the motion to dismiss the appeal, which was based on the fact that the notice of appeal and movant's motion for rehearing were filed on the same day. Green v. C.R. Anthony Co., 194 M 102, 634 P2d 629, 38 St. Rep. 1638 (1981).

Notice of Appeal Filed — District Court Divested of Jurisdiction to Enter Nunc Pro Tunc Order: The findings, conclusions, and decree of dissolution were filed on December 2, 1980. Appellant filed a motion to alter the court's findings and conclusions on December 4, 1980, and filed a notice of appeal on January 7, 1981. On January 20, 1981, the District Court entered amended findings and conclusions and dated them, nunc pro tunc, December 12, 1980. The Supreme Court held that a trial court cannot enter supplemental findings after a notice of appeal has been filed. Bartmess v. Bartmess, 193 M 200, 631 P2d 299, 38 St. Rep. 1097 (1981).

Notice of Appeal Filed After Order but Before Findings and Conclusions Entered: An employer appealed from an order of the Workers' Compensation Court determining that its former employee was permanently totally disabled. Through various states of the case, the court failed to make findings of fact. Notice of appeal to the Supreme Court was filed after the court entered its order. A week later the court entered its findings of fact and conclusions of law in support of its original order reinstating benefits cut off by the employer. The Supreme Court agreed with the appellant/employer that the supplemental findings entered after the notice of appeal was filed could not be considered. The trial court had lost jurisdiction, except for ancillary matters, when the notice of appeal was filed. The order reinstating the claimant's benefits, determining that she was permanently totally disabled, and ordering the employer to pay a penalty and attorney fees was not an interim order because, unless appealed, it would have to be obeyed. Therefore, proper findings and conclusions were needed to support the order. A new hearing was ordered with discovery to be enforced against both parties. Churchhill v. Holly Sugar Corp., 192 M 533, 629 P2d 758, 38 St. Rep. 860 (1981).

Loss of District Court Jurisdiction Upon Filing Notice of Appeal — Findings and Conclusions Improperly Amended: In an action for damages resulting from the defendants' breach of contract by failing to complete the construction of a road for the plaintiff, the trial court committed reversible error in attempting to amend its findings of fact and conclusions of law after the defendants filed a notice of appeal. Since 1954 it has been the rule in Montana that when a notice of appeal is filed, personal and subject matter jurisdiction pass from the District Court to the Supreme Court. When the District Court amended its findings and conclusions after filing of the notice of appeal, it did so without jurisdiction and the amendments were therefore void. Julian v. Buckley, 191 M 487, 625 P2d 526, 38 St. Rep. 128 (1981). See also St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Motion to Set Aside Judgment — Jurisdiction Not Retained by District Court After Appeal Taken: When petitioner moved the District Court to set aside its judgment and thereafter filed a notice of appeal to the Supreme Court, the District Court properly asserted that it had no authority to rule on petitioner's motion. Upon a proper appeal being taken, jurisdiction of the cause passes to the Supreme Court, subject to the right of the District Court to correct clerical errors. N. Plains Resource Council v. Bd. of Health & Environmental Sciences, 184 M 466, 603 P2d 684 (1979), followed in Lewistown Propane Co. v. Moncur, 2003 MT 368, 319 M 105, 82 P3d 896 (2003).

Loss of Jurisdiction to Hear Motion to Dismiss: Where District Court signed an order extending time to file an appeal alleging excusable neglect and notice of appeal was filed the same day, District Court was without jurisdiction to grant a motion to dismiss said appeal as upon the original filing of notice of appeal. Supreme Court was given sole jurisdiction to determine propriety of appeal. McCormick v. McCormick, 168 M 136, 541 P2d 765 (1975).

CASES DECIDED UNDER STATUTE

Defaulting Adverse Party — Severable Appeal: A defaulting defendant must be served with notice of appeal if a reversal of the judgment may affect him adversely. Where in a foreclosure action all but one of several defendants defaulted, the plaintiff could not have a reversal thereof in its entirety without making the defaulting defendants adversely affected by it parties to the appeal and serving notice thereof upon them. But where a judgment is severable as between coparties to an action, an appeal may be taken as to any one of the coparties. And if a lone

answering defendant makes no objection, reversal may be had as to him alone, but not favoring the others. W. Holding Co. v. NW. Land & Loan Co., 113 M 24, 120 P2d 557 (1941).

Multiple Appeals Covered by One Notice: An order settling an administrator's account, disallowing two certain items, and directing him to deliver certain stock to a special administratrix, though included in one paper, is in effect several distinct and separate orders, and, though embraced in one notice of appeal, will be so treated for the purposes of the appeal. In re Barker's Estate, 26 M 279, 67 P 941 (1902). See also MacGinniss v. Boston & Mont. Consol. Copper & Silver Min. Co., 29 M 428, 75 P 89 (1904).

Collateral References

Appeal and Error *key* 411 through 430.

4 C.J.S. Appeal and Error §§11, 298.

5 Am. Jur. 2d Appellate Review §§285 through 361.

Check or money as meeting requirement of appeal bond. 65 ALR 2d 1134.

Exclusion or inclusion of terminal Sunday or holiday in computing time for giving of appeal bond or undertaking. 61 ALR 2d 499.

Necessity that person acting in fiduciary or representative capacity give bond to maintain appellate review proceedings. 41 ALR 2d 1324.

Necessity of notice of application or intention to correct error in judgment entry in appellate and review proceedings. 14 ALR 2d 261.

Rule 5. Time for filing notice of appeal.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule is patterned after Rule 4 of the Federal Draft. (Provisions for appeals in bankruptcy, petitions for impeachment, under the Railway Labor Act, under the Interlocutory Appeals Act, and in criminal cases, are omitted.) It materially shortens the time for taking an appeal.

The Federal Draft provides that the notice of appeal shall be filed within 30 days "of the date of the entry of the judgment order appealed from." The change, which measures the time from service of notice of entry of the judgment, is for the purpose of avoiding uncertainty as to what is a judgment and reducing the possibility of lack of knowledge of the entry of the judgment or order.

The provision for added time for appeal by other parties after notice of appeal is filed by one party is new. The Federal Advisory Committee Note explains this as follows: "It not infrequently happens that a party considers himself aggrieved by the final judgment but is willing to abide by it if it is to be the final result of the action. Such a party should be protected against the possibility that another party may file a final hour appeal and thereby oblige the forbearing party to undergo the expense of an appeal without the opportunity of presenting his own grievance" to the supreme court.

The time limit for taking an appeal would not prevent the taking of an appeal at any time after the entry of the judgment or order and before service of notice of entry.

The final paragraph permits an extension of the time for taking an appeal by the district court "upon a showing of excusable neglect." In view of the ease with which an appeal may be taken—the filing of a simple notice with the clerk of court—and the unlikelihood that there will not be actual notice of the entry of the judgment or order, it would be an extraordinary case which would justify an extension. But the district court should have the authority to extend time in extraordinary cases where injustice would otherwise result. The phrase "by any party" makes it clear that the district court may extend the time allowed for filing a cross or separate appeal after an initial appeal has been filed.

NOTE TO SEPTEMBER 29, 1967, AMENDMENT

Source: None.

Since Rule 77(d), M.R.Civ.P., only requires service of notice of entry of judgment in cases where an appearance has been made, no time appears to be provided for filing notice of appeal from judgments in default cases. This amendment is designed to supply the deficiency.

The addition of the phrase, "or any political subdivision thereof," is added to make it clear that the 60-day provision applies to cities, counties, etc.

NOTE TO JUNE 16, 1986, AMENDMENT

Extensive amendments of the rule have been made, adopting in some cases language similar to Rule 4 of the Federal Rules of Appellate Procedure. Significant changes have been made by the adoption of subsections (2), (4) and (5).

COMMISSION NOTE TO 1993 AMENDMENT

The amendment makes a motion for extension of time for filing a notice of appeal applicable to both civil and criminal appeals. The previous rule was applicable to civil appeals only.

Compiler's Comments

1998 Amendment: In (b) in first sentence after "judgment" inserted reference to 46-18-116 and after "60 days" inserted "after entry of judgment appealed from"; and inserted second sentence concerning oral pronouncement of decision. Amendment effective December 1, 1998.

1997 Amendment: In (a)(1), in first clause after "appealed from", deleted "except that in cases where service of notice of entry of judgment is required by Rule 77(d) of the Montana Rules of Civil Procedure the time shall be 30 days from the service of notice of entry of judgment" and in second clause, after "judgment or order", substituted "provided, however, that in cases where service of notice of entry of judgment is required by Rule 77(d) of the Montana Rules of Civil Procedure, said 30 days or 60 days, as the case may be, shall not begin to run until service of notice of entry of judgment" for "or 60 days from the service of notice of the entry or judgment"; in (a)(2), at beginning, deleted "Except as provided in subsection (a)(4) of this Rule 5", after "but" deleted "prior to the time that the appeal period begins to run under subsection (a)(1) of this Rule 5, i.e.", and after "appealed from" deleted "or the service of the notice of entry of judgment as the case may be" and inserted second sentence concerning date of filing of appeal filed before notice of entry of judgment; in (a)(4)(iv) substituted second sentence concerning no requirement for filing for "A notice of appeal filed before the disposition of any of the above motions shall have no effect" and substituted third sentence concerning filing date before disposition of motions for "A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above, or if applicable, from the date of the expiration of the 60-day period established in Rule 59(d), Montana Rules of Civil Procedure. No additional fees shall be required for such filing"; and made minor changes in style. Amendment effective October 1, 1997.

1995 Amendment: In subsection (a)(4), in two places, increased time for appeal from 45 days to 60 days. Amendment effective December 19, 1995.

1993 Amendment: Substituted (c) concerning extension of time for filing a notice of appeal for former (5) that read: "The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 5(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later."

1986 Amendment: The Supreme Court Order of June 16, 1986, substituted present language (for text see 1987 MCA) for former Rule 5 that read: "The time within which an appeal from a judgment or an order must be taken shall be 30 days from the entry thereof, except that in cases where service of notice of entry of judgment is required by Rule 77(d) of the Montana Rules of Civil Procedure the time shall be 30 days from the service of notice of entry of judgment, but if the state of Montana, or any political subdivision thereof, or an officer or agency thereof is a party the notice of appeal shall be filed within 60 days from the entry of the judgment or order or 60 days from the service of notice of the entry of judgment. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 7 days of the date on which the first notice of appeal was filed, or within the time otherwise provided by this rule, whichever period last expires.

The running of the time for filing a notice of appeal is suspended as to all parties by a timely motion filed in the district court by any party pursuant to the Montana Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this rule commences to run and is to be computed from mailing by the clerk of notice of the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59.

Upon showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the original time prescribed by this rule."

Amendments: The amendment of September 29, 1967, in the first sentence of the first paragraph, inserted "a judgment or" before "an order"; substituted "except that . . . the time" for "and the time within which an appeal from a judgment must be taken"; deleted "as provided in Rule 77(d) of the Montana Rules of Civil Procedure" after "entry of judgment"; and inserted "or any political subdivision thereof" after "state of Montana".

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CASES DECIDED UNDER RULES

GENERAL

No Jurisdiction to Hear Criminal Appeal Filed More Than Sixty Days After Judgment — Deadline Not Extended by Mailing Extension Rule: Dill filed notice of an appeal of a judgment in a criminal action 63 days after judgment was entered. Rule 5(b), M.R.App.P., requires filing of an appeal within 60 days after entry of judgment. Dill contended that the deadline should be extended because Rule 21(e), M.R.App.P., allows an additional 3 days when service of a paper is made by mail. The District Court order was mailed to Dill, so Dill argued that the deadline was actually 63 days. The Supreme Court noted that under Mont. Fair Housing, Inc. v. Barnes, 2003 MT 16, 314 M 73, 68 P3d 653 (2003), Rule 21(e) applies only to situations involving response-type pleadings, but when a deadline is required by court rule to be filed within a specified time, Rule 21(e) does not apply. Dill's criminal appeal was filed more than 60 days after judgment was entered, the Supreme Court lacked jurisdiction to hear it, so the appeal was dismissed. Billings v. Dill, 2005 MT 134, 327 M 262, 113 P3d 302 (2005).

No Showing of Damages or That Client Would Have Prevailed on Lost Appeal of Marital Dissolution Case — Failure of Legal Malpractice Claim: Richards brought a malpractice claim against an attorney who negligently failed to appeal Richards' marriage dissolution proceeding prior to the deadline for appeal. The District Court dismissed the claim, ruling that the court, rather than a jury, should decide the consequences of the attorney's failure to file the appeal and that the lost appeal would not have succeeded. Richards appealed, but the Supreme Court affirmed. Even though the attorney admitted malpractice by allowing the claim to expire, the attorney contended that no damages occurred. When a malpractice claim changes to the question of whether an attorney perfected an appeal, the analysis shifts from one of fact to one of law, which is properly considered by the court rather than a jury. The question of the probable outcome of a lost appeal also presents a question of law for the trial court to decide based on the special expertise required to analyze the relevant law and rules of appellate procedure, and the review is limited to the transcript and record of the underlying action and arguments presented by counsel. Here, there was substantial credible evidence regarding primary parenting time, valuation of the marital estate, and child support payments showing that Richards' lost appeal would not have resulted in a successful or favorable outcome. Further, one element of a legal malpractice claim requires a showing that the attorney's conduct proximately caused damages suffered by the claimant. Because Richards failed to show that the lost appeal would have been successful, he also failed to show that the attorney's breach caused any damages, so the malpractice claim failed. Richards v. Knuchel, 2005 MT 133, 327 M 249, 115 P3d 189 (2005).

Motion for Posttrial Relief Untimely — Posttrial Motion to Correct Clerical Mistakes Proper — Motion for Posttrial Relief Not Substitute for Appeal: Following notice of entry of judgment in a marriage dissolution trial, the husband had 10 days to file a motion under Rule 59, M.R.Civ.P. (Title 25, ch. 20), but missed the deadline by 2 days, so the motion was properly ruled untimely. The husband had 30 days to file a notice of appeal, but the untimely Rule 59 motion did not toll the time for appeal, and that time also expired. The decree became final, subject only to the husband's motion for relief under the various provisions of Rule 60, M.R.Civ.P. (Title 25, ch. 20). The District Court erred in not applying Rule 60(a), M.R.Civ.P., to correct clerical mistakes in the findings of facts. However, a Rule 60 motion may not be used as a substitute for appeal, so the husband's Rule 60 motion essentially seeking to set aside the decree based on insufficient evidence was properly denied. In re Marriage of Schoenthal, 2005 MT 24, 326 M 15, 106 P3d 1162 (2005).

Failure of Counsel to Properly Withdraw or Preserve Direct Appeal — Denial of Postconviction Petition Erroneous: Adams filed a pro se petition for postconviction relief, alleging ineffective

assistance of counsel because his original court-appointed attorney failed to move to dismiss for lack of a speedy trial and because his subsequently appointed trial counsel offered a lesser included instruction on aggravated assault to the jury and failed to appeal to the Supreme Court following Adams' conviction, despite Adams' request to do so. The petition was denied on grounds that Adams failed to file an appeal within 60 days of judgment as required by this rule, and Adams appealed. The Supreme Court reversed. Under 46-8-103, appointed counsel is required to continue representation until final judgment, including appellate review, unless counsel is relieved by court order. Adams' counsel failed to comply with the requirements of 46-8-103 and effect a valid withdrawal, so the right to appeal was not preserved. When a defendant would have appealed but for counsel's deficient performance, the error is prejudicial. Thus, denial of Adams' petition for postconviction relief on procedural grounds was reversible error, and on remand, Adams was allowed to raise the issues that would have been raised on direct appeal but for counsel's abandonment of the appeal, as well as the issues raised in the petition for postconviction relief that were not previously raised. St. v. Adams, 2002 MT 202, 311 M 202, 54 P3d 50 (2002), following In re Petition of Hans, 1998 MT 7, 288 M 168, 958 P2d 1175 (1998), and St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Civil Procedure Rule That Notice of Entry of Order Be Served by Prevailing Party Inapplicable in Postconviction Relief Proceeding: In a case of first impression, the Supreme Court addressed whether the notice of entry of judgment requirement under Rule 77(d), M.R.Civ.P. (Title 25, ch. 20), applied to postconviction relief proceedings governed by Title 46, ch. 21. The court previously held in cases unrelated to postconviction proceedings that only when the notice is served does a prospective appellant's time for filing a notice of appeal begin to run. (See In re Marriage of Robertson, 237 M 406, 773 P2d 1213 (1989), Buckley v. Wordal, 262 M 306, 865 P2d 240, 50 St. Rep. 1570 (1993), and Troglia v. Bartoletti, 266 M 240, 879 P2d 1169, 51 St. Rep. 783 (1994).) Here, Garner was convicted of forgery and felony theft and contended that because the state was the "prevailing party", notice should have been provided to him of the entry of the District Court's order and that because notice was not provided, the 60 days within which to appeal could not have expired because it never commenced to run. However, the Montana Rules of Civil Procedure apply in a postconviction relief proceeding only when they are applicable and not inconsistent with postconviction statutes. Section 46-21-203 specifically requires that an appeal in postconviction proceedings be taken within 60 days of the entry of the order, which is inconsistent with the general notice rule in Rule 77(d). The Supreme Court applied the particular provision over the general provision and concluded that Rule 77(d) has no application in postconviction relief proceedings, so the 60-day filing deadline in 46-21-203 commences in all instances and without more upon entry of the court's order granting or denying postconviction relief. St. v. Garner, 1999 MT 295, 297 M 89, 990 P2d 175, 56 St. Rep. 1180 (1999).

Authority to Defer Imposition of Sentence When Financial Condition Imposed — Failure to File Timely Appeal: Ingersoll filed for postconviction relief, arguing that the District Court lacked statutory authority to either impose consecutive deferred sentences or to defer imposition of his sentence in excess of 3 years. The Supreme Court found that the District Court had statutory authority at the time of sentencing under 46-18-201 to impose a deferred sentence for up to 6 years for Ingersoll's felony conviction for criminal mischief. Therefore, pursuant to subsection (b) of this rule, Ingersoll had 60 days after sentencing to appeal the court's authority to impose the sentence. Failure to file a timely appeal rendered Ingersoll's claim procedurally barred in a postconviction hearing. Ingersoll v. St., 1999 MT 215, 295 M 520, 986 P2d 403, 56 St. Rep. 843 (1999).

"Motion for Reconsideration" — Procedural Trap for Unwary and Grave Risk to Meritorious Appeal — Criteria to Equate With Motion to Alter or Amend: Stephen Nelson filed a motion for reconsideration of the District Court's grant of the defendant's motion for summary judgment based on a later-decided Third Circuit Court of Appeals case. Stephen contended that the motion was filed to allow the District Court to alter or amend its judgment to correct its mistake of law. The motion for reconsideration was denied, and Stephen filed a notice of appeal more than 60 days after the notice of entry of judgment but within 60 days from the denial of the motion for reconsideration. The defendant moved for dismissal of the appeal, contending that it had not been timely filed under this rule, on the grounds that a motion for reconsideration is not a motion to alter or amend under Rule 59(g), M.R.Civ.P. (Title 25, ch. 20). The Supreme Court, warning against the use of motions for reconsideration, established criteria under which to evaluate the motions. When a motion for reconsideration substantively addresses one of the following areas, the court is more likely to conclude that the motion is actually a motion to alter or amend under Rule 59(g), M.R.Civ.P.: (1) to correct manifest errors of law or fact upon which the judgment was based; (2) to raise newly discovered or previously unavailable evidence; (3) to prevent manifest

injustice resulting from, among other things, serious misconduct of counsel; or (4) to bring to the court's attention an intervening change in controlling law. The Supreme Court denied the motion to dismiss. Nelson v. Driscoll, 285 M 355, 948 P2d 256, 54 St. Rep. 1190 (1997), followed in Lee v. USAA Cas. Ins. Co., 2001 MT 59, 304 M 356, 22 P3d 631 (2001).

Notice or Motion Not Required to Correct Clerical Error in Order — Reentry of Judgment Not Required: The District Court entered judgment terminating parental rights but misspelled the father's first name. One week later, the court issued an amended order correcting the clerical error but made no other changes. The state did not notify appellant of entry of the amended judgment. Seventeen months after the termination of parental rights, appellant served notice of the amended order on the state and filed a notice of appeal from the amended order based on this rule, contending that the state never entered the amended judgment and that therefore the 60-day appeal period did not run until the amended judgment was entered by the appellant's attorney. Under Rule 60(a), M.R.Civ.P. (Title 25, ch. 20), the District Court has inherent power at any time to correct clerical errors in its own judgments in order to ensure that the record speaks the truth and reflects the court's decision. A notice or motion is not required to rectify a clerical error, nor must the order that makes the correction be denominated a nunc pro tunc order. An error may also be corrected by the issuance of a new order that does not contain the clerical error and that entirely replaces the old order. In the present case, appellant was properly notified when judgment was entered and the original order was handed down. The state was not required to enter judgment again after the amended new order was issued or to notify appellant of the entry of the amended order in order to keep the appeal clock running. Because appellant failed to file a notice of appeal within 60 days of the entry of judgment, the appeal was dismissed as untimely. In re N.K.O. & Z.J.M., 277 M 122, 919 P2d 394, 53 St. Rep. 570 (1996), distinguishing El-Ce Storms Trust v. Svetahor, 223 M 113, 724 P2d 704 (1986), Kenny v. Koch, 227 M 155, 737 P2d 491 (1987), Hankinson v. Picotte, 235 M 143, 766 P2d 242 (1988), and In re Marriage of Robertson, 237 M 406, 773 P2d 1213 (1989).

Failure of State to Appeal — County Attorney Representation of State Position as Sufficient Opportunity for Hearing: Despite a District Court order in 1993, Sheppard was not admitted to phase II of the sexual offender program at the state prison. In 1995, Sheppard moved the District Court to order his enrollment in the program, serving the motion on the County Attorney who had prosecuted him for the underlying offense, but not on the state attorney for the Department of Corrections. The County Attorney appeared at the hearing on the motion and, pursuant to 7-4-2716, advanced the state's position that Sheppard was not eligible for the treatment program because he failed to accept responsibility for the crime. The court affirmed its 1993 order and ordered that Sheppard be allowed into the program. The state did not timely appeal the decision and thus was bound by the 1993 order. The representation by the County Attorney of the state's position at the hearing, coupled with the state's opportunity to address the issue at prior hearings, was adequate consideration. St. v. Sheppard, 277 M 76, 919 P2d 1057, 53 St. Rep. 548 (1996).

No Final Judgment When Conditions in Decree Anticipate Subsequent Modification — Appeal of Decree Not Limited: An original dissolution decree was made conditional on whether wife exercised her option to purchase the family business, leaving the rights and obligations of the parties with regard to maintenance, child support, and other matters uncertain until the purchase option period expired. After several court orders rendered her efforts to exercise the option unsuccessful, wife appealed 170 days after the original decree was entered, which husband contended was barred by the 30-day appeal limit in this rule. While noting that under 40-4-108 a decree of dissolution is final when entered, the Supreme Court nevertheless adopted the holding in Heater v. Boston & Mont. Corp., 84 M 500, 277 P 11 (1929), that the finality of a judgment depends to a great extent on its apparent purpose and whether it contains provisions for subsequent modification. Because of the conditional language in the original decree, it could not be considered final until the option period expired, and orders issued prior to that time were interlocutory in effect, absent a final determination of the parties' rights. Wife's appeal filed 6 days after expiration of the option period was therefore timely and subject to appellate review. In re Marriage of Griffin, 260 M 124, 860 P2d 78, 50 St. Rep. 945 (1993), followed in Kirchner v. W. Mont. Regional Community Mental Health Center, Inc., River House Program, 261 M 227, 861 P2d 927, 50 St. Rep. 1299 (1993).

Ineffective Appeal After Motion to Alter or Amend Judgment — Failure to Cure Results in Dismissal: On April 30, Grounds filed a motion to alter or amend a judgment partially granting her former husband's (Coward's) posttrial motions. On May 17, before Grounds' motion was ruled upon, Coward filed a notice of appeal from the disposition of his pretrial motions. The Supreme Court held that under Rule 6(a), M.R.Civ.P. (Title 25, ch. 20), the day the order was

issued on his motions is not to be counted and that because the time for serving a motion to alter or amend judgment is less than the 11 days referred to in Rule 6(a), intervening Saturdays and Sundays are not counted. Therefore, the District Court could still rule on Grounds' motion. Under subsection (a)(4) of this rule, Coward filed a premature notice of appeal and should have waited until Grounds' motion was disposed of or considered denied. Failure of Coward to file a new notice of appeal after Grounds' motion was considered denied means that his own appeal must be dismissed. In re Marriage of Grounds & Coward, 256 M 397, 846 P2d 1034, 50 St. Rep. 114 (1993).

Retention of District Court Jurisdiction After Filing of Appeal: A motion filed under Rule 59(g), M.R.Civ.P. (Title 25, ch. 20), must be determined by the District Court within 45 days. If the court fails to rule within that time, the motion is considered denied. Subsection (a)(1) of this rule requires the notice of appeal in civil cases to be filed within 30 days of judgment. However, if a motion is timely filed under Rule 59(g), M.R.Civ.P., the time for appeal runs from the entry of an order granting or denying the motion or, if applicable, from the time the motion is considered denied at the end of the 45-day period. If a notice of appeal is filed before the motion is disposed of, the notice of appeal has no effect. Semenza v. Hartelius, 248 M 294, 811 P2d 1262, 48 St. Rep. 356 (1991).

Prevailing Party — Proper Notice of Entry of Judgment: The prevailing party in an action has the duty of serving notice of entry of judgment, together with a copy of the judgment or a description of the nature and amount of relief and damages granted, on all parties who have made an appearance. If proper notice of entry of judgment is never served, the time for filing a notice of appeal never begins to run. El-Ce Storms Trust v. Svetahor, 223 M 113, 724 P2d 704, 43 St. Rep. 1575 (1986). See also Willoughby v. Loomis, 264 M 44, 869 P2d 271, 51 St. Rep. 138 (1994).

Bond Not Jurisdictional: Respondent contended an appeal to the Supreme Court should be dismissed for failure to file an undertaking for costs on appeal as stated in Rule 6(a), M.R.App.P. Respondent argued that posting of bond is jurisdictional. The court noted that while under section 9733, R.C.M. 1935, posting a bond for costs on appeal was jurisdictional, that is no longer the case. The only step necessary to perfect an appeal is filing a notice of appeal within the time allowed by Rule 5, M.R.App.P. While the filing of a bond for costs may be required, failure to file the bond does not affect the validity of the appeal. Failure to effect timely filing of the bond should not, without more, result in dismissal. There were no other circumstances mandating dismissal in this case. Westmont Tractor Co. v. Leighty, 222 M 336, 722 P2d 617, 43 St. Rep. 1309 (1986).

Permissible to Provide Reasons for Certification After Appeal Filed: The failure of the District Court to provide its reasons for a proper certification until after the notice of appeal was filed does not render the certification defective as long as the guidelines of Rule 54(b), M.R.Civ.P., have been complied with. Klaudt v. Flink, 202 M 247, 658 P2d 1065, 40 St. Rep. 64 (1983), overruling Churchhill v. Holly Sugar Corp., 192 M 533, 629 P2d 758, 38 St. Rep. 860 (1981).

Conditional Notice of Appeal: Appellant filed a conditional notice of appeal conditioned upon the Supreme Court finding that the judgment being appealed was a final judgment. Because the notice was conditioned upon an action to be taken at an undetermined time in the future, it was totally ineffective. Ring v. Hoselton, 197 M 414, 643 P2d 1165, 39 St. Rep. 687 (1982).

Dissolution of Marriage — Appeal From Original Judgment or Amending Order to Preserve Issues of Both: Respondent husband raised the issue of the scope of the wife's notice of appeal from the District Court's order amending the decree made on dissolution of the marriage. The husband argued that the appeal should be limited solely to issues arising from the amending order. The Supreme Court said that the contention ignored the interdependent nature of the amending order and the original decree. Finality of the original judgment had to await a determination of the lower court regarding motions to amend or alter. The intertwining of an amending order and an original judgment necessitated review of all issues contained in both, and thus an appeal from either incorporated all issues of both for review. This was in accord with the idea that technical defects of procedure should not bar a party from access to the court. This was distinguished from the situation in which a party appealed from one order in a series or separate and distinct orders or from one part of a divisible judgment. An amending order and an original judgment could not be viewed as separate and distinct or divisible. The notice of appeal was therefore sufficient to preserve all issues for review. Tefft v. Tefft, 192 M 456, 628 P2d 1094, 38 St. Rep. 837 (1981), distinguishing St. v. Todd, 117 M 80, 158 P2d 299 (1945) and Sperling v. Calfee, 7 M 514, 19 P 204 (1888), in accord with J.C. Penney and Woolworth v. Employment Sec. Div., 192 M 289, 627 P2d 851, 38 St. Rep. 694 (1981).

Effect of Failure to Send Notice of Entry of Order in Formal Probate Proceeding: Under 72-3-318, the court may vacate orders in a formal probate proceeding within the time allowed for appeal. Since the clerk failed to send notice of entry of an order as required by Rule 77(d), M.R.Civ.P., the time allowed for appeal had not begun to run and the party was still entitled to request the court to modify or vacate its order. Estate of Holmes, 183 M 290, 599 P2d 344 (1979).

Sole Jurisdiction of Supreme Court to Determine Propriety of Appeal: Court was without jurisdiction to dismiss an appeal because Supreme Court had sole jurisdiction to determine propriety of appeal. A change of mind is not "excusable neglect". McCormick v. McCormick, 168 M 136, 541 P2d 765 (1975).

Commencement of Sixty-Day Period — Letter of Clerk of No Effect: Sixty-day allotted period in which to file an appeal commenced to run the day after motion for new trial was considered denied under the self-executing provision of Rule 59(d) which provides that a motion for a new trial which does not contain a notice of hearing and upon which no hearing is held is automatically denied 10 days after service; District Court Clerk's letter mailed 22 days after service of notice stating that the motion for new trial had been denied had no effect on the commencement of the 60-day period in which appellants had to file their appeal. Leitheiser v. Mont. St. Prison, 161 M 343, 505 P2d 1203 (1973).

Amending Notice of Appeal: Amendment of a notice of appeal to the Supreme Court after the time period for notice has run is not possible. Payne v. Mtn. States Tel. & Tel. Co., 142 M 406, 385 P2d 100 (1963).

EXCUSABLE NEGLECT

Denial of Motion for Extension of Time Allowed for Filing Notice of Appeal as Appealable Order — Applicability of Forty-Five-Day Rule: The denial of a motion made pursuant to subsection (a)(5) (now (c)) of this rule for an extension of the time allowed for filing a notice of appeal is an appealable order. However, the District Court did not abuse its discretion in denying plaintiff's extension request because the 45-day limit for filing a motion for relief from summary judgment, as set out in Rules 59(d) and 60(c), M.R.Civ.P. (Title 25, ch. 20), had expired. It was the responsibility of plaintiff's counsel to be aware of the 45-day rule, and lack of knowledge of a clear rule of civil procedure is not an excuse for relief from the rules. Sadowsky v. Glendive, 259 M 419, 856 P2d 556, 50 St. Rep. 860 (1993), citing Shields v. Pirkle Refrigerated Freightlines, 181 M 37, 591 P2d 1120 (1979), and distinguishing Zell v. Zell, 172 M 496, 565 P2d 311 (1977).

Counsel's Busy Schedule: Counsel's busy schedule is not a basis for a finding of excusable neglect. In re Marriage of Bahm, 225 M 331, 732 P2d 846, 44 St. Rep. 279 (1987).

Excusable Neglect — Appeal Timely Filed: On September 11, 1984, defendant filed a motion to set aside a default judgment. Since no hearing was held within 10 days as required by Rule 59(d), M.R.Civ.P., the motion was considered denied on September 21, 1984. Defendant filed a notice of appeal on October 26, 1984, 35 days after his motion was considered denied. Plaintiff contended the notice of appeal was not timely filed. However, the Supreme Court pointed out that upon a showing of excusable neglect, the District Court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the original time prescribed by this Rule. Defendant was granted an extension on October 26, 1984, upon a showing of excusable neglect. The notice of appeal was filed within the 30-day extension of time authorized by this Rule; thus, it was timely filed. Milbank Mut. Ins. Co. v. Eagleman, 218 M 58, 705 P2d 1117, 42 St. Rep. 1393 (1985).

Motion to Vacate Considered Denied — Time for Filing Notice of Appeal: A motion to vacate judgment was served on May 22, 1981, was set for hearing and heard on June 30, 1981, and was denied on July 28, 1981. The defendant filed a notice of appeal on August 3, 1981. Because Rule 59(d), M.R.Civ.P., requires a motion to vacate to be heard within 10 days after its service, it was considered denied on June 1, 1981. The notice of appeal, therefore, was not timely because it was not filed within 30 days of denial of the motion to vacate. Lerum v. Logue, 198 M 194, 645 P2d 418, 39 St. Rep. 873 (1982).

Excusable Neglect — Motion for Extension Properly Denied: The reasoning of Winchell v. Lortscher, 377 P2d 247 (8th Cir. 1967), applies to the present case. Plaintiff's attorney had notice shortly after the judgment was entered. Plaintiff actually knew that the case had been decided against him. He knew that he had 30 days from the entry of judgment within which to file an appeal, and yet he waited approximately 8 weeks to contact his attorney. Given these factors, plus the fact that the attorney was served with the required notice, the District Court did not abuse its discretion in finding there was no excusable neglect. Neuringer v. Wortman, 186 M 298, 607 P2d 543 (1980).

Change of Mind: In determining what constitutes "excusable neglect", court held affidavit which reflected appellant decided not to appeal and then, after time for filing a notice of appeal lapsed, decided to appeal; this change of mind is not an extraordinary case for which an extension of time to file an appeal is allowed. McCormick v. McCormick, 168 M 136, 541 P2d 765 (1975), followed in In re Marriage of Bahm, 225 M 331, 732 P2d 846, 44 St. Rep. 279 (1987).

TIMELY FILING OF NOTICE

Appeal of Appointment of Personal Representative Not Timely: The District Court appointed a son as personal representative of his mother's estate and ordered that letters of administration be issued to him, and his sister appealed the appointment. Pursuant to In re Estate of Peterson, 264 M 104, 874 P2d 1230 (1994), the Supreme Court reviewed the appointment to determine whether the District Court correctly interpreted the law. Under Rule 1, M.R.App.P., an order granting letters of administration is appealable, but this rule provides that an aggrieved party has 30 days from the date of entry of an order to file a notice of appeal. By the time that the sister appealed, her brother had been personal representative of the estate for 14 months, so the appeal was not timely. In re Estate of McMurchie, 2004 MT 98, 321 M 21, 89 P3d 18 (2004).

Conversion of Probate Proceeding From Informal to Formal Proceeding and Effect of Failure to Give Proper Notices: When the personal representative of an estate in informal proceedings petitioned for judicial approval of his final account and for the settlement and distribution of the estate, the proceeding was converted into a formal proceeding for those purposes. The Montana Rules of Civil Procedure apply to formal proceedings. The bank, which was a creditor of the estate and filed a claim against the estate, was entitled to notice of the hearing on the petition and entitled to an opportunity to appear and contest. Because the notice was not given, the court's decree was void and reversed as to the bank. The bank was also entitled to notice of the entry of the formal estate decree, and because that notice was not given, the 30-day time period for the bank to appeal did not run and the bank's appeal, filed after that period, was timely. In re Estate of Spencer, 2002 MT 304, 313 M 40, 59 P3d 1160 (2002).

Failure of Counsel to Preserve Defendant's Request for Appeal Prejudicial Per Se — Out-of-Time Appeal Appropriate Remedy: Despite a request to do so, Tweed's counsel failed to file a timely appeal of Tweed's sexual abuse conviction. Counsel did not intentionally abandon the appeal; rather, the failure was unintentional and resulted from a filing oversight and miscommunication. Nevertheless, the error was prejudicial per se and constituted ineffective assistance of counsel in violation of Tweed's constitutional rights. The failure to timely appeal was excusable, and because postconviction proceedings were considered an inadequate remedy, the Supreme Court decided that an out-of-time appeal was the appropriate remedy and, being in possession of a sufficient record, proceeded to consider the merits of the appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002), following St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Out-of-Time Appeal in Criminal Matters — Exclusive Jurisdiction With Supreme Court: Under 46-20-101, the only method for review in criminal cases is by notice of appeal. Time limits for filing an appeal are mandatory and jurisdictional. If a defendant takes no action to perfect an appeal within 90 days of judgment, the District Court loses its jurisdiction and the appeal is out-of-time. However, an out-of-time appeal is a remedy that may be available to a criminal defendant who, through no fault of the defendant, misses a deadline for filing an appeal. Although Rule 21(b), M.R.App.P., precludes an out-of-time appeal in a civil case, the Supreme Court is not precluded from addressing a motion for an out-of-time appeal in a criminal case. Further, a District Court lacks jurisdiction to grant an out-of-time appeal. The Supreme Court has exclusive jurisdiction to grant a motion for an out-of-time appeal, and the motion is considered an original proceeding subject to the provisions of Rule 17, M.R.App.P. Upon a showing that the failure to timely notice a criminal appeal was excusable under the circumstances, the Supreme Court may conclude that an out-of-time appeal is the appropriate remedy pursuant to Rule 21(b), M.R.App.P. In that event, the matter will be remanded to the District Court with instructions to vacate and reenter judgment to afford the defendant a second opportunity to act within the statutory timeframes for filing notice of appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

Time Bar on Writ of Certiorari to Review Contempt Proceedings: In a case of first impression, the Supreme Court was asked to establish a timeframe within which a petition for review of a contempt order must be filed. The issue was whether the time limitation should come from Title 25, which includes the Montana Rules of Civil Procedure and the Montana Rules of Appellate Procedure, or from Title 27, which prescribes the various statutes of limitation for the commencement of actions. The court noted that there is no appeal, as such, from an order of

contempt in a civil proceeding and that the exclusive method of review of civil contempt orders (with certain exceptions) is through a writ of certiorari or writ of review. That review is generally limited to jurisdictional questions and whether evidence supports the contempt. Therefore, the issue of timeliness for filing a petition for a writ of certiorari or review is not a statute of limitations issue, and to mechanically characterize those writs for the review of contempt proceedings as original proceedings governed by the 5-year statute of limitations in 27-2-231 would be to deny the basic nature of appellate review. Further, petitions for writs of certiorari to review contempt proceedings are fundamentally different from other original proceedings commenced in the Supreme Court and from petitions for writs of supervisory control, which do not so much involve appellate review of and a decision on the underlying proceedings as they involve the court dealing with discreet questions of law during the pendency of the underlying proceedings. Because the timeframe in which to file petitions for writs of certiorari to review contempt proceedings is a procedural issue analogous to the procedure for filing a notice of appeal, the Supreme Court held that Rule 72, M.R.Civ.P. (Title 25, ch. 20), Rule 1, M.R.App.P. (Title 25, ch. 21), Rule 17, M.R.App.P., and 27-25-103 require that the timeframe for those petitions be determined by the Montana Rules of Appellate Procedure. Specifically, pursuant to this rule, a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding. This may not be construed to limit the Supreme Court's power to grant writs of supervisory control or to consider applications for other types of original proceedings. The Supreme Court chose not to establish a precedent that allows contempt proceedings to be delayed until the underlying cause is resolved. Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), overruling Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102.

Petition for Postconviction Relief Both Procedurally and Time Barred: Wells pleaded guilty to felony assault, and the District Court entered its written judgment and sentence on January 2, 1998. Wells did not appeal, and the time for filing an appeal expired 60 days later, on March 3, 1998, which became the date of final conviction. In order to come within the 1-year period for a petition for postconviction relief, Wells needed to file by March 3, 1999, but the petition was not filed until December 22, 1999, when Wells asserted a double jeopardy claim for weapons enhancement based on St. v. Guillaume, 1999 MT 29, 293 M 224, 975 P2d 312 (1999). The District Court dismissed the petition as untimely. Wells argued on appeal that the 1-year limitation is not a jurisdictional limitation, but rather a statute of limitations subject to equitable tolling, and contended that a tolling should be applied to the time period that Wells was incarcerated in New Mexico without adequate legal assistance. The Supreme Court recalled the holding in St. v. Rosales, 2000 MT 89, 299 M 226, 999 P2d 313 (2000), when it was held that the postconviction statute of limitations is indeed a jurisdictional limit on litigation to be waived only if there is a clear miscarriage of justice and defendant alleges newly discovered evidence that defendant did not commit the offense. Wells presented no new evidence of innocence. Further, Wells could have raised the Guillaume claim on direct appeal, but did not. Wells' petition was thus both procedurally and time-barred. St. v. Wells, 2001 MT 55, 304 M 329, 21 P3d 610 (2001), overruled in St. v. Whitehorn, 2002 MT 54, 309 M 63, 43 P3d 922 (2002), to the extent that Wells was barred from raising a double jeopardy claim in a petition for postconviction relief pursuant to 46-21-105 for failing to raise the issue on direct appeal.

Lack of Objection to Expert Testimony on Hedonic Damages — Testimony Allowed: In order to preserve an objection to the admission of evidence for purposes of appeal, the objecting party must make a timely objection and state specific grounds for the objection. To be timely, an objection must be made as soon as the grounds for the objection become apparent. Here, defendant became aware at least 1 year before trial that plaintiff intended to introduce expert testimony regarding plaintiff's hedonic damages for loss of enjoyment of life, but failed to file a motion in limine at that time seeking to have the evidence excluded. Defendant had another opportunity to object to introduction of the evidence when the District Court issued its pretrial order listing witnesses and exhibits to be used at trial, but defendant failed to object until the second day of trial. Thus, the court did not abuse its discretion in allowing the expert testimony because of the lack of a timely and specific objection or in denying defendant's motion for a new trial on grounds that the admission of the evidence resulted in an unfair trial and excessive damages. Hunt v. K-Mart Corp., 1999 MT 125, 294 M 444, 981 P2d 275, 56 St. Rep. 503 (1999), following Kizer v. Semitool, Inc., 251 M 199, 824 P2d 229, 48 St. Rep. 1115 (1991).

No Distinction Between Civil and Criminal Appellants With Regard to Filing of Timely Notice of Appeal: Roullier neglected to file notice of appeal of his criminal case in the District Court within the 60-day period required by subsection (b) of this rule. The state cited the lack in subsection (b) of a provision, similar to that for civil cases in subsection (a) of this rule, that permits notice of an appeal mistakenly filed in the Supreme Court to be considered filed in the District Court on the date that it was filed in the Supreme Court and contended therefore that timely filing in the Supreme Court was of no significance and that the Supreme Court lacked jurisdiction to consider the merits of Roullier's mistakenly filed appeal. Citing an interpretation of identical Rule 4, Federal Rules of Appellate Procedure, in Brannan v. U.S., 993 F2d 709 (9th Cir. 1993), the Supreme Court found no rational basis for distinguishing between civil and criminal appellants in this procedural regard. Thus, when a criminal appellant has mistakenly filed a notice in the Supreme Court but has done so within the 60-day period established in this rule and has complied with the rules in substantive respects, the criminal appellant will be given the same opportunity as the civil appellant to have the appeal determined on its merits. St. v. Roullier, 1999 MT 37, 293 M 304, 977 P2d 970, 56 St. Rep. 157 (1999).

"Motion for Reconsideration" — Procedural Trap for Unwary and Grave Risk to Meritorious Appeal — Criteria to Equate With Motion to Alter or Amend: Stephen Nelson filed a motion for reconsideration of the District Court's grant of the defendant's motion for summary judgment based on a later-decided Third Circuit Court of Appeals case. Stephen contended that the motion was filed to allow the District Court to alter or amend its judgment to correct its mistake of law. The motion for reconsideration was denied, and Stephen filed a notice of appeal more than 60 days after the notice of entry of judgment but within 60 days from the denial of the motion for reconsideration. The defendant moved for dismissal of the appeal, contending that it had not been timely filed under this rule, on the grounds that a motion for reconsideration is not a motion to alter or amend under Rule 59(g), M.R.Civ.P. (Title 25, ch. 20). The Supreme Court, warning against the use of motions for reconsideration, established criteria under which to evaluate the motions. When a motion for reconsideration substantively addresses one of the following areas, the court is more likely to conclude that the motion is actually a motion to alter or amend under Rule 59(g), M.R.Civ.P.: (1) to correct manifest errors of law or fact upon which the judgment was based; (2) to raise newly discovered or previously unavailable evidence; (3) to prevent manifest injustice resulting from, among other things, serious misconduct of counsel; or (4) to bring to the court's attention an intervening change in controlling law. The Supreme Court denied the motion to dismiss. Nelson v. Driscoll, 285 M 355, 948 P2d 256, 54 St. Rep. 1190 (1997), followed in Lee v. USAA Cas. Ins. Co., 2001 MT 59, 304 M 356, 22 P3d 631 (2001).

Criminal Case — Court Modification of Sentence — No Extension of Time to Appeal: In a 1995 suspended sentence order, the defendant was ordered to pay restitution and was restricted from entering Cascade County. When the court modified the sentence in 1997 to order additional payment of restitution, the defendant appealed the order to remain out of Cascade County. The Supreme Court held that the modification of restitution did not reimpose the conditions of the suspended sentence and did not create a new sentence from which the defendant could appeal. St. v. Richards, 285 M 322, 948 P2d 240, 54 St. Rep. 1172 (1997).

Time Limit for Filing Cross-Appeal Jurisdictional, Not Discretionary With Court: The respondent requested permission to file a cross-appeal 52 days after the first notice of appeal was filed by the appellant. The Supreme Court ruled that the time limit for filing a cross-appeal in Montana is jurisdictional and that the respondent's failure to file the cross-appeal within the 14-day limit precludes the Supreme Court from considering the motion for leave to file a cross-appeal. Joseph Eve & Co. v. Allen, 284 M 511, 945 P2d 897, 54 St. Rep. 987 (1997).

Motion for Reconsideration Held Not to Be Motion to Alter or Amend Judgment — Subsection (a)(1) of This Rule Held Applicable — Notice of Appeal Filed Before Receipt of Notice of Entry of Judgment Not Premature: In an action to enforce the Individuals With Disabilities Education Act (IDEA), the Shieldses filed a motion for reconsideration shortly after the District Court dismissed their first amended complaint. Before the District Court ruled on the motion for reconsideration, the Shieldses filed a notice of appeal. The defendants claimed that the motion for reconsideration should be treated as a motion to alter or amend judgment under Rule 59(g), M.R.Civ.P. (Title 25, ch. 20), and that because subsection (a)(4) of this rule specifies that a notice of appeal filed before the disposition of a motion to alter or amend judgment has no effect until the motion to alter or amend judgment is disposed of, the Shieldses' notice of appeal was ineffective. The Supreme Court noted that a motion for reconsideration is not one of the motions provided for or authorized by the Montana Rules of Civil Procedure. The Supreme Court reviewed the substance of the motion for reconsideration to determine whether, under Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364 (1996), the motion could be treated as a motion to

alter or amend judgment and held that the motion could not be so treated. Because the motion could not be treated as a motion to alter or amend judgment, the time for the Shieldses to file a notice of appeal was governed by subsection (a)(1) of this rule and not by subsection (a)(4). Under subsection (a)(1), the Shieldses had 30 days from the time of notice of entry of judgment under Rule 77(d), M.R.Civ.P. (Title 25, ch. 20), in which to file their notice of appeal. However, the Supreme Court also noted that there was nothing in the Montana Rules of Civil Procedure that prevented the Shieldses from filing their notice of appeal earlier than provided under Rule 77(d), and for that reason, the Supreme Court held the filing of the notice of appeal to be effective. Shields v. Helena School District No. 1, 284 M 138, 943 P2d 999, 54 St. Rep. 815 (1997).

Time for Appeal Not Tolled During Extra Time Granted to File Brief in Support of Posttrial Motion: A District Court cannot grant extensions under Rule 59(g), M.R.Civ.P. (Title 25, ch. 20), for additional briefing time and must rule on a Rule 59(g) motion to amend a judgment within the time allotted without regard to the status of the briefing. If the court does not rule on the motion within the allotted time, the motion is considered denied. The court's grant of a 16-day extension of time in which to file a brief in support of the motion did not suspend for 16 days the time allotted for appeal. Failure to file a notice of appeal within the allotted time was an absolute jurisdictional bar to Montana Supreme Court consideration of the appeal. Challinor v. Glacier Nat'l Bank, 283 M 342, 943 P2d 83, 54 St. Rep. 520 (1997).

Time for Filing Appeal When Required Service of Notice of Entry of Judgment Not Made: As the prevailing party, defendants were required by Rule 77(d), M.R.Civ.P. (Title 25, ch. 20), to serve plaintiffs with notice of entry of judgment. Under this rule, when such a notice is required, the time for filing a notice of appeal is within 30 days after service of the notice of entry of judgment. Because defendants failed to serve plaintiffs with a notice of entry of judgment, the 30 days never began to run. Therefore, notice of appeal filed on November 8, 1995, from an order filed on August 29, 1995, was timely. Haugen v. Blaine Bank of Mont., 279 M 1, 926 P2d 1364, 53 St. Rep. 1024 (1996).

Judgment as Including Sentence — Sentence Not Strictly Premised on Punishment: A defendant has 60 days under subsection (b) of this rule to appeal a final judgment. Although prior to the 1991 enactment of 46-1-202, "sentence" was interpreted as being the same as "punishment", 46-1-202 now defines a sentence as any judicial disposition of a criminal proceeding upon a plea, verdict, or finding of guilt. The judicial disposition is itself a sentence regardless of whether actual punishment is deferred or imposed immediately. This broader definition applies to deferment cases, but in double jeopardy cases, the narrower meaning premised on the punishment factor still applies. Therefore, a judgment that includes a deferred sentence is final for purposes of appeal, and an appeal filed more that 60 days after sentencing was dismissed as untimely. St. v. Rice, 275 M 81, 910 P2d 245, 53 St. Rep. 48 (1996), followed in St. v. Woods, 286 M 355, 951 P2d 981, 54 St. Rep. 1445 (1997), and Davis v. St., 2004 MT 112, 321 M 118, 88 P3d 1285 (2004).

Child Custody Dispositional Hearing — Timely Filed Notice of Appeal: In a dispositional hearing on petitions by the Department of Family Services (now Department of Public Health and Human Services) and former foster parents for permanent custody of a child, the District Court dismissed the foster parents' petition and mailed denial on August 25. The foster parents filed an objection and motion to amend the court's order, which was considered denied 45 days later after the court failed to rule on the motion. Notice of appeal, which was filed on November 26, was well within the 60-day period provided for in this rule. When a motion is made to alter or amend a judgment pursuant to Rule 52 or Rule 59, M.R.Civ.P. (Title 25, ch. 20), the time for filing a notice of appeal runs from the entry of an order in which the motion is denied or from the time that the motion is considered denied at the expiration of the 45-day period. In re J.J.G., 266 M 274, 880 P2d 808, 51 St. Rep. 793 (1994).

Calendaring Error — "Good Cause" and "Excusable Neglect" Properly Applied to Allow Late Filing: Following judgment, Dvoraks made a motion for extension of time in which to file a notice of appeal. The motion was made after expiration of the 30-day limit provided in this rule. The District Court granted Dvoraks's motion for an extension of time. Northwest appealed from the District Court's order, arguing that the District Court should not have found either good cause or excusable neglect based upon Dvoraks's counsel's failure to properly calendar the motion. Citing Pioneer Inv. Serv. Co. v. Brunswick Associates Ltd. Partnership, 507 US 380, 123 L Ed 2d 74, 113 S Ct 1489 (1993), the Supreme Court held that the District Court properly construed the rule and had more opportunity to judge the good faith of counsel and prejudice to Dvoraks. NW. Truck & Trailer Sales, Inc. v. Dvorak, 265 M 327, 877 P2d 31, 51 St. Rep. 564 (1994).

Grant of Motion for Extension of Time for Appeal as Appealable Order: The District Court granted Dvoraks's motion for an extension of time in which to file a notice of appeal. Northwest

appealed from the District Court's order. Dvoraks claimed that the order was not appealable because it was not specifically set forth in Rule 1, M.R.App.P. Citing Sadowsky v. Glendive, 259 M 419, 856 P2d 556 (1993), the Supreme Court held that an order extending the time to file a notice of appeal was a "special order made after final judgment" within the language of Rule 1, M.R.App.P. NW. Truck & Trailer Sales, Inc. v. Dvorak, 265 M 327, 877 P2d 31, 51 St. Rep. 564 (1994).

Rule 5(c) "Good Cause" Construed — Extension of Time Because of Calendaring Error Properly Allowed: The District Court granted Dvoraks's motion for an extension of time in which to file a notice of appeal. Northwest appealed from the District Court's order. Northwest argued that the District Court should have construed the "good cause" standard of subsection (c) of this rule in a manner similar to the construction of Rule 4 of the Federal Rules of Appellate Procedure given in Oreg. v. Champion Int'l Corp., 680 F2d 1300 (9th Cir. 1982), in which the court held that "good cause" applies only to motions made within the 30-day limit of the rule. Citing Kizer v. Semitool, Inc., 251 M 199, 824 P2d 229 (1991), the Supreme Court rejected Northwest's argument and allowed the filing of the motion for extension made after the 30-day limit. NW. Truck & Trailer Sales, Inc. v. Dvorak, 265 M 327, 877 P2d 31, 51 St. Rep. 564 (1994).

Denial of Motion to Set Aside Default as Final Judgment — Appeal Timely Filed: An order made after final judgment setting aside or refusing to vacate a default judgment is a special order that may be considered by the Supreme Court on appeal. During a hearing on a motion to set aside default, the District Court denied the motion, thus making a final determination of the parties' rights. An appeal perfected and filed within 30 days of dismissal of the motion was timely. In re Marriage of Martin, 265 M 95, 874 P2d 1219, 51 St. Rep. 443 (1994).

Interplay Between Time for Filing Notice of Appeal and Time for Filing Motion to Amend or Alter Judgment: District Courts retain jurisdiction to consider and resolve timely motions to alter or amend filed pursuant to Rule 52(b), M.R.Civ.P. (Title 25, ch. 20), or Rule 59(g), M.R.Civ.P. (Title 25, ch. 20). A notice of appeal filed under this rule prior to the expiration of the time allowed for motions to alter or amend but followed by such motions timely filed has no effect. Shull v. First Interstate Bank of Great Falls, 262 M 355, 864 P2d 1268, 50 St. Rep. 1594 (1993).

Denial of Motion for Extension of Time Allowed for Filing Notice of Appeal as Appealable Order — Applicability of Forty-Five-Day Rule: The denial of a motion made pursuant to subsection (a)(5) (now (c)) of this rule for an extension of the time allowed for filing a notice of appeal is an appealable order. However, the District Court did not abuse its discretion in denying plaintiff's extension request because the 45-day limit for filing a motion for relief from summary judgment, as set out in Rules 59(d) and 60(c), M.R.Civ.P. (Title 25, ch. 20), had expired. It was the responsibility of plaintiff's counsel to be aware of the 45-day rule, and lack of knowledge of a clear rule of civil procedure is not an excuse for relief from the rules. Sadowsky v. Glendive, 259 M 419, 856 P2d 556, 50 St. Rep. 860 (1993), citing Shields v. Pirkle Refrigerated Freightlines, 181 M 37, 591 P2d 1120 (1979), and distinguishing Zell v. Zell, 172 M 496, 565 P2d 311 (1977).

Failure to Perfect Appeal Within Time Limits as Precluding Jurisdiction: Failure to perfect an appeal within the time limits provided by law prevents the Supreme Court from acquiring jurisdiction to entertain the appeal. First Sec. Bank of Havre v. Harmon, 255 M 168, 841 P2d 521, 49 St. Rep. 955 (1992), followed in In re Marriage of Yeanuzzi, 2001 MT 171, 306 M 163, 30 P3d 1095 (2001). See also St. v. Shockley, 2001 MT 180, 306 M 196, 31 P3d 350 (2001).

Extension of Time to File Notice Granted — Notice Timely Filed: After a District Court jury awarded the plaintiff employee judgment, the employer, Semitool, Inc., filed a notice of appeal. The Supreme Court held that the notice of appeal was timely filed because Semitool had filed and the District Court had granted a motion to extend the time for filing its notice. Under this rule, the time for filing the notice may be extended by the District Court if a motion to extend is filed within 30 days of expiration of the time for filing the notice and good cause is shown. It was unclear to counsel for Semitool whether counsel's posttrial motions had been denied from the bench or would be denied later in writing. The District Court found this to be good cause for extension of the time to file and granted the motion for extension. Filing within the extended time period therefore perfected the appeal. Kizer v. Semitool, Inc., 251 M 199, 824 P2d 229, 48 St. Rep. 1115 (1991).

Jurisdiction When Notice of Appeal Prematurely Filed: In order to prevent taking jurisdiction away from a District Court prior to the disposition of all matters before it, subsection (a)(4) of this rule provides that a prematurely filed notice of appeal has no effect. Therefore, a notice of appeal that is filed too early does not vest jurisdiction in the Supreme Court, but rather leaves jurisdiction in the District Court. Plains & Prairie Implement, Inc. v. Ag-Management & Associates, 243 M 235, 794 P2d 332, 47 St. Rep. 933 (1990).

More Than One "Prevailing Party" — Effect of Failure to Timely File Notice of Entry of Judgment — Appeal Allowed: Where the plaintiff was successful in his claim for conversion and the defendant was successful in his counterclaim for trespass, both parties were considered to have prevailed and both parties were responsible for the failure to technically comply with the filing requirements of the Rules of Civil Procedure. The defendant could not enforce technical compliance with the filing requirements of Rule 77(d), M.R.Civ.P., against the plaintiff when he had not complied with the same requirements. In this case, the time limitations for filing an appeal began to run on the date the plaintiff filed a notice of entry of judgment, 71 days after judgment on the posttrial motions. The appeal, filed on the same day, was timely filed, and the Supreme Court had jurisdiction to hear the appeal. Kenney v. Koch, 227 M 155, 737 P2d 491, 44 St. Rep. 960 (1987).

Standing of Attorney General to Appeal P.S.C. Order — P.S.C. Appeal Untimely: The Montana Power Company (M.P.C.) applied to the Public Service Commission (P.S.C.) for a rate increase of over $96.3 million. The P.S.C. granted only $4.1 million and denied in toto M.P.C.'s request to recover costs associated with Colstrip Unit 3. The M.P.C. appealed to District Court for review under 2-4-701. The judge reversed the P.S.C. order. The Attorney General filed notice of appeal. More than 60 days after the judge's order was entered, the P.S.C. also filed notice of appeal. The M.P.C. filed a motion to dismiss the appeal of the Attorney General for lack of standing and the appeal of the P.S.C. as untimely. The Supreme Court granted the motion, holding that the Attorney General had no standing to represent the state on appeal since it was not an aggrieved party or a party to the proceedings before the District Court and because, in his official capacity, the Attorney General may not appeal a decision that is within the discretion of the P.S.C. as a party to the action. The appeal of the P.S.C. was untimely, although within 7 days of the notice of appeal filed by the Attorney General. The latter appeal being invalid, the P.S.C. appeal would have to fall within the 60-day rule. Mont. Power Co. v. Dept. of Public Service Regulation, 218 M 471, 709 P2d 995, 42 St. Rep. 1750 (1985).

Notice of Denial of Motion Not Required — Appeal Period: Appellant's posttrial motion for a new trial was considered denied upon failure of the District Court to rule on it for 45 days, under Rule 59(d), M.R.Civ.P. No notice of such denial is required under Rule 5, M.R.Civ.P. The 30-day period for appeal under Rule 5, M.R.App.P., begins to run upon expiration of the 45-day period of Rule 59(d). Mortensen Constr. Co. v. Burlington N., Inc., 218 M 415, 708 P2d 1006, 42 St. Rep. 1699 (1985).

Notice Timely Filed: Under this Rule a party has 30 days to file a notice of appeal after a motion to set aside a default judgment is denied or after denial by operation of law. In the present case, the motion to set aside the default judgment was filed on September 14, 1984, under Rules 55(c) and 60(b), M.R.Civ.P. Rule 60(c), M.R.Civ.P., provides that motions filed pursuant to Rule 60(b) shall be heard and determined within the times provided by Rule 59. That Rule requires that a hearing on the motion shall be had within 10 days after it has been served. Here the motion was filed on September 14 and the hearing set for September 17, well within the 10-day limit. The court initially continued the hearing to October 11, which was within the 30-day limit prescribed by Rule 59(d), M.R.Civ.P. The court then continued the hearing beyond the 30-day limit to November 26. As a result, the motion to vacate the default judgment was considered denied on October 17. The appellant then filed the notice of appeal on October 24, well within the 30-day period under this Rule. The notice of appeal was timely filed. In re Marriage of Neneman, 217 M 155, 703 P2d 164, 42 St. Rep. 1095 (1985).

Timely Hearing on Motion to Amend — Appeal Timely: A hearing on a motion to amend a judgment was within the 40 days which Rule 59(d), M.R.Civ.P. (Title 25, ch. 20), allows for such hearing. The notice of appeal filed under this rule was filed exactly 30 days from the denial of the motion for amendment of the judgment. Therefore, the notice of appeal was timely filed. Redinger v. French, 216 M 16, 699 P2d 94, 42 St. Rep. 604 (1985).

Late Appeal — New Grounds for Argument Below — Failure to Argue on Appeal: The merits of appellants' arguments in support of removal of personal representative of an estate could not be considered on appeal from denial of final order denying motion to remove when: (1) since the order was final and appealable, it had to be appealed within 30 days of notice of its entry; (2) appeal was filed 34 days after notice of entry of the order; and (3) though appellants had, within the 30 days prior to their notice of appeal, filed a second petition for removal that raised a new ground for removal, appellants did not argue that failure to raise the ground earlier was excusable because of inadvertence, excusable neglect, or newly discovered evidence, and the lower court found appellants had earlier been in possession of all the facts. The order was conclusive as to all matters that could have been raised under the issues raised in the original petition for removal. In re Pegg's Estate, 209 M 71, 680 P2d 316, 41 St. Rep. 558 (1984).

Order Denying Venue Change Motion — Time Period for Appeal Calculated From Time of Service of Notice of Entry of Judgment: This rule provides that ordinarily an appeal from a judgment or an order must be filed within 30 days of its entry. In this case the order denying defendant's motion to change venue was entered on December 8, 1982, and notice of appeal was not filed until April 25, 1983. However, the rule further provides that in cases where service of notice of entry of judgment is required by Rule 77(d), M.R.Civ.P., the 30 days are to be counted from the date of service of the notice of entry of judgment. Here notice of the denial of the motion was given to defendant on April 4, 1983, so defendant's notice of appeal was timely. Tanniehill v. Remington Arms Co., 207 M 501, 675 P2d 948, 41 St. Rep. 103 (1984).

Technical Compliance With Rule on Notice of Entry of Judgment Required: It is the filing of the notice of entry of judgment that begins the running of the time limitations for filing a notice of appeal. Even though findings of fact, conclusions of law, and a decree were mailed to the parties by the Clerk of Court, no notice of entry of judgment was filed, and the time for filing a notice of appeal did not begin to run at that time. Morrison v. Higbee, 204 M 515, 668 P2d 1025, 40 St. Rep. 1031 (1983).

Motion Objecting to Costs — No Suspension of Time for Filing Notice of Appeal: On October 9, 1981, 1 day after the entry of judgment against the plaintiff in a quiet title action, the plaintiff filed a motion objecting to the defendant's memorandum of costs, which motion was noticed for hearing but the hearing was never held. Following the filing of a notice of appeal by the plaintiff on January 26, 1982, the Supreme Court held it did not have jurisdiction of the appeal because the 30-day period for the filing of the notice of appeal is not suspended by the filing of a motion objecting to costs. Time for appeal therefore expired on November 9, 1981. O'Connell v. Heisdorf, 202 M 89, 656 P2d 199, 39 St. Rep. 2347 (1982).

Motion to Amend Judgment Untimely Filed — Expiration of Time for Appeal: After the plaintiff and defendant stipulated to costs in a quiet title action, an amended judgment was entered by the District Court on October 29, 1981, but on November 13, the plaintiff filed a motion to amend judgment. On appeal by the plaintiff, the Supreme Court held that inasmuch as the motion to amend judgment was not timely filed, the motion did not suspend the running of the time for appeal, and that because the running of the time for filing an appeal had not been suspended, the notice of appeal was filed too late and the court lacked jurisdiction of the appeal. O'Connell v. Heisdorf, 202 M 89, 656 P2d 199, 39 St. Rep. 2347 (1982).

Motion to Amend Judgment Considered Denied Before Hearing — Untimely Appeal: Notice of entry of judgment against appellant was served on him on November 6, 1981. On November 20, 1981, he filed a motion to amend the findings. He did not file a notice of hearing on the motion. The motion was heard on February 1, 1982, and denied on February 2, 1982. Later in February, appellant filed a notice of appeal. The Supreme Court held that appellant's notice was not timely and dismissed the appeal. Under Rule 59(d), M.R.Civ.P., a motion to amend a judgment is considered denied at the end of the time period in which a hearing on the motion must be held. A hearing must be held within 10 days after the motion is filed. Therefore, appellant's motion was considered denied on November 30, 1981, and the notice of appeal was not timely. Fields v. Summit Eng'r, 201 M 204, 653 P2d 1204, 39 St. Rep. 2057 (1982). See also Redinger v. French, 216 M 16, 699 P2d 94, 42 St. Rep. 604 (1985).

Notice of Entry of Judgment Served by Mail — Effect on Time for Appeal:

The final notice of entry of judgment was mailed on November 5. This rule required an appeal to be taken within 30 days after the service of the notice of entry of judgment. A notice of appeal was filed on December 7. Although more than 30 days had passed, allowing 3 days for the mailing of the notice of entry of judgment, the notice of appeal was filed within the 30-day requirement. Rudio v. Yellowstone Merchandising Corp., 200 M 537, 652 P2d 1163, 39 St. Rep. 1923 (1982).

Where, following a judgment for the defendants, one of whom was the city of Lewistown, the defendants served notice of entry of the judgment upon the plaintiffs by mail on June 13, that notice, for purposes of calculating the 60-day time limit for appeal under Rule 5, M.R.App.P., became effective on June 16 by operation of Rule 6(e), M.R.Civ.P. A notice of appeal filed on August 13 was therefore timely filed 2 days before the 60-day time limit had expired. Lewistown Propane Co. v. Util. Builders, Inc., 170 M 292, 552 P2d 1100 (1976).

Challenge of Decree and Property Settlement After Six Years — Res Judicata: A property settlement and decree entered in 1974 cannot be set aside in 1980 on the grounds of unconscionability. The failure of the spouse to appeal the court's decree in 1974 has rendered the issue res judicata. Hadford v. Hadford, 194 M 518, 633 P2d 1181, 38 St. Rep. 1308 (1981).

Late Entry of Order Granting Extension: The time for filing the notice of appeal from District Court may, upon a showing of excusable neglect, be extended for up to 30 days. However, that

period is added to the initial 30 days, plus 3 days for mailing. Even though the Clerk of the Court neglected to send notice of entry of judgment to defendant's cocounsel in Missouri, which may have caused confusion constituting excusable neglect, the order granting an extension of time was not even entered until after the 63-day period, was beyond the limits of Rule 5, M.R.App.P., and was therefore erroneous. NW. Nat'l Ins. Co. v. Agra-Steel Corp., 193 M 437, 632 P2d 330, 38 St. Rep. 1257 (1981), followed in In re M.B., L.B., & F.B., 282 M 150, 935 P2d 1129, 54 St. Rep. 291 (1997). See also St. v. Garner, 1999 MT 295, 297 M 89, 990 P2d 175, 56 St. Rep. 1180 (1999).

Appeal From Workers' Compensation Court — Starting Point for the Period for Filing of Appeal: For an appeal from a final decision of the Workers' Compensation Judge to be filed in the manner provided by law for appeals from the District Court in civil cases, there must be a date that is the starting point for the period for filing notice of appeal under Rule 5, M.R.App.P. In that there is no judgment book in the Workers' Compensation Court in which to enter the judgment and therefore there can be no notice of entry of judgment, the court established, under the powers granted by Art. VII, sec. 2, Mont. Const., that the date on which a decision becomes final under ARM 2.52.222 (now repealed) shall be the starting point for the period for filing the notice of appeal. In this case the court therefore had jurisdiction over the appeal. McMahon v. The Anaconda Co., 38 St. Rep. 1233 (1981) (apparently not reported in Pacific Reporter or Montana Reports but consolidated for purposes of appeal with second case filed by plaintiff against defendant and reported at 678 P2d 661 (1984)).

Order Denying Motion for Relief From Default Judgment Properly Appealed — Special Appearance Abolished: When the defendant honey processing company twice moved to vacate and dismiss a default judgment obtained against it by the plaintiff honey producing company, the Supreme Court had jurisdiction over an appeal from the District Court's denial of the second motion to vacate and dismiss. The defendant's first motion was untimely filed, and the fact that it was brought to challenge the personal jurisdiction of the court and characterized as a "special appearance" is of no effect, as special appearances have been abolished and the same requirements for timely appeal applies to all appearances. The second motion was properly appealable as it is considered denied, which denial is a final order, if the court has not ruled on the motion within 15 days after submission. Foster Apiaries, Inc. v. Hubbard Apiaries, Inc., 193 M 156, 630 P2d 1213, 38 St. Rep. 1025 (1981).

Jurisdiction Over Appeal of Untimely Modification Order: The lower court order modified the findings of fact and conclusions of law more than 15 days after submission of appellant's posttrial motions. By exceeding the time period mandated by Rule 59, M.R.Civ.P., the District Court divested itself of jurisdiction to determine the motion, and its order was a nullity. The original notice of appeal from the second decree, based on that order, was untimely under Rule 5, M.R.App.P., and the Supreme Court has no jurisdiction as to the second decree. However, the jurisdictional defect is cured by the appellants having lodged an appeal to the first decree. Sell v. Sell, 193 M 88, 630 P2d 222, 38 St. Rep. 956 (1981).

Time for Appeal Following Motion for New Trial Made Without Hearing — Time Limits of Rules Jurisdictional Regardless of Stipulation: Where, following a judgment against the defendant for damages caused by fraudulent misrepresentation and breach of warranty, the defendant and plaintiff orally agreed to waive the hearing on defendant's motion for a new trial, filed on April 23, and denied by the court on May 15, the defendant's notice of appeal filed on June 12 was untimely and the plaintiff's motion to dismiss the appeal was granted. Because no hearing was held on the motion for a new trial, the motion was considered denied, under Rule 59(d), M.R.Civ.P., 10 days after it was made and the time for appeal expired on June 2. The defendant's argument that the stipulation meant the motion for a new trial would be considered submitted "at the completion of briefing" cannot extend the time for the court's ruling, as the time limits imposed by the rules of procedure are mandatory and the parties may not by stipulation confer jurisdiction on the court beyond the time provided by the rules. Marvel Brute Steel Building, Inc. v. Bass, 189 M 480, 616 P2d 380, 37 St. Rep. 1670 (1980), distinguished in In re Marriage of Bryant, 276 M 317, 916 P2d 115, 53 St. Rep. 412 (1996).

Supreme Court — Acquisition of Appellate Jurisdiction: The time limits for filing an appeal are mandatory and jurisdictional. An appellant has a duty to perfect an appeal in the manner and within the time limits provided by law. Absent such compliance, the Montana Supreme Court does not acquire jurisdiction to entertain and determine an appeal. Price v. Zunchich, 188 M 230, 612 P2d 1296 (1980), followed in Garmann v. Employers Ins. Co. of Wausau, 234 M 466, 764 P2d 471, 45 St. Rep. 2054 (1988), and in Anderson v. Bashey, 241 M 252, 787 P2d 304, 47 St. Rep. 200 (1990).

Motion for a New Trial — Time for Notice of Appeal Extended: A judgment was entered against the appellant May 31. On June 6 appellant mailed a motion for a new trial and for

extension of the time for filing briefs. On June 11 the District Court gave appellant until June 25 to file its brief, which appellant did on that date. On July 20 the District Court denied appellant's motion for a new trial without hearing, and on August 2 the appellant mailed his notice of appeal. Under these circumstances the notice of appeal was timely filed, since the filing of appellant's motion for a new trial suspended the running of the time in which to file a notice of appeal and the District Court's order extending the time for filing supporting briefs must by necessary implication extend the time for ruling on that motion. The 10-day period for ruling on the motion did not begin to run until the appellant's brief was filed within the time period allowed by the court. The motion for a new trial was automatically denied when it was not acted upon within 15 days. Appellant thereafter had 30 days in which to file its notice of appeal, which was done on August 3. Britton v. Burlington N., Inc., 184 M 107, 601 P2d 1192 (1979).

Notice of Appeal on Default Judgment: The court dismissed the appeal and stated it had no jurisdiction to hear the appeal because the notice of appeal was not timely filed pursuant to Rule 5, M.R.App.P. It was filed more than 5 months after the entry of a default judgment. No notice of entry of judgment was served on appellants, and no such service is required. Snyder v. Gommenginger, 183 M 375, 600 P2d 171 (1979).

Thirty-Day Limit Not Affected by Petition for Attorney's Fees Filed After Its Expiration: Appellant had 30 days to appeal after he was served with notice of entry of an order denying his petition to modify a decree of dissolution, and the filing of a petition by respondent almost 3 months later for attorney's fees incurred by her in defense of appellant's petition did not affect the 30-day limit. McDonald v. McDonald, 183 M 312, 599 P2d 356 (1979), followed in Garmann v. Employers Ins. Co. of Wausau, 234 M 466, 764 P2d 471, 45 St. Rep. 2054 (1988).

Computation of Time Limit for Appeal in Workers' Compensation Case — Civil Procedure Rules Applied: A person who appeals from a final decision of the workers' compensation court should in all fundamental fairness be given the benefit of that provision of Rule 5, M.R.App.P., which states that ". . . except that in cases where service of notice of entry of judgment is required by Rule 77(d) of the M.R.Civ.P. the time shall be 30 days from the service of notice of entry of judgment". When service of notice of the final decision is made as mandated by 2-4-623 and that service is made by mail, the provisions of Rule 21(c), M.R.App.P., are automatically put into play adding 3 days to the prescribed 30-day time limit for filing the notice of appeal set by Rule 4(a), M.R.App.P. However, when the final day of the period falls on a Sunday, Rule 21(a), M.R.App.P., comes into play extending the time limit to the next day. Dumont v. Aetna Fire Underwriters, 183 M 190, 598 P2d 1099 (1979). See also Garmann v. Employers Ins. Co. of Wausau, 234 M 466, 764 P2d 471, 45 St. Rep. 2054 (1988).

Second Motion for New Trial — Filing Deadline Not Suspended: The filing of a second motion for a new trial after denial of the first motion does not suspend the time for filing the notice of appeal. Flathead Hay Cubing, Inc. v. Moore, 35 St. Rep. 1260 (1978) (apparently not reported in Pacific Reporter or Montana Reports).

Violation of Montana Rules of Civil Procedure — Effect: Since counsel for petitioner violated Rule 77(d), M.R.Civ.P., by giving notice of entry of judgment himself rather than having the clerk of court serve notice of entry of judgment, opposing counsel was not required to adhere to the 30-day period for filing of notice of appeal until proper service was made; thus the court committed no error in denying petitioner's motion to strike all posttrial motions as untimely. Pierce Packing Co. v. District Court, 177 M 51, 579 P2d 760 (1978), followed in Granite Ditch Co. v. Anderson, 204 M 10, 662 P2d 1312, 40 St. Rep. 630 (1983).

Appeal Not Timely: When a motion to vacate and set aside a portion of a judgment was made 46 days beyond the authority of Rule 52, M.R.Civ.P., it did not suspend the running of time permitted to file appeal under Rule 5, M.R.App.P. Appellant's contention that Rule 60, M.R.Civ.P., was applicable did not operate to vest the Supreme Court with jurisdiction to hear the appeal. First Nat'l Bank v. Fry, 176 M 58, 575 P2d 1325 (1978).

Series of Proceedings — Jurisdiction on Appeal: The Supreme Court was without jurisdiction to review a series of legal proceedings surrounding a divorce decree other than the last decision and judgment because the appellant failed to give timely notice of appeal of the prior proceedings. Easton v. Easton, 175 M 416, 574 P2d 989 (1978).

Extension of Time Limit: A notice of appeal filed 53 days after judgment was entered was timely because the court granted an extension based on an affidavit signed by defense attorney alleging personal illness. Keller v. Llewellyn, 175 M 164, 573 P2d 166 (1977).

Failure to File Timely Notice of Appeal Extension by District Court: The Supreme Court has no authority to permit an appeal to be taken after the expiration of the time fixed by Rule 5, M.R.App.P. If an extension of time is sought, the proper forum to make such a request is the District Court. An appellant must request any extension no later than 60 days from service of

notice of entry of judgment. Zell v. Zell, 174 M 216, 565 P2d 311 (1977), followed in In re M.B., L.B., & F.B., 282 M 150, 935 P2d 1129, 54 St. Rep. 291 (1997). See also St. v. Garner, 1999 MT 295, 297 M 89, 990 P2d 175, 56 St. Rep. 1180 (1999).

Order to Vacate Order Changing Venue: Defendant's appeal of the order denying his motion to vacate an order changing venue should be dismissed since an order to vacate is not appealable under Rule 1, M.R.App.P., and if treated as an appeal from the order for change of venue, it was not timely made. Myskewitz v. Berg, 173 M 46, 566 P2d 64 (1977).

Parties Entitled to Sixty-Day Period: When a party to an action is a state officer, state agency (including a municipality), or the State, any party may file notice of appeal within the 60-day limit of the rule, irrespective of whether or not State, political subdivision, or agency is appellant. Lewistown Propane Co. v. Util. Bldrs., Inc., 170 M 292, 552 P2d 1100 (1976).

Untimely Appeal From Motion for New Trial: When motion for new trial was filed without notice of hearing, the motion was automatically denied 10 days after service notwithstanding letter from clerk notifying movant of denial on some other date. Appeal filed later than 60 days after denial of the motion was untimely. Leitheiser v. Mont. St. Prison, 161 M 343, 505 P2d 1203 (1973).

Extension of Time — Notice: An order granting appellant additional time "to effect the composition of the record on appeal" was not an extension of time for filing notice of appeal. It is not necessary to serve a copy of the judgment on adverse party. Jackson v. Tinker, 161 M 51, 504 P2d 692 (1972).

CASES DECIDED UNDER STATUTE

Petition for Postconviction Relief Time-Barred Absent Showing of Exceptions: Sanchez was convicted of deliberate homicide and sentenced to life in prison. Sentence was imposed on November 14, 1997, and Sanchez had 60 days to appeal. Sanchez filed no direct appeal, and sentence was final on January 13, 1998, for purposes of postconviction proceedings. Sanchez first filed for postconviction relief on August 31, 2000, and filed an amended petition for postconviction relief on December 5, 2002. Although 46-21-102 allowed 5 years for filing for postconviction relief when the crime was committed, the section was amended in 1997 and allowed only a 1-year period for filing when Sanchez's conviction became final and when the petitions were filed. Thus, Sanchez's first filing was 1 1/2 years late, and the amended petition was nearly 4 years late. Absent a showing that any exceptions to the statutory time bar applied, such as newly discovered evidence or that a miscarriage of justice occurred, Sanchez's petitions for postconviction relief were properly denied as untimely. Sanchez v. St., 2004 MT 9, 319 M 226, 86 P3d 1 (2004).

Failure to Take Appeal — Supervisory Control Inapplicable: Where the plaintiff failed to take his appeal within the statutory time limitation he could not obtain relief by a Writ of Review or a Writ of Supervisory Control. McVay v. McVay, 128 M 31, 270 P2d 393 (1954).

Appeal Proper — Supervisory Control Inapplicable: An application for a Writ of Supervisory Control will be denied since an appeal may be taken from a special order made after judgment which modifies a judgment theretofore entered and adversely affects the rights of a party to the litigation. State ex rel. Ferris v. District Court, 126 M 623, 255 P2d 687 (1953).

Status of Findings and Conclusions: The findings of fact and conclusions of law in an equity case do not constitute the judgment but are merely the foundation for the judgment within the meaning of this section. Hence, where respondents did not perfect their cross-appeal until more than 6 months after the filing of the findings, but within 6 months after the filing of the judgment, their appeal was timely and not subject to a motion for dismissal. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

Time for Cross-Appeal: Subdivision 1 of this section applies where a respondent takes a cross-appeal under section 93-8023, R.C.M. 1947 (superseded by Rule 14, M.R.App.P.), for the purpose of having rulings made against him during the course of the trial reviewed. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

Findings and Conclusions — Time Limits Inapplicable: Where the trial court, in a probate proceeding, filed its findings of fact and conclusions of law 3 weeks before entry of the decree, stating in effect that formal decree would follow (a practice commended as enabling the parties to move for amendment of findings and conclusions before entry of decree), the statutory period for appeal ran from the date of entry of the decree and not from the time the findings and conclusions were filed. In re Toomey's Estate, 96 M 489, 31 P2d 729 (1934).

Appeal From Minute Order Proper: On July 1 the District Court made an order, entered in the minutes, vacating one confirming a sale of real property belonging to an estate. On July 12 a formal order was made and filed. On September 7 an appeal was taken from the latter order. The

order of July 1 was the order from which the appeal should have been taken. The order made on July 12 did not alter or amend the former one nor extend the time within which the appeal could be taken. Therefore, the appeal was not taken within the 60-day period prescribed by subdivision 4 and was vulnerable to a motion to dismiss. In re McCracken's Estate, 87 M 342, 287 P 941 (1930).

Effect of Failure to Appeal Within Time Provided: Where a creditor of an insolvent bank by order of court is denied a preference of payment of his claim but fails to appeal therefrom within the time allowed by this section, the order becomes final and the propriety of the court's order is not subject to review on appeal. State ex rel. Rankin v. Wibaux County Bank, 85 M 532, 281 P 341 (1929), followed in Colstrip Faculty Ass'n, MEA/NEA v. Trustees, School District No. 19, 251 M 309, 824 P2d 1008, 49 St. Rep. 43 (1992).

Multiple Parties — Parties Affected by Appeal: Where only one of a number of creditors of an insolvent bank, grouped under a certain class, appealed within 60 days from an order of the District Court refusing them a preference right to payment of their claims, and secured a reversal thereof as to her, the order as to the nonappealing claimants became final, and the action of the court in thereafter reinstating them as preferred creditors and prorating the money available in the bank for that purpose among them and the successful appellant was error. State ex rel. Rankin v. Banking Corp., 80 M 49, 257 P 1020 (1927).

Dismissal of Appeal: An appeal from a final judgment, not taken within the time provided for appeal will be dismissed. Hodson v. O'Keeffe, 71 M 322, 229 P 722 (1924); Wilson v. Norris, 43 M 454, 117 P 100 (1911); Reynolds v. Fitzpatrick, 40 M 593, 107 P 902 (1910); Kaufman v. Cooper, 38 M 6, 98 P 504 (1908); Ramsey v. Burns, 24 M 234, 61 P 129 (1900); Gallagher v. Cornelius, 23 M 27, 57 P 447 (1899).

School Superintendent Decisions — Time for Appeal: No time having been fixed by statute within which an appeal may be taken from the decision of a County Superintendent of Schools, and in the absence of regulations by the state superintendent with relation thereto, the appeal may be taken within a reasonable time after the making of the decision, a limitation of 6 months being deemed reasonable. State ex rel. School District v. Trumper, 69 M 468, 222 P 1064 (1924).

Amendment of Judgment — Time for Appeal: Where, in an action to set aside a fraudulent conveyance, an erroneous description of the land in the judgment was not corrected until some 70 days after its entry, the property rights of the defendant thus not becoming affected until after amendment, the rule that an order amending a judgment after entry is a special order after final judgment, and therefore appealable only within 60 days, does not apply, but the computation of time within which to perfect an appeal from the judgment dates from the time the amendment was made. St. Bank of New Salem v. Schultze, 63 M 410, 209 P 599 (1922).

Law Review Articles

Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 352 (1981).

Failure to File Timely Notice: This note reviews the decision of St. v. Frodsham, 139 M 222, 362 P2d 413 (1961), in which the Supreme Court held that failure of counsel to file a notice of appeal within the time limits required deprives the court of jurisdiction but that the court would consider the merits in the interests of justice. 23 Mont. L. Rev. 116 (1961).

Collateral References

Appeal and Error *key* 337 through 357.

4 C.J.S. Appeal and Error §264, et seq.

5 Am. Jur. 2d Appellate Review §§285 through 324.

Formal requirements of judgment or order as regards time for taking appeal. 73 ALR 2d 250.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review. 61 ALR 2d 482.

Amendment of judgment as affecting time for taking or prosecuting appellate review proceedings. 21 ALR 2d 285.

Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted. 10 ALR 2d 1075.

Failure, due to fraud, duress, or misrepresentation by adverse parties, to file notice of appeal within prescribed time. 149 ALR 1261.

Power of trial court indirectly to extend time for appeal. 149 ALR 740; 89 ALR 941.

Untimely notice of appeal as motion for extension of time to appeal under Rule 4(a)(5) of Federal Rules of Appellate Procedure. 74 ALR Fed. 775.

Tolling of time for filing notice of appeal in civil action in federal court under Rule 4(a)(4) of Federal Rules of Appellate Procedure. 74 ALR Fed. 516.

Appellate review of order denying extension of time for filing notice of appeal under Rule 4(a) of Federal Rules of Appellate Procedure. 39 ALR Fed. 829.

Rule 6. Undertaking for costs on appeal in civil cases.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

Rules 7 and 8 of the Federal Draft contain provisions for appeal bonds and the stay of judgments and orders. These provisions are not followed in the rule. Rather Rules 6, 7 and 8 hereof are substituted. These provisions are believed to be more in accord with state practice and to better fit into Montana statutes than do the provisions of the Federal Draft. This rule supersedes R.C.M. 1947, sections 93-8005, 93-8006, 93-8012, 93-8015, and compares with Federal Rule 73(c) and (e).

The amount of the undertaking has remained at $300 since 1895, and the rule would increase it to $500. Also, express provision is made for corporate sureties as may be authorized by law. Such authorization is found in R.C.M. 1947, section 93-8711 [33-26-101(part), MCA].

NOTE TO JUNE 16, 1986, AMENDMENT

The amendment makes the filing of a bond or providing other security discretionary with the judge, the same as provided in Rule 7 of the Federal Rules of Appellate Procedure, rather than mandatory as provided heretofore.

Compiler's Comments

1986 Amendment: The Supreme Court Order of June 16, 1986, substituted present language (for text see 1987 MCA) for former Rule 6 which read: "**Undertaking for costs on appeal.** (a) [Form of undertaking—time for filing]. Within 10 days after service of notice of appeal an undertaking for costs on appeal shall be filed in the district court, or a deposit of the money in the amount thereof be made with the clerk of the district court to abide the event of the appeal, or the undertaking be waived by the adverse party in writing. The undertaking must be executed on the part of the appellant by at least 2 sureties, or by a corporate surety as may be authorized by law, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on the dismissal thereof, not exceeding $500. If the undertaking on appeal is not filed within the time specified, or if the undertaking filed is found insufficient, and if the action is not yet docketed with the supreme court, an undertaking may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file an undertaking may be made only in the supreme court. The undertaking for costs herein provided may be combined in a single document with a supersedeas bond under Rule 7."

Case Notes

Cases Decided Under Rules 1265
Cases Decided Under Statute
General 1266
Ambiguous Undertaking. 1267

CASES DECIDED UNDER RULES

Bond for Costs on Appeal May Not Include Attorney Fees: When allowed by law, attorney fees that a party incurs on appeal may be recovered by that party if that party prevails on appeal. Section 39-2-915 provides that if a party in a wrongful discharge proceeding declines an offer to arbitrate and then loses in court, the party that offered to arbitrate is entitled to reasonable attorney fees incurred after the offer was made, including those incurred on appeal. However, for purposes of determining the amount of a bond or security under this rule, a District Court may not include anticipated attorney fees for the future defense of an appeal as part of the anticipated costs on appeal. Moore v. Imperial Hotels Corp., 285 M 188, 948 P2d 211, 54 St. Rep. 1104 (1997).

Appeal From Unlawful Detainer Judgment — Bond Based on Amount of Taxes, Appeal Expenses, and Inability to Invest Land Sale Proceeds: In a tenant's appeal from summary judgment for the landowner in an unlawful detainer action, the only factor preventing the closing of a sale to a third party was the tenant's refusal to leave the property. The District Court properly and reasonably calculated the amount of a supersedeas bond that it required the tenant to post based on the interest lost from the owner's inability to reinvest sale proceeds, the amount of taxes on the land, and appeal expenses. Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996).

Purpose of Supersedeas Bond: The purpose of requiring an appellant to post a supersedeas bond as a condition to staying execution on a judgment is to secure the rights of the judgment creditor during the appeal process. Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996).

Test for Review of Amount of Supersedeas Bond: In reviewing the amount of a supersedeas bond, the Supreme Court determines whether the lower court acted arbitrarily without using conscientious judgment or exceeded the bounds of reason. Rasmussen v. Lee, 276 M 84, 916 P2d 98, 53 St. Rep. 263 (1996).

Bond Not Jurisdictional: Respondent contended an appeal to the Supreme Court should be dismissed for failure to file an undertaking for costs on appeal as stated in Rule 6(a), M.R.App.P. Respondent argued that posting of bond is jurisdictional. The court noted that while under section 9733, R.C.M. 1935, posting a bond for costs on appeal was jurisdictional, that is no longer the case. The only step necessary to perfect an appeal is filing a notice of appeal within the time allowed by Rule 5, M.R.App.P. While the filing of a bond for costs may be required, failure to file the bond does not affect the validity of the appeal. Failure to effect timely filing of the bond should not, without more, result in dismissal. There were no other circumstances mandating dismissal in this case. Westmont Tractor Co. v. Leighty, 222 M 336, 722 P2d 617, 43 St. Rep. 1309 (1986).

Supreme Court — Acquisition of Appellate Jurisdiction: The time limits for filing an appeal are mandatory and jurisdictional. An appellant has a duty to perfect an appeal in the manner and within the time limits provided by law. Absent such compliance, the Montana Supreme Court does not acquire jurisdiction to entertain and determine an appeal. Price v. Zunchich, 188 M 230, 612 P2d 1296 (1980).

CASES DECIDED UNDER STATUTE

GENERAL

Governmental Entities — Undertaking for Costs on Appeal: The Division of Motor Vehicles, being a governmental entity, is not required to file an undertaking for costs on appeal of the denial of its motion for rehearing. In re Petition of Burnham, 217 M 513, 705 P2d 603, 42 St. Rep. 1342 (1985).

Receivership Proceedings — Supersedeas Bond Required: Where the District Court appointed a receiver to preserve property pendente lite, from which order plaintiff appealed, he was not entitled to a stay without a supersedeas bond. The bond described by this section was not enough. Demos v. Doepker, 115 M 183, 141 P2d 372 (1943).

Deposit in Lieu of Undertaking — Statement of Purpose Not Required: While a written undertaking on appeal must specify the purpose for which it is given, where money is deposited in lieu of such undertaking no writing is required, the statute declaring the purpose for which it is deposited. In re McGovern's Estate, 77 M 182, 250 P 812 (1926).

Multiple Appellants in Probate Proceeding — One Bond Required: Where the purpose of a petition in an estate matter was to have the executor render a final account, settle the estate, and deliver possession of the real estate to the devisees, on appeal from the order denying the petition and dismissing the proceeding the appellants were required to furnish but one joint appeal bond in the sum of $300. In re McGovern's Estate, 77 M 182, 250 P 812 (1926).

New Trial Motion After Appeal From Judgment: In view of this section, 25-11-102, and section 93-8003, R.C.M. 1947 (superseded by Rule 1, M.R.App.P.), the trial court, notwithstanding and perfecting of an appeal from a judgment, retains jurisdiction over a motion for a new trial; and an appeal may be taken from an order denying the new trial, although, before such order was entered, an appeal from the judgment has been perfected. Molt v. N. Pac. Ry., 44 M 471, 120 P 809 (1912).

One Bond Allowed — Purpose: The purpose of the provision contained in the first sentence of this section is to enable an appellant to have one set of sureties execute one instrument instead of several, and to make the merely formal parts of one of the obligations assumed by them answer for all, and thus relieve him of the necessity of writing out each instrument in full. Sullivan v. Fried, 42 M 335, 112 P 535 (1910).

Instrument Combining Undertakings Allowed — Satisfaction of Amounts Required Separately: Whatever may be the number of appeals taken at the same time, only one undertaking need be filed, but the penalty in all cases, except where the appeals from the final judgment are combined with an appeal from an order granting or denying a new trial, taken at the same time, must be sufficient in amount to support all of them, and the references must be so made to each of them that the penalty may be properly apportioned. In re Kappler's Estate, 38 M 419, 100 P 228 (1909).

Nugatory Undertaking: An undertaking on appeal is abortive if words are used therein which render it meaningless and nugatory as an indemnity for costs in any amount. In re Kappler's Estate, 38 M 419, 100 P 228 (1909).

Signature of Appellant Not Required: An undertaking filed in conformity with this and the following section need not be signed by the party in whose behalf it is given. Russell v. Chicago, Burlington & Quincy Ry., 37 M 10, 94 P 501 (1908).

Separate Undertaking for Each Appeal Required: Where appeals are taken from a judgment and from any order other than one denying a new trial, or from more than one order, a separate undertaking in the sum of $300 must be filed for each, or, if both are included in the same paper, appropriate references must be made to show which appeal each is intended to effectuate, even though one of the orders appealed from may be a nonappealable order. Pirrie v. Moule, 33 M 1, 81 P 390 (1905).

Undertaking as Bond: An undertaking on appeal is technically a "bond" within the common-law definition, save that it need not be under seal. King v. Pony Gold Min. Co., 24 M 470, 62 P 783 (1900).

Joinder of Appeals Under Single Undertaking — Language Required: Where the appeal bond, on appeal from a final judgment and from an order denying appellant's motion for a new trial, was conditioned that it should be void if appellant paid all damages and costs awarded against it "on said appeals, or on a dismissal thereof", not exceeding the sum of $300, the undertaking was insufficient in that the words "or either of them" should have been inserted in each of the alternative conditions, and because of such omission the sureties were not liable upon said undertaking unless both appeals should be affirmed or both dismissed. Baker v. Butte City Water Co., 24 M 31, 60 P 488 (1900). See also Ramsey v. Burns, 24 M 234, 61 P 129 (1900); Coleman v. Perry, 24 M 237, 61 P 129 (1900); Frary v. Dwyer, 26 M 414, 68 P 1133 (1902).

Substitution for Defective Undertaking Allowed: An undertaking on appeal which provides for the payment by appellants of all damages and costs which may be awarded against them on the appeal, but omits the words "or on a dismissal thereof", is defective but not void, and a motion to dismiss the appeal for such defect will be denied where a new and sufficient undertaking is filed before the motion is heard. Woodman v. Calkins, 12 M 456, 31 P 63 (1892), distinguished in Creek v. Bozeman Water Works Co., 22 M 327, 56 P 362 (1899).

AMBIGUOUS UNDERTAKING

Supersedeas and Cost Bond Treated as Separate: If there be any ambiguity in the undertaking so far as it relates to the supersedeas, that would furnish no ground for the dismissal of the appeal for want of an undertaking for costs. Rader v. Taylor, 134 M 419, 333 P2d 480 (1958).

Appeal From Order Treated as Abandoned: Where an appellant served notice that he desired to appeal from a judgment and an order denying a new trial, but the undertaking referred to an appeal from the judgment only, the appeal will be treated as abandoned as far as it relates to the order denying a new trial, and to that extent will be dismissed, irrespective of the intention of appellant. Hurley v. O'Neill, 24 M 293, 61 P 658 (1900).

Ambiguous Undertaking Invalid: Where an appeal undertaking recited four distinct appeals, one from the judgment and three from orders, and that, in consideration "of such appeal, etc., appellant will pay all damages and costs which may be awarded against her", the undertaking was invalid for ambiguity, in not stating which appeal it was intended to secure. Creek v. Bozeman Water Works Co., 22 M 327, 56 P 362 (1899). See also Murphy v. N. Pac. Ry., 22 M 577, 57 P 278 (1899); Washoe Copper Co. v. Hickey, 23 M 319, 58 P 866 (1899); Grage v. Paulson, 23 M 337, 59 P 1 (1899); Richter v. Eagle Life Ass'n, 24 M 346, 61 P 878 (1900); Pirrie v. Moule, 33 M 1, 81 P 390 (1905); Faust v. Rustler Min. & Mill. Co., 34 M 368, 86 P 421 (1906); In re Kappler's Estate, 38 M 419, 100 P 228 (1909), distinguished in In re McGovern's Estate, 77 M 182, 250 P 812 (1926).

Ambiguous Undertaking Void — Avoidance: If an appeal undertaking, reciting separate appeals from the judgment and from different orders, is void for ambiguity as to which appeal it is intended to refer to, appellant cannot escape the effect of the ambiguity by claiming that the orders are not appealable, and the bond therefor refers to the judgment, as the court, in determining the validity of the undertaking, will not examine the record to see what orders are appealable. Creek v. Bozeman Water Works Co., 22 M 327, 56 P 362 (1899). See also Gassert v. Strong, 38 M 18, 98 P 497 (1908).

Collateral References

Appeal and Error *key* 372 through 385.

4 C.J.S. Appeal and Error §§325 through 327.

5 Am. Jur. 2d Appellate Review §358, et seq.
Check or money as meeting requirement of appeal bond. 65 ALR 2d 1134.

Rule 7. Stay of judgment or order pending appeal.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule supersedes subdivisions (a) and (d) of Rule 62 of the Montana Rules of Civil Procedure. It also supersedes section 93-8013[, R.C.M. 1947; 25-33-205(2), 25-33-206, MCA] in so far as applicable to appeals from district courts to the supreme court. However, since these rules do not apply to appeals from police and justices' courts, section 93-8013 is not superseded in so far as it provides that in cases where an undertaking is required on appeal by the provisions of sections 93-7901 to 93-7908[, R.C.M. 1947; 25-33-102 through 25-33-104, 25-33-201 through 25-33-205, 25-33-207, 25-33-301 through 25-33-306, MCA], "a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and . . . the undertaking or deposit may be waived by the written consent of the respondent." Also section 93-8014[, R.C.M. 1947] is superseded, and subdivision (c) of this rule is patterned after the last part of that section.

The provision of this rule that, upon entry of a judgment or order a party may apply to the district court on notice or ex parte for a stay of execution, is designed to afford time to obtain a supersedeas bond during which the status quo is maintained by court order. The power of the supreme court recognized by the last sentence of subdivision (a) supplements the power of the district court.

NOTE TO JUNE 16, 1986, AMENDMENT

The amendments limit the stay of execution to a 30 day period in certain cases and otherwise clarifies the rule.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, in (a), in first sentence inserted "in a civil case" and inserted third sentence providing a 30-day limit for a stay of execution; in (b) substituted present first sentence (for text see 1987 MCA) for "Upon service of notice of appeal, if the court has made no such order or the appellant desires a stay for a longer period than ordered, he may present to the district court and secure its approval of a supersedeas bond which shall have such surety or sureties as are required for an undertaking for costs on appeal prescribed by Rule 6(a)"; inserted (e) relating to stays in criminal cases; and reoutlined.

Case Notes

Cases Decided Under Rules 1268
Cases Decided Under Statute 1272

CASES DECIDED UNDER RULES

When Supersedeas Bond Remains in Effect Following Remand: On remand, a surety remains in effect when the question is the amount of damages, and not whether a party is entitled to damages. If a question of liability or a question of whether a party is entitled to damages remains after an appeal, the bond may lapse. Spooner Constr. & Tree Serv., Inc. v. Maner, 2003 MT 43, 314 M 268, 66 P3d 263 (2003), following Tenn. Valley Authority v. Atlas Mach. & Iron Works, 803 F2d 794 (4th Cir. 1986), and Beatrice Foods Co. v. New England Printing, 930 F2d 1572 (Fed. Cir. 1991).

Partial Payment of Interest on Promissory Note Not Precluding Appeal: Plaintiff owed defendant $200,000 plus interest on a promissory note. The same day that plaintiff filed a claim for misrepresentation and failure to disclose, plaintiff also deposited the first promissory note payment with the Clerk of the District Court. Following judgment for plaintiff, the District Court ordered release of the funds, which defendant accepted. Plaintiff argued that by accepting the funds and the fruits of the judgment, defendant was prohibited from prosecuting an appeal to reverse the judgment. Defendant responded that because the judgment could not possibly affect the benefit that was accepted, the right to appeal was not waived. The long-recognized general rule is that the right to accept the fruits of a judgment and at the same time prosecute an appeal

from it are not concurrent, but rather wholly inconsistent, rights and that the election of one excludes the enjoyment of the other (see Peck v. Bersanti, 101 M 6, 52 P2d 168 (1935)). The exception is that when reversal of the judgment cannot possibly affect the appellant's right to the benefit accepted under a judgment, then appeal may be taken and sustained despite the fact that the benefit was sought and secured (see Niles v. Carbon County, 174 M 20, 568 P2d 524 (1977)). The acceptance of payments that were not contested or that were irrevocably conceded as due by the opposing party does not preclude appeal. Here, when defendant accepted the funds, it simply accepted what plaintiff already conceded was due and no more than it conceded would be due in the event that the appeal was successful. Therefore, defendant did not waive the right to appeal. H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95, 57 St. Rep. 832 (2000).

Involuntary Satisfaction of Judgment — Request for Stay of Execution Not Required: Following entry and satisfaction of judgment in District Court, the parties were aware of a contemplated appeal, but no stay of execution was requested or supersedeas bond posted. After plaintiff acquired title to the disputed property pursuant to the judgment, defendant filed a notice of appeal and lis pendens, effectively preserving the status quo pending appeal. Plaintiff moved to dismiss, contending that by voluntarily satisfying the judgment, defendants waived their right to appeal. Applying Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996), the Supreme Court held that the parties' course of conduct illustrated the involuntary, rather than voluntary nature of the satisfaction of judgment. Because satisfaction was involuntary, the right to appeal was not waived. Further, under this rule, a party may request a stay of execution, but the request is not mandatory, even though a party choosing not to seek a stay runs the risk of having the appeal become moot. Plaintiff's motion to dismiss was denied. Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Mootness as Separate From Question of Waiver of Appeal Rights — Voluntary Versus Involuntary Performance: The question of whether compliance with a judgment was voluntary or not has bearing on whether a party has waived the right to appeal, but it has no bearing on the question of mootness, which arises when an appellate court cannot grant effective relief. The issue of mootness is separate and distinct from the question of waiver of appeal rights. Complying with the judgment does not necessarily render the appeal moot. However, if compliance is voluntary, the party may be said to have waived any objection to the judgment. In deciding whether a case is moot, it must be determined whether effective relief is available. The fact that a party has not voluntarily waived the right to appeal does not necessarily mean that effective relief can still be provided on appeal, nor may a party claim an exception to the mootness doctrine when the case became moot through that party's own failure to seek a stay of judgment. Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996), following and clarifying State ex rel. Hagerty v. Rafn, 130 M 554, 304 P2d 918 (1956), and Martin Dev. Co. v. Keeney Co., 216 M 212, 703 P2d 143 (1985), overruling any contrary holding in Mont. Nat'l Bank of Roundup v. Dept. of Revenue, 167 M 429, 539 P2d 722 (1975), First Nat'l Bank in Eureka v. Giles, 225 M 467, 733 P2d 357 (1986), Moore v. Hardy, 230 M 158, 748 P2d 477 (1988), LeClair v. Reiter, 233 M 332, 760 P2d 740 (1988), and Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604 (1993), and followed in Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999). See also Gates v. Deukmejian, 987 F2d 1392 (9th Cir. 1993).

Voluntary Versus Involuntary Performance — Bar of Appeal Because of Waiver: Appellants allowed a foreclosure sale to proceed, did not stay the proceedings, and did not post a supersedeas bond. Because of the danger of dismissal for mootness, there is a special need for seeking a stay when the sale of property is ordered and is not enjoined. A party confronted with a judgment ordering a foreclosure sale who allows the sale to proceed runs the risk that an appeal will be rendered moot. The question of whether compliance with a judgment was voluntary or not has bearing on whether a party has waived the right to appeal. If an appellant has voluntarily complied with or performed a judgment, that voluntary compliance may result in a waiver of that party's right to appeal and preclude the necessity of the Supreme Court addressing the issue of mootness. Similarly, when compliance is involuntary, as in most foreclosure actions, the appeal is not barred or waived but may nevertheless be moot to the extent that the Supreme Court cannot grant effective relief. Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996), following State ex rel. Hagerty v. Rafn, 130 M 554, 304 P2d 918 (1956), Gallatin Trust & Sav. Bank v. Henke, 154 M 170, 461 P2d 448 (1969), First Sec. Bank of Kalispell v. Income Properties, Inc., 208 M 121, 675 P2d 982 (1984), and Martin Dev. Co. v. Keeney Co., 216 M 212, 703 P2d 143 (1985), and followed in Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Foreclosure Action — Appeal Not Moot Because of Owners' Failure to Post Bond or Stay Appeal: In a foreclosure action, the bank prevailed in District Court. The owners did not voluntarily relinquish the property. The bank foreclosed. The owners' failure to post a supersedeas bond or otherwise stay the proceedings in District Court did not render their appeal moot. Traders St. Bank of Poplar v. Mann, 258 M 226, 852 P2d 604, 50 St. Rep. 509 (1993), overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996).

Waiving Right to Homestead Exemption: The defendant used his home as security for an appeal in a civil case in lieu of a supersedeas bond. In the court documents relating to the security for the appeal, the defendant specifically agreed to not file for a homestead exemption on the property. Subsequently, the defendant filed for a homestead exemption. The Supreme Court ruled that although no specific provision of the homestead laws would allow the plaintiff to have the homestead exemption invalidated, the defendant had specifically waived any right he had to the homestead exemption. Amundson v. Wortman, 244 M 103, 796 P2d 205, 47 St. Rep. 1427 (1990).

Involuntary Satisfaction of Judgment — Appeal Not Rendered Moot: If a judgment is satisfied by an involuntary payment or performance, the appeal from the judgment is not thereby rendered moot. First Nat'l Bank in Eureka v. Giles, 225 M 467, 733 P2d 357, 43 St. Rep. 1326 (1986), overruling Gallatin Trust & Sav. Bank v. Henke, 154 M 170, 461 P2d 448 (1969), and In re Black's Estate, 32 M 51, 79 P 554 (1905), and followed in LeClair v. Reiter, 233 M 332, 760 P2d 740, 45 St. Rep. 1531 (1988), with LeClair distinguished in Maloney v. Heer, 257 M 500, 850 P2d 957, 50 St. Rep. 382 (1993), Giles and LeClair were overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996). Turner was followed in Kennedy v. Dawson, 1999 MT 265, 296 M 430, 989 P2d 390, 56 St. Rep. 1078 (1999).

Bond Covering Judgment — Use of Bond in Companion Case: District Court did not abuse its discretion in requiring a supersedeas bond in an amount large enough to cover the judgment, including interest, or in concluding that a bond deposited in companion cases was not available to satisfy the judgment in this case. Safeco Ins. Co. v. Lovely Agency, 215 M 420, 697 P2d 1354, 42 St. Rep. 509 (1985).

No Stay of Execution Sought — Appeal Moot: Defendant bought property under a trust indenture from First National Bank of Kalispell in 1975. Defendant defaulted on the terms in 1981. The property was noticed for a public trustee's sale and was purchased by plaintiff. Plaintiff gave defendant written notice to vacate. Defendant refused, and plaintiff brought an unlawful detainer action. Defendant filed an answer questioning the propriety of the sale and plaintiff's title. Plaintiff moved for summary judgment, alleging it was a bona fide purchaser for value and that defendant's complaint was with the trustee or beneficiary under the trust indenture. No responsive pleadings were filed by defendant. The court granted summary judgment; a Writ of Possession was prepared, and damages were awarded. Defendant then filed an appeal without ever applying to the District Court for a stay of execution or supersedeas bond. By surrendering the property and paying damages under the judgment, defendant removed from the Supreme Court the authority to grant relief. The issue of damages was not before the court, only the summary judgment. The appeal was dismissed as moot. First Sec. Bank of Kalispell v. Income Properties, Inc., 208 M 121, 675 P2d 982, 41 St. Rep. 212 (1984).

Procedure for Judgment Debtor to Stay Execution of Judgment — Bond Not Approved: Petitioner requested a Writ of Supervisory Control to have an ejection order in a property dispute declared illegal. The Supreme Court in reviewing the proceedings stated that a judgment debtor desiring to stay the execution of a judgment or order of a District Court must proceed under Rule 7, M.R.App.P. That rule provides that if an appellant desires a stay of proceedings where the court has made no such order, he may present to the court and secure its approval of a supersedeas bond. In this case, the District Court fixed the amount of the bond but the bond was never presented to the court for approval prior to the ejection order. Therefore, the judgment holder was entitled to enforcement of the judgment by execution under 25-13-101 and 25-13-201. The District Court followed these statutes and was authorized to order delivery of the possession of the property under 25-13-307. State ex rel. Cady v. District Court, 203 M 522, 662 P2d 602, 40 St. Rep. 610 (1983).

Stay of Execution of Judgment — Effect on Priority: On June 22 Colonial obtained a judgment against Schmidt. On June 30 Schmidt obtained a judgment against the city of Kalispell. On July 2 Colonial filed a Writ of Execution in Flathead County. On July 2 Schmidt executed a note to his

bank assigning the funds from the Kalispell judgment as collateral. On July 23 the Missoula County Court issued a charging order pursuant to 35-10-505 directing that any proceeds received by Schmidt be used to satisfy Colonial's judgment. Schmidt subsequently appealed the Colonial judgment and was granted a stay of execution pending appeal. In an action to determine priority to the Kalispell judgment as between Colonial and the bank, the funds were properly applied first to the bank. Colonial was stayed from taking any action to execute on its judgment pending a decision on its appeal. Stenerson v. Colonial Terrace Assoc., 200 M 160, 649 P2d 1344, 39 St. Rep. 1646 (1982).

Bond for Judgment — Remedy for Failure to Post: Plaintiff contended defendant's appeal should be dismissed for failure to post a supersedeas bond for the full amount of the judgment for plaintiff. The contention was without merit. Plaintiff's remedy for defendant's failure to post a bond was to execute on the judgment. Failure to post a bond did not affect the right to appeal. Allers v. Willis, 197 M 499, 643 P2d 592, 39 St. Rep. 745 (1982).

No Stay of Execution — Failure to Follow Internal Guidelines: The District Court held that C. M. Russell High School had been illegally excluded from the Montana Class AA football championship playoffs and ordered them back into the playoffs, with the playoffs to start no later than 7 days from the date of the order. The Montana High School Association sought a stay of judgment pending appeal. The Supreme Court held that in order to preserve the status quo, it would not be enough to determine if the Association was correct on the merits in excluding C. M. Russell because of the alleged ineligibility of players. The court would also have to determine whether the Association followed its own rules and did not violate the law itself in reaching its decision. A new hearing would be required. A new hearing would effectively mean there would be no 1981 Class AA state football playoff. That result would be caused by the Association itself. The Supreme Court refused to grant a stay because it determined even without a record that the Association violated its own rules and therefore its decision could not stand. State ex rel. Mont. High School Ass'n v. District Court, 38 St. Rep. 1847 (1981) (apparently not reported in Pacific Reporter or Montana Reports).

District Court — No Authority to Order Dismissal of an Appeal: Under Rule 7, M.R.App.P., the District Court is given the power to stay the execution of a judgment entered in its court and has broad discretion in fixing the amount of a supersedeas bond upon which a stay of execution may be conditioned. The District Court does not have authority to order dismissal of an appeal, which authority is exclusively in the Supreme Court. Hadford v. Hadford, 189 M 329, 615 P2d 920 (1980).

Substitution of Other Security for Supersedeas Bond or Bond in Lesser Amount Than Judgment: The Supreme Court denied a motion for substitution of other security or a bond in a lesser amount because neither would protect the rights of the judgment creditor. The security offered, common stocks and pledges of personal assets, is subject to fluctuations in value. The moving party might suffer some financial hardship, but he did not make prompt and thorough attempts to obtain a bond. Paulsen v. Treasure St. Indus., Inc., 183 M 439, 600 P2d 206 (1979).

Postjudgment Powers of Court: A District Court has power to award necessary maintenance, child support, and suit money after judgment in a marital dissolution case during the pendency of appeal. To hold otherwise would leave a hiatus in the remedial power of the court that could cause unmeasured hardship and distress. State ex rel. Kaasa v. District Court, 177 M 547, 582 P2d 772 (1978).

Custody Proceedings — Allegation Regarding Environment Absent: The Supreme Court vacated an earlier order which stayed the District Court's judgment ordering return of custody of a child to the mother because the father was petitioning to modify custody within 2 years of the custody decree with no allegation concerning what kind of environment the mother would provide in another state. Hamilton v. Hamilton, 176 M 488, 580 P2d 104 (1978).

Satisfaction of Judgment Precluded: The District Court's grant of a stay of disbursement and defendants' posting of a supersedeas bond precluded satisfaction of plaintiff's judgment. Therefore, plaintiff's motion to dismiss the appeal was denied. Erdman v. C & C Sales, Inc., 176 M 177, 577 P2d 55 (1978).

Failure to Apply for Stay — Effect on Appeal: When plaintiff neither applied for a stay of execution nor filed a supersedeas bond but accepted and cashed warrants issued to him for reimbursement of taxes, penalty, and interest paid on a tax deed, he was not entitled to appeal. Niles v. Carbon County, 174 M 20, 568 P2d 524 (1977).

Filing of Supersedeas Bond on Appeal Not to Suspend Decree's Provision Regarding Child Support: Supreme Court will not sanction nonpayment of support money decreed in District Court on appeal where need for such funds is shown but will require that such support payments

be kept current until final determination of the appeal. Woolverton v. Woolverton, 169 M 490, 549 P2d 458 (1976).

Restitution of Funds — Previous Judgment Vacated on Appeal: The Supreme Court denied the defendant's request for a Writ of Supervisory Control requiring the District Court to order an accounting and restitution of funds, since execution was based upon a previous judgment reversed only as to damages and because the defendant failed to post a supersedeas bond. State ex rel. Burlington N., Inc. v. District Court, 169 M 480, 548 P2d 1390 (1976).

Protective Order — Stay of Proceedings: When the Public Service Commission assumed jurisdiction over matters which were at issue in an appeal before the Supreme Court, the court granted a protective order to enjoin the P.S.C. and Consumer Counsel from undertaking actions which interfered with the court's appellate jurisdiction and declared that the actions of the P.S.C. in reopening its docket and issuing further orders were beyond its jurisdiction. Consumer Counsel v. P.S.C., 168 M 177, 541 P2d 769 (1975).

Authority to Approve Bond Granted: Order of the Supreme Court giving the District Court authority to approve bond for stay of judgment does not give District Court any authority to dismiss appeal if bond is not filed. Bryant Dev. Ass'n v. Dagel, 166 M 8, 531 P2d 1319 (1974).

Constitutional Power — Stay of Mandamus Allowed: Supreme Court's constitutional power under Art. VIII, sec. 3, 1889 Mont. Const., to issue writs necessary to the complete exercise of its appellate jurisdiction overrode the provision in subsection (c) of this rule prohibiting stay of a Writ of Mandamus, and Supreme Court could stay a District Court Writ of Mandamus ordering the superintendent of banks [functions transferred to Department of Business Regulation by executive reorganization] to issue a bank charter since a stay was necessary to make the right of appeal effectual. State ex rel. Bennett v. Dowdall, 157 M 11, 482 P2d 572 (1971).

Monetary Requirement Deviated From: The requirement of a monetary amount to be at issue before a stay is granted was deviated from because the appeal would be ineffectual without a stay. State ex rel. Bennett v. Dowdall, 157 M 11, 482 P2d 572 (1971).

Application for Reduction of Bond: An application for reduction in the amount of a supersedeas bond should be submitted to the District Court that set the amount. State ex rel. Adams v. District Court, 155 M 309, 471 P2d 537 (1970).

Supersedeas Bond Required — Dismissal of Appeal: Failure of defendant to file supersedeas bond pursuant to this section resulted in dismissal of appeals since such bond is only method to stay execution of judgment and after judgment is paid, it passes beyond review. Gallatin Trust & Sav. Bank v. Henke, 154 M 170, 461 P2d 448 (1969), distinguished in Mont. Nat'l Bank of Roundup v. Dept. of Revenue, 167 M 429, 539 P2d 722 (1975), overruled in First Nat'l Bank in Eureka v. Giles, 225 M 467, 733 P2d 357, 43 St. Rep. 1326 (1986). Mont. Nat'l Bank and Giles were overruled, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996).

Eminent Domain Proceeding — No Bond Required: Where Highway Commission (now Transportation Commission) filed notice of appeal and perfected its appeal after Writ of Execution under 70-30-308 had issued, the appeal stayed the judgment although no bond was filed as required by this section, since under Rule 62(e), no security was required from the State. Robertson v. St. Highway Comm'n, 148 M 275, 420 P2d 21 (1966).

CASES DECIDED UNDER STATUTE

Ability of District Court to Correct Errors: Upon an appeal being taken, jurisdiction thereof passes from the District Court to the Supreme Court, subject to right of District Court to correct clerical errors. Polson v. Thomas, 138 M 533, 357 P2d 349 (1960).

Mandate to Compel Licensure — Authority of Supreme Court: Though this section may not provide a stay of execution in case a Writ of Mandate is issued by a District Court to compel the issuance of a license, the Supreme Court may nevertheless issue any appropriate writ to insure an appeal. Gill v. Rafn, 133 M 505, 326 P2d 974 (1958), followed and clarified, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996), and distinguished in State ex rel. Ronish v. School District, 136 M 453, 348 P2d 797 (1960).

Mandate and Prohibition — Moot Question on Appeal: Where Writ of Prohibition was issued against Liquor Control Board prohibiting the issuance of licenses except to persons who have Indian tribal permits and a Writ of Mandate was also issued compelling the issuance of licenses to certain persons, which Writs were complied with after the District Court refused to stay the Writs, so that the licensees invested and established businesses and could not be returned to the

status quo, the questions on appeal were moot. State ex rel. Hagerty v. Rafn, 130 M 554, 304 P2d 918 (1956), distinguished in State ex rel. Ronish v. School District, 136 M 453, 348 P2d 797 (1960).

Probate Proceedings — Loss of Jurisdiction After Appeal: Where an appeal was taken from an order appointing a person executor, the District Court and its Clerk were then without jurisdiction to issue letters testamentary to the executor and allow him to qualify. In re Hansen's Estate, 129 M 261, 284 P2d 1007 (1955).

Jurisdiction of District Court Passed to Supreme Court: Where a notice of appeal from a judgment was served and filed, jurisdiction over the parties to the controversy and the subject matter thereof passed from the District Court and vested in the Supreme Court. It then became the duty of the Supreme Court to maintain the status quo of the parties and their rights until the controversy could be determined in this court, so that rights involved in such appeal may not be lost or prejudiced prior to such determination. Benolken v. Miracle, 128 M 262, 273 P2d 667 (1954).

Usurpation of Office — Application to Statutory Disqualification From Office: The provision relating to proceedings wherein judgment relates to defendants guilty of usurping, or intruding into, or unlawfully holding public office, etc., applies not only in quo warranto proceedings, but also to all judgments, including one rendered in a proceeding brought under the Corrupt Practices Act, sections 94-1427 to 94-1474, R.C.M. 1947 (partially repealed), where a finding of the violation of a statute disqualifies the defendant from holding office and authorizes a finding that the office is vacant. State ex rel. Kommers v. District Court, 109 M 287, 96 P2d 271 (1939).

Usurpation of Office — Undertaking Not to Act as Stay: The filing of an undertaking on appeal from a judgment removing a Sheriff from office for violating the provisions of the Corrupt Practices Act, sections 94-1427 to 94-1474, R.C.M. 1947 (partially repealed), and declaring the office vacant, does not operate as a supersedeas or stay of execution, and therefore does not prevent the County Commissioners from filling the office pending appeal. State ex rel. Kommers v. District Court, 109 M 287, 96 P2d 271 (1939).

Mandate to Transfer Cause — Authority of Supreme Court: Though this section may not provide a stay of execution, in case a Writ of Mandate is issued by the District Court to compel the transfer of a cause from a police to a Justice's Court (a question not decided), the Supreme Court may nevertheless issue any appropriate writ to insure an appeal. State ex rel. Brass v. Horn, 36 M 418, 93 P 351 (1908).

Collateral References

Appeal and Error *key* 436, et seq., 458 through 492.

4 C.J.S. Appeal and Error §408, et seq.

5 Am. Jur. 2d Appellate Review §436, et seq.

Necessity that person acting in fiduciary or representative capacity give bond to maintain appellate review proceedings. 41 ALR 2d 1324.

Supersedeas or stay upon appeal in habeas corpus. 143 ALR 1354.

Liability on supersedeas bond which was legally insufficient to effect stay, where enforcement of judgment was in fact suspended. 120 ALR 1062.

Measure and item of damages recoverable upon a suspending or supersedeas bond on appeal from order appointing a receiver or confirming such appointment. 117 ALR 1274.

Executor's or administrator's right to appeal without bond from order, judgment, or decree relating to matters concerning him in his personal as well as in his representative capacity. 104 ALR 1192.

Amount named in appeal or supersedeas bond as the maximum limit of sureties' liability or as a limitation of the amount which they undertake shall be paid on the judgment appealed from. 87 ALR 257.

Failure of obligee in supersedeas bond to accept protection thereof for his acts inconsistent therewith as affecting liability on bond. 53 ALR 807.

De minimis non curat lex as applied to deficiency in appeal bond. 44 ALR 184.

Liability of surety in appeal bond where there was no supersedeas for costs in court below. 12 ALR 721.

Rule 8. Sureties and their justification.

Advisory Committee Notes

The provisions of subdivision (a) of the rule with respect to proceedings against sureties is patterned after Rule 8(b) of the Federal Draft. Subdivision (b) of the rule follows the existing Montana practice provided by R.C.M. 1947, section 93-8013[; 25-33-205(2), 25-33-206, MCA], but the language is changed to avoid confusion where there are cross appeals or mixed forms of relief

and to make it clear that either appellant or respondent, or both, may except to the sufficiency of sureties on a bond or undertaking furnished by the other.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

Cases Decided Under Rules 1274
Cases Decided Under Statute 1274

CASES DECIDED UNDER RULES

When Supersedeas Bond Remains in Effect Following Remand: On remand, a surety remains in effect when the question is the amount of damages, and not whether a party is entitled to damages. If a question of liability or a question of whether a party is entitled to damages remains after an appeal, the bond may lapse. Spooner Constr. & Tree Serv., Inc. v. Maner, 2003 MT 43, 314 M 268, 66 P3d 263 (2003), following Tenn. Valley Authority v. Atlas Mach. & Iron Works, 803 F2d 794 (4th Cir. 1986), and Beatrice Foods Co. v. New England Printing, 930 F2d 1572 (Fed. Cir. 1991).

CASES DECIDED UNDER STATUTE

Exceptions to Sufficiency — Application and Meaning: Exception to the sufficiency of sureties on an undertaking or bond within the meaning of this section has reference to their solvency or pecuniary sufficiency, rather than their qualifications to act as such. Objection to the form of the undertaking challenges their qualifications in respects other than their financial worth. Whitcomb v. Beyerlein, 84 M 470, 276 P 430 (1929).

Failure to Justify — Effect: The provision of this section, that unless the sureties justify when excepted to, execution of the judgment or order appealed from is no longer stayed, does not render the appeal ineffectual because of the failure to justify, but only destroys the effect of the undertaking insofar as it may operate as a supersedeas—the appeal remains though execution is no longer stayed. Threlkeld v. O'Neal, 26 M 209, 66 P 940 (1901); King v. Pony Gold Min. Co., 24 M 470, 62 P 783 (1900).

Application to Ejectment Action: This section applies in case of an appeal by defendant in ejectment involving an unpatented mining claim. The statutes and courts of this state do not recognize any distinction between possessory rights to mining claims upon public lands and real estate held under other titles. State ex rel. Baker v. District Court, 24 M 330, 61 P 882 (1900). See also Cobban v. Meagher, 42 M 399, 113 P 290 (1911).

Liability of Sureties When Execution Already Had: Sureties on a stay bond on appeal were not liable, though they failed to justify as required, where respondent, before determination of the appeal, issued execution against appellant. State ex rel. Reins v. District Court, 22 M 449, 57 P 89 (1899).

Waiver of Undertaking by Respondent Allowed: The statute requiring a justification of sureties on a stay bond is directory, and meant to be for respondent's not appellant's benefit, and may be waived by respondent. State ex rel. Reins v. District Court, 22 M 449, 57 P 89 (1899). See also Morin v. Wells, 30 M 76, 75 P 688 (1904).

Collateral References

4 C.J.S. Appeal and Error §§425 through 428.

Contempt by false justification by surety on appeal bond. 89 ALR 2d 1258.

Check or money as meeting requirement of appeal bond. 65 ALR 2d 1134.

Failure of sureties on appeal bond to justify after exception to their sufficiency, and consequent dismissal of appeal, as releasing them from liability. 96 ALR 1371.

Rule 9. The record on appeal.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule is patterned after Rule 10 of the Federal Draft.

Subdivision (a). This subdivision provides for the use of the original trial record as the official record on appeal, and judgment rolls are nowhere provided for in these Rules. This use of the trial record is now provided for in all federal circuit courts.

Subdivision (b). The Federal Advisory Committee's Note states: "The appellant is required to serve a statement of the issues which he intends to present on appeal if only a part of the proceedings is transcribed solely to allow the appellee to determine whether the partial transcript will be adequate for the determination of the issues presented by the appeal. Such a statement is not the equivalent of an assignment of errors, which is nowhere required in the proposed rules, and the statement would not result in limiting the issues on appeal. The precise statement of the issues presented by the appeal is to be made in the brief. An appellee who can show that he was misled by the statement required by this subdivision and in consequence failed to designate for transcription material parts of the reported proceedings may seek relief under subdivision (e) of this rule."

The second and third sentences of this subdivision following the title are added to the Federal Draft to make the duty which rests on the appellant more specific. Also, the second paragraph of this subdivision has been expanded to afford protection to an appellant against payment of costs of a transcript of unnecessary portions of the proceeding ordered by a respondent. And the last paragraph, requiring the reporter to certify the correctness of the transcript, has been added to the Federal Draft.

Subdivision (c). The provision of the Federal Draft for settlement has been expanded, patterned after section 93-5508[, R.C.M. 1947; superseded by this rule]; also, because memories are short, there has been added a time limit for the preparation of the statement.

Subdivisions (d) and (e) are the same as the provisions of the federal draft, adjusted to the Montana court system.

NOTE TO JUNE 16, 1986, AMENDMENT

Subdivision 9(c). The amendment authorizes transcripts to be furnished to defendants without financial means and provides for procedure in the supreme court in the case of denial by the trial court.

Subdivision 9(f). This section as it previously appeared in the rules has been deleted because the inclusion of findings of fact and conclusions of law in a brief or appendix is now covered by Rules 23 and 25.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1996 Amendment: In (b), at beginning of first sentence, substituted language concerning stipulation filed pursuant to Rule 54(c) for former text that read: "Except as hereafter set forth". Amendment effective October 1, 1996.

1994 Amendment: In (a) inserted second sentence concerning duty of party seeking review to provide sufficient record and inserted third sentence concerning sanctions for inadequate record; in (b), at beginning of first sentence, inserted exception clause, near middle substituted "all" for "such parts", and after "file" deleted "as the appellant deems necessary", deleted former third sentence that read: "In all cases where the appellant intends to urge insufficiency of the evidence to support the verdict, order or judgment in the district court, it shall be the duty of the appellant to order the entire transcript of the evidence", and deleted former fifth sentence that read: "Wherever the sufficiency of the evidence to support a special verdict or answer by a jury to an interrogatory, or to support a specific finding of fact by the trial court, is to be raised on the appeal by the appellant, the appellant shall be under a duty to include in the transcript all evidence relevant to such verdict, answer or finding"; in (b), at beginning of first sentence of second paragraph, substituted "If the appellant determines, on the basis of the issues raised on appeal, that the entire transcript is not necessary" for "Unless the entire transcript is to be included", after "within" substituted "10 days" for "time", after "provided" inserted "order only such parts of the proceedings not already on file as the appellant deems necessary and also", after "which the appellant" inserted "determines to be unnecessary and which it", after "intends to" substituted "exclude from" for "include in", and after "record" substituted "along with" for "and" and in second sentence, after "transcript of", substituted "the" for "other", after "proceedings" inserted "to be excluded", after "reporter or" inserted "file and serve notice on the appellant in writing of respondent's intention to", and after "procure" inserted "at a date, time and place certain within 10 days of such notice"; and in (b) inserted third paragraph concerning failure of either party to file and serve notice as creating a presumption.

Applicability: The Supreme Court Order dated June 30, 1994, was effective for notices of appeal filed on or after September 15, 1994.

1993 Amendment: In (b) inserted second sentence concerning filing of copy and inserted fourth sentence concerning responsibility for cost of transcript.

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, in (b), at beginning of second paragraph, inserted the exception clause; inserted (c) relating to transcripts of proceedings in criminal cases; deleted former (f) that read: "(f) Findings of fact and conclusions of law. In all nonjury cases where judgment is rendered on the basis of findings of fact and conclusions of law such findings and conclusions by the district court should be incorporated in the appendix to appellant's brief, along with the district court's opinion, if any"; and reoutlined.

1971 Amendment: The 1971 amendment added subdivision (f). (See 1986 amendment note for text.)

Case Notes

Cases Decided Under Rules 1276
Cases Decided Under Statute 1280

CASES DECIDED UNDER RULES

Failure to Provide Trial Record Precluding Review of Trial Court Evidentiary Rulings: In an employment discrimination case, Rolison moved for a new trial in District Court on grounds that he was denied a fair trial when the employer did not disclose certain exhibits before trial and the trial court made an evidentiary ruling refusing any evidence of discrimination following Rolison's complaint to the Commission on Human Rights. The District Court denied the motion for a new trial, and on appeal, the Supreme Court affirmed. Rolison did not mention the District Court's reasoning for denying the motion and did not provide a trial transcript or record for review on appeal. Absent an adequate record, the Supreme Court could not discern the substance of the anticipated testimony or whether any prejudice resulted from its exclusion. Absent a showing of a manifest abuse of discretion, denial of the new trial motion was affirmed. Rolison v. Bozeman Deaconess Health Serv., Inc., 2005 MT 95, 326 M 491, 111 P3d 202 (2005).

Electronic Recording of Municipal Court Evidentiary Hearing Part of Record on Appeal: Lyons contended on appeal of a DUI case that because the electronic recording of the Municipal Court's evidentiary hearing was not considered by the District Court, it was not part of the record and could not be considered on appeal. The Supreme Court disagreed. Regardless of whether the recording was used in District Court, it was part of the record available for Supreme Court review. Missoula v. Lyons, 2004 MT 255, 323 M 67, 97 P3d 1120 (2004).

Failure to Record Voir Dire Examination — Britt Test to Determine Whether Failure to Record Portions of Criminal Trial Violative of Due Process: Deschon argued that his right to a meaningful appeal of his deliberate homicide conviction was violated because he had tenable appellate theories, such as possible juror prejudice, that could not be determined without a transcript of the voir dire proceedings, and that there was no alternative to a transcript available. The state pointed out that subsection (d) of this rule provides a procedure whereby a party can submit its version of unrecorded portions of the record to the District Court, and then the court can generate a written summary to be included in the appeal. However, the state contended that Deschon made no effort to recreate the circumstances of voir dire and thus could not claim that the lack of a record was reversible error. The Supreme Court noted that a trial court should order its court reporter to record the voir dire examination and that diligent defense counsel should demand recording of voir dire proceedings (St. v. Seitzinger, 180 M 136, 589 P2d 655 (1979)). However, when the trial court fails to record portions of a criminal trial, Britt v. N.C., 404 US 226 (1971), is applied to determine whether due process has been violated, and two criteria are relevant to the determination: (1) the value of the transcript to defendant in connection with the appeal or trial for which it is sought; and (2) the availability of alternative devices that would fulfill the same function as a transcript, such as an evidentiary hearing to reconstruct the unrecorded portions of the trial. Here, Deschon established the first part of the Britt test by showing that a transcript was valuable in determining whether any jurors were prejudiced by pretrial publicity. The second part of the Britt test would be satisfied by a written summary prepared pursuant to subsection (d) of this rule, but lacking that summary, the Supreme Court remanded for an evidentiary hearing to reconstruct the unrecorded portions of the voir dire proceedings. St. v. Deschon, 2002 MT 16, 308 M 175, 40 P3d 391 (2002). Following remand and an evidentiary hearing to reconstruct the unrecorded voir dire portions of Deschon's trial, Deschon appealed again on grounds that the hearing was insufficient to provide information to determine whether jurors were biased. The Supreme Court concluded that, taken as a whole, the combined testimony from jurors, attorneys, and Deschon, together with the trial notes in exhibit, created a record of sufficient completeness to ensure that Deschon's right to due

process was not violated and that the reconstruction hearing comprised an adequate alternative to the verbatim voir dire transcript to establish a fair and accurate picture of what transpired that was sufficiently complete to accord review of Deschon's issues on appeal, satisfying the second part of the *Britt* test. St. v. Deschon, 2004 MT 32, 320 M 1, 85 P3d 756 (2004). See also U.S. v. Cashwell, 950 F2d 699 (11th Cir. 1992), and U.S. v. Preciado-Cordobas, 981 F2d 1206 (11th Cir. 1993).

Newspaper Articles Improperly Attached to Opening Brief Set Aside: Counsel for the Franks attached several irrelevant newspaper articles to an opening brief, contending that it was permissible to supplement the record on appeal with judicially recognizable material. The Supreme Court found that the articles were not judicially recognizable under this rule and were improperly attached to the brief. Affirming the District Court decision to set aside a default judgment, the Supreme Court cited Downs v. Smyk, 185 M 16, 604 P2d 307 (1979), in cautioning counsel against attempting to introduce extraneous evidence by the back door via attachment to briefs, a practice that is not tolerated. Frank v. Harding, 1998 MT 215, 290 M 448, 965 P2d 254, 55 St. Rep. 903 (1998), distinguishing In re Establishment & Organization of Ward Irrigation District, 216 M 315, 701 P2d 721, 42 St. Rep. 824 (1985).

Order Granting Temporary Guardianship Held Final Order and Special Proceeding for Purposes of Appeal — Noncompliance With This Rule Excused — Expiration of Temporary Guardianship Held Not to Render Issue Moot: After a District Court twice appointed the same temporary guardians for Kathleen Klos pursuant to 72-5-317, once in writing and once by making an oral order with no documentation except a minute entry entered by the Clerk of Court, Klos filed a motion to set aside the second order of guardianship. The guardians argued that an order appointing a temporary guardian is not subject to appeal and that Klos had not complied with this rule because she did not file a transcript of a hearing appointing the guardians. The Supreme Court held that in as much as Rule 1(b)(3), M.R.App.P. (Title 25, ch. 21), does not differentiate between a permanent order and a temporary order, a temporary order qualified as an appealable order. The Supreme Court also held that the temporary order is a "special proceeding", as defined by 27-1-102(2), for the purposes of Rule 1(b)(1), M.R.App.P., and therefore appealable for that reason as well. Concerning the argument on noncompliance with this rule, the Supreme Court noted that no transcript could be provided because none was ever made and held that Klos had substantially complied by notifying the Clerk of the Supreme Court of the lack of a transcript and by providing the District Court Clerk's minute entry. Citing Butte-Silver Bow Local Gov't v. Olsen, 228 M 77, 743 P2d 564 (1987), the Supreme Court also noted that just because the order had expired by operation of law did not mean that the issue of appealability was moot because the guardians had twice been appointed by a temporary order that expired by operation of law and could be appointed in the same manner again. Thus, if the order was not appealable, it would be "capable of repetition, yet evade review". In re Klos, 284 M 197, 943 P2d 1277, 54 St. Rep. 843 (1997).

No Obligation for State to Furnish Summaries of Testimony — Failure to Provide Transcript — No Surprise or Prejudice Found: Sol was convicted in Justice's Court of DUI and appealed to District Court. He argued that the state had failed to make available to him summaries of witnesses' testimony and had failed to deliver to him a copy of a summary of the testimony of one of the state's experts after he was informed of the identity of the expert. The Supreme Court held that there was no requirement in 46-15-322 for the state to provide a summary of the testimony of any witness and that the state's obligation to provide reports completed by its expert had been satisfied by notification of where the reports could be obtained. The Supreme Court also noted that Sol was unable to point to any prejudice or surprise that he suffered as a result of the alleged discovery violations. Because Sol had failed to order a transcript of the District Court trial in compliance with subsection (b) of this rule, the Supreme Court was unable to determine whether disputed evidence had been offered at trial and, if it was, whether it resulted in surprise or prejudice. St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Case Remanded — Insufficient Record: The Supreme Court stated that the record before it was lacking any factual record or findings by the lower court. The Supreme Court held that in light of the importance of the issues involved in the case, it was not prepared to make any rulings when there was insufficient information on which to base a ruling and therefore remanded the case to the District Court with instructions to develop an appropriate record. Balyeat Law, PC v. Pettit, 281 M 95, 931 P2d 50, 54 St. Rep. 77 (1997).

Failure to File Workers' Compensation Insurer's Claims File on Appeal — No Presumption of Error in Trial Court In Camera Inspection: Miller contended that the Workers' Compensation Court's order on disclosure of the insurer's claims file did not indicate whether certain documents not disclosed contained factual information otherwise discoverable. Miller could not

prevail because she did not seek to have the insurer's claims file filed with the Supreme Court as a part of the record on appeal. As appellant, it was Miller's obligation to ensure the completeness and accuracy of the record and to have included all documents, discovery, and evidence related to the errors claimed. Without the file, there was no way for the Supreme Court to review the Workers' Compensation Court's decision to exclude some documents in the file from discovery and to produce other documents; therefore, the Supreme Court would not presume error in the in camera inspection. An appellant may not predicate error on an incomplete record. Miller v. Frasure, 264 M 354, 871 P2d 1302, 51 St. Rep. 233 (1994), followed in St. v. Arlington, 265 M 127, 875 P2d 307, 51 St. Rep. 417 (1994).

Entire Transcript Not Included in Record — Notification of Respondent Required: When the entire transcript is not included in the record on appeal, the provisions of this rule require the appellant to notify the respondent of the issues that the appellant intends to raise on appeal so that the respondent can determine whether a transcript of parts of the proceeding that are not included in the record will be required. S.M. v. R.B., 261 M 522, 862 P2d 1166, 50 St. Rep. 1437 (1993).

Supplementation of Record to Account for Circumstances Occurring Subsequent to Appeal Impermissible: Supplementation of the record to take into account circumstances occurring subsequent to the appeal is beyond the scope of this rule and is impermissible. Trieweiler v. Spicher, 254 M 321, 838 P2d 382, 49 St. Rep. 711 (1992).

Rule Inapplicable When Record Not Part of Lower Court Proceedings: Appellant claimed that the original record on appeal was void of certain documents unavailable at the time of the lower court trial and sought to modify the record under subsection (f) of this rule to include the missing documents. To prevail, appellant must show that the record does not truly disclose what occurred in the court below. Modification was inappropriate because the record that appellant sought to introduce was not part of the proceedings below at the time of those proceedings. Richter v. Indus. Indem. Co., 241 M 518, 788 P2d 308, 47 St. Rep. 467 (1990).

Failure to Follow Rule Not Absolute Bar to Appeal: Appellant filed only a partial transcript of the lower court record with his appeal but did not provide a description of the included parts or a statement of the prospective issues to the respondent as required by this rule. Although dismissal of the appeal would be appropriate, an appeal need not be dismissed in every instance where there has not been strict compliance. Where the record contained sufficient information to consider some issues, the court considered those issues. Williams v. Rigler, 234 M 161, 761 P2d 833, 45 St. Rep. 1812 (1988).

Preservation of Record for Appeal — Counsel Duty: It is the duty of counsel to preserve the record for appeal. Searight v. Cimino, 230 M 96, 748 P2d 948, 45 St. Rep. 46 (1988).

Failure to File Transcript — Extension of Time: When the appellant's late filing of an appeal was held timely because the respondent had also failed to comply with the technical filing requirements of the Rules of Civil Procedure and when the District Court had granted a request for an extension of time to the court reporter to complete a transcript of the proceedings, the appeal was properly before the court. Kenney v. Koch, 227 M 155, 737 P2d 491, 44 St. Rep. 960 (1987).

Record on Appeal — Lack of Transcript: Arguments on the sufficiency of the evidence in action on charges of unfair labor practices could not be considered without a transcript of the testimony at the original administrative hearing. The cause was remanded to the trial court for election by the employee either to order and pay for the transcript so the trial court could receive it and enter further judgment or to accept affirmation of the trial court's decision. Klundt v. St., 222 M 172, 720 P2d 1181, 43 St. Rep. 1148 (1986).

Accusation of District Court Judge Misconduct Raised on Appeal — Supreme Court Not to Consider: In reviewing a child custody modification determination, the Supreme Court refused to consider an affidavit submitted to the Supreme Court alleging an improper ex parte communication between the District Court judge and a person interested in the proceeding. Appellant had made no motion for a mistrial or to remove the District Court judge from the case, nor had appellant mentioned the alleged misconduct on the record. In re Marriage of Stout, 216 M 342, 701 P2d 729, 42 St. Rep. 856 (1985).

Judicial Notice of Maps and Descriptions on Appeal: In a dispute over control of an irrigation district's headgate, the Supreme Court permitted submission on appeal of government survey descriptions and maps that had not been introduced as evidence at trial. The court reasoned: first, that the commission comments to Rule 201, Montana Rules of Evidence, indicate that published maps or charts are included within the Rule's scope; and second, that maps and descriptions are acceptable articles of evidence by which to show a water right in the adjudication process. In re Establishment & Organization of Ward Irrigation District, 216 M

315, 701 P2d 721, 42 St. Rep. 824 (1985), distinguished in Frank v. Harding, 1998 MT 215, 290 M 448, 965 P2d 254, 55 St. Rep. 903 (1998).

Necessity of Trial Transcript: A challenge to a final judgment cannot be reviewed on appeal in the absence of a transcript. Lutzenhiser v. Holzworth, 213 M 260, 690 P2d 990, 41 St. Rep. 2102 (1984).

County Resolution — Record Incomplete — Appeal Denied: An appeal from a District Court's granting motions to dismiss and quash in a case revolving around a county resolution was dismissed because the record on appeal did not contain the resolution or any reference to it. Bukvich v. Butte-Silver Bow, 200 M 259, 650 P2d 783, 39 St. Rep. 1727 (1982).

Appeal Denied for Failure to Keep Record: The Supreme Court noted in Guardianship of Gullette, 173 M 132, 566 P2d 396 (1977), that the District Court is, by statute, a court of record, and this implies that a record will be kept of the proceedings. Recently in Schneider v. Ostwald, 190 M 29, 617 P2d 1293, 37 St. Rep. 1728 (1980), a trial court contempt order was set aside because the contempt of court proceedings were not recorded. The same result obtains in the instant case. The record is silent as to why a court reporter was not present. But reasons aside, the failure to record the property distribution hearings has effectively denied the husband appellate review of the trial court's judgment. Malley v. Malley, 190 M 141, 619 P2d 531, 37 St. Rep. 1827 (1980).

Review of Equity Cases on Record Only: Where judgment was rendered against the appellant in a proceeding to quiet title and for an accounting of rents and profits from real property and appellant subsequently appealed to the Supreme Court, the Supreme Court would not consider depositions taken in a different action and submitted by the appellant but not made a part of the record in the case before the court. In appeals from equitable proceedings, the Supreme Court may not consider evidence extraneous to the record. Downs v. Smyk, 185 M 16, 604 P2d 307 (1979), followed in In re George Trust, 253 M 341, 834 P2d 1378, 49 St. Rep. 424 (1992).

Agreed Statement Insufficient: In a marriage dissolution case where the appellant challenged the sufficiency of the evidence, his "agreed statement of facts" was insufficient to comply with Rule 9(d), M.R.App.P., because it merely recited the undisputed facts of the marriage and did not show ". . . how the issues presented by the appeal arose and were decided in the district court . . .". Harrington v. Harrington, 181 M 451, 594 P2d 319 (1979).

Agreed or Approved Statement — Failure to Provide: Appellant's challenge of the trial court's findings of fact was dismissed because he failed to provide the Supreme Court with a transcript or to comply with Rule 9(c) or 9(d), M.R.App.P. Flathead Hay Cubing, Inc. v. Moore, 35 St. Rep. 1260 (1978) (apparently not reported in Pacific Reporter or Montana Reports).

Clerk's Affidavit Not Acceptable as to Variant Date of Service: A District Court Clerk's affidavit should not be accepted to prove that service was made on a date other than the date shown on the certificate of mailing on the notice of entry of judgment because the affidavit is not part of the record on appeal. Flathead Hay Cubing, Inc. v. Moore, 35 St. Rep. 1260 (1978) (apparently not reported in Pacific Reporter or Montana Reports).

Offer of Proof — Effect on Appeal: The Supreme Court refused to review various documents attached to appellant's brief in an appeal pro se when no offer of proof was made at trial because, as such, they were not a part of the record on appeal. Jerome v. Jerome, 175 M 429, 574 P2d 997 (1978).

Property Disposition — Insufficient Evidence: Lack of a court reporter's record was not a fatal error. As substitute, a bystander's bill and exhibits admitted at trial disclosed insufficient credible evidence to support a property disposition because certain assets were not considered. Martinez v. Martinez, 175 M 280, 573 P2d 667 (1978).

Failure to Transmit Transcript: Defendants demonstrated a complete lack of adherence to the Montana Rules of Appellate Procedure. Their failure to transmit the transcript of the trial court proceedings required dismissal of the appeal. Yetter v. Kennedy, 175 M 1, 571 P2d 1152 (1977), followed in In re Marriage of Bell, 220 M 123, 713 P2d 552, 43 St. Rep. 226 (1986).

Failure to State Evidence at Issue: Appeal was dismissed for inadequacy of record where there was no statement of the evidence and sufficiency of evidence was in issue, even though appellant contended that only an issue of law was presented. Washington v. Washington, 161 M 516, 507 P2d 1071 (1973).

Failure to Perfect Appeal: Appeal was dismissed where appellants had failed to request parts of the transcript within the time allowed by subsection (b) of this rule, had not requested preparation of any portion of the record on appeal, had failed to pay for copies of documents requested or portions of the transcript prepared, had failed to transmit any part of the record on appeal to the Supreme Court, had failed to docket the appeal or pay the docket fee, and had

failed, within the time allowed by the Chief Justice, to replace counsel desiring to withdraw with good cause. Larry C. Iverson, Inc. v. United Bank of Pueblo, 158 M 223, 490 P2d 352 (1971).

Cost of Transcript: Under rule providing that District Court "may impose upon the respondent the cost of producing any part of the record which it deems unnecessary for the determination of the issues", court determined that cost of portion of transcript ordered by respondent, which did not bear on any issue presented upon appeal, should be assessed against respondent. (See 1993 amendment.) Ratcliff v. Murphy, 150 M 31, 430 P2d 627 (1967).

Failure to Provide Judge's Certificate on Evidence: Merits of appeal could not be determined where purported transcript on appeal did not contain certificate of judge that records included in the transcript had been used at the hearing. Anderson v. Mennie, 144 M 105, 394 P2d 853 (1964).

Late Presentment of Bill: A bill of exceptions presented after the time prescribed in section 93-5505, R.C.M. 1947 (superseded by Rule 9, M.R.App.P.), was a nullity and could not be considered on appeal. Anderson v. Mennie, 144 M 105, 394 P2d 853 (1964).

Amendment of Notice of Appeal Not Allowed: Where appellant sought to amend notice of appeal from a nonappealable order so as to make it an appeal from final judgment, the Supreme Court acquired no jurisdiction to allow such amendment when the statutory provisions for time and manner of appeal were not complied with. Payne v. Mtn. States Tel. & Tel. Co., 142 M 406, 385 P2d 100 (1963).

CASES DECIDED UNDER STATUTE

Copy of Notice of Appeal Required: Where no copy of any notice of appeal appears in either the transcript on appeal or in the files of the Supreme Court or having been supplied in the court, the purported appeal will be dismissed for want of jurisdiction. Hansen v. Hansen, 129 M 516, 290 P2d 438 (1955).

Superfluous Papers Incorporated in Transcript on Appeal: Papers and documents incorporated in the transcript on appeal from a final judgment which are not properly a part of the judgment roll and not included in a bill of exceptions duly settled are no part of the record and will be stricken therefrom. Thompson v. Chicago, Burlington & Quincy Ry., 78 M 170, 253 P 313 (1927).

Collateral References

4 C.J.S. Appeal and Error §§450, et seq., 506, et seq.

5 Am. Jur. 2d Appellate Review §484, et seq.

Rule 10. Transmission of the record.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule is taken from Rule 11 of the Federal Draft.

Subdivision (a). This subdivision fixes the time for transmission rather than for filing at 40 days after the filing of the notice of appeal, thus enabling the parties to know with certainty precisely when the complete record must be transmitted to the supreme court. The only justification for delay between filing the notice of appeal and the transmission of the record to the supreme court is the time required for securing a transcription of the trial proceedings. If the appellant is prevented from securing the necessary transcript within the 40-day period by circumstances beyond his control, he may seek an extension of time for transmitting the record.

The requirement that the appellant take any other action necessary to enable the clerk to assemble and transmit the record emphasizes the primary responsibility of the appellant for effecting timely transmission of the record. His responsibilities include, for example, the payment of any required fee or charge.

Subdivision (b). The appellant is allowed 40 days between the filing of the notice of appeal and the transmission of the record in order to allow him to secure the necessary transcript. If the transcript is available sooner, the allowance is unnecessary, and either party may oblige the clerk of the district court to transmit the record forthwith. On the other hand, unless the record contains the necessary transcript, the clerk is not to transmit it.

Subdivision (c). Cause for extension of the time by either the district or the supreme court must be shown. The final sentence permits any party to expedite the appeal in cases in which the record is complete by obtaining an order that the record be transmitted and the appeal docketed at a date earlier than otherwise allowed or fixed.

Subdivision (d). This subdivision permits the record to be retained in the district court by order of the supreme court, or order of the district court subject to the order of the supreme court. Especially in cases where the judgment or order does not dispose of the entire litigation,

retention of the record in the district court may be a convenience for counsel and the district court. In some cases there may be no need for the transmission of the record, and the labor and expense of transmission may be saved.

Subdivision (e). This subdivision permits parties to stipulate against transmission of designated parts of the record free from the fear that a mistake may substantially affect the scope of the appeal. The final sentence makes it clear that a stipulation that designated parts of the record not be transmitted in no way diminishes the record itself. In effect, a party may at any time revoke his stipulation against transmission of parts of the record.

Subdivision (f). The substance of this subdivision was taken from Fed. R. Civ. P., Rule 75(j).

NOTE TO JUNE 30, 1981, AMENDMENT

The amendment is made for the purpose of economizing as to the expense of appeals to the Montana Supreme Court, and also assisting the court in solving a filing space problem which confronts the court. The amendment recognizes that no one, including the court, the parties and the clerk of court, has any real need for more than three copies of the transcript on an appeal, nor will any such need exist when the court is expanded to seven Justices, commencing January 1, 1981.

NOTE TO JUNE 16, 1986, AMENDMENT

The amendment is designed to remove uncertainty as to service and to include additional matter to be included in a motion for an extension of time for transmission of the record.

NOTE TO NOVEMBER 1, 1988, AMENDMENT

The amendment is designed to provide appropriate security and chain of custody procedures.

1988 Amendment: In (b), near middle of third sentence after "containers", deleted "and physical exhibits other than documents"; inserted fourth sentence relating to physical exhibits other than documents or photographs; inserted fifth sentence relating to motion for transmitting physical exhibit; and inserted sixth sentence relating to content of motion. Amendment effective November 1, 1988.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1996 Amendment: In (a), at end of first sentence, inserted exception concerning stipulation filed pursuant to Rule 54(c). Amendment effective October 1, 1996.

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, in first paragraph of (c) substituted last three sentences (for text see 1987 MCA) for "If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given."

1981 Amendment — Reasons — Effective Date: Supreme Court Order 10750, June 30, 1981, provided in part:

"1. The Court received from the Advisory Committee to the Supreme Court of the State of Montana on Rules of Civil Procedure its Report and Proposal that Rule 10(a) of the Montana Rules of Appellate Civil Procedure be amended to provide that three copies of each transcript, instead of six copies, be filed with the clerk of this Court on appeals.

2. On December 9, 1980, in an order entered in our cause no. 10750 (1980), we directed that notice of said proposal be given as required by section 3-2-703, MCA, and further directed that within six months of the filing of the petition by the Advisory Committee members of the bar or bench might file suggestions regarding the proposal, or request hearing thereon within said six month period.

3. No request for hearing has been filed within the said time by any member of the bench or bar.

4. The association of Montana judges has adopted a resolution requesting (1) delay of one year in adopting the proposal for the purpose of a study; (2) requesting hearings outside the six month period provided by section 3-2-703, MCA, on the proposal, and (3) requesting the aid of this Court in procuring increased allowances for transcripts from the legislature.

5. The legislature, in Chapter 295, Laws of Montana (1981), increased the permissible folio charge allowed to court reporters from 7 ½ cents per folio to 10 cents per folio, effective October 1, 1981.

6. The reason given by the Advisory Committee in submitting the proposal are these:

"COMMENT: The amendment is made for the purpose of economizing as to the expense of appeals to the Montana Supreme Court, and also assisting the court in solving a filing space problem which confronts the court. The amendment recognizes that no one, including the court, the parties and the clerk of court, has any real need for more than three copies of the transcript on an appeal, nor will any such need exist when the court is expanded to seven Justices, commencing January 1, 1981."

7. The Court finds that the reasons given by the Advisory Committee for the proposal outweighs any need for delay in adopting the proposal, and that the matter of increased allowances for court reporters is a legislative matter outside the province of this Court unless such allowance became so unreasonable as to affect the business of this Court. . . .

9. Said amendment shall be effective as to all transcripts required to be filed in this Court, based on notices of appeal filed and served on or after July 1, 1981 or proceedings had or taken to this Court commencing on and continuing from July 1, 1981."

Note: The Montana Rules of Appellate Civil Procedure are now cited as the Montana Rules of Appellate Procedure.

Case Notes

Appeal Not Dismissed for Appellant's Failure to Comply With Rule 10(c): More than 90 days elapsed from date of filing notice of appeal and forwarding of the record to Supreme Court. The court noted that the District Court had no authority to grant an extension, and that both appellant and the District Court displayed a relaxed attitude about the Appellate Rules, which the Supreme Court did not encourage. However, the violation was not egregious and there was no evidence that it was anything but inadvertent. The Supreme Court refused to dismiss. Scheitlin v. R&D Minerals, 217 M 8, 701 P2d 1388, 42 St. Rep. 986 (1985).

Failure to Timely Transmit Transcript — Refusal to Dismiss Appeal: Although the Supreme Court received the transcript 12 days beyond the 40-day deadline and the transcript lacked pertinent documents, the court refused to dismiss the appeal. The court noted that the procedural violation was not one that would affect the validity of the appeal, caused no substantive harm, and was not intended to mislead the court. Garza v. Peppard, 213 M 25, 689 P2d 279, 41 St. Rep. 1922 (1984).

Appeal Allowed Despite Failure to Comply With Procedural Rules: A seller was granted summary judgment against a buyer. Several months later, the court amended its order nunc pro tunc and certified the case for appeal under Rule 54(b), M.R.Civ.P. Despite failure to comply with the Montana Rules of Appellate Procedure, the Supreme Court chose to hear the appeal under Rules 3, 10, and 21, M.R.App.P. Marcus Daly Mem. Hosp. v. Borkoski, 191 M 366, 624 P2d 997, 38 St. Rep. 322 (1981).

Suspension of Rules: Appellants, upon petition to the Supreme Court, were granted a suspension of time limits set forth in Rules 10, 11, and 26, M.R.App.P., and substitution of specified time limits. Bd. of Natural Resources & Conservation v. N. Plains Resource Council, 183 M 540, 601 P2d 28, 35 St. Rep. 414 (1978).

Failure to Transmit Transcript: Defendants demonstrated a complete lack of adherence to the Montana Rules of Appellate Procedure. Their failure to transmit the transcript of the trial court proceedings required dismissal of the appeal. Yetter v. Kennedy, 175 M 1, 571 P2d 1152 (1977), followed in In re Marriage of Bell, 220 M 123, 713 P2d 552, 43 St. Rep. 226 (1986).

Error of Defendant — Refusal to Dismiss Appeal: Supreme Court refused to dismiss appeal for failure to file record within time limit where appellant-defendant had been granted a 90-day extension for filing the record, but through error of defendant or District Court, the order granted the appellant over 130 days in which to file record and where appellant at the end of that period moved for a 30-day extension which was granted and on the day of that motion filed the record. Hannifin v. Retail Clerks Int'l Ass'n, 162 M 170, 511 P2d 982 (1973).

Extension of Time — Notice: An order granting appellant additional time "to effect the composition of the record on appeal" was not an extension of time for filing notice of appeal. It is not necessary to serve a copy of the judgment on adverse party. Jackson v. Tinker, 161 M 51, 504 P2d 692 (1972).

Dismissal of Appeal — Failure to Comply With Rules: Appeal was dismissed where appellants had not transmitted any part of the record on appeal within the time required by subsection (a) of this rule, had not applied for an extension of time, had not requested parts of the transcript from the District Court Clerk within the time allowed, had not requested preparation of any part of the record on appeal, had not paid for copies of documents requested or portions of the transcript prepared, had not docketed the appeal or paid the docket fee, and had failed,

within the time allowed by the Chief Justice, to replace counsel desiring to withdraw with good cause. Larry C. Iverson, Inc. v. United Bank of Pueblo, 158 M 223, 490 P2d 352 (1971).

Collateral References

4 C.J.S. Appeal and Error §527, et seq.

5 Am. Jur. 2d Appellate Review §511, et seq.

Correction, modification, or supplementation of record on appeal under Rule 10(e) of Federal Rules of Appellate Procedure. 60 ALR Fed. 183.

Composition of record on appeal from district court under Rule 10(a) of Federal Rules of Appellate Procedure. 33 ALR Fed. 588.

Rule 11. Docketing the appeal — filing of the record.

Advisory Committee Notes

This rule is patterned after Rule 12 of the Federal Draft, with adjustments to state practice. The provision of section 82-503[, R.C.M. 1947; 3-2-403, 3-2-404, MCA] for a fee for filing the "transcript" on appeal will apply to the "record" on appeal pursuant to these rules.

The appellant's responsibility with respect to docketing and filing are specified. The appellant may pay the filing fee at any time after filing the notice of appeal, and it is then the duty of the clerk of the supreme court to enter the appeal on the docket. The appellant's responsibility is (1) to pay the filing fee at or before the time allowed or fixed for transmission of the record, and (2) to insure that the record is transmitted to the supreme court within the time allowed or fixed for its transmission. The clerk of the supreme court is directed to assign to cases on appeal the title which was used in the district court in the interest of facilitating future reference and citation and location of cases in indexes.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, in (a) substituted "In criminal cases and other cases in which" for "If" at beginning of second sentence.

Case Notes

Cases Decided Under Rules 1283
Cases Decided Under Statute 1283

CASES DECIDED UNDER RULES

Suspension of Rules: Appellants, upon petition to the Supreme Court, were granted a suspension of time limits set forth in Rules 10, 11, and 26, M.R.App.P., and substitution of specified time limits. Bd. of Natural Resources & Conservation v. N. Plains Resource Council, 183 M 540, 601 P2d 28, 35 St. Rep. 414 (1978).

Failure to Transmit Transcript: Defendants demonstrated a complete lack of adherence to the Montana Rules of Appellate Procedure. Their failure to transmit the transcript of the trial court proceedings required dismissal of the appeal. Yetter v. Kennedy, 175 M 1, 571 P2d 1152 (1977), followed in In re Marriage of Bell, 220 M 123, 713 P2d 552, 43 St. Rep. 226 (1986).

Dismissal of Appeal — Reasons: Appeal was dismissed where appellants had failed to docket the appeal or pay the docket fee, had not requested parts of the transcript within the time allowed, had not requested preparation of any part of the record on appeal, had not paid for copies of documents requested or portions of the transcript prepared, had not transmitted any part of the record on appeal to the Supreme Court, and had not, within the time allowed by the Chief Justice, replaced counsel desiring to withdraw for good cause. Larry C. Iverson, Inc. v. United Bank of Pueblo, 158 M 223, 490 P2d 352 (1971).

CASES DECIDED UNDER STATUTE

Delay in Appeal — Order of Trial Court as Evidence: On motion to dismiss appeal the fact that appellant did obtain an order from the trial court purporting to extend the time may be considered in determining whether she was guilty of laches in preparing her transcript on appeal. Rader v. Taylor, 134 M 419, 333 P2d 480 (1958).

Delay in Filing Transcript — No Laches Found: A motion to dismiss an appeal on the grounds that no transcript or brief of appeal had been served or filed by the appellants within the time prescribed by the rules of the Supreme Court will be denied when it appears that prior to the consideration of the motion to dismiss the appellant's transcript had been filed with the Supreme

Court and the record perfected to the satisfaction of the court and the delay in filing such transcript has been without laches on the part of the appellants. McNaught v. McCahan, 126 M 616, 250 P2d 912 (1952).

Collateral References

4 C.J.S. Appeal and Error §527, et seq.
5 Am. Jur. 2d Appellate Review §§511 through 532.

Rule 12. Effect of dismissal.

Advisory Committee Notes

This rule incorporates R.C.M. 1947, section 93-8020.

Case Notes

Cases Decided Under Rules 1284
Cases Decided Under Statute 1284

CASES DECIDED UNDER RULES

Failure to Prosecute Appeal — Default Judgment Affirmed: The District Court entered a default judgment, and Reese appealed but failed to prosecute his appeal by ordering the necessary transcripts. Upon motion by plaintiff and without objection by Reese, the Supreme Court dismissed the appeal with prejudice. The dismissal affirmed the order of the District Court and became the law of the case. The District Court did not err in refusing to set aside the default judgment. State ex rel. Dept. of Health and Environmental Sciences v. Reese, 260 M 24, 858 P2d 357, 50 St. Rep. 925 (1993).

Second Appeal Denied: Appellant who requested dismissal of his appeal from ruling denying motion to set aside summary judgment cannot later make a second appeal attacking the validity of the summary judgment. United Bank of Pueblo v. Iverson, 164 M 473, 525 P2d 21 (1974).

CASES DECIDED UNDER STATUTE

New Actions in District Court Improper Remedy for Dismissal: In the absence of fraud, perjury, or other collusive action, after the Supreme Court's dismissal of an appeal from the District Court's judgment denying a petition for a Writ of Mandate, such judgment could not again be challenged by another action in the District Court. Gray v. Bohart, 131 M 522, 312 P2d 529 (1957), followed in S. Gallatin Land Corp. v. Yetter, 245 M 320, 801 P2d 575, 47 St. Rep. 2139 (1990).

Modification of Dismissal Order as Plaintiff's Remedy: If plaintiffs are aggrieved by dismissal, their remedy is to promptly apply to Supreme Court to have order of dismissal modified and not to take another appeal from the same judgment. Libin v. Huffine, 124 M 361, 224 P2d 144 (1950).

Subsequent Appeal Not Proper Remedy for Dismissal: Where appeal was dismissed a subsequent appeal taken from the same judgment within the time allowed for taking appeals must likewise be dismissed. Libin v. Huffine, 124 M 361, 224 P2d 144 (1950).

Dismissal for Failure of Service — Effect: An appeal by plaintiff in an action against a county may be dismissed for failure to serve the Attorney General with a copy of the transcript and appellant's brief, and such dismissal, unless done without prejudice, will be in effect an affirmance of the judgment. McIntosh Hardware Co. v. Flathead County, 32 M 254, 80 P 239 (1905).

Collateral References

Appeal and Error *key* 803.
5 C.J.S. Appeal and Error §§653 through 655.
5 Am. Jur. 2d Appellate Review §876.

Rule 13. Acts of personal representatives or guardians valid when appointment vacated.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule incorporates R.C.M. 1947, section 93-8016.

NOTE TO JUNE 16, 1986, AMENDMENT

The amendment conforms the rule to the terminology of the Uniform Probate Code.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, substituted "personal representative" for "executor, or administrator" in two places; and made minor changes in grammar.

Case Notes

CASES DECIDED UNDER STATUTE

Letters Issued Pending Appeal: The District Court proceeded without jurisdiction when its Clerk issued letters testamentary to a person appointed executor when an appeal was taken from the order appointing such person executor and such appeal was taken before the executor qualified. Neither his letters nor his acts done thereunder are saved by this section inasmuch as he never qualified. In re Hansen's Estate, 129 M 261, 284 P2d 1007 (1955).

Qualification Pending Appeal: Where a person was appointed administrator, but before he qualified an appeal was taken from the order appointing him, such person could not then qualify and enter into administration of the estate, for at the time of attempting to qualify, the District Court had lost jurisdiction of the matter because of the appeal. In re Hansen's Estate, 129 M 261, 284 P2d 1007 (1955).

Acts Taken Under Voidable Appointment Valid: Where the court appointed decedent's "nominee" in an instrument not qualifying as a will, as against the petition of the public administrator, decedent having died intestate, such appointment was not void but voidable only, and whatever proper steps in the administration were taken and done under the appointment before reversal must be taken as lawfully performed and valid. In re Rohkramer's Estate, 113 M 545, 131 P2d 967 (1942), distinguished in In re Hansen's Estate, 129 M 261, 284 P2d 1007 (1955).

Rule 14. Ruling against respondent may be reviewed.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule incorporates R.C.M. 1947, section 93-8023, but eliminates references to bills of exceptions and statements of the case properly settled because these rules nowhere provide for such bills and statements.

NOTE TO JUNE 16, 1986, AMENDMENT

The foregoing rule does not obviate the necessity of filing cross appeals. See Johnson v. Tindall, (1981) 195 Mont. 165, 635 P.2d 266, and Converse v. Converse, (1982) 198 Mont. 227, 645 P.2d 413.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, inserted "in a civil case" in the first sentence, and inserted "civil" in the second sentence.

Case Notes

Cases Decided Under Rules 1285
Cases Decided Under Statute
General 1287
Compensating Error 1288
Cross-Appeals 1288
Cross-Assignments of Error 1289
Substantial Rights to Be Affected 1289

CASES DECIDED UNDER RULES

No Error in Giving Jury Instructions Regarding Intervening Cause When Jury Did Not Consider Issue: Pula sued the state for negligence related to an incident of rape of Pula by another inmate while Pula was incarcerated in Blaine County jail. The District Court's special

verdict form required jurors to answer a series of questions on breach of duty, causation, and damages, and then, depending on the answers, to move on to succeeding questions, one of which was the issue of whether there was an intervening cause. Pula asserted error in that the instructions on independent intervening causation were incorrect statements of the law. However, the first question for the jury was whether the state was negligent, which was answered affirmatively, so the jury moved on to the second question, which was whether the negligence resulted in Pula's injuries. The answer was negative, so the jury was instructed not to consider the third question, which was whether there was an intervening cause. Because the jury never considered the issue of intervening cause in reaching its verdict, the instructions on intervening cause had no effect on the outcome of the trial. The Supreme Court declined to assign reversible error to instructions addressing an issue that was never reached. Pula v. St., 2002 MT 9, 308 M 122, 40 P3d 364 (2002). See also Stenberg v. Neel, 188 M 333, 613 P2d 1007 (1980).

Controversial Evidence Erroneously Admitted — Appeal Showing Substantial Rights Affected — Not Harmless Error: When controversial evidence was erroneously admitted at trial and when on appeal a showing was made that substantial rights might well have been affected, the error was not harmless. Beil v. Mayer, 242 M 204, 789 P2d 1299, 47 St. Rep. 661 (1990). See also St. Highway Comm'n v. Churchwell, 146 M 52, 403 P2d 751 (1965).

Incorrect Calculations Inappropriate for Judicial Notice — Harmless Error: The trial court took judicial notice of two calculations that proved incorrect. The inferences drawn from these figures were used to support the court's decision. The Supreme Court stated that the trial court erred by taking judicial notice of facts not appropriate for judicial notice, but the error was harmless since other evidence supported the court's decision. Rose v. Myers, 223 M 13, 724 P2d 176, 43 St. Rep. 1493 (1986).

Slight Dollar Amount Errors in Findings — Harmless Error: That certain monetary amounts in the findings varied slightly from the proof at the trial was harmless error not requiring reversal, when the variation had no effect on the outcome of the issues. Farmers St. Bank of Victor v. Imperial Cattle Co., 218 M 89, 708 P2d 223, 42 St. Rep. 1419 (1985).

No Ruling Against Respondent — Issue Not Reviewable: When there was no ruling by the Workers' Compensation Court against claimant on the issue of the present value discount of claimant's net award, and claimant had made no objections on this issue, the claimant could not raise the issue under this section. Conway v. Blackfeet Indian Dev., Inc., 217 M 54, 702 P2d 970, 42 St. Rep. 1020 (1985).

Perfected Cross-Appeal Necessary to Address Separate Issues: Respondent raised two issues not addressed by appellant. The court did not consider the issues because respondent did not perfect a cross-appeal. Rule 14, M.R.App.P., provides for review of matters by cross-assignment of errors, but this does not eliminate the necessity for cross-appeal by a respondent who seeks review of matters separate and distinct from those sought to be reviewed by appellant. Mydlarz v. Palmer/Duncan Constr. Co., 209 M 325, 682 P2d 695, 41 St. Rep. 738 (1984), followed in Tigart v. Thompson, 237 M 468, 774 P2d 401, 46 St. Rep. 974 (1989). See also Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Cross-Appeal Necessary — Damages: Defendant could not, on plaintiff's appeal, challenge failure to award defendant damages, as defendant did not cross-appeal. Lemley v. Allen, 203 M 37, 659 P2d 262, 40 St. Rep. 279 (1983). See also Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Consent to Alleged Error: On appeal, a father suing for injury to his son found submerged in defendant's swimming pool alleged pretrial discovery abuse by defendant in that defendant was allowed to add a witness the day before trial and had known the location of the witness but failed to inform the father of the address, in violation of defendant's duty to supplement its interrogatory answers. It was not reversible error to allow the witness to testify. The testimony was probative on important fact issues, and the father interviewed the witness before trial and rejected an offered continuance. The father was not entitled to have his cake and eat it too. Johnson v. YMCA, 201 M 36, 651 P2d 1245, 39 St. Rep. 1937 (1982).

When Cross-Appeal Required: The respondent in an appeal sought review under this rule of an alleged inequitable property distribution. Because the respondent sought a determination more favorable than that made by the lower court, a cross-appeal was necessary. Converse v. Converse, 198 M 227, 645 P2d 413, 39 St. Rep. 887 (1982).

Cross-Appeal Necessary — Attorney Fees: Johnson, an attorney, brought suit against Tindall to recover attorney's fees. The record in the case contains a substantial basis for awarding all the fees claimed, but the District Court reduced the fees in the judgment. Tindall appealed the decision, and on appeal Johnson asked the court to review the decision to reduce the fees under Rule 14, M.R.App.P. The court held that absent a cross-appeal by Johnson, the court cannot

review the decision to reduce the fees. Johnson v. Tindall, 195 M 165, 635 P2d 266, 38 St. Rep. 1763 (1981), followed in Johnson v. Johnson, 205 M 259, 667 P2d 438, 40 St. Rep. 1255 (1983), and in Neumann v. Rogstad, 232 M 24, 757 P2d 761, 45 St. Rep. 837 (1988).

Trade Secrets as Protectable Property — Necessity to Consider Under This Rule: Although the District Court finding that trade secrets are protectable property was not appealed, the Supreme Court considered the determination sine qua non to its decision in a utility ratemaking case, and it was also required to be considered under this rule. Mtn. States Tel. and Tel. Co. v. Dept. of Public Service Regulation, 194 M 277, 634 P2d 181, 38 St. Rep. 1479 (1981).

Delinquent Youth Conviction — Inadmissible Hearsay — Corroboration of Testimony of Others Accountable for Same Offense: After a minor was cited for running a red light and for driving without a license, the County Attorney charged he was a delinquent youth under the Youth Court Act, alleging the minor had taken the car without the owner's consent. The minor appealed stating that the testimony of two police officers concerning the stolen property report was inadmissible hearsay and that his conviction declaring him a delinquent youth was improperly based on the testimony of other individuals who were legally accountable for the offense. The Supreme Court found that the officers' testimony was inadmissible hearsay. The court also found that the corroborating evidence supplied by the officer who stopped the vehicle tended to connect the youth directly with the offense and that, therefore, the testimony of other minors responsible or legally accountable for the same offense was properly admitted. Despite the fact that the testimony of the other youths in the car, in conjunction with the independent corroborating evidence, could support a conviction in some cases, the reviewing court reversed the conviction. It found that the admission of the hearsay so affected the substantial rights of the accused as to require reversal. In re D.W.L., a Youth, 189 M 267, 615 P2d 887 (1980).

No Reversible Error on Damage Instructions When Jury Did Not Reach Issue: Where the jury does not reach the issue of damages, on appeal no reversible error can be predicated on damage instructions. Stenberg v. Neel, 188 M 333, 613 P2d 1007 (1980). See also Pula v. St., 2002 MT 9, 308 M 122, 40 P3d 364 (2002).

Opinion Testimony as to State of Intoxication — Harmless Error: Failure to allow witnesses to answer defense attorney's question of whether they thought defendant was drunk or on drugs, when witnesses had testified as to defendant's erratic actions, responses, appearance, and condition and defendant's expert witness had testified concerning the effect of alcohol and drugs, was at most harmless error not affecting the substantive rights of the defendant. St. v. Hardy, 185 M 130, 604 P2d 792 (1980).

Denial of Discovery: Motion to discover papers went unruled upon, and no objection was made. Therefore, substantial rights of defendant were not violated and conviction will not be overturned due to harmless error. St. v. Armstrong, 172 M 296, 562 P2d 1129 (1977).

CASES DECIDED UNDER STATUTE

GENERAL

Dismissal of Parties — Remedy by Cross-Appeal: Where the trial court in an action against a corporation and two of its employees granted a motion of the latter two for a directed verdict and ordered judgment in their favor for costs, plaintiff's (respondent's) remedy was by cross-appeal, not by cross-assignment of error. Truzzolino Food Prod. Co. v. F. W. Woolworth Co., 108 M 408, 91 P2d 415 (1939).

Instructions to Jury Disregarded — When Harmless Error: The Supreme Court will not, when the record discloses that the jury disregarded a specific instruction, inquire whether the instruction is correct, but will direct a new trial on that ground, except when the evidence was sufficient to have justified the verdict, in which case the appellant would be entitled, under this section, to have the judgment affirmed. De Young v. Benepe, 55 M 306, 176 P 609 (1918).

Appeal by Plaintiff — Insufficiency of Evidence Raised by Defendant: Where the plaintiff, on appeal from a judgment in his favor, complains that it is for an insufficient amount, but the defendant correctly insists that the complaint is insufficient to support any judgment, the Supreme Court will reverse the judgment with directions to sustain the demurrer (demurrer abolished by Rule 7(c), M.R.Civ.P., and 25-31-503, now repealed) to the complaint. Manhattan Co. v. White, 48 M 565, 140 P 90 (1914).

New Trial Granted — Application of Statute: The rule that an order granting a new trial will be upheld, if any ground of the motion supports such order, is applicable only where the order is a general one, not disclosing the particular ground upon which the court acted, or where counsel have invoked the provisions of this section for the compensation of errors. Harrington v. Butte Miner Co., 48 M 550, 139 P 451 (1914).

COMPENSATING ERROR

Failure to Appeal as Precluding Consideration of Error: In action to foreclose lien by taker up of animals under 81-4-217, where defendant appealed but plaintiff did not cross-appeal, a cross-assignment of error by plaintiff contending that allowance of 10 cents per goat per day for caring for animals was not a reasonable allowance but that allowance should have been 50 cents per goat per day, could not be considered since the error was not of a compensatory character. Doornbos v. Ihde, 124 M 570, 228 P2d 235 (1951).

Separate Causes of Action — No Effect by Separate Error: Where the complaint consisted of two causes of action each relating to separate transactions independent of each other, cross-assignments relating to the trial of the one could not compensate or render harmless error committed in the trial of the other, and therefore such assignments were not available to respondent. J. M. Hamilton Co. v. Battson, 99 M 583, 44 P2d 1064, 101 ALR 520 (1935).

New Trial Granted — Error to Be Considered: A new trial should never be granted when it is apparent that the result reached would not be changed on a retrial, and in passing on an appeal from an order granting a new trial the Supreme Court may consider an assignment of error that if the trial court had not committed error against respondent during the trial a cause would be presented in which a new trial should not have been granted, under the doctrine of compensatory error. Parsons v. Rice, 81 M 509, 264 P 396 (1928).

Requirements and Effect of Statute:

It is only where alleged errors assigned by respondent under his cross-assignment of error compensate appellant for errors committed against him that the Supreme Court is required to affirm the judgment under this section. Murray v. Creese, 80 M 453, 260 P 1051 (1927).

Since the enactment of this section, the Supreme Court is required on appeal to review not only the errors assigned by appellant, but the cross-assignment made by respondent if made to appear in the record by bill of exceptions, and under the doctrine of compensatory error thereby established, the court cannot reverse the judgment for error committed against appellant if the same result would have been attained had the trial court not committed errors against respondent. Nitsche v. Sec. Benefit Ass'n, 78 M 532, 255 P 1052 (1927).

Under this section authorizing review of cross-assignments of error made by the successful party, the Supreme Court will affirm the judgment if error committed against the appellant is compensated by that committed against respondent. Hale v. Belgrade Co., Ltd., 75 M 99, 242 P 425 (1925).

This section requires the Supreme Court to review the errors made, not only against the appellant, but also those made in his favor, if they are made to appear in the record by bill of exceptions, and prohibits the reversal of the judgment upon any error complained of by the appellant, if, but for the error against the respondent, the result of the trial would have been the same. In re Murphy's Estate, 43 M 353, 116 P 1004 (1911).

Exception of Parties in Record — Use by Prevailing Party: By virtue of this section and of section 93-5509, R.C.M. 1947 (superseded by Rules 9, 10, and 25, M.R.App.P.), the exceptions of both parties may be incorporated in the record, and the prevailing party is always in a position to inform the Supreme Court that he has not been permitted to introduce all of his evidence. State ex rel. La France Copper Co. v. District Court, 40 M 206, 105 P 721 (1909).

CROSS-APPEALS

Issue Not Raised by Appellant: The appellant's workers' compensation benefits had been terminated on the basis that his conviction for growing marijuana demonstrated that his injury was not permanent. The State Fund argued that the appellant should have been ordered to reimburse the fund for all payments received. The Supreme Court held that the issue had not been raised by cross-appeal and therefore was not properly before the court. Baldwin v. St. Comp. Ins. Fund, 242 M 373, 791 P2d 49, 47 St. Rep. 810 (1990). See also Billings Firefighters Local 521 v. Billings, 1999 MT 6, 293 M 41, 973 P2d 222, 56 St. Rep. 23 (1999).

Cross-Appeal Still Required for Consideration of Separate Error: Where respondent desires a review of rulings of the trial court upon a cause of action separate and distinct from that which the appellant seeks to have reviewed on his appeal, he must prosecute a cross-appeal, even though the causes were tried in the same action, this section authorizing review of cross-assignments of error not being intended to do away with the necessity of a cross-appeal under such conditions. Francisco v. Francisco, 120 M 468, 191 P2d 317, 1 ALR 2d 625 (1947); Osnes Livestock Co. v. Warren, 103 M 284, 62 P2d 206 (1936); Best v. London Guar. & Accident Co., 100 M 332, 47 P2d 456 (1935); In re Silver's Estate, 98 M 141, 38 P2d 277 (1934); Cook v. MacGinniss, 72 M 280, 233 P 129 (1925).

Time Limits Applicable to Cross-Appeals: The provision of section 93-8004, R.C.M. 1947 (superseded by Rule 5, M.R.App.P.), that an appeal from a final judgment must be taken within 6 months after entry thereof, applies where a respondent takes a cross-appeal under this section, for the purpose of having rulings made against him during the course of the trial reviewed. Conway v. Fabian, 108 M 287, 89 P2d 1022 (1939).

CROSS-ASSIGNMENTS OF ERROR

Mutual Failure to Cross-Assign Excused: Where appellant did not make an assignment of error, the court will likewise excuse the failure of the respondent to make a cross-assignment of error. Nat'l Sur. Corp. v. Kruse, 121 M 202, 192 P2d 317 (1948).

No Cross-Assignment Considered Where Cross-Appeal Not Taken: Where no cross-appeal was taken, the court declined to consider a cross-assignment of error, stating that it was evident that it could in nowise compensate for the alleged errors claimed by appellant. Hitchner & Hitchner, Inc. v. Fox, 109 M 593, 98 P2d 327 (1940).

Application of Statute — Cross-Assignments Required:

A statute authorizing cross-assignments of error applies only where the respondent makes such assignments upon rulings adverse to him and preserves them in the bill of exceptions, to enable the Supreme Court to determine whether the errors complained of by appellant were compensated for or were rendered harmless by reason of them. Phelps v. Union Cent. Life Ins. Co., 105 M 195, 71 P2d 887 (1937).

This section has application only to cases in which the respondent makes cross-assignments upon errors in rulings adverse to him and preserved in a bill of exceptions, its purpose being to enable the Supreme Court to determine whether those complained of by the appellant were compensated or rendered harmless by reason of those complained of by respondent. In re Silver's Estate, 98 M 141, 38 P2d 277 (1934); Cook v. MacGinniss, 72 M 280, 233 P 129 (1925).

Application to Claim and Delivery: This section has no application to a case wherein the verdict in claim and delivery fails to find that there was an unlawful taking or detention. It has application only to cases in which the respondent makes cross-assignments upon errors on rulings adverse to him and preserved in a bill of exceptions, in order to enable the Supreme Court to determine whether those complained of by the appellant were compensated or rendered harmless by reason of them. Olcott v. Gebo, 54 M 35, 166 P 300 (1917).

Cross-Appeal or Assignment of Error Required: On a plaintiff's appeal from a judgment for the plaintiff, the defendant cannot complain where he has not appealed nor even, by cross-assignment in his brief, asked that the judgment be modified. Williams v. Johnson, 50 M 7, 144 P 768 (1914).

SUBSTANTIAL RIGHTS TO BE AFFECTED

Failure to Read Testimony of No Effect: Affidavit of eight of the jurors, who were enough to render a verdict, stated that they were not in disagreement as to what the evidence showed. The only jurors who desired some or all of the testimony read were those who finally voted against the verdict. They had hoped to influence the other jurors to change their minds by having testimony read. The other jurors being two-thirds of them, stated definitely that their verdict would not have been different had the testimony or any part of it been read to them. The irregularity, if it actually existed, did not affect verdict and was not cause for reversal where it was clear that it did not affect substantial right of plaintiff. Galiger v. Hansen, 133 M 34, 319 P2d 1051 (1957).

No Application to Lack of Evidence: The portion of this section declaring that no judgment shall be reversed for trivial or nonprejudicial error does not extend to proceeding where in addition to prejudicial error in admission of testimony, the evidence in support of dismissal was meager and unconvincing while that for the prosecution was direct and forceful. St. v. Patton, 102 M 51, 55 P2d 1290, 104 AlR 76 (1936).

Substantial Justice to Be Done: The Supreme Court will dispose of a case according to the substantial rights of the parties, as shown by the record. Manhattan Co. v. White, 48 M 565, 140 P 90 (1914).

Collateral References

Appeal and Error *key* 878, 1026 through 1030.

5 C.J.S. Appeal and Error §§715, 742, 825 through 827.

4 Am. Jur. 2d Appellate Review §84, et seq.

Rule 15. Remedial powers of the supreme court in civil cases.

Advisory Committee Notes

This rule incorporates R.C.M. 1947, section 93-8024, substituting "supreme court" for "appellate court" and eliminating the provision for damages when the appeal is made for delay. Rule 32 covers the matter of damages.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, at beginning, inserted "In a civil case".

Case Notes

Cases Decided Under Rules 1290
Cases Decided Under Statute 1290

CASES DECIDED UNDER RULES

Appeal Moot for Inability of Supreme Court to Grant Relief: Plaintiffs owned a ranch, but being in default and facing foreclosure, they made a deal with defendant Bell whereby Bell would borrow money to pay off plaintiffs' debt and plaintiffs would receive an ownership interest in Bell's company formed to manage the ranch. However, the mortgage was never transferred into the company, and plaintiffs sued Bell for fraud and breach of contract. A jury granted plaintiffs $500,000 in damages for Bell's breach of contract, and Bell appealed. Bell ultimately declared bankruptcy and sold the ranch to pay off the loan and to pay off the money judgment owed to plaintiffs, whereby plaintiffs' mortgage on the ranch was released. Plaintiffs moved that Bell's appeal be dismissed for mootness, and the Supreme Court agreed. The $500,000 judgment could not simply be reversed with plaintiffs retaining ownership because the ranch had been sold, and Bell would be considerably richer than he was at the beginning of the deal, having invested little of his own money, and plaintiffs would have nothing. Therefore, applying Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799 (1996), the Supreme Court held that Bell's claim was moot based on the court's inability to grant effective relief. Graveyard Creek Ranch, Inc. v. Bell, 2005 MT 172, 327 M 491, 116 P3d 779 (2005).

Insufficient Evidence to Support Verdict: The Supreme Court held that the respondent was not entitled to recover under any of the damage theories he had presented. The court reversed the District Court's judgment and refused to grant a new trial for a case in which a party could at most recover only nominal damages upon retrial. First Bank-Billings v. Clark, 236 M 195, 771 P2d 84, 46 St. Rep. 291 (1989).

Erroneous Judgment — Reversal — Effect: The trial court held that Fix was the owner of a state lease, based on an oral agreement to assign the lease. The Supreme Court reversed the decision in Aye v. Fix, 176 M 474, 580 P2d 97 (1978). Bruski, the assignee of the lease, contended that the reversal on the first appeal precluded the trial judge from relying on his original finding that Fix was rightfully in possession under a sublease from Aye. A reversal, however, extends only to those issues that the appellate court actually decided or decided by necessary implication; it does not affect collateral matters not before the court, so that the finding that Fix was rightfully in possession was allowable. Fix was liable to Bruski, however, for payments made to producers who raise crops in accordance with federal guidelines. A party who has been dispossessed of property by an erroneous judgment is entitled, upon reversal, not only to specific restitution of the property, but also to rents, issues, and profits therefrom. Had it not been for the trial court's erroneous judgment, Bruski would have been in possession of the land and entitled to the payments. Aye v. Fix, 192 M 141, 626 P2d 1259, 38 St. Rep. 578A (1981). See also Slater v. Cent. Plumbing & Heating Co., 1999 MT 257, 297 M 7, 993 P2d 654, 56 St. Rep. 1023 (1999).

Practice of Additur: The rule of additur given in Zook Bros. Constr. Co. v. St., 171 M 64, 556 P2d 911 (1976), may be invoked only for an adjustment of an award of damages made by a District Court sitting without a jury and only to correct an error ascertainable by mathematical calculation. Bohrer v. Clark, 180 M 233, 590 P2d 117, 35 St. Rep. 1878 (1978), affirmed in Barnes v. United Indus., Inc., 275 M 25, 909 P2d 700, 53 St. Rep. 17 (1996).

CASES DECIDED UNDER STATUTE

Partnership Dissolution — Unjust Benefit Required Restitution: The District Court erred in refusing motion of appellant for order of restitution in proceedings dissolving partnership

between two brothers. One of the brothers, pursuant to original judgment of the District Court, obtained possession and control over all of the property of the partnership, save that portion paid into court, in an attempt to satisfy the judgment in respect to appellant, the other brother, where there was an unjust benefit conferred upon purchaser as a result of the District Court's judgment. He had no legal right to the amount given him of the proceeds of the partnership and the judgment had been modified declaring appellant the owner of certain property previously paid over to the purchaser. Hanson v. Hansen, 134 M 290, 329 P2d 791 (1958).

Right to Deny License Subject to Restitution: The right of the Montana Liquor Control Board to deny a license is not personal to the members or of such nature that the license may be subject of restitution under this section. Gill v. Rafn, 133 M 505, 326 P2d 974 (1958), followed and clarified, with regard to voluntary versus involuntary payment or performance as affecting waiver of right to appeal without having bearing on mootness, in Turner v. Mtn. Eng'r & Constr., Inc., 276 M 55, 915 P2d 799, 53 St. Rep. 23 (1996).

Jurisdiction Available to Enforce Restitution: While the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution of an amount lost through the enforcement of a judgment subsequently reversed. Waggoner v. Glacier Colony of Hutterites, 131 M 525, 312 P2d 117 (1957).

Restitution Impossible — Issues Moot: Where District Court issued a Writ of Prohibition prohibiting the Liquor Control Board from issuing licenses to persons other than those who had permits, and also issued a Writ of Mandate directing the issuance of licenses to certain persons, which Writs the court refused to stay pending appeal, and the parties to whom the licenses were issued engaged in the business of selling liquor at retail; the questions on appeal are moot, since the court on appeal could not restore the parties to the status quo and could not effect restitution. State ex rel. Hagerty v. Rafn, 130 M 554, 304 P2d 918 (1956), distinguished in State ex rel. Ronish v. School District, 136 M 453, 348 P2d 797 (1960).

Restitution of Books and Papers to Officer: Under this section, the Supreme Court may order restitution in a proper case or direct the District Court to do so. Hence, where a city officer was wrongfully ousted from office in quo warranto proceedings, the appellate court on reversal of the judgment may remand the cause with direction that the books and papers of the office be turned over to the successful appellant. State ex rel. Kurth v. Grinde, 96 M 608, 32 P2d 15 (1934), distinguished in State ex rel. Hagerty v. Rafn, 130 M 554, 304 P2d 918 (1956); explained in Gill v. Rafn, 133 M 505, 326 P2d 974 (1958).

Manner of Compelling Restitution: The District Court improperly vacated an order appointing a receiver in a mortgage foreclosure suit and directed the clerk of court to pay over to defendant the money collected during the receivership. With knowledge that the order was subject to review and possible reversal, the money was at once obtained from the clerk. Under this section the Supreme Court may either compel restitution by its mandate or direct the District Court to do so, or the plaintiff mortgagee may maintain a separate action for that purpose. Burgess v. Lasby, 94 M 534, 24 P2d 147 (1933).

Collateral References

Appeal and Error *key* 1115 through 1121, et seq.; Costs *key* 259 through 263.

5 C.J.S. Appeal and Error §§861 through 863, 934; 20 C.J.S. Costs §§371 through 374, 403.

Rule 16. Remittitur must be certified to the clerk of the district court.

Advisory Committee Notes

This rule incorporates the substance of R.C.M. 1947, section 93-8025, but eliminates references to the judgment roll, which is nowhere provided for in these rules.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Case Notes

CASES DECIDED UNDER STATUTE

Judgment Pursuant to Mandate Becomes Final Judgment: The entry of the judgment rendered by the Supreme Court by the Clerk of the District Court as directed by statute ipso facto modifies the judgment theretofore entered by the District Court. The judgment of the Supreme Court so entered becomes the final judgment in the cause. Hansen v. Hansen, 130 M 496, 304 P2d 1107 (1956).

Modification of Judgment — Language Incorrect: Where Supreme Court, on appeal, by its judgment and remittitur, modified the judgment of the lower court, an entry by the lower court to the effect that its former judgment "stand for naught" is error and can be corrected. Hansen v. Hansen, 130 M 496, 304 P2d 1107 (1956).

Application of Statutes Directing Entry of Judgment: A mandate of the Supreme Court, reversing a judgment and remanding the case, with directions to enter judgment, must be interpreted in the light of the statutes governing the entry of a judgment after appeal, and the direction to enter judgment as directed must be construed as addressed to the clerk of the trial court. State ex rel. Dolenty v. Reece, 43 M 291, 115 P 681 (1911).

Recording of Judgment Proper: The practice of the clerk of the trial court of signing and recording a formal judgment, on receipt of a remittitur by the Clerk of the Supreme Court, is proper, in the absence of any other legislative direction. State ex rel. Dolenty v. Reece, 43 M 291, 115 P 681 (1911).

Duty of Clerk Ministerial Duty: The duty which this section imposes upon the Clerk of the District Court, in requiring him to enter on his docket the judgment of the Supreme Court rendered in any cause before it on appeal, is a purely ministerial one. State ex rel. Dolenty v. District Court, 42 M 170, 111 P 731 (1910).

Mandamus Against District Court Improper — Duty Upon Clerk: Since the duty of entering a judgment rendered by the Supreme Court in disposing of an appeal rests upon the Clerk of the District Court from which the appeal was taken, such court, or its judge, may not be compelled by mandamus to perform the act thus imposed by law upon the Clerk. State ex rel. Dolenty v. District Court, 42 M 170, 111 P 731 (1910).

Law Review Articles

Additur Not Recognized in Montana: This note reviews the case of St. Highway Comm'n v. Schmidt, 143 M 505, 391 P2d 692 (1964), in which the court held that the power of additur was not available to a Montana District Court. 26 Mont. L. Rev. 104 (1964).

Collateral References

Appeal and Error *key* 1183.

5 C.J.S. Appeal and Error §§964, 968 through 972.

5 Am. Jur. 2d Appellate Review §§826, 827.

III. Original Proceedings — Extraordinary Writs

Rule 17. Acceptance and manner of conducting.

Advisory Committee Notes

This rule incorporates Montana Supreme Court Rule IV, with changes in subdivisions (e) and (f) designed to recognize that on original applications the court is not limited to the issuance of alternative writs or orders to show cause, but may issue whatever remedial writ or order it deems expedient.

Compiler's Comments

2002 Amendments: In (e) in last sentence near end after "initials" deleted "or first names". Amendment effective February 1, 2003.

In (e) at end of paragraph inserted last sentence concerning use of initials rather than names of certain parties. Amendment effective March 15, 2002.

2000 Emergency Rule: In an order dated June 28, 2000, the Supreme Court adopted rule modifications on an emergency basis. The portion of the order affecting this rule provided: "**Shortened Briefs and Petitions.** The word and page limitation for briefs specified in Rule 27(d)(i), M.R.App.P., is modified as follows: A principal brief must not exceed 10,000 words and a reply brief, amicus brief or petition for rehearing must not exceed 5,000 words. Rule 27(d)(ii), M.R.App.P., is modified as follows: a principal brief must not exceed 30 pages and a reply brief, amicus brief or petition for rehearing must not exceed 14 pages. Petitions filed under Rule 17(b), M.R.App.P., must not exceed 5000 words or 14 pages. These modifications apply to all briefs and petitions filed on or after August 1, 2000. Except as modified herein, all other provisions of the referenced Rules remain unchanged."

1999 Amendment: At end of last sentence of (b) inserted exception clause; in (e) in first sentence inserted "in summary fashion and", at end of second sentence inserted language concerning summarizing authorities, and substituted third sentence concerning not filing separate memorandum or brief for former sentence requiring filing memorandum or authorities; substituted (f) concerning procedure upon filing of application for former text that read: "The supreme court shall consider an application for an extraordinary writ at the court's next court

conference following the filing of the application. On the basis of the application filed, the court shall as promptly as possible, dismiss the petition, accept jurisdiction, or order a response reserving the question of jurisdiction. Only in extraordinary cases will the court grant oral argument to determine the necessity and propriety of accepting jurisdiction.

Unless oral argument is ordered by this court in order to establish jurisdiction, the court will enter an appropriate order forthwith. Such order may dismiss the petition, grant the relief requested, order a hearing on the application, or issue any other writ or order deemed appropriate in the circumstances"; and in (h) in first sentence substituted "more extensive briefing" for "oral argument" and inserted "unless otherwise ordered" and at end of second sentence deleted "and in no event later than 24 hours prior to the time fixed for oral argument". Amendment effective August 15, 1999.

1997 Amendment: Inserted (i) concerning copies of petitions. Amendment effective June 23, 1997.

1992 Amendment: Deleted language at end of subsection (b) referring to Rule 27, M.R.App.P., which language was previously deleted from that rule; and inserted subsection (c) concerning notice to a District Judge.

1971 Amendment: The 1971 amendment added to the second sentence of subdivision (b) the clause excepting typewritten papers; added the third sentence to subdivision (b); and added the final sentence to subdivision (d).

Supreme Court Rules Superseded: As to the advisory committee note above, see the compiler's comments to Rule 43 (now Rule 53), M.R.App.P., and to this chapter.

Case Notes

General 1293
Writ of Supervisory Control 1296

GENERAL

Failure of Counsel to Preserve Defendant's Request for Appeal Prejudicial Per Se — Out-of-Time Appeal Appropriate Remedy: Despite a request to do so, Tweed's counsel failed to file a timely appeal of Tweed's sexual abuse conviction. Counsel did not intentionally abandon the appeal; rather, the failure was unintentional and resulted from a filing oversight and miscommunication. Nevertheless, the error was prejudicial per se and constituted ineffective assistance of counsel in violation of Tweed's constitutional rights. The failure to timely appeal was excusable, and because postconviction proceedings were considered an inadequate remedy, the Supreme Court decided that an out-of-time appeal was the appropriate remedy and, being in possession of a sufficient record, proceeded to consider the merits of the appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002), following St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Out-of-Time Appeal in Criminal Matters — Exclusive Jurisdiction With Supreme Court: Under 46-20-101, the only method for review in criminal cases is by notice of appeal. Time limits for filing an appeal are mandatory and jurisdictional. If a defendant takes no action to perfect an appeal within 90 days of judgment, the District Court loses its jurisdiction and the appeal is out-of-time. However, an out-of-time appeal is a remedy that may be available to a criminal defendant who, through no fault of the defendant, misses a deadline for filing an appeal. Although Rule 21(b), M.R.App.P., precludes an out-of-time appeal in a civil case, the Supreme Court is not precluded from addressing a motion for an out-of-time appeal in a criminal case. Further, a District Court lacks jurisdiction to grant an out-of-time appeal. The Supreme Court has exclusive jurisdiction to grant a motion for an out-of-time appeal, and the motion is considered an original proceeding subject to the provisions of this rule. Upon a showing that the failure to timely notice a criminal appeal was excusable under the circumstances, the Supreme Court may conclude that an out-of-time appeal is the appropriate remedy pursuant to Rule 21(b), M.R.App.P. In that event, the matter will be remanded to the District Court with instructions to vacate and reenter judgment to afford the defendant a second opportunity to act within the statutory timeframes for filing notice of appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

District Court Proceeding Under Mistake of Law in Determining Whether Implied Consent Statute Applicable to Blood Drawn for Medical Reasons — Supervisory Control Accepted: The District Court suppressed the results of a blood test taken for medical reasons after a DUI suspect declined to give consent for a blood test following a car accident in which the use of alcohol was suspected. The Supreme Court concluded that the District Court was proceeding under a mistake of law, and that if the mistake was left uncorrected, the state would be without an adequate remedy on appeal. Given the state's limited ability to appeal an evidentiary ruling,

the Supreme Court accepted original jurisdiction in the matter to prevent the introduction of evidence when correction of the ruling by a later court decision would be ineffective. State ex rel. McGrath v. District Court, 2001 MT 305, 307 M 491, 38 P3d 820 (2001), following State ex rel. Mazurek v. District Court, 277 M 349, 922 P2d 474 (1996), and Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267 (1998).

Time Bar on Writ of Certiorari to Review Contempt Proceedings: In a case of first impression, the Supreme Court was asked to establish a timeframe within which a petition for review of a contempt order must be filed. The issue was whether the time limitation should come from Title 25, which includes the Montana Rules of Civil Procedure and the Montana Rules of Appellate Procedure, or from Title 27, which prescribes the various statutes of limitation for the commencement of actions. The court noted that there is no appeal, as such, from an order of contempt in a civil proceeding and that the exclusive method of review of civil contempt orders (with certain exceptions) is through a writ of certiorari or writ of review. That review is generally limited to jurisdictional questions and whether evidence supports the contempt. Therefore, the issue of timeliness for filing a petition for a writ of certiorari or review is not a statute of limitations issue, and to mechanically characterize those writs for the review of contempt proceedings as original proceedings governed by the 5-year statute of limitations in 27-2-231 would be to deny the basic nature of appellate review. Further, petitions for writs of certiorari to review contempt proceedings are fundamentally different from other original proceedings commenced in the Supreme Court and from petitions for writs of supervisory control, which do not so much involve appellate review of and a decision on the underlying proceedings as they involve the court dealing with discreet questions of law during the pendency of the underlying proceedings. Because the timeframe in which to file petitions for writs of certiorari to review contempt proceedings is a procedural issue analogous to the procedure for filing a notice of appeal, the Supreme Court held that Rule 72, M.R.Civ.P. (Title 25, ch. 20), Rule 1, M.R.App.P., 27-25-103, and this rule require that the timeframe for those petitions be determined by the Montana Rules of Appellate Procedure. Specifically, pursuant to Rule 5, M.R.App.P., a petition for a writ of certiorari to review contempt proceedings must be filed with the Clerk of the District Court within 30 days of the date on which the District Court enters the contempt finding, unless the state is a party, in which case the petition must be filed within 60 days of the date on which the District Court enters the contempt finding. This may not be construed to limit the Supreme Court's power to grant writs of supervisory control or to consider applications for other types of original proceedings. The Supreme Court chose not to establish a precedent that allows contempt proceedings to be delayed until the underlying cause is resolved. Jones v. District Court, 2001 MT 276, 307 M 305, 37 P3d 682 (2001), overruling Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937), to the extent that Shaffroth holds that the general 5-year statute of limitations in 27-2-231 applies to all writs of review authorized in 27-25-102.

Criteria Met for Supreme Court Jurisdiction of Death Row Petition for Injunctive Relief: Pursuant to the version of 46-19-103 that was in effect at the time that Langford was sentenced for execution, he affirmatively elected that death be imposed by hanging rather than lethal injection. Langford appealed to the District Court for a declaration that execution by hanging was cruel and unusual punishment that violated the eighth amendment to the U.S. Constitution. The District Court denied the motion, holding that Langford's choice of hanging rendered the cruel and unusual punishment argument moot. Langford appealed to the appropriate federal courts for a writ of habeas corpus, applying the same argument. During the pendency of Langford's federal habeas corpus proceedings, the Montana Legislature met and amended 46-19-103 by removing the hanging option, rendering the federal proceedings moot and nonjusticiable. Langford then filed an original proceeding with the Montana Supreme Court, asserting that the state impermissibly truncated his ability to fully appeal his death sentence by removing hanging as a means of execution and that the state should be permanently enjoined from executing him under the current version of 49-19-103. After examining the applicable statutory criteria, the Supreme Court accepted jurisdiction of the petition for writ of injunction because: (1) the state was clearly a party to the action; (2) the public had an interest in establishing and maintaining the validity of state actions in a proceeding that attempted to curtail the state's ability to enact, amend, and enforce state legislation; and (3) Langford's imminent execution constituted sufficient emergency circumstances to render due consideration in the trial court and appeal to the Supreme Court an inadequate remedy. Langford v. St., 287 M 107, 951 P2d 1357, 54 St. Rep. 1522 (1997).

Factors Necessary for Acceptance of Original Jurisdiction:

Although it is correct that prior to the decision in State ex rel. Racicot v. District Court, 244 M 521, 798 P2d 1004 (1990), the Supreme Court had exercised supervisory control under all three

circumstances set forth in the Racicot test, subsequent decisions interpreted Racicot to mean that all three circumstances must be present before supervisory control will be accepted. However, the Supreme Court recognizes that there will be circumstances that are appropriate for the exercise of supervisory control that do not satisfy the three-part test. To the extent that Racicot suggests that all three elements must be established and to the extent that subsequent decisions have applied the test in that fashion, they are reversed. Plumb v. District Court, 279 M 363, 927 P2d 1011, 53 St. Rep. 1187 (1996).

Once standing to bring an action is established, the question shifts to whether the action meets the necessary factors for the Supreme Court to accept original jurisdiction. Assumption of original jurisdiction is proper when: (1) constitutional issues of major statewide importance are involved; (2) the case involves purely legal questions of statutory and constitutional construction; and (3) urgency and emergency factors exist, making the normal appeal process inadequate. Butte-Silver Bow Local Gov't v. St., 235 M 398, 768 P2d 327, 46 St. Rep. 87 (1989), followed in State ex rel. Racicot v. District Court, 244 M 521, 798 P2d 1004, 47 St. Rep. 1785 (1990), and Montanans for the Coal Trust v. St., 2000 MT 13, 298 M 69, 996 P2d 856, 57 St. Rep. 73 (2000). See also State ex rel. Greely v. Water Court, 214 M 143, 691 P2d 833 (1984), State ex rel. Nelson v. District Court, 262 M 70, 863 P2d 1027, 50 St. Rep. 1447 (1993), and Craig v. District Court, 262 M 201, 864 P2d 791, 50 St. Rep. 1515 (1993).

No Legal Duty to Provide Party Copies of Transcripts in Pending Matter: Walker petitioned the Supreme Court for a writ of mandamus ordering the District Court to provide him with copies of the transcripts, minutes, and documents in his pending criminal case. The Supreme Court refused to issue the order on the basis that there was no clear legal duty requiring the District Court to provide the requested information and that Walker could appeal any final decision by the District Court. Walker v. Colberg, 250 M 382, 822 P2d 82, 48 St. Rep. 971 (1991).

Supreme Court — Refusal to Determine Factual Issues: In an original proceeding before the Supreme Court, petitioners protested the physical conditions under which they were held in a county jail. They alleged a tort cause of action and violation of their constitutional right to be free from cruel and unusual punishment. They sought relief under the habeas corpus and declaratory judgment statutes. It is not the role of the Supreme Court to function as the primary fact finder, and petitioners have demonstrated no emergency justifying departure from the usual proceedings in District Court to decide the merits of the issues raised by their allegations. Therefore, there is no basis on which the Supreme Court should accept original jurisdiction. Gates v. Missoula County Comm'rs, 235 M 261, 766 P2d 884, 45 St. Rep. 2370 (1988).

Writ Denied — No Abuse of Discretion: Relator failed to show that the District Court abused its discretion by denying her motion for visitation pending the outcome of the appeal; consequently, her petition for a writ directing the court to allow such visitation was denied. State ex rel. C.M.J. v. District Court, 179 M 32, 585 P2d 1312 (1978).

Petition Attacking Bar Unification: A petition to test the efficacy, constitutional legality, and beneficial application of the Supreme Court order and opinion of January 29, 1974, unifying the Montana Bar was dismissed for failure to state a claim on which relief could be granted. In re Petition of Morris, 175 M 456, 575 P2d 37 (1978).

Writ of Supervisory Control — Lower Court Order to Seek: The Writ of Supervisory Control was denied even though petitioner was ordered by the lower court to seek the Writ to determine jurisdiction in a child custody case. State ex rel. Jennings v. District Court, 178 M 187, 582 P2d 1260 (1978).

Original Jurisdiction Accepted: The Supreme Court accepted original jurisdiction pursuant to this rule because of the shortness of time before the next meeting of the Legislature. Huber v. Groff, 171 M 442, 558 P2d 1124 (1976).

Emergency Review — Constitutionality of Legislative Finance Committee: Since substantial questions of constitutionality existed with 5-12-102 through 5-12-402 (5-12-402 now repealed), except 5-12-304, establishing and empowering defendant Legislative Finance Committee and its office of Legislative Fiscal Analyst and because operation of these laws would have such significant impact on state government functions during delay before final resolution by Supreme Court, original jurisdiction of Supreme Court for declaratory judgment as to constitutionality was properly invoked. State ex rel. Judge v. Legislative Fin. Comm., 168 M 470, 543 P2d 1317 (1975).

Injunction Against State Agency — Protection of Court's Jurisdiction: Where Public Service Commission reopened its docket and issued further orders in connection with rate schedule change which was being challenged in courts at that time, Commission had no authority to take that action, and protective order was issued enjoining respondents from taking actions which

interfere with court's appellate jurisdiction. Mont. Consumer Counsel v. P.S.C., 168 M 177, 541 P2d 769 (1975).

Emergency Nature: Since the effect of Ch. 417, L. 1971, concerning minimum wages, was broad and touched all of the state's citizens, the Supreme Court accepted an original action alleging the unconstitutionality of the act as an emergency matter. Billings v. Smith, 158 M 197, 490 P2d 221 (1971).

Denial of Injunction — No Emergency: Supreme Court declined jurisdiction in original proceeding seeking injunction restraining defendant school districts from collecting certain fees and levies and requiring students to purchase certain material because no emergency existed, class action could be established in District Court, and thorough examination into multiple problems presented could not have been achieved. State ex rel. Thompson v. Elementary School District, 156 M 79, 474 P2d 700 (1970).

Writ of Review When Appeal Available: Notwithstanding the fact that appeal was available as a remedy, the Supreme Court determined that a Writ of Review was available when children were made illegitimate and support was cut off by action which exceeded court's jurisdiction. Butler v. Brownlee, 152 M 453, 451 P2d 836 (1969).

Alternative Writ to Review Discovery Order: Highway Commission (now Transportation Commission), ordered by District Court to produce certain appraisals under discovery rules, was entitled to have order reviewed on allegations that order required production of irrelevant and privileged matter in excess of lower court's jurisdiction, that it was not an appealable order, and that Commission had no remedy at law, which allegations were sufficient to authorize issuance of alternative Writ. St. Highway Comm'n v. District Court, 149 M 384, 427 P2d 49 (1967).

WRIT OF SUPERVISORY CONTROL

Discovery of Corporate Communications Conducted During Former Director's Tenure — No Violation of Attorney-Client Privilege: Plaintiff corporation sought a writ of supervisory control on grounds that the District Court was proceeding under a mistake of law by controlling a discovery attempt by the former director of a corporation to discover communications between the corporation's current directors and corporate counsel that occurred while the former director was a director. Plaintiff contended that allowing discovery violated the attorney-client privilege. The Supreme Court concluded that although the corporation was the client, the directors were jointly responsible for the management of the corporation and that, consistent with this responsibility, the directors must be treated as joint clients with the corporation when legal advice is rendered to the corporation through its officers or directors. When the former director was a corporate officer, he was entitled to access attorney-client communications, and the fact that he was no longer a director was not sufficient cause to render those communications privileged against him. The confidentiality of the attorney-client privilege is not violated when a former director of a closely held corporation who brings claims against the corporation is allowed to discover communication between corporate counsel and other directors that occurred during the former director's tenure as a director. Thus, the Supreme Court declined to accept supervisory control. Inter-Fluve v. District Court, 2005 MT 103, 327 M 14, 112 P3d 258 (2005).

Supervisory Control Appropriate to Address Res Judicata Claim: Following a dispute over the sale of irrigation equipment, H-D Irrigating and Lane sued Kimble Properties and Kimble for false representation of the irrigation equipment and damages. Kimble Properties and Kimble counterclaimed for the balance due on the equipment, alleging that H-D Irrigating was a sham and the alter ego of Lane. The alter ego claim was never pursued. The Supreme Court eventually decided the case in H-D Irrigating, Inc. v. Kimble Properties, Inc., 2000 MT 212, 301 M 34, 8 P3d 95 (2000), and remanded for judgment in favor of Kimble. In an effort to collect, Kimble sought to compel Lane to testify regarding the assets of H-D Irrigating, but rather than appear, Lane filed bankruptcy and received a stay on further proceedings. Kimble then filed an action to collect from Lane personally, again raising the alter ego issue. Lane asserted that the issue had been already decided in the prior litigation and sought supervisory control on res judicata grounds. The Supreme Court held that the case was appropriate for supervisory control because if the res judicata claim was correct, Lane was entitled to summary judgment, but if denial of the summary judgment motion was in error, Lane would be required to defend against the same claim a second time and incur the attendant delay and expense, resulting in a gross injustice. The case was remanded for further proceedings on the alter ego claim. Lane v. District Court, 2003 MT 130, 316 M 55, 68 P3d 819 (2003), following Plumb v. District Court, 279 M 363, 927 P2d 1011 (1996).

Dual Insurance Claims — Supervisory Control Proper to Facilitate Convenience and Judicial Economy: Following a vehicle accident, a couple sought recovery for injuries and loss of

consortium and also alleged that the damages exceeded the limits of defendants' coverage, entitling them to recover from their own policy. The District Court bifurcated the claims, and the couple sought relief from the order on grounds that they would be prejudiced by having to prosecute two separate trials. The Supreme Court concurred with the couple and, in the interests of the convenience of the parties and judicial economy, agreed to exercise supervisory control. State ex rel. Gadbaw v. District Court, 2003 MT 127, 316 M 25, 75 P3d 1238 (2003), following Malta Pub. School District A & 14 v. District Court, 283 M 46, 938 P2d 1238 (1997).

Temporary Custody Order Not Considered Final for Purposes of Appeal — Writ of Supervisory Control Appropriate Mechanism to Challenge Temporary Custody: The District Court ordered temporary legal custody for a child, and the child's mother appealed. The Supreme Court held that orders of temporary legal custody do not embrace a final determination of the rights of the parties contemplated in Rule 1, M.R.App.P., that would subject the temporary order to direct appeal. Rather, temporary custody orders are considered interlocutory orders from which the Supreme Court will grant relief in extraordinary circumstances. This ensures the expeditious review of legal errors while still protecting children from the instability of protracted, piecemeal litigation. However, qualifying temporary custody orders as interlocutory does not leave a parent who is aggrieved by an erroneous order without a remedy. The parent may invoke the extraordinary remedy of a writ of supervisory control, which is the appropriate mechanism to challenge an order of temporary custody. In re D.A., 2003 MT 109, 315 M 340, 68 P3d 735 (2003). See also G.B. v. M.M.B., 670 A2d 714 (Pa. Sup. Ct. 1996).

Supervisory Control Proper to Determine Whether Admission of Evidence of Subsequent Accidents With Nonparties Admissible to Disprove Liability for Damages: Following Truman's injury in an automobile accident, she was involved in a second automobile accident and in an accident involving an ultralight aircraft. The District Court held that evidence of Truman's injuries in the second automobile accident and the aircraft accident would be admissible in a trial related to the first automobile accident to disprove causation. Truman requested that the Supreme Court exercise supervisory control because the District Court made a mistake of law that would place Truman at a significant disadvantage in litigating the case. If the District Court's conclusion, that evidence of subsequent accidents with nonparties was admissible, proved incorrect, that conclusion would impact all aspects of the trial, render the trial results unreliable, and substantially increase the cost to Truman in both time and finances. Therefore, the Supreme Court acceded to the request and exercised supervisory control to determine whether the District Court was proceeding based upon a mistake of law. Truman v. District Court, 2003 MT 91, 315 M 165, 68 P3d 654 (2003), following Plumb v. District Court, 279 M 363, 927 P2d 1011 (1996).

Supervisory Control Proper to Determine Scope of Court-Ordered Medical Examination: Pursuant to Rule 35, M.R.Civ.P. (Title 25, ch. 20), the District Court ordered plaintiff to undergo an extensive independent medical examination by an expert 750 miles away. The examination would have subjected plaintiff to burdensome, painful, invasive, elective, and potentially harmful procedures. Plaintiff requested that the Supreme Court assume supervisory control, asserting that the District Court was proceeding on a mistake of law that posed a risk of gross injustice to plaintiff. The Supreme Court agreed. The extent to which Rule 35 permits an individual to be subjected to extensive and potentially harmful procedures is an issue of statewide importance, and an appeal from a mistake of law compelled by the rule would be an inadequate remedy. Therefore, the Supreme Court determined that supervisory control was appropriate to determine whether the District Court was proceeding under a mistake of law in ordering the examination. Simms v. District Court, 2003 MT 89, 315 M 135, 68 P3d 678 (2003). See also Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001).

Supervisory Control of Issue Related to Wrongful Death and Survival Action and Evidence of Economic Consumption: Plaintiff sought supervisory control of an action related to evidence of economic consumption as it pertained to a survival action and wrongful death. The Supreme Court found that allowing the District Court to permit the jury to consider evidence of economic consumption in this case would be a mistake of law constituting a deviation from well-established jurisprudence that would alter the cost of and preparation for trial, affect settlement negotiations, and call into question the value of any potential verdict, resulting in additional time and expense for appellate resolution and subsequent litigation. Any remedy available to plaintiff on direct appeal would thus prove inadequate, resulting in a gross injustice. Therefore, the Supreme Court held that this was an appropriate case in which to exercise supervisory control. Payne v. District Court, 2002 MT 313, 313 M 118, 60 P3d 469 (2002).

Supervisory Control Granted to Address Stay of Declaratory Judgment Until Settlement Reached or Judgment Entered: Hill was injured in a vehicle accident caused by the negligence of

Bennett, an insured of Safeco Insurance Company of Illinois (Safeco). Although Safeco apparently paid some of Hill's initial medical bills, Safeco eventually disputed the causal relationship between the accident and the injuries, refusing to pay any further medical bills after a specific date. Hill sued Bennett for negligence and Safeco for nonpayment of medical expenses, seeking a declaratory judgment that he was entitled to advance payment of medical costs prior to settlement or final judgment and claiming that a declaratory judgment was proper under the Unfair Trade Practices Act and Ridley v. Guar. Nat'l Ins. Co., 286 M 325, 951 P2d 987 (1997). The District Court granted the declaratory judgment, and Safeco sought a writ of supervisory control because a direct appeal would be an inadequate remedy. The Supreme Court agreed and granted the writ. Safeco's application presented an appropriate legal issue for supervisory control because if the ordered payment of medical expenses was a mistake of law or incorrect, the delay in awaiting the outcome of the corollary litigation could create an unfair prejudice for Safeco, while any unnecessary delay in the payment of the medical costs would certainly prejudice Hill. Ultimately, the Supreme Court affirmed on grounds that the declaratory judgment did not constitute a money judgment for damages in the ordinary sense, but merely removed all uncertainty and controversy over the issue of when the inevitable policy proceeds were due. Safeco Ins. Co. of Ill. v. District Court, 2000 MT 153, 300 M 123, 2 P3d 834, 57 St. Rep. 604 (2000).

Youth Considered in Custody — Supervisory Control Appropriate When Lower Court Proceeding Under Mistake of Law: Fourteen-year-old Evans was taken by his mother to the Flathead County Sheriff's office, upon request of the Deputy Sheriff, because he had been observed talking to a child on the day of her disappearance. Evans and his mother were separated upon arrival at the office, and Evans was taken to a 9-by-9-foot windowless interrogation room with a shut door where he was questioned for 2 ½ hours by two officers wearing badges and weapons. Evans waived his Miranda rights outside the presence and without the consent of his mother and without an opportunity to discuss his rights or the waiver with counsel. The officers did not tell Evans that he could leave the interrogation room or consult with his mother, and during the course of the interview, Evans' mother was denied contact with Evans. Although initially adamantly denying involvement, the officers repeatedly suggested that Evans had "more to tell them" and mislead him into believing that the police had fingerprints from the girl's body that could be matched to his. Toward the end of the interrogation, Evans confessed that he drowned the child and was charged with her death, arrested, handcuffed, and escorted to juvenile detention without an opportunity to speak to his mother. Evans filed a motion to suppress the confession on grounds that his waiver of rights while in custody was invalid under 41-5-331. The District Court denied the motion, concluding that Evans was not in custody during the interview and that the confession was voluntary. Accepting supervisory control because the District Court was proceeding under a mistake of law, the Supreme Court, finding it difficult to imagine a more "custodial" setting, applied the factors in St. v. Staat, 251 M 1, 822 P2d 643, 48 St. Rep. 1041 (1991), and concluded that Evans was in custody during the interview, that his waiver of rights without the consent of a parent or advice of counsel was invalid under 41-5-331, and that the confession was not voluntary under the totality of the circumstances. Although the record on appeal was not sufficient to determine whether the state had other evidence sufficient to charge Evans, the case was nevertheless remanded for consideration of the evidence without the confession. Evans v. District Court, 2000 MT 38, 298 M 279, 995 P2d 455, 57 St. Rep. 175 (2000), followed, with regard to applicability of the totality of circumstances test for determining voluntariness of a juvenile's waiver and consent, in In re C.T.P., 2004 MT 63, 320 M 279, 87 P3d 399 (2004). See also State ex rel. D.M.B. v. District Court, 2004 MT 335, 324 M 190, 103 P3d 514 (2004).

Examination of Defendant by State Psychiatrist — Supervisory Control Granted to Prevent Denial of Defendant's Fifth Amendment Right Against Self-Incrimination: Park, who was charged with forgery and deliberate homicide, filed notice of his intent to use the affirmative defense that extreme mental and emotional stress caused him to commit the offenses and gave notice of his intent to use expert psychological testimony in the course of his defense. The state requested an examination of Park by its own psychological expert, but Park objected to the oral part of the requested examination on the grounds that, first, his defense was not reliance upon a mental disease or defect and the state therefore had no right to a psychological examination, and, second, he did not want to discuss his offenses with the psychological expert for fear of waiving his constitutional right against self-incrimination. The Supreme Court, citing Mapes v. District Court, 250 M 524, 822 P2d 91 (1991), held that the case was appropriate for supervisory control because Park was faced with the loss of a constitutional right as part of the psychological interview and appeal could not prevent the loss of that right. Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Court Reporter Salary Dispute — Writ of Supervisory Control Appropriate: The Board of Lewis and Clark County Commissioners set the salary for court reporters, based on its interpretation of the 1997 amendment to 3-5-602. The salary did not include fringe benefits because the statute states that a court reporter is to receive the base salary "and no other compensation except as provided in 3-4-604", which allows a court reporter to collect only certain fees for providing transcripts. The District Court Judges ordered the Board to give the court reporters the maximum raise allowed and to continue their benefits at the prior level. The Board appealed the order directly to the Supreme Court. The judges contended that the appeal was improper because the Board filed no appropriate underlying civil action, whether a petition for a writ of mandamus, a petition for a writ of prohibition, or another action, and sought to have the appeal dismissed. The Board characterized the judges' order as a final appealable order rather than an administrative action. The Supreme Court found some merit to both arguments. Applying the rationale in Awareness Group v. School District, 243 M 469, 795 P2d 447 (1990), the court found that neither a writ of mandamus nor a writ of prohibition was appropriate and that they would not provide meaningful relief because it would be futile to seek to prohibit or to compel an act already accomplished. While granting the judges' motion to dismiss without prejudice to the underlying merits of the case, the Supreme Court held that if the Board decided to do so, it could file a petition for a writ of supervisory control with the Supreme Court, pursuant to this rule, and could raise whatever legal questions that it determined were at issue. If the Supreme Court determined it necessary, it could then remand for an evidentiary hearing in a neutral District Court in the same manner as in Gallatin County v. District Court, 281 M 33, 930 P2d 680 (1997). In re District Court Budget Order, 1998 MT 4, 287 M 137, 952 P2d 427, 55 St. Rep. 9 (1998).

Writ Granted — District Court's Order Error: The petitioner requested that the Supreme Court accept supervisory control over his petition for dissolution on the basis that the District Court was ordering him to have his trust land appraised in order to help the District Court determine the property settlement. The Supreme Court stated that based on prior decisions, it was clear that a state court may not distribute Indian trust land and that it therefore followed that a state court may not order an appraisal of the land. In order to avoid substantial injustice, the Supreme Court would accept supervisory control and reverse the District Court's order that the petitioner have the land appraised. Smith v. McKeon, 284 M 528, 946 P2d 117, 54 St. Rep. 990 (1997).

Bifurcation of Breach of Insurance Contract and Bad Faith Claims — Use of Supervisory Control to Require That Both Claims Be Tried to Same Jury: After the District Court bifurcated the Malta school district's insurance contract and bad faith claims, the school district requested by motion that both claims be tried to the same jury, one claim immediately following the other. The District Court denied the motion, and the school district sought a writ of supervisory control. The Supreme Court granted the writ and directed the District Court to try the contract claim and the bad faith claim to the same jury. Because 33-18-242 contains no standards governing whether a bifurcated case should be tried to the same jury, the Supreme Court looked to cases decided under Rule 42(b), M.R.Civ.P. (Title 25, ch. 20), for guidance and, after finding the state and federal versions of the same rule sufficiently similar, relied upon Martin v. Bell Helicopter Co., 85 FRD 654 (1980). The Supreme Court held that a two-step process should be used; it should first be determined whether bifurcation is appropriate and then whether the interests of judicial economy, fairness to the parties, clarity of the issues, and convenience require trial of the issues to the same or a different jury. In determining whether to grant the writ of supervisory control, the Supreme Court weighed the same or similar considerations also weighed by the Supreme Court pursuant to Martin v. Bell Helicopter Co. to determine whether separate juries should be used. The Supreme Court reviewed the circumstances of the case and found that the writ of supervisory control should be granted and that the District Court abused its discretion in refusing to try the two claims to the same jury. Malta Pub. School District A & 14 v. District Court, 283 M 46, 938 P2d 1335, 54 St. Rep. 486 (1997), followed in State ex rel. Gadbaw v. District Court, 2003 MT 127, 316 M 25, 75 P3d 1238 (2003).

Court Order for Suitable Jury Room — Supervisory Control Properly Used — Inherent Powers Not Implicated — Findings Not Clearly Erroneous: Judge Moran issued an order pursuant to 3-5-404 (now repealed) for the Gallatin County Sheriff to provide a specific space in the Gallatin County courthouse for use as a jury room and to have the room remodeled and for the expenses to be paid from the Gallatin County general fund. Gallatin County requested the Supreme Court to take supervisory control to prevent protracted litigation, a request with which Judge Moran joined. However, Judge Moran asked that a District Court Judge be appointed to make findings and conclusions. The Supreme Court accepted jurisdiction in order to prevent protracted

litigation of the issues and appointed a neutral District Court Judge, Judge Wilson, to hold a hearing and make findings and conclusions. The Supreme Court held that Judge Moran had the authority under 3-5-404 (now repealed) to issue an order to the Sheriff to provide a suitable jury room; that the space provided by the Sheriff pursuant to the order was "suitable", within the dictionary definition of that word; that because the Legislature provided the authority under which Judge Moran acted, the implied powers of the District Court and the separation of powers doctrine were not implicated by Judge Moran's action; and that the findings of fact concerning the suitability of the room provided by the Sheriff and the suitability of another alternative jury room designated by the County Commissioners were not clearly erroneous. Gallatin County v. District Court, 281 M 33, 930 P2d 680, 54 St. Rep. 46 (1997).

Constitutionality of Statute Regarding Multiple Defendants Proper Issue for Supervisory Control: Although all three circumstances for the exercise of supervisory control in State ex rel. Racicot v. District Court, 244 M 521, 798 P2d 1004 (1990), were not present, the Supreme Court nevertheless concluded that the constitutionality of 27-1-703(6) was an appropriate issue to decide by supervisory control after finding that any remedy available to plaintiffs by appeal was inadequate and that denial of a speedy remedy by supervisory control would be a denial of justice. (See 1997 amendment.) Plumb v. District Court, 279 M 363, 927 P2d 1011, 53 St. Rep. 1187 (1996), following State ex rel. Deere & Co. v. District Court, 224 M 384, 730 P2d 396 (1986), and followed in Preston v. District Court, 282 M 200, 936 P2d 814, 54 St. Rep. 312 (1997), and Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

District Court Without Authority to Issue Writ of Supervisory Control to City Court: Maloney was convicted in City Court of speeding and driving under the influence of alcohol. Maloney appealed his conviction de novo for a trial in District Court and, at the same time, filed a petition for a writ of review, mandamus, and supervisory control, asking the District Court to direct the City Court to dismiss the charges. The District Court denied the petition. The Supreme Court held that the District Court had no authority to issue a writ of supervisory control to a City Court. Maloney v. Gordon, 254 M 314, 837 P2d 1341, 49 St. Rep. 834 (1992).

Defendant's Discovery Needs Balanced by Plaintiff's Right to Privacy: The defendant in a personal injury case sought access to the files of Mapes's psychologist. Mapes resisted the motion on the basis that it violated his right to privacy. The Supreme Court held that granting the supervisory writ was necessary because the defendant's discovery rights and the plaintiff's statutory privacy rights were in conflict. The court further held that the defendant could seek information pertaining only to prior physical or mental conditions that might relate to the damages being claimed in the present action. State ex rel. Mapes v. District Court, 250 M 524, 822 P2d 91, 48 St. Rep. 954 (1991), followed in Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998), and Winslow v. Mont. Rail Link, Inc., 2001 MT 269, 307 M 269, 38 P3d 148 (2001).

Writ Proper to Avoid Needless and Expensive Litigation: The lower court erred in granting the plaintiff's summary judgment motion on the question of liability. The Supreme Court ruled that its granting of a writ of supervisory control requested by the defendant was proper in order to avoid a trial only on the question of damages. Such a trial would constitute needless and expensive litigation because the question of liability had been improperly excluded by the lower court. State ex rel. First Bank System v. District Court, 240 M 77, 782 P2d 1260, 46 St. Rep. 1956 (1989), followed in St. v. District Court, 265 M 445, 877 P2d 1008, 51 St. Rep. 599 (1994).

Writ Proper to Clarify Law and Provide Judicial Economy: In a negligence action against a school district and its employees, the District Court granted summary judgment dismissing the school district defendant pursuant to the immunity provisions of 2-9-111 and allowed plaintiffs to amend their complaint to name particular school district employees, namely school janitors, as defendants. This is a proper case for a writ of supervisory control to clarify the law and promote judicial economy. The lack of any issue of material fact renders the case appropriate for disposition upon summary judgment. The problem confronting the District Court is whether 2-9-111 provides immunity to school district employees, thereby entitling them to summary judgment. State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989).

Appropriateness of Writ of Supervisory Control Regarding Motion to Compel Discovery — Discovery of Potentially Privileged Material: Although a discovery order is interlocutory and normally not appealable, the Supreme Court accepted supervisory control in a case involving the discovery of potentially privileged material when it was apparent that the discovery order would place the defendant at a significant disadvantage in litigating the merits of the case. State ex rel. Burlington N. RR Co. v. District Court, 239 M 207, 779 P2d 885, 46 St. Rep. 1625 (1989), followed

in Preston v. District Court, 282 M 200, 936 P2d 814, 54 St. Rep. 312 (1997). See also Park v. District Court, 1998 MT 164, 289 M 367, 961 P2d 1267, 55 St. Rep. 657 (1998).

Exercise of Supervisory Control Improper — No Ruling by Trial Court on Subject: The defendants' motion in limine granted by the trial court excludes references to judicial statements made in the underlying action in the present voir dire of prospective jurors, opening statements, and examination of witnesses, until the trial court has ruled the statements are admissible. The plaintiff thus is not prevented from applying to the trial court for a pretrial determination of the admissibility of such statements. It is improper for the Supreme Court to exercise supervisory control in advance of any rulings by the trial court on this subject. Also, such rulings may be reviewed on appeal. State ex rel. Fitzgerald v. District Court, 217 M 106, 703 P2d 148, 42 St. Rep. 1061 (1985).

Fundamental Rights of Petitioner in Jeopardy — Appeal — May Be Inadequate Remedy: Plaintiff in an action against an insurance company for payment of a judgment under an insurance policy was granted a Writ of Supervisory Control. The Supreme Court determined that there were procedural entanglements caused by rulings made in the trial court that might prolong the litigation and potentially make an appeal an inadequate remedy. Fundamental rights of the petitioner are in sufficient jeopardy as to require supervisory control. State ex rel. Fitzgerald v. District Court, 217 M 106, 703 P2d 148, 42 St. Rep. 1061 (1985), followed in State ex rel. Boyne USA, Inc. v. District Court, 228 M 314, 742 P2d 464, 44 St. Rep. 1550 (1987). See also State ex rel. Eccleston v. District Court, 240 M 44, 783 P2d 363, 46 St. Rep. 1929 (1989), and State ex rel. USF&G. Co. v. District Court, 240 M 5, 783 P2d 911, 46 St. Rep. 1896 (1989).

Criminal Trial Pending — No Emergency Shown — Writ Denied: In 1980, defendant was convicted of the deliberate homicide of his wife. The conviction was reversed in 1982 (St. v. Forsyth, 197 M 248, 642 P2d 1035). Upon his retrial, the jury was deadlocked and a mistrial was declared. Upon the scheduling of the third trial, defendant moved to dismiss: first, for double jeopardy and lack of due process predicated upon a claim of jury tampering and prosecutorial misconduct in the second trial; and second, for lack of a speedy trial. Defendant also moved for a change of venue. The motions were denied by the District Court. Defendant then petitioned the Supreme Court for a Writ of Supervisory Control. The Supreme Court refused to issue the Writ, ruling that, with respect to all four issues, defendant had failed to demonstrate that any emergency exists which renders appeal an inadequate remedy. State ex rel. Forsyth v. District Court, 216 M 480, 701 P2d 1346, 42 St. Rep. 65 (1985).

Supervisory Control of Water Court Accepted — Federal Reserved Water Rights: Following the U.S. Supreme Court decision in Ariz. v. San Carlos Apache Tribe, 463 US 545, 77 L Ed 2d 837, 103 S Ct 3201 (1983), that to the extent state courts have taken jurisdiction over Indian water rights, such jurisdiction is proper, the state requested that the Montana Supreme Court exercise its powers of supervisory control over the state Water Court concerning the adjudication of federal reserved water rights. In assuming jurisdiction, the Supreme Court concluded that factors of urgency and emergency argued for acceptance of original jurisdiction. The request is not barred by the suspension provisions of 85-2-217, as the proceeding will not generally adjudicate an Indian reserved water right or any federal reserved water right. The issues before the court are limited to a determination of the effect of the so-called disclaimer clause of Art. I of the Montana Constitution on subject matter jurisdiction by the Water Court, and whether the Water Use Act is adequate to adjudicate Indian reserved water rights. State ex rel. Greely v. Water Court, 214 M 143, 691 P2d 833, 41 St. Rep. 2373 (1984).

Same Defendant — Similar Facts — Change of Venue Required: Paisley appealed to the District Court a conviction of a misdemeanor sexual assault. The case was to be tried de novo in the District Court. Earlier in St. v. Paisley, 204 M 191, 663 P2d 322, 40 St. Rep. 763 (1983), the Supreme Court had approved an order granting a change of venue in companion cases on felony charges. In the interests of consistency, the Supreme Court issued a Writ of Supervisory Control ordering the District Court to grant a change of venue. State ex rel. Paisley v. District Court, 673 P2d 815, 40 St. Rep. 1852 (1983) (apparently not reported in Montana Reports).

Appellate Review on Motion for Writ of Supervisory Control — Issues Not Raised Below: In suit for damages arising out of railroad accident, issue regarding the admission of evidence of other accidents was not presented to the District Court upon application of one party for a Writ of Supervisory Control and a motion of the other party for a stay of proceedings, and thus the issue would not be addressed by Supreme Court in deciding the application and motion. Henry v. District Court, 198 M 8, 645 P2d 1350, 39 St. Rep. 430 (1982).

Error Below — Finding of Federal Preemption of Issue: Petition for Writ of Supervisory Control, brought by plaintiff suing railroad in crossing accident case, was granted where District Court incorrectly decided that federal law preempted the field of warning devices on locomotives

and that the jury could thus not deliberate on the question of whether the railroad had the duty to equip its locomotives with devices other than those required by federal law. Henry v. District Court, 198 M 8, 645 P2d 1350, 39 St. Rep. 430 (1982).

Interlocutory Review of Interrogatories Rulings — Exhaustion of Remedies Required: Applicant for a Writ of Supervisory Control seeking reversal of lower court's order denying applicant's objections to interrogatories failed to exhaust its remedies in lower court where it did not apply there for a protective order under this rule or for an order under Rule 37(a)(4), M.R.Civ.P., assessing costs and attorney fees against its opponent should the lower court order be reversed on appeal. State ex rel. Guarantee Ins. Co. v. District Court, 194 M 64, 634 P2d 648, 38 St. Rep. 1682 (1981).

Supervisory Writ Granted Where Right of Access to Courts Impaired: A Writ of Supervisory Control is an appropriate form for judicial review where, as here, no direct appeal was available from the District Court's order requiring petitioners to pay respondent's attorney's fees as a condition to allowing petitioners to revise their second amended complaint and where, as here, extraordinary and compelling circumstances are presented. If the Supreme Court declined to review the claim, petitioners could be precluded from proceeding on all counts they consider necessary for appropriate relief, resulting in a possible improper denial of petitioners' right of access to the courts. St. v. District Court, 193 M 413, 632 P2d 318, 38 St. Rep. 1204 (1981).

District Court Without Authority to Order "Interviews" of Witnesses — Supervisory Control: In a personal injury case, the defendant obtained a court order stating that the plaintiff had waived her physician-patient privilege and that the plaintiff's doctors were to be treated as any other witnesses in the case. On appeal, the Supreme Court agreed with the order on its face but held that the District Court did not have the power under the rules of discovery to order private interviews between counsel for one party and possibly adverse witnesses, expert or not. The Supreme Court noted that other rules of discovery serve to supplement Rule 26(a), M.R.Civ.P. The District Court must relate discovery it allows and enforces to one of the methods provided for in that rule. A Writ of Supervisory Control was issued in this case. Jaap v. District Court, 191 M 319, 623 P2d 1389, 38 St. Rep. 280 (1981).

Order Vacating Default Judgment Nonappealable — Supervisory Control Inappropriate: Where, after obtaining a default judgment in a breach of contract action against the defendant, the plaintiff sought a review, both by appeal and Writ of Supervisory Control, of the court's order setting aside the default judgment, the Supreme Court held that the order was interlocutory and nonappealable. The Supreme Court also held that a Writ of Supervisory Control was inappropriate to review the court's order, for to issue the Writ would be to allow the appellant to do indirectly what could not be done directly. Kinion v. Design Sys., 190 M 226, 620 P2d 852, 37 St. Rep. 2036 (1980), overruled in part in Roberts v. Empire Fire & Marine Ins. Co., 276 M 225, 915 P2d 872, 53 St. Rep. 359 (1996).

Rights of Legal Heir Adequately Represented by Special Administrator — Intervention Denied: After a special administrator was appointed to continue prosecution of an action begun before the testatrix's death, the heir to the estate sought to intervene in the case but was denied. Although holding that ruling nonappealable, the Supreme Court did grant the heir's Writ of Supervisory Control. Nonetheless, it found the heir was not a proper intervenor in the suit because her interest was represented adequately by the special administrator, noting that the heir had no right to pursue the action herself unless the personal representative failed to act on the claim, which was not the case here. Further, an administrator could sue in his own name without joining with him the party for whose benefit the action is brought. State ex rel. Palmer v. District Court, 190 M 185, 619 P2d 1201, 37 St. Rep. 1876 (1980).

No Supervisory Control Power in District Court: Relator was arrested for driving while intoxicated. He refused to take a blood alcohol test and subsequently applied to the District Court for a Writ of Supervisory Control on the issue of the admissibility of evidence of the refusal, arguing that the nonlawyer Justice of the Peace was ill-equipped to handle the constitutional aspects of his case. Relator appealed from the District Court's ruling against him after hearing the Writ on the merits. The Supreme Court found no power in the District Courts to exercise supervisory control and stated that a Writ of Supervisory Control was not to be used as a means to circumvent the appeal process. Only in the most extenuating circumstances will a Writ be granted. State ex rel. Ward v. Schmall, 190 M 1, 617 P2d 140, 37 St. Rep. 1720 (1980). See also Joslyn v. City Court, 198 M 223, 645 P2d 428, 39 St. Rep. 884 (1982).

Supervisory Control — Denial of Dismissal in Complex Workers' Compensation-Related Action: When an employee alleged a "wanton" negligent tort against his employer and third parties as an additional remedy to workers' compensation and the employer, after being denied a motion to dismiss by the District Court, applied for supervisory control alleging that the case

involved complex liability claims against multiple defendants that would require extended and complicated discovery, the situation existed where there was no plain, speedy, or adequate remedy at law and there was no right to appeal the order of the District Court. Therefore, it was a proper circumstance for the Supreme Court to assume jurisdiction and to order supervisory control to dismiss the employee's complaint against the employer because the action, not being an intentional tort, belonged exclusively within the purview of the Workers' Compensation Act. Great W. Sugar Co. v. District Court, 188 M 1, 610 P2d 717 (1980).

Writ of Supervisory Control Denied — Remedy by Appeal Adequate: Review by Writ of Supervisory Control of the decision of a District Court that resulted in an estimated tax loss of over $2 million and that also will result in appeals to the District Courts of 25 counties was denied since the decision of the District Court had been appealed to the Supreme Court and was ready to be set for the next court calendar. The remedy by appeal was adequate precluding review by supervisory control. Dept. of Revenue v. St. Tax Appeal Bd., 185 M 172, 605 P2d 170 (1980).

Writ of Supervisory Control to Terminate Needless Litigation: Where a Writ of Supervisory Control will not terminate needless litigation, the Supreme Court will not issue the Writ. Beamer v. Rice, 182 M 1, 594 P2d 321 (1979).

Immediate Appeal From Partial Judgment: This is a proper case for a Writ of Supervisory Control because relator wife has no plain, speedy, and adequate remedy at law by appeal. Neither 40-4-108 nor Rule 1, M.R.App.P., provide for immediate appeal from a partial judgment. Instead, the right of immediate appeal from a judgment on part but not all of the claims for relief in a single action is governed by Rule 54(b), M.R.Civ.P. State ex rel. Marlenee v. District Court, 181 M 59, 592 P2d 153 (1979).

Prosecutorial Immunity — Writ of Supervisory Control Proper: Invocation of original jurisdiction of the Supreme Court was a proper remedy for the state, Department of Justice, and Attorney General to seek in order to establish that a third party's civil damage suit against them charging malicious prosecution was barred under the doctrine of prosecutorial immunity. State ex rel. Dept. of Justice v. District Court, 172 M 88, 560 P2d 1328 (1976).

Restitution of Funds — Previous Judgment Vacated on Appeal: The Supreme Court denied the defendant's request for a Writ of Supervisory Control requiring the District Court to order an accounting and restitution of funds, since execution was based upon a previous judgment reversed only as to damages and because the defendant failed to post a supersedeas bond. State ex rel. Burlington N., Inc. v. District Court, 169 M 480, 548 P2d 1390 (1976).

Request to Convene Grand Jury Denied — Review: Although there is no statutory means provided for appealing from the denial of a request to convene a grand jury, a Writ of Supervisory Control may issue so that the decision by the lower court may be reviewed by the Montana Supreme Court. State ex rel. Woodahl v. District Court 166 M 31, 530 P2d 780 (1975).

Needless Litigation Prevented: Writ of Supervisory Control was proper where District Court orders requiring Highway Commission (now Transportation Commission) to quiet title against all possible lienholders of land subject to condemnation and to use valuation date more than 3 years beyond the alleged proper date were not appealable until after final judgment, and this would result in extended and needless litigation if District Court was wrong. St. Highway Comm'n v. District Court, 160 M 35, 499 P2d 1228 (1972), followed in Cont. Oil Co. v. Elks Nat'l Foundation, 235 M 438, 767 P2d 1324, 46 St. Rep. 121 (1989).

Class Action — Writ of Supervisory Control Unjustified: Writ of Supervisory Control granting relief from District Court order permitting maintenance of class action was not justified since the order was subject to alteration or amendment as the matter progresses and since the question can be considered on appeal from final judgment. State ex rel. Anaconda Aluminum Co. v. District Court, 158 M 228, 490 P2d 351 (1971).

Writ of Supervisory Control — Dismissal of Removal Petition: Writ of Supervisory Control to compel dismissal of removal petition that could not be granted even if the facts alleged were proved was a necessary and proper supervision of District Court. State ex rel. Arnot v. District Court, 155 M 344, 472 P2d 302 (1970).

Appeal Inadequate — Writ of Supervisory Control Available: Although denial of Writ of Assistance, placing purchaser at Sheriff's sale under mortgage foreclosure into possession of lands involved, by District Court was appealable under rule either as "an order directing . . . surrender of property" or as "any special order made after final judgment", Writ of Supervisory Control to compel the District Court to issue Writ of Assistance was available as remedy since remedy by appeal was neither speedy nor adequate. State ex rel. Foss v. District Court, 152 M 73, 446 P2d 707 (1968).

Sustaining of Demurrer — Right to Supervisory Writ: Notwithstanding that former statute providing for appeals gave party against whom demurrer (abolished by Rule 7(c), M.R.Civ.P. and 25-31-503, now repealed) was sustained plain and speedy remedy by appeal, court would not dismiss application for Supervisory Writ where judgment sustaining demurrer also stayed proceedings and expressly accorded losing party right to apply for Supervisory Writ. State ex rel. Cave Constr. Co. v. District Court, 150 M 18, 430 P2d 624 (1967).

Denial of Motion to Dismiss — Writ Proper to Prevent Needless Litigation: Where the District Court improperly denied the defendant's motion to dismiss for failure to state a claim in a contract action against the defendant, a Writ of Supervisory Control will be issued directing that the order denying the defendant's motion be vacated. The order denying the defendant's motion is not appealable under Rule 1, M.R.Civ.P., and the Writ is therefore proper to prevent needless litigation when no claim has in fact been stated. Buttrey Foods, Inc. v. District Court, 148 M 350, 420 P2d 845 (1966).

Motion to Dismiss Improperly Denied — Writ of Supervisory Control Proper: Writ of Supervisory Control was proper where lessor's motion to dismiss sublessees' action for breach of lease agreement, to which sublessees were not parties, was denied by the District Court, the order denying the motion to dismiss not being appealable under this rule. State ex rel. Buttrey Foods, Inc. v. District Court, 148 M 350, 420 P2d 845 (1966).

Writ of Supervisory Control Denied: When appeal is available from a summary judgment, the Supreme Court will not issue a Writ of Supervisory Control without extremely extenuating circumstances. Circumstances here were insufficient. State ex rel. Kober v. District Court, 147 M 116, 410 P2d 945 (1966).

Law Review Articles

The Use of Supervisory Control in Discovery Matters: Pretrial Procedure Via the Supreme Court, Williams, 52 Mont. L. Rev. 465 (1991).

Montana Supreme Court Survey, Dyrud, 42 Mont. L. Rev. 329, 353 (1981).

The Writ of Supervisory Control, Morris, 8 Mont. L. Rev. 14 (1947).

IV. Appeals in Forma Pauperis

Rule 18. Applications and manner of proceeding.

Advisory Committee Notes

This rule is patterned after Rule 23 of the Federal Draft, but omits the last clause of the Federal Draft reading "and may request that the appeal be heard on the original record without an 'appendix'." This change is made because these rules do not adopt the appendix system of Rule 30 of the Federal Draft. See Rule 25. This rule is believed to be consistent with R.C.M. 1947, section 93-8625 [25-10-404, MCA].

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

2002 Amendments: In (c) in last sentence near end after "initials" deleted "or first names". Amendment effective February 1, 2003.

In (c) at end of paragraph inserted last sentence concerning use of initials rather than names of certain parties. Amendment effective March 15, 2002.

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, in (a), at beginning of first sentence, inserted "in a civil case".

Law Review Articles

Constitutionality of Statutes Limiting Indigent Appeals: This note discusses the case of Griffin v. Illinois, 351 US 12 (1956), concerning a state's ability to condition the right of indigents to free trial transcripts for purposes of appeal. 18 Mont. L. Rev. 103 (1956).

Collateral References

4 C.J.S. Appeal and Error §§322 through 324.

5 Am. Jur. 2d Appellate Review §§407 through 414.

V. General Provisions

Rule 19. Record of commissions and oaths.

Advisory Committee Notes

This rule incorporates Montana Supreme Court Rule I.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Supreme Court Rules Superseded: As to the advisory committee note above, see the compiler's comments to Rule 43 (now Rule 53), M.R.App.P., and to this chapter.

Rule 20. Filing and service.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule is taken from Rule 25 of the Federal Draft, but the phrase "including any transcript" has been added to subdivision (b) to make it clear that copies of any transcript are to be served on all parties. The first paragraph of Montana Supreme Court Rule III is superseded.

NOTE TO JUNE 16, 1986, AMENDMENT

Subdivision 20(e). The amendment is intended to clarify the number of copies of various instruments which should be filed. The absence of such a general provision in the past has led to confusion in many cases. The term "procedural motions" is used to describe motions which do not substantially affect the rights of the parties or the ultimate disposition of the appeal. Examples of procedural motions are motions for extensions of time and motions to enlarge length of briefs.

NOTE TO NOVEMBER 1, 1988, AMENDMENT

The amendment clarifies the rule in order to make certain that a signed original is filed.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

2000 Amendment: In third sentence of (b) inserted requirement for service on county attorney and attorney general in cases involving termination of parental rights and abused, dependent, or neglected children. Amendment effective January 1, 2001.

1997 Amendment: In (e), after "(other than motions for extension of time)", deleted "petitions for extraordinary writs or other original proceedings". Amendment effective June 23, 1997.

1994 Amendment: In (e), in two places, substituted "motions for extension of time" for "procedural motions". Amendment effective February 1, 1995.

1993 Amendment: In (a) inserted last sentence concerning facsimile or electronic filing.

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1988 Amendment: In (e), at beginning, substituted "A signed" for "An". Amendment effective November 1, 1988.

1986 Amendment: The Supreme Court Order of June 16, 1986, in (b) inserted last sentence concerning service on the County Attorney and the Attorney General; and inserted (e) relating to number of copies to be filed.

Collateral References

4 C.J.S. Appeal and Error §§445, 527, 534, 625.

5 Am. Jur. 2d Appellate Review §§571 through 574.

Rule 21. Computation and extension of time.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule is patterned after Rule 26 of the Federal Draft. There are omitted provisions of the Federal Draft with respect to petitions for allowance, applications for permission to appeal, appeals from advisory agencies, and a definition of "legal holiday." A definition of "legal holiday" is contained in R.C.M. 1947, section 19-107.

It is believed that these provisions are consistent with R.C.M. 1947, section 90-407 [1-1-306, MCA].

NOTE TO JUNE 16, 1986, AMENDMENT

The amendment is designed to facilitate the handling of motions for extension of time.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

2001 Amendment: In (b) in exception clause inserted reference to subsection (d) and after "rule" deleted "relating to appeals in termination of parental rights and abused, dependent and neglected children cases"; in (c) after "abused" deleted "dependent"; and inserted (d) concerning extensions of time in all cases not governed by subsection (c). Amendment effective July 24, 2001.

2000 Emergency Rule: In an order dated June 28, 2000, the Supreme Court adopted rule modifications on an emergency basis. The portion of the order affecting this rule provided: "**Motions for Extension of Time.** Recognizing that a significant part of the delay in the present appellate system is at the briefing stage and that it is necessary we eliminate this source of delay, commencing January 1, 2001, motions for extension of time to file briefs will no longer be routinely granted except in cases where the inability to timely file a brief is caused by the inability of the court reporter to timely transcribe the proceedings.

All motions for extension of time to file briefs must be supported by an affidavit demonstrating diligence and substantial need. All such motions must be filed at least seven (7) days before the expiration of the time prescribed for the filing of the brief. The affidavit in support must state: (1) when the brief is due; (2) when the brief was first due; (3) the length of the requested extension; (4) the reason the extension is necessary; (5) the movant's explanation establishing that the movant has exercised diligence and has substantial need for the extension and that the brief will be filed within the time requested; and (6) whether any other party separately represented objects to the request. A conclusory statement of justification being the "press of other business" will not constitute a showing of diligence and substantial need.

To this extent Rule 21(b), M.R.App.P., is modified accordingly." See 2001 amendment officially adopting the emergency modification.

2000 Amendment: At beginning of (b) inserted exception clause; inserted (c) concerning requirements for motion and brief for extension of time in cases involving termination of parental rights and abused, dependent, and neglected children; and inserted last sentence in (c)(6) concerning conclusory statements being insufficient. Amendment effective June 1, 2000.

1993 Amendment: In (a), in last sentence, increased time from 7 days to 11 days.

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, in (b), in first sentence, substituted "except the court in a civil case" for "but the court" and inserted second and third sentences concerning notification to opposing counsel and time limits related to motions and orders for extension of time.

Case Notes

No Jurisdiction to Hear Criminal Appeal Filed More Than Sixty Days After Judgment — Deadline Not Extended by Mailing Extension Rule: Dill filed notice of an appeal of a judgment in a criminal action 63 days after judgment was entered. Rule 5(b), M.R.App.P., requires filing of an appeal within 60 days after entry of judgment. Dill contended that the deadline should be extended because Rule 21(e), M.R.App.P., allows an additional 3 days when service of a paper is made by mail. The District Court order was mailed to Dill, so Dill argued that the deadline was actually 63 days. The Supreme Court noted that under Mont. Fair Housing, Inc. v. Barnes, 2003 MT 16, 314 M 73, 68 P3d 653 (2003), Rule 21(e) applies only to situations involving response-type pleadings, but when a deadline is required by court rule to be filed within a specified time, Rule 21(e) does not apply. Dill's criminal appeal was filed more than 60 days after judgment was entered, the Supreme Court lacked jurisdiction to hear it, so the appeal was dismissed. Billings v. Dill, 2005 MT 134, 327 M 262, 113 P3d 302 (2005).

Allowance of Additional Time After Service by Mail Applicable Only to Response-Type Pleadings — Inapplicable When Filing Deadline Specified: The Supreme Court entered an opinion in this case on December 31, 2002. On January 16, 2003, remittitur was entered, and the next day, defendants filed a petition for rehearing. After being advised that the petition was beyond the 10 days allowed under Rule 34, M.R.App.P., defendants claimed that subsection (e) of this rule provided an additional 3 days for timely filing. The Supreme Court took the opportunity

to clarify the application of subsection (e) of this rule, holding that the rule applies only to response-type pleadings when parties are required or permitted to file a document or brief after having been served with a document or brief. When a filing deadline is specified by the Supreme Court or when a document is required to be filed with the court within a specified time, the rule does not apply and the party does not get the benefit of an extra 3 days for mailing. Rule 34, M.R.App.P., allows petitions for rehearing to be filed within 10 days after a Supreme Court decision is rendered. Because this time period is specified by court rule, and because the petition for rehearing was not a response-type pleading, defendants' petition was not timely. However, defendants did not have the benefit of this interpretation when their petition was filed, so in the interest of fairness, the court applied this holding prospectively only and decided to entertain defendants' petition in this instance. Mont. Fair Housing, Inc. v. Barnes, 2003 MT 16, 314 M 73, 68 P3d 653 (2003).

Failure of Counsel to Preserve Defendant's Request for Appeal Prejudicial Per Se — Out-of-Time Appeal Appropriate Remedy: Despite a request to do so, Tweed's counsel failed to file a timely appeal of Tweed's sexual abuse conviction. Counsel did not intentionally abandon the appeal; rather, the failure was unintentional and resulted from a filing oversight and miscommunication. Nevertheless, the error was prejudicial per se and constituted ineffective assistance of counsel in violation of Tweed's constitutional rights. The failure to timely appeal was excusable, and because postconviction proceedings were considered an inadequate remedy, the Supreme Court decided that an out-of-time appeal was the appropriate remedy and, being in possession of a sufficient record, proceeded to consider the merits of the appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002), following St. v. Rogers, 2001 MT 165, 306 M 130, 32 P3d 724 (2001).

Out-of-Time Appeal in Criminal Matters — Exclusive Jurisdiction With Supreme Court: Under 46-20-101, the only method for review in criminal cases is by notice of appeal. Time limits for filing an appeal are mandatory and jurisdictional. If a defendant takes no action to perfect an appeal within 90 days of judgment, the District Court loses its jurisdiction and the appeal is out-of-time. However, an out-of-time appeal is a remedy that may be available to a criminal defendant who, through no fault of the defendant, misses a deadline for filing an appeal. Although subsection (b) of this rule precludes an out-of-time appeal in a civil case, the Supreme Court is not precluded from addressing a motion for an out-of-time appeal in a criminal case. Further, a District Court lacks jurisdiction to grant an out-of-time appeal. The Supreme Court has exclusive jurisdiction to grant a motion for an out-of-time appeal, and the motion is considered an original proceeding subject to the provisions of Rule 17, M.R.App.P. Upon a showing that the failure to timely notice a criminal appeal was excusable under the circumstances, the Supreme Court may conclude that an out-of-time appeal is the appropriate remedy pursuant to subsection (b) of this rule. In that event, the matter will be remanded to the District Court with instructions to vacate and reenter judgment to afford the defendant a second opportunity to act within the statutory timeframes for filing notice of appeal. St. v. Tweed, 2002 MT 286, 312 M 482, 59 P3d 1105 (2002).

Computation of Time for Appeal Following Mailing of Final Notice of Entry of Judgment: The final notice of entry of judgment was mailed on November 5. Rule 5, M.R.App.P., required an appeal to be taken within 30 days after the service of the notice of entry of judgment. A notice of appeal was filed on December 7. Although more than 30 days had passed, allowing 3 days for the mailing of the notice of entry of judgment, the notice of appeal was filed within the 30-day requirement. Rudio v. Yellowstone Merchandising Corp., 200 M 537, 652 P2d 1163, 39 St. Rep. 1923 (1982).

Late Entry of Order Granting Extension: The time for filing the notice of appeal from District Court may, upon a showing of excusable neglect, be extended for up to 30 days. However, that period is added to the initial 30 days, plus 3 days for mailing. Even though the Clerk of the Court neglected to send notice of entry of judgment to defendant's cocounsel in Missouri, which may have caused confusion constituting excusable neglect, the order granting an extension of time was not even entered until after the 63-day period, was beyond the limits of Rule 5, M.R.App.P., and was therefore erroneous. NW. Nat'l Ins. Co. v. Agra-Steel Corp., 193 M 437, 632 P2d 330, 38 St. Rep. 1257 (1981).

Appeal Allowed Despite Failure to Comply With Procedural Rules: A seller was granted summary judgment against a buyer. Several months later, the court amended its order nunc pro tunc and certified the case for appeal under Rule 54(b), M.R.Civ.P. Despite failure to comply with the Montana Rules of Appellate Procedure, the Supreme Court chose to hear the appeal under Rules 3, 10, and 21, M.R.App.P. Marcus Daly Mem. Hosp. v. Borkoski, 191 M 366, 624 P2d 997, 38 St. Rep. 322 (1981).

Computation of Time Limit for Appeal — Workers' Compensation Case — Civil Procedure Rules Applied: A person who appeals from a final decision of the Workers' Compensation Court should in all fundamental fairness be given the benefit of that provision of Rule 5, M.R.App.P., which states that ". . . except that in cases where service of notice of entry of judgment is required by Rule 77(d) of the M.R.Civ.P. the time shall be 30 days from the service of notice of entry of judgment". When service of notice of the final decision is made as mandated by 2-4-623 and that service is made by mail, the provisions of Rule 21(c), M.R.App.P., are automatically put into play, adding 3 days to the prescribed 30-day time limit for filing the notice of appeal set by Rule 4(a), M.R.App.P. However, when the final day of the period falls on a Sunday, Rule 21(a), M.R.App.P., comes into play, extending the time limit to the next day. Dumont v. Aetna Fire Underwriters, 183 M 190, 598 P2d 1099 (1979).

Failure to File Timely Notice of Appeal: The Supreme Court has no authority to permit an appeal to be taken after the expiration of the time fixed by Rule 5, M.R.App.P. If an extension of time is sought, the proper forum to make such a request is the District Court. An appellant must request any extension no later than 60 days from service of notice of entry of judgment. Zell v. Zell, 172 M 496, 565 P2d 311 (1977).

Collateral References

5 Am. Jur. 2d Appellate Review §§285 through 324.

Rule 22. Motions.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule supersedes Montana Supreme Court Rule XI. It is patterned after Rule 27 of the Federal Draft, but the last sentence of the Federal Draft requiring the filing of three copies of motions and supporting papers has been omitted. Also, there has been added as a last paragraph the amendment of the Montana Supreme Court Rule XI, effective January 1, 1965.

NOTE TO JUNE 16, 1986, AMENDMENT

The amendments are designed to insure that opposing counsel have been contacted, to limit the necessity of submitting proposed orders to procedural motions only and to place the expenses of mailing orders upon the parties. For the definition of a "procedural motion" see Advisory Commission Note to Rule 20(e).

Compiler's Comments

2002 Amendments: At end of first paragraph in last sentence near end after "initials" deleted "or first names". Amendment effective February 1, 2003.

At end of first paragraph inserted last sentence concerning use of initials rather than names of certain parties. Amendment effective March 15, 2002.

2001 Amendment: In fourth sentence after "papers" inserted "whether required by these rules or otherwise, or submitted in a party's discretion". Amendment effective July 24, 2001.

2000 Emergency Rule: In an order dated June 28, 2000, the Supreme Court adopted rule modifications on an emergency basis. The portion of the order affecting this rule provided: "**Over Length and Supplemental Briefs.** From and after August 1, 2000, motions to file over length and supplemental briefs will no longer be routinely granted except in capital cases. Motions to file such briefs in other cases must be supported by an affidavit demonstrating extraordinary justification. To this extent, Rules 22 and 23(g), M.R.App.P., are modified accordingly." See 2001 amendment officially adopting the emergency modification.

1997 Amendment: In first paragraph inserted seventh sentence concerning signing of motion by appellant personally. Amendment effective April 3, 1997.

1986 Amendment: The Supreme Court Order of June 16, 1986, in first paragraph, inserted third sentence concerning notification of and objection by opposing counsel and deleted fifth sentence that read: "Motions for procedural orders may be determined ex parte"; and in second paragraph inserted "procedural" near beginning and inserted "as well as stamped envelopes addressed to all counsel of record".

Supreme Court Rules Superseded: As to the advisory committee note above, see the compiler's comments to Rule 43 (now Rule 53), M.R.App.P., and to this chapter.

Case Notes

No Pretrial Determination Regarding Whether Statement Admissible for Impeachment Purposes — Waiver of Right to Object to Admissibility: At the time of arrest, Harris admitted an act of sexual intercourse with his adopted daughter. Prior to trial, Harris moved to suppress the statement on grounds that it was involuntary and obtained in violation of his fifth amendment

rights under the United States Constitution. The District Court agreed that the statement could not be used, but expressly stated that its limited suppression order did not address whether it could be used by the state for impeachment purposes in the event that Harris testified, essentially reserving its ruling for a later time, as authorized in 46-13-104. Harris's testimony about the statement during direct examination brought the statement into evidence by his own volition, constituting waiver of the right to appeal the admissibility of the statement for use as impeachment. St. v. Harris, 1999 MT 115, 294 M 397, 983 P2d 881, 56 St. Rep. 481 (1999), distinguishing St. v. Fuhrmann, 278 M 396, 925 P2d 1162, 53 St. Rep. 966 (1996), and St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Denial of Bond Pending Appeal — Method of Supreme Court Review — Jurisdiction: After conviction for negligent homicide and on related charges, Ingraham moved the District Court to continue bond pending appeal. The District Court denied the motion, finding that Ingraham was a danger to the community and therefore did not meet the requirements of 46-9-107. Ingraham then moved the Supreme Court, pursuant to this rule, to continue bond pending appeal or, in the alternative, to accept appeal of the District Court's order denying bond, pursuant to Rule 1, M.R.App.P., and 46-20-104. The Attorney General moved to dismiss, contending that there was no provision in law for appeal from a District Court order denying bond pending appeal and that Ingraham should have brought an original habeas corpus proceeding. The Supreme Court agreed with the Attorney General and dismissed Ingraham's motion or appeal, holding that Ingraham should have brought a petition for a writ of habeas corpus pursuant to 46-22-103. Ingraham then filed a petition for a writ of habeas corpus, which was filed with Justice Trieweiler pursuant to 3-2-212. Justice Trieweiler granted the petition to the extent necessary for the District Court to hold an evidentiary hearing as provided by statute, under the theory that the District Court was the more appropriate court for the hearing than was the Supreme Court. The Attorney General opposed the order by applying to the full Supreme Court for a writ of supervisory control, arguing, contrary to the state's previous position, that 46-22-103 does not really apply to persons convicted in a criminal case and that the more appropriate procedure was an original proceeding "in the nature of habeas corpus" before the full Supreme Court. The application for a writ of supervisory control was denied, was treated by the Supreme Court as a late-filed response to Ingraham's petition for a writ of habeas corpus, and was referred to Justice Trieweiler. Justice Trieweiler determined that it was inappropriate for him alone to determine the form of review of the District Court's denial of bond. Justice Trieweiler also determined that: (1) Ingraham had no constitutional right to bond pending appeal; (2) Ingraham did have a right to the proper exercise of the District Court's discretion in the application of 46-9-107; and (3) that right was a substantial right for the purposes of 46-20-104. For these reasons, Justice Trieweiler vacated his previous order granting Ingraham's petition for a writ of habeas corpus and referred the matter to the full Supreme Court for review of the District Court's order denying bond pending appeal. St. v. Ingraham, 284 M 77, 945 P2d 16, 54 St. Rep. 614 (1997).

Rule 23. Briefs.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule is patterned after Rule 28 of the Federal Draft, adjusted to state practice. The second paragraph of subdivision (e) of the Federal Draft is omitted, since these rules do not adopt the "appendix" system of Rule 30 of the Federal Draft. See Rule 25.

Also, in the Federal Draft, subdivision (f) requires reproduction of statutes, rules, regulations, etc. This has been changed, so that reproduction is permissive, unless ordered by the supreme court.

NOTE TO JUNE 16, 1986, AMENDMENT

Subdivision 23(a)(6). Heretofore, parties have often failed to include the designated documents, which are often crucial to the decision, in their briefs or appendix.

Subdivision 23(g). The amendment is intended to bring the rule up-to-date with current reproduction processes.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

COMMISSION NOTE TO 1993 AMENDMENT

The amendments conform the rule to the 1991 amendments of the Federal Rule.

Compiler's Comments

2003 Amendment: Inserted (i) concerning disc or CD copy of briefs. Amendment effective April 1, 2003.

2002 Amendments: In (d) in last sentence near end after "initials" deleted "or first names". Amendment effective February 1, 2003.

In (d) at end of paragraph inserted last sentence concerning use of initials rather than names of certain parties. Amendment effective March 15, 2002.

Case Notes

Mailing to Attorney of Record and Party's Last-Known Address Considered Adequate Notice — Personal Service Not Required: After 11 years passed from the time that a dissolution decree was entered, the wife moved to obtain her share of the husband's retirement benefits as ordered in the decree. Notice of the action was sent to the husband's last attorney of record, who filed a motion to dismiss, and by mail to the husband's last-known address in Hawaii. The husband contended that personal service was required because so much time had passed since the decree and because the attorney-client relationship was stale. However, the husband cited no authorities for the argument that personal service was required because the passage of time concluded the attorney-client relationship or that service requirements were modified based upon the last date of activity in a case. The attorney was clearly acting as the husband's attorney, and the decree was intended to extend to the issue of retirement, which had only recently occurred. Thus, under Rule 5(b), M.R.Civ.P. (Title 25, ch. 20), service was perfected and complete upon mailing a copy to the husband's last attorney of record and to the husband's last-known address. In re Marriage of Weber, 2004 MT 206, 322 M 324, 95 P3d 694 (2004).

Offset of Unpaid Retirement Benefits Proper Under Prior Family Law Order: The District Court ordered the husband to pay $734 a month from his retirement benefits, as ordered in a dissolution decree, and allowed the wife to offset her obligations to the husband when he became eligible to share in her retirement benefits to cover accrued payments of more than $10,000 owed by the husband. On appeal, the husband contended that he was exempt from this legal process under 19-2-1004 because 11 years had passed since the decree was issued, so the decree should no longer be considered a family law order under 19-2-907. The Supreme Court disagreed and affirmed. The husband cited no authority for the proposition that a family law order is no longer a family law order after 11 years. The District Court did not err in allowing the wife to collect accrued payments by setoff or otherwise. In re Marriage of Weber, 2004 MT 206, 322 M 324, 95 P3d 694 (2004).

Unsupported and Incomprehensible Issues Raised by Pro Se Appellant Dismissed: The wife appealed from a marital property distribution by filing a pro se brief that alluded to libelous conduct, unscrupulous activity regarding trial documents, false testimony, judicial bias, and erroneous calculation of marital assets. The Supreme Court found that the brief contained general contentions of impropriety, but no citations to the record or supporting legal authority. Although the Supreme Court has shown some willingness to make accommodations for pro se parties by relaxing technical requirements that do not impact fundamental bases for appeal, in this case, the appeal was dismissed because of an utter failure to comply with the Montana Rules of Appellate Procedure by filing a brief that could be comprehended by the court and realistically responded to by the opposing party. In re Marriage of McMahon, 2002 MT 198, 311 M 175, 53 P3d 1266 (2002).

Failure to Properly Raise Issue in Opening Appellate Brief — Case Dismissed: In five issues presented for appeal, the appellant pro se set forth little or no argument and no citations in support of the argument in the opening brief. Instead, after setting forth the issue, the appellant simply stated that the issue was presented at face value without argument. Pursuant to subsection (a) of this rule, in order for an appellant to properly raise an issue in an opening brief, the appellant's contentions must be listed as to the issues presented and the reasons for presenting the arguments, along with citation to the authorities relied upon. The Supreme Court will not consider unsupported issues or arguments, conduct legal research on an appellant's behalf, guess an appellant's precise position, or develop legal analysis in support of an appellant's position. The opening brief violated the Montana Rules of Appellate Procedure and was therefore dismissed. In re Marriage of Snow, 2002 MT 143, 310 M 260, 49 P3d 610 (2002).

Denial of Will Contestants' Discovery Requests for Probate and Adoption Files Affirmed: The will contestants questioned Lande's testamentary capacity and asserted undue influence, claiming District Court error in failing to strike privilege-based objections from the record and to require production of Lande's complete estate planning files, particularly Lande's wife's file and a son's adoption file. The suggestion that the court was required to strike privilege-based objections, in addition to rejecting the applicability of the privilege, was raised without

supporting authority as required by subsection (a)(4) of this rule and thus was disregarded as without merit. The Supreme Court, citing Duck Inn, Inc. v. Mont. St. Univ., 285 M 519, 949 P2d 1179 (1997), stated that having failed to advance supporting authority, the contestants cannot establish error in this regard. Lande's wife's file was irrelevant because it had been completed years prior, and the question of when it was prepared bore no connection to the underlying questions of Lande's testamentary capacity or undue influence. The adoption file was also irrelevant because the contestants conceded that the adopted son had long been a substantial devisee and they did not challenge the son's adoption or status as a beneficiary. The contestants further failed to show that the entire estate planning files were not produced and thus failed to meet their burden of establishing District Court error. In re Estate of Lande, 1999 MT 162, 295 M 160, 983 P2d 308, 56 St. Rep. 642 (1999).

Response and Cross-Appeal Brief Limited to 14,000 Words: Idaho Asphalt Supply, the respondent in an appeal, filed with the Montana Supreme Court a combined response brief and cross-appeal brief containing 90 pages and 20,163 words. When the Supreme Court returned the brief because it failed to comply with the length limitation provided in Rule 27(d)(i), M.R.App.P., Idaho Asphalt Supply filed a motion for order allowing it to file an overlength brief, arguing that it was entitled under Rule 27(d)(i), M.R.App.P., and subsection (h) of this rule to file a response brief of a maximum of 14,000 words and a cross-appeal brief of 14,000 words and that there was no rule limiting it to a combined brief of 14,000 words. The Supreme Court pointed out that the language of subsection (h) of this rule regarding briefs involving cross-appeals requires that the respondent's brief address the cross-appeal "as well as" respond to the appellant's brief. The Supreme Court therefore read Rule 27(d)(i) and subsection (h) of this rule together to provide that in the case of a cross-appeal, a respondent may file one principal brief serving the purposes of both a response brief and a cross-appeal brief and that the combined brief is limited to a maximum of 14,000 words. The Supreme Court noted that although it is fairly liberal in allowing overlength briefs, there was nothing particularly unusual or complex about the issues involved in Idaho Asphalt Supply's response and cross-appeal. The Supreme Court therefore held, because it was given no compelling reasons to allow the overlength brief, that the 14,000-word limitation would apply to the combined brief. Idaho Asphalt Supply v. Dept. of Transportation, 1998 MT 312, 292 M 162, 974 P2d 1117, 55 St. Rep. 1287 (1998).

Failure to Cite Authority or Legal Analysis — No Error Established: Carter contended on appeal that admission of the results of a blood test taken as part of a DUI arrest was improper but cited no authority or legal analysis to support the argument. Failure to cite authority for the position being advanced on appeal precluded Carter from establishing any error in the trial court's admission of the blood test results. St. v. Carter, 285 M 449, 948 P2d 1173, 54 St. Rep. 1235 (1997).

Failure to Cite Authority — Constitutional Argument Not Addressed: In a property dispute over the existence of an easement, the Goods, who appeared pro se, argued that the District Court unconstitutionally took their property, because the District Court did not find an easement in their favor. The Supreme Court noted that the Goods had the burden of proof on the issue of the establishment of their easement and also that this rule requires that the party advancing an argument cite authority that supports the party's argument. Because the Goods cited no authority for their position, the Supreme Court refused to address the constitutional issue raised by the Goods. Small v. Good, 284 M 159, 943 P2d 1258, 54 St. Rep. 825 (1997).

Appeal From Justice's Court to District Court — Failure to Include Citation of Authority for Lack of Jurisdiction — Jurisdictional Argument Not Addressed on Appeal: Sol appealed his DUI conviction in Justice's Court to the District Court. In the Supreme Court, Sol argued that the failure of the Justice's Court Clerk to timely transmit the file to the District Court within the time provided by 46-17-311 deprived the District Court of jurisdiction. The Supreme Court noted that Sol had failed to cite any authority, as required by this rule, for his assertion that the clerk's failure deprived the District Court of jurisdiction. For this reason, the Supreme Court declined to address the issue of the District Court's jurisdiction. St. v. Sol, 282 M 69, 936 P2d 307, 54 St. Rep. 246 (1997).

Corporate Officer Without Authority for Pro Se Representation of Corporation — Refusal to Consider Brief: Plaintiff realty corporation brought an action in District Court to find defendants in default for failure to make payments under a contract for deed. Plaintiff was represented by counsel in District Court, but on appeal, it was represented by the president of the corporation. The Supreme Court, sua sponte, raised the issue of whether the corporation could be represented by its president and held that it could not. Citing Weaver v. Law Firm of Graybill, 246 M 175, 803 P2d 1089 (1990), the Supreme Court held that a corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an

attorney. The Supreme Court therefore determined not to consider the brief filed by the president on behalf of the corporation. Cont. Realty, Inc. v. Gerry, 251 M 150, 822 P2d 1083, 48 St. Rep. 1134 (1991).

Damages to Respondent for Appeal Taken Without Substantial Grounds — Skimpy Briefs: Damages to respondent were proper when counsel for appellant was repeatedly informed by the trial judge of the need to establish a duty owing by the respondent, but no evidence of a duty was presented. Assessment of damages was further warranted because appellant's brief did not contain: (1) a statement of the case; (2) citations to authority for numerous contentions; (3) citations to pages of the record relied upon; and (4) accurate quotations of case law, commissioners' comments, and the record. Rookhuizen v. Blain's Mobile Home Court, Inc., 236 M 7, 767 P2d 1331, 46 St. Rep. 139 (1989).

Excluded Documents Never Offered and Refused as Exhibits — Refusal to Consider on Appeal — Admonishment for Attaching to Appeal Brief: Medical documents that were excluded as evidence but were never offered as exhibits at trial and thus were not in the record as refused exhibits were included as part of an appendix to the defendant's appeal brief. The Supreme Court held that it was unable to evaluate or rule on the admissibility of documents that were never offered into evidence or described in the record and admonished counsel for attaching extraneous material to briefs as an attempt to introduce evidence through the "back door". Garza v. Peppard, 222 M 244, 722 P2d 610, 43 St. Rep. 1233 (1986), followed in Murphy v. St., 248 M 82, 809 P2d 16, 48 St. Rep. 335 (1991).

Motion to Strike Reply Brief Denied: Respondent made a motion before the Supreme Court to strike appellants' reply brief in its entirety because it raised as a new matter a constitutional argument. The court denied the motion, stating that the court would not consider any portion of the reply brief not in conformance with Rule 23(c), M.R.App.P. Denend v. Glacier Gen. Assurance Co., 218 M 505, 710 P2d 61, 42 St. Rep. 1778 (1985).

Jury Instruction Error — How Set Forth in Brief: When an appellant claims jury instruction error, he should set forth the text of the instructions in the brief as well as the trial court's ruling on the instructions and any related instructions the appellant claims should have been given. Goodnough v. St., 199 M 9, 647 P2d 364, 39 St. Rep. 1170 (1982).

No Statement of Issues: When appellant fails to set forth the issues of its case on appeal the Supreme Court will discuss the matter on issues delineated and set forth by respondent. School District v. Driscoll, 173 M 492, 568 P2d 149 (1977).

Law Review Articles

Montana Supreme Court Survey, Crnich, 44 Mont. L. Rev. 305, 326 (1983).

Collateral References

4 C.J.S. Appeal and Error §605, et seq.

5 Am. Jur. 2d Appellate Review §§540 through 578.

Rule 24. Brief of an amicus curiae.

Advisory Committee Notes

This rule is taken from Rule 29 of the Federal Draft. It follows the practice of a majority of federal circuits in requiring leave of court to file an amicus brief unless the litigants consent to its filing.

Compiler's Comments

2002 Amendments: In last sentence near end after "initials" deleted "or first names". Amendment effective February 1, 2003.

At end inserted last sentence concerning use of initials rather than names of certain parties. Amendment effective March 15, 2002.

Collateral References

4 C.J.S. Appeal and Error §605.

5 Am. Jur. 2d Appellate Review §540.

Rule 25. The appendix to the briefs.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

Rules 30 and 31 of the Federal Draft, require post-brief appendices, unless dispensed with by court rule or order. The rule does not follow the Federal Draft at this point. Rather, under this rule the supreme court may order an appendix, or either party may if he chooses use an appendix. When an appendix is used it is to be filed and served with the brief.

NOTE TO JUNE 16, 1986, AMENDMENT

The amendment adds essential materials to the appendix. Heretofore Rule 9(f) covered findings and conclusions but 9(f) has been deleted in favor of inclusion of findings, conclusions and other materials in a more logical place.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, in (b), in (2), substituted "given or refused jury instruction" for "portions of the charge" and, in (3), inserted "findings of fact, conclusions of law" and "together with the memorandum opinion, if any, in support thereof".

Case Notes

Excluded Documents Never Offered and Refused as Exhibits — Refusal to Consider on Appeal — Admonishment for Attaching to Appeal Brief: Medical documents that were excluded as evidence but were never offered as exhibits at trial and thus were not in the record as refused exhibits were included as part of an appendix to the defendant's appeal brief. The Supreme Court held that it was unable to evaluate or rule on the admissibility of documents that were never offered into evidence or described in the record and admonished counsel for attaching extraneous material to briefs as an attempt to introduce evidence through the "back door". Garza v. Peppard, 222 M 244, 722 P2d 610, 43 St. Rep. 1233 (1986), followed in Murphy v. St., 248 M 82, 809 P2d 16, 48 St. Rep. 335 (1991).

Rule 26. Filing and service of briefs.

Advisory Committee Notes

This rule is patterned after Rule 31 of the Federal Draft.

Subdivision (a) follows the time fixed for filing of briefs provided in the Federal Draft, and that is the time now allowed by a majority of the federal circuits.

Subdivision (b) of the federal Draft is omitted, since it provides a post-brief time for filing the appendix. Under Rule 25 an appendix must be filed and served with the brief, unless otherwise ordered by the supreme court.

Subdivision (b) of this rule is patterned after subdivision (c) of the Federal Draft. The number of copies to be filed and served, however, are adjusted to fit state practice and the present requirement of Montana Supreme Court Rule II.

Subdivision (c) of this rule follows subdivision (d) of Rule 31 of the Federal Draft.

1988 Amendment: The amendment clarifies the rule in order to make certain that a signed original is filed.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

The amendments are designed to resolve problems of construction which have arisen in the past.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral. In second sentence of subsection (a), before "brief", inserted "an answer"; and inserted fourth sentence concerning cross appeals.

1988 Amendment: In (b), at beginning, substituted "A signed original and nine copies" for "Ten copies". Amendment effective November 1, 1988.

Case Notes

Suspension of Rules: Appellants, upon petition to the Supreme Court, were granted a suspension of time limits set forth in Rules 10, 11, and 26, M.R.App.P., and substitution of specified time limits. Bd. of Natural Resources & Conservation v. N. Plains Resource Council, 183 M 540, 601 P2d 28, 35 St. Rep. 414 (1978).

Failure of Respondent to Appear by Brief: Where the respondent does not appear by brief, appellate court shall take appellant's versions and positions as being correct if they are in fact supported by the record. Alden v. Bd. of Zoning Comm'rs, 165 M 364, 528 P2d 1320 (1974).

Collateral References

4 C.J.S. Appeal and Error §625, et seq.

5 Am. Jur. 2d Appellate Review §§571 through 574.

Rule 27. Form of briefs and other papers — duplication.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

Rule 32 of the Federal Draft is adjusted to conform to the paper and forms prescribed for state practice and Montana Supreme Court Rule II, as amended effective January 1, 1965. The provisions requiring the use of pica type and two typewritten originals are stricken as being obsolete or unnecessary.

NOTE TO JUNE 16, 1986, AMENDMENT

Rule 27 has been completely revamped in order to bring it up-to-date with current reproduction processes. The requirements of subdivision (c) have been adopted from Rule 32(a) of the Federal Rules of Appellate Procedure.

Papers and attachments thereto are often filed which are illegible, sometimes caused by excessive reduction in size. Illegible papers are subject to being returned and may be the subject of sanctions imposed by the Montana Supreme Court.

Compiler's Comments

2003 Amendment: In (f) in first sentence inserted second clause concerning certified questions. Amendment effective January 1, 2004.

2001 Amendment: In (d)(i) reduced principal brief from 14,000 words to 10,000 words and reduced reply brief, amicus brief, or petition for rehearing from 7,000 words to 5,000 words; in (d)(ii) reduced maximum length allowed for principal brief from 40 pages to 30 pages, reduced maximum length allowed for reply brief, amicus brief, or petition for rehearing from 20 pages to 14 pages, and inserted last sentence concerning petitions filed under Rule 17(b).

2000 Emergency Rule: In an order dated June 28, 2000, the Supreme Court adopted rule modifications on an emergency basis. The portion of the order affecting this rule provided: "Shortened Briefs and Petitions. The word and page limitation for briefs specified in Rule 27(d)(i), M.R.App.P., is modified as follows: A principal brief must not exceed 10,000 words and a reply brief, amicus brief or petition for rehearing must not exceed 5,000 words. Rule 27(d)(ii), M.R.App.P., is modified as follows: a principal brief must not exceed 30 pages and a reply brief, amicus brief or petition for rehearing must not exceed 14 pages. Petitions filed under Rule 17(b), M.R.App.P., must not exceed 5000 words or 14 pages. These modifications apply to all briefs and petitions filed on or after August 1, 2000. Except as modified herein, all other provisions of the referenced Rules remain unchanged." See 2001 amendment officially adopting the emergency modifications.

1999 Amendment: In (d)(i) near beginning after "brief" deleted "or petition for writ"; and in (d)(ii) near beginning after "Briefs" deleted "or petitions for writs". Amendment effective August 15, 1999.

1997 Amendments: In first sentence of (c) after "right side" inserted "and left side" and after "1 inch wide" deleted "and on the left side not less than 1 ½ inches wide". Amendment effective November 4, 1997.

In (a), in first sentence, substituted "standard printing, word processing, typewritten or equivalent process" for "standard printing process, by typewriter or by an equivalent process" and at end deleted "or standard quality, opaque, unglazed, white paper. All print must appear in at least a 12 point Courier font (not more than 10 characters per inch)"; inserted (b) concerning typeface and text style; in (c), near end of first sentence, substituted "the foregoing size limitations" for "12 point type" and deleted former last sentence that read: "Petitions, motions and other like papers filed with the clerk of the supreme court shall contain numbered lines"; inserted (d) concerning calculations and length; in (e), at end of first sentence, deleted references to subdivision (a) and paper, size, form and pagination; and in (f) inserted second sentence concerning colors and materials to be avoided. Amendment effective March 21, 1997.

1996 Amendment: In (a) deleted former third sentence that read: "After January 1, 1994, only on standard quality, opaque, unglazed, acid-free recycled paper, 25% cotton fiber content, a minimum of 50% recycled content of which 10% shall be post-consumer waste", near beginning of fourth sentence substituted "a 12 point Courier font (not more than 10 characters per inch)" for "Courier 10 characters per inch type on opaque, unglazed paper", and near end of fifth sentence substituted "12 point type" for "11 point type"; and made minor changes in style. Amendment effective May 1, 1996.

1994 Amendment: In an order dated April 5, 1994, the Supreme Court in the fourth sentence substituted "Courier 10 characters per inch type" for "11 point type".

1993 Amendment: In an order dated March 25, 1993, the Supreme Court in (a), near end of first sentence before "paper", deleted "white" and inserted second and third sentences concerning recycled paper; and in (b), in first sentence before "paper", deleted "white".

1986 Amendment: The Supreme Court Order of June 16, 1986, substituted present Rule 27 (for text see 1987 MCA) for former rule that read: "**Form of briefs, the appendix, motions and other papers.**

(a) Form of briefs, appendices and separate volumes of exhibits. Briefs, appendices and separate volumes of exhibits may be produced by standard typographic printing or by any duplicating or copying process capable of producing a clear black image on white paper. Typewritten copies of briefs, appendices and separate volumes of exhibits may not be submitted without permission of the chief justice of the supreme court, except in behalf of parties allowed to proceed in forma pauperis. Pica solid is the smallest letter and the most compact form of composition allowed for all printed matter. Briefs, appendices and separate volumes of exhibits shall be on white uncalendered book paper in book or booklet form. If produced by the standard typographic printing process, the pages shall be 10 inches long and 7 inches wide, with a margin on the outer edge not less than 1 inch wide and on the inner edge not less than 2 inches wide. If produced by a duplicating or copying process, the pages shall be 11 inches long and 8 ½ inches wide, with a margin on the outer edge not less than 1 inch wide and on the inner edge not less than 2 inches wide. The pages shall be fastened at the side and numbered at the top.

(b) Typewritten papers and motions. Papers not required to be produced in a manner prescribed by subdivision (a) of this rule shall be plainly and legibly written by a typewriter with a new black ribbon and new black carbon paper of good grade, in double spacing, except that quotations may be single spaced, on one side only of white typewriter paper, 8 ½ inches wide and 13 inches long, numbered at the bottom, with a ruled margin of 1 ½ inches on the left-hand side of the page and 1 inch on the right-hand side, and numbered lines, not more than 32 lines to the page. The pages shall be bound at the left-hand side into volumes not containing more than 250 pages; provided, however, that if the pages number 50 or less they may be bound at the top.

In collating typewritten papers the copies shall not be mixed, but each copy shall consist throughout of uniform pages. Each page of every copy shall be opaque and each line of print thereon plainly legible. The difficulty of examining transparent, illegible and nonuniform typewritten copies has become so great that this rule will be strictly applied and papers not complying with it will not be received.

(c) First page and cover. All papers shall be bound in cardboard or pasteboard covers, unless bound at the top under subdivision (b) of this rule, in which case they may be bound in cover paper. On the first page and cover of all papers must be stated the title of this court, the title of the case as in the court below, adding to the words "Plaintiff" and "Defendant," the words "Appellant" and "Respondent" as the case may require, the names of counsel for appellant and respondent, the title of the papers, as "Appellant's Brief," "Appendix to Appellant's Brief," etc., and the venue from which the appeal is taken."

Case Notes

Response and Cross-Appeal Brief Limited to 14,000 Words: Idaho Asphalt Supply, the respondent in an appeal, filed with the Montana Supreme Court a combined response brief and cross-appeal brief containing 90 pages and 20,163 words. When the Supreme Court returned the brief because it failed to comply with the length limitation provided in subsection (d)(i) of this rule, Idaho Asphalt Supply filed a motion for order allowing it to file an overlength brief, arguing that it was entitled under Rule 23(h) and subsection (d)(i) of this rule to file a response brief of a maximum of 14,000 words and a cross-appeal brief of 14,000 words and that there was no rule limiting it to a combined brief of 14,000 words. The Supreme Court pointed out that the language of Rule 23(h) regarding briefs involving cross-appeals requires that the respondent's brief address the cross-appeal "as well as" respond to the appellant's brief. The Supreme Court therefore read Rule 23(h) and subsection (d)(i) of this rule together to provide that in the case of a cross-appeal, a respondent may file one principal brief serving the purposes of both a response brief and a cross-appeal brief and that the combined brief is limited to a maximum of 14,000 words. The Supreme Court noted that although it is fairly liberal in allowing overlength briefs, there was nothing particularly unusual or complex about the issues involved in Idaho Asphalt Supply's response and cross-appeal. The Supreme Court therefore held, because it was given no compelling reasons to allow the overlength brief, that the 14,000-word limitation would apply to the combined brief. (See 2001 amendment.) Idaho Asphalt Supply v. Dept. of Transportation, 1998 MT 312, 292 M 162, 974 P2d 1117, 55 St. Rep. 1287 (1998).

Collateral References

4 C.J.S. Appeal and Error §621.

Rule 28. Prehearing conference.

Advisory Committee Notes

This rule is taken from Rule 33 of the Federal Draft.

Rule 29. Oral argument.

Advisory Committee Notes

This rule is patterned after Rule 34 of the Federal Draft, but the time provisions are more liberal than those of the Federal Draft which allows 30 minutes to each side. It is intended that the time be afforded to opposing interests rather than to individual parties, as is true under the Federal Draft. Thus, if there are multiple appellants they have together but 40 minutes, and multiple respondents have a total of 30 minutes. The 40 minutes for the appellant or applicant may be divided between the opening and closing statement, as the appellant or applicant chooses.

In other particulars this rule follows the usual practice among the federal circuits.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

COMMISSION NOTE TO 1993 AMENDMENT

The amendment conforms this rule with the amendment of Rule 23(h).

Compiler's Comments

1993 Amendment: In (d), in second sentence after "cross-appeal", substituted "the party who first files a notice of appeal, or in the event that the notices are filed on the same day the plaintiff in the proceeding below" for "the plaintiff in the action below"; and made minor changes in style.

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Collateral References

5 C.J.S. Appeal and Error §669.

5 Am. Jur. 2d Appellate Review §§579 through 590.

Rule 30. Entry and notice of orders.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule is patterned after Rule 36 of the Federal Draft. The purpose is to clarify what constitutes an entry of a judgment or order. The provision for mailing by the clerk is for the convenience of the parties but does not affect the time for taking an appeal, which is controlled by Rule 5. As to the entry of judgments, see M.R.Civ.P., Rule 58.

NOTE TO JUNE 16, 1986, AMENDMENT

The deletions conform the style of the rule with the other rules and omit the word "judgment" because of its inapplicability to the supreme court.

Compiler's Comments

1986 Amendment: The Supreme Court Order of June 16, 1986, deleted "and judgments" from the catchline; and in (a) deleted "Entry and notice" as the subsection catchline and deleted reference to "judgment" before "or order" in three places.

Collateral References

5 C.J.S. Appeal and Error §§962 through 964.

5 Am. Jur. 2d Appellate Review §§826, 827.

Rule 31. Interest on judgments.

Advisory Committee Notes

The language of Rule 37 of the Federal Draft is modified to conform to R.C.M. 1947, section 93-8622 [25-9-204, MCA].

Case Notes

General Rules for When Interest Begins to Accrue: As this rule sets forth, in those cases in which a judgment for money in a civil case is affirmed, whatever interest is allowed by law is payable from the date on which the judgment was entered in the District Court. In those cases in

which a money judgment is either modified or reversed by virtue of a decision of the Supreme Court, the following rules apply:

a. To the extent that a discreet and identifiable portion of the original judgment is upheld on appeal, the amount of that judgment bears interest from the date on which the original judgment was entered in the District Court.

b. In those cases in which a money judgment is modified or reversed by the Supreme Court, with the result that the money judgment is increased over that entered by the District Court, the amount representing the increase bears interest from the date on which the new judgment is entered on remand pursuant to the Supreme Court's direction.

c. In those cases in which a money judgment rendered in the District Court is reversed, modified, or vacated on appeal, with the consequence that the District Court is directed to enter an entirely new judgment, no portion of which is discreetly identifiable from the original verdict or judgment, then interest on the new judgment begins to accrue from the date on which the new judgment is entered on remand pursuant to the Supreme Court's direction.

The portion of Resner v. N. Pac. Ry., 161 M 177, 505 P2d 86 (1973), announcing the manner in which postjudgment interest should be assessed following reversal or modification of a judgment is overruled. Woods v. Burlington N. Ry., 2004 MT 384, 325 M 106, 104 P3d 1045 (2004).

Dissolution Decree Granting Ranch to Husband — Wife Not Entitled to Appreciation or Subject to Liability Accruing on Property — Judgment Interest Owing on Money Judgment: A dissolution decree entered in 1996 granted ranch property to the husband and a liquidated money judgment of $305,855 to the wife. When the remainder of the issues concerning the marital estate was finally addressed in 1999, the wife contended that the subsequent appreciation of the ranch marital assets must be accounted for in determining the final disposition of the 1996 decree. The Supreme Court held that the wife was not entitled either to appreciation or, conversely, to any liability that may have accrued on the property because the ranch was exclusively awarded to the husband. However, the wife was entitled to judgment interest on the money as a statutory right pursuant to 25-9-205. On remand, the Supreme Court applied the statutory 10% interest rate to the balance of the wife's money judgment that remained unpaid following entry of the decree, not including interest accruing during the pendency of the appeal. The Supreme Court refigured the dollar amount due the wife after adjusting the figure, which had been incorrectly offset by the District Court because of the wife's alleged receipt of livestock and sales and an interest debt allegedly due to the husband's mother under a "conspiratorial sham" designed to deprive the wife of her interest in the farm property and to directly benefit the husband. In re Marriage of Pospisil, 2000 MT 132, 299 M 527, 1 P3d 364, 57 St. Rep. 547 (2000).

Award of Postjudgment Interest Improper When Money Judgment Not Affirmed: In a prior appeal, the wife asserted that the District Court had erroneously valued her possessory interest in the family home (see In re Marriage of Pfeifer, 282 M 461, 938 P2d 684, 54 St. Rep. 432 (1997)). The Supreme Court agreed and reversed for consideration of evidence regarding the value of the wife's possessory interest. On remand, the District Court awarded the wife postjudgment interest accrued on a $400,000 equalization cash payment between the date of the initial decree and the date that the payment was finally made. The husband appealed the award of postjudgment interest, contending that the interest was not owing because the wife had appealed the initial distribution of the marital estate, seeking a greater share, and lost. The wife responded that under this rule, it is irrelevant who appealed or cross-appealed when determining whether a judgment creditor is entitled to postjudgment interest. The Supreme Court noted that the question of the propriety of an award of postjudgment interest depended on whether the District Court's judgment was affirmed on appeal. In this case, the distribution of the marital estate, and thus the cash equalization payment, was not affirmed; therefore, the award of postjudgment interest was reversible error. In re Marriage of Pfeifer, 2000 MT 100, 299 M 268, 999 P2d 340, 57 St. Rep. 406 (2000).

Suspension of Accrual of Interest Appropriate: The trustees appealed the Supreme Court's directive to suspend the interest accruing on a loan from the date of the Sheriff's sale to the date of entry of the new judgment. The Supreme Court ruled that although the District Court decision was not reversed, the judgment was modified in respect to the deficiency amount allowed. Since instructions pursuant to interest allowance were provided, the directive to suspend interest until entry of the new judgment was appropriate. Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 250 M 175, 819 P2d 158, 48 St. Rep. 724 (1991), affirming Trustees of the Wash.-Idaho-Mont. Carpenters-Employers Retirement Trust Fund v. Galleria Partnership, 239 M 250, 780 P2d 608, 46 St. Rep. 1661 (1989).

Interest Payable From Date of Judgment: Interest due on the amount wife was ordered to pay husband under the dissolution judgment is calculated from the date of the judgment. In re Marriage of Dalley, 237 M 287, 773 P2d 295, 46 St. Rep. 808 (1989).

Modification of Judgment — Recalculation of Damages Based on When Interest to Accrue: The jury set the date on which interest on damages would begin to accrue as October 16, the expected date of harvest according to the jury form. Defendant argued that the determination was nonsensical because it put the date of expected harvest after the date in October on which the replacement crop was actually harvested. In modifying the judgment, the Supreme Court found no appearance of jury passion or prejudice in reaching the verdict and remanded for recalculation of damages using October 2 as the expected date of harvest. Vandalia Ranch, Inc. v. Farmers Union & Oil Supply Co., 221 M 253, 718 P2d 647, 43 St. Rep. 790 (1986).

Modification of Incorrect Money Judgment — Interest Due on Retroactively Due Increase: If a judgment is effective from the date of entry and any changes to the judgment relate back to the entry date, it follows that interest is assessed from the date of judgment. Where a child support and maintenance decree was later modified and larger payments granted, with the increase made retroactive to the date of the original decree, interest was due on that retroactive amount, beginning on the date of the original decree. In re Marriage of Wilson, 216 M 392, 701 P2d 1372, 42 St. Rep. 894 (1985).

Workers' Compensation Court — No Interest on Claimants' Judgments: On remand from the Supreme Court to the Workers' Compensation Court for a determination of reasonable costs and attorney fees, the Workers' Compensation Court determined that claimant was not entitled to interest based on past due compensation and medical benefits awarded by its earlier judgment. The Supreme Court affirmed. The penalties and assessments allowed against an insurer under the Workers' Compensation Act are the exclusive penalties and assessments that can be assessed against an insurer in absence of authorizing legislation. Carlson v. Cain, 216 M 129, 700 P2d 607, 42 St. Rep. 695 (1985).

Property Settlement — Liability for Interest Pending Appeal — Burden of Parties: Where, following a decree dissolving the marriage of the parties and awarding a money judgment to the wife, the husband obtained a stay of execution pending appeal, the trial court did not err upon remand in ordering the husband to pay interest upon the previous judgment, calculated from the day the judgment was originally rendered. Under the holding in Kerner v. N. Pac. Ry., 161 M 177, 505 P2d 86 (1973), a judgment bears interest from the date of its entry even though it is subject to direct attack. As the husband made no attempt to see what obligations were accruing, the court will not allow the husband to avoid his interest obligations by claiming that his wife did not do enough to secure it. Knudson v. Knudson, 191 M 204, 622 P2d 1025, 38 St. Rep. 154 (1981).

Reversal Without Directions: Where Supreme Court by its reversal of judgment granted plaintiff's demand for payment of dishonored checks, further evidence as to damages would not be proper; and although court omitted specific directions, there was no need for a new trial. Sun River Cattle Co. v. Miners' Bank of Mont., 164 M 479, 525 P2d 19 (1974).

Collateral References

5 Am. Jur. 2d Appellate Review §841.

Rule 32. Damages for appeal without merit.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

The language of Montana Supreme Court Rule XIX is substituted for that of Rule 38 of the Federal Draft.

NOTE TO JUNE 16, 1986, AMENDMENT

The deletion removes an ambiguity which has previously caused problems.

Compiler's Comments

1986 Amendment: The Supreme Court Order of June 16, 1986, inserted "in a civil case" and after "reasonable grounds" deleted "but apparently for purposes of delay only".

Supreme Court Rules Superseded: As to the advisory committee note above, see the compiler's comments to Rule 43 (now Rule 53), M.R.App.P., and to this chapter.

Case Notes

Substantial Grounds for Appeal of Marital Property Valuation and Distribution — Costs of Appeal Denied: The wife sought sanctions based on the husband's allegedly unreasonable appeal of the parties' marital property valuation and distribution. The Supreme Court denied sanctions after finding that the husband's appeal was based on substantial and reasonable grounds and

was not intended to cause delay. Collins v. Collins, 2004 MT 365, 324 M 500, 104 P3d 1059 (2004). See also In re Marriage of Moss, 1999 MT 62, 293 M 500, 977 P2d 322 (1999).

Assertion of Interpretation of Rule Regarding Remand of Pending Appeal — No Award of Sanctions: While a jurisdictional question was pending in a civil action seeking monetary damages, Nielsen contended that a settlement agreement was reached and filed a complaint in District Court to enforce the alleged agreement. The motion was dismissed because the underlying action was pending on appeal. Nielsen then appealed, but dismissal was affirmed. The Brocksmiths sought sanctions. However, Nielsen had participated in mediation and believed that an agreement was reached and thus presented the issue to the Supreme Court regarding remand of a pending appeal to settle an alleged agreement question, an issue not previously addressed. Because Nielsen's action could not be considered entirely unfounded, the Brocksmiths' motion for sanctions was denied. Nielsen v. Brocksmith, 2004 MT 259, 323 M 98, 99 P3d 181 (2004).

Sanctions Appropriate for Appeal Without Merit or Legal Support: Following affirmation of all underlying legal issues in this case in Lewistown Propane Co. v. Moncur, 2002 MT 349, 313 M 368, 61 P3d 780 (2002), defendants filed another appeal seeking a determination of whether the District Court improperly denied their motion seeking relief from judgment. Following examination of the record, the Supreme Court concluded that defendants' brief was less an appeal to revise a judgment based on a supportable legal analysis and precedent than it was a vexatious personal attack on the presiding District Court Judge, which unreasonably lengthened the proceedings, resulted in unnecessary costs to the parties, and unnecessarily consumed court time. Therefore, sanctions were warranted and were ordered to be paid by defendants' attorney pursuant to 37-61-421 and this rule. Lewistown Propane Co. v. Moncur, 2003 MT 368, 319 M 105, 82 P3d 896 (2003).

Reasonable Grounds for Appeal of Child Medical Support Case — Sanctions Inappropriate: Cynthia waited 6 years to file a claim to require Lorney to pay his portion of their child's medical expenses and then requested sanctions on grounds that Lorney caused delay by appealing the trial court's decision. The Supreme Court found no evidence of delay caused by Lorney's appeal and concluded that there were substantial and reasonable grounds for the appeal, so sanctions were not imposed. In re Marriage of Deist, 2003 MT 263, 317 M 427, 77 P3d 525 (2003).

Sanctions Not Presumptively Assumed on Appeal Barred by Res Judicata: Defendant contended that sanctions were appropriate because plaintiff brought an appeal that was barred by res judicata. However, the fact that an appeal is barred by res judicata does not mean that an award of sanctions is presumptively appropriate. Absent a showing that the appeal was entirely unfounded, intended to cause delay, or constituted an abuse of the judicial system, sanctions are not appropriate. Johnson v. Hamilton, 2003 MT 199, 317 M 24, 75 P3d 778 (2003).

Failure to Cite Supporting Authority or File Record on Appeal — Sanctions Awarded: Hodge appealed the distribution of the marital estate, but failed to cite any authority to support his positions on the issues or file a record upon which the Supreme Court might base its review in considering his claims. Hodge's actions constituted an abuse of the judicial system, and sanctions were awarded to the wife for the costs and attorney fees associated with the appeal. In re Marriage of Hodge, 2003 MT 146, 316 M 194, 69 P3d 1192 (2003), following In re Marriage of Snow, 2002 MT 143, 310 M 260, 49 P3d 610 (2002).

Appeal of Parenting Plan Not Unfounded — Award of Attorney Fees Declined: Each parent submitted a different plan for custody and visitation. The District Court adopted most provisions of the mother's proposed plan, and the father appealed. The Supreme Court ruled in the mother's favor, and she requested attorney fees and costs on grounds that the father's appeal was taken without substantial or reasonable grounds. The Supreme Court found that the appeal was not entirely unfounded or intended to cause delay and did not constitute an abuse of the judicial system, so the request for attorney fees and costs was denied. In re Marriage of Carter, 2003 MT 19, 314 M 84, 63 P3d 1124 (2003).

Groundless Appeal of Easement Case — Damages Assessed: In District Court, defendant proceeded with an easement case, contending that a road did not exist in 1985, even though aerial photographs clearly showed that the road existed in exactly the same location since 1979. Fees and costs were assessed against defendant for unreasonably and vexatiously multiplying the proceedings, yet defendant brought exactly the same arguments on appeal. The Supreme Court awarded plaintiff reasonable attorney fees for defending an appeal taken without substantial or reasonable grounds. Ponderosa Pines Ranch, Inc. v. Hevner, 2002 MT 184, 311 M 82, 53 P3d 381 (2002).

Appeal of Denial of Motion to Compel Arbitration Not Considered Frivolous: An employer failed to timely respond to an employee's request for arbitration, and subsequently moved to

compel arbitration. When the District Court denied the employer's motion to compel, the employer appealed. The employee then sought sanctions pursuant to this rule, contending that unnecessary delay and needless increase in the costs of litigation were compounded by the employer's appeal. The Supreme Court was not convinced from the record that the appeal was taken without substantial or reasonable grounds and thus declined to award sanctions. Firestone v. Oasis Telecommunications, Data & Records, Inc., 2001 MT 297, 307 M 469, 38 P3d 796 (2001).

Reasonable Grounds for Appeal of Trial Court's Imposition of Sanctions — No Sanctions Awarded on Appeal: The District Court awarded sanctions against Pospisil in favor of his ex-wife and a bank because the complaint was groundless and was not pursued in good faith and because Pospisil's conduct was not reasonable under the circumstances. Pospisil appealed, and the ex-wife also sought sanctions on appeal. Although the trial court's award of sanctions was proper, there were reasonable grounds for Pospisil to appeal the sanctions, so the Supreme Court declined to award additional sanctions on appeal. Pospisil v. First Nat'l Bank of Lewistown, 2001 MT 286, 307 M 392, 37 P3d 704 (2001).

Failure to Succeed on Appeal Not Equated to Taking Appeal Without Substantial or Reasonable Grounds — Attorney Fees Denied: The Supreme Court dismissed the father's appeal in a custody dispute because it was not timely filed, and the mother sought attorney fees as damages, contending that because the father had repeatedly sought custody over a short span of time in three different states, presenting different arguments depending on which state's court that he was appearing in, and that all of the claims lacked merit. The mother also contended that the appeal was taken without substantial or reasonable grounds, so attorney fees were warranted. The Supreme Court noted that it did not reach the merits of the father's claim and thus was unable to determine whether the appeal was taken without substantial or reasonable grounds and that even if it had reached the merits of the appeal, the failure to succeed on appeal does not necessarily equate to taking an appeal without substantial or reasonable grounds. Further, the lack of timeliness of the appeal was not blatant and was not the focus of the mother's request for attorney fees, so the fees were denied. In re Marriage of Yeanuzzi, 2001 MT 171, 306 M 163, 30 P3d 1095 (2001).

Sanction for Alleged Frivolous Appeal and Undue Influence Refused Against Party Who Partly Prevailed on Appeal: The wife in a divorce case argued that her attorney fees on appeal should be ordered paid by the husband because his appeal of denial of enforcement of a settlement agreement was frivolous and because he continually attempted to use his superior financial position to leverage her into a disadvantageous settlement. The Supreme Court would not impose sanctions because there were reasonable grounds for appeal, as evidenced by the Supreme Court's reversal in the husband's favor on the issue of the apportioning of the marital assets. In re Marriage of Rolf, 2000 MT 361, 303 M 349, 16 P3d 345, 57 St. Rep. 1536 (2000).

Appeal Taken Without Substantial or Reasonable Grounds — Sanctions Imposed: With the exception of four sentences in her brief, plaintiff's entire argument on appeal was devoted to arguing that no easement burdened her land. However, the appeal was related to a complaint of assault and trespass, not the validity of an easement. The four sentences were simply a collection of conclusions and contained no discussion of the law relating to trespass or assault, no citation to legal authority or to the record, and no application of the law to the facts. The Supreme Court found this to be a proper case in which to impose sanctions for a frivolous appeal and remanded for a determination of defendant's reasonable attorney fees and costs incurred on appeal. Kinsey-Cartwright v. Brower, 2000 MT 198, 300 M 450, 5 P3d 1026, 57 St. Rep. 769 (2000).

Attorney Fees Not Imposed Absent Evidence That Pro Se Appeal Brought in Bad Faith: As a general rule, the Supreme Court will not impose sanctions under this rule unless an appeal is entirely unfounded and intended to cause delay or unless counsel's actions otherwise constitute an abuse of the judicial system. Here, even though a plaintiff's pro se arguments were legally unsound and untimely, there was no indication that the arguments were brought in bad faith, so the court declined to award defendants their attorney fees on appeal. Greenup v. Russell, 2000 MT 154, 300 M 136, 3 P3d 124, 57 St. Rep. 610 (2000).

Lack of Respect for Judicial Process and Appeal Without Reasonable Grounds — Award of Fees and Costs Appropriate: The Supreme Court held that under this rule, sanctions were appropriate against appellant who proceeded without respect for the judicial process and did so without sufficient reasonable grounds. Lee v. Lee, 2000 MT 67, 299 M 78, 996 P2d 389, 57 St. Rep. 308 (2000). See also Spoonheim v. Norwest Bank Mont., 277 M 417, 922 P2d 528, 53 St. Rep. 764 (1996).

Motion for Relief From Judgment Barred by Res Judicata — Sanctions Appropriate: McLaughlins moved for relief from judgment under Rule 60(b), M.R.Civ.P. (Title 25, ch. 20), but

the motion was denied by the District Court. On appeal, McLaughlins raised 14 different reasons why the District Court's judgment following remand was void. The thrust of their argument was that the District Court failed to follow statutory law when awarding punitive damages against them. In denying the Rule 60(b) motion, the District Court noted that the issues raised by the motion had been appealed three times to the Supreme Court and affirmed each time in noncite opinions and held that the Rule 60(b) motion was dilatory in nature and without substance in law or fact. On this fourth appeal, the Supreme Court agreed, finding that all of the issues raised by the McLaughlins in their Rule 60(b) motion were barred by res judicata because they either had been previously litigated or could have been litigated in prior proceedings. Further, because the latest appeal was taken without substantial or reasonable grounds, it was frivolous pursuant to this rule, so sanctions in the form of reasonable costs and attorney fees were ordered to be added to the judgment against McLaughlins on remand. Bragg v. McLaughlin, 1999 MT 320, 297 M 282, 993 P2d 662, 56 St. Rep. 1276 (1999). See also Wellman v. Wellman, 198 M 42, 643 P2d 573 (1982), Searight v. Cimino, 238 M 218, 777 P2d 335, 46 St. Rep. 1217 (1989), and Loney v. Milodragovich, Dale & Dye, P.C., 273 M 506, 905 P2d 158, 52 St. Rep. 1093 (1995).

Failure to Participate in Water Court Hearing — Attorney Fees Assessed as Sanction for Defense of Unreasonable Appeal: Despite warnings from the Water Court of the consequences, plaintiffs chose not to participate in a Water Court hearing, thereby creating no record of their issues and preserving none of their arguments for appeal. They appealed anyway, contending that the Water Court's findings were in error. The Supreme Court first found that the findings and conclusions were correct, then sanctioned plaintiffs pursuant to this rule, finding that defendant was entitled to attorney fees incurred in defending an appeal that was taken without any substantial or reasonable grounds, that delayed the case, and that wasted the resources of defendant and the Supreme Court. Swinger v. Collins, 1999 MT 202, 295 M 447, 984 P2d 151, 56 St. Rep. 787 (1999).

Issue of Sanctions as Meritorious Question — Award of Damages Declined: Respondents sought damages pursuant to this rule, arguing that attorney fees and costs were appropriate because an appeal was taken without substantial or reasonable grounds. Appellants had raised the question on appeal as to whether Rule 37(c), M.R.Civ.P. (Title 25, ch. 20), sanctions could be imposed jointly and severally. The Supreme Court, noting that the appeal was not taken solely for delay or harassment and that the issue was a meritorious question worthy of appeal, declined to award damages. Morris v. Big Sky Thoroughbred Farms, Inc., 1998 MT 229, 291 M 32, 965 P2d 890, 55 St. Rep. 957 (1998).

Section 1983 Action — Denial of Summary Judgment on Qualified Immunity Held Not Appealable — Lack of Supreme Court Jurisdiction — Sanctions Awarded: After a riot at the Montana State Prison (MSP) in which several prison inmates were killed or injured, inmates brought a negligence and section 1983 action against MSP officials. The MSP officials moved for summary judgment on the issue of qualified immunity from the section 1983 action. The District Court denied the motion, and the MSP officials appealed the denial. The Supreme Court held that the Supreme Court had no jurisdiction over the appeal from the District Court's denial of the summary judgment motion because the District Court order is not a final judgment within the meaning of Rule 1(b)(1), M.R.App.P. and that the appeal was likewise not authorized by Rule 1(b)(2) or (b)(3), M.R.App.P. The Supreme Court noted that this result was not changed by the state's allegation that the record was "ripe for appeal" and was "easily reviewable". The Supreme Court also held that the case law of the federal courts interpreting 28 U.S.C. 1291, especially Mitchell v. Forsyth, 472 US 511 (1985), and Johnson v. Jones, 515 US 304, 132 L Ed 2d 238, 115 S Ct 2151 (1995), was not relevant because the Montana Supreme Court derives its authority over appeals from the state constitution and the Montana Rules of Appellate Procedure and not from 28 U.S.C. 1291. Because the appellants had not made any arguments in favor of their appeal, the Supreme Court determined that it was frivolous and, pursuant to this rule, awarded the respondents their attorney fees on appeal. In re Litigation Relating to Riot, 283 M 277, 939 P2d 1013, 54 St. Rep. 598 (1997).

Good Faith Argument Despite Lack of Underlying Law — Damages Unwarranted: Although plaintiff's argument regarding the doctrine of equitable tolling was unconvincing, absent evidence that the argument was not made in good faith or that the appeal was taken without substantial or reasonable grounds, defendant's claim for damages was denied. Sorenson v. Massey-Ferguson, Inc., 279 M 527, 927 P2d 1030, 53 St. Rep. 1269 (1996).

Attorney Fees: Whenever an appeal is entirely unfounded and causes delay, the other party should be reimbursed to a reasonable extent for his costs and attorney fees in connection with the appellate proceedings. Spoonheim v. Norwest Bank Mont., 277 M 417, 922 P2d 528, 53 St. Rep. 764 (1996); Reilly v. Farm Credit Bank of Spokane, 261 M 532, 863 P2d 420, 50 St. Rep. 1441

(1993), followed in CNA Ins. Co. v. Dunn, 273 M 295, 902 P2d 1014, 52 St. Rep. 981 (1995); Hock v. Lienco Cedar Prod., 194 M 131, 634 P2d 1174, 38 St. Rep. 1598 (1981); Carbon County v. Schwend, 182 M 89, 594 P2d 1121 (1979). See also Tipp v. Skjelset, 1998 MT 263, 291 M 288, 967 P2d 787, 55 St. Rep. 1084 (1998).

Sanctions Applicable Based on Conflicting Positions, Baseless Claims, and Inaccurate Citations: The Supreme Court applied this rule in holding that sanctions were appropriate against an appellant who had taken inconsistent and conflicting positions throughout the case, asserted baseless claims on appeal, and used inaccurate citations in its appellate brief. Federated Mut. Ins. Co. v. Anderson, 277 M 134, 920 P2d 97, 53 St. Rep. 618 (1996), followed in Tipp v. Skjelset, 1998 MT 263, 291 M 288, 967 P2d 787, 55 St. Rep. 1084 (1998). On remand, defendant was entitled to present proof to the jury that third-party defendant, which had been sanctioned for prosecuting a meritless appeal, was involved in a continuing course of bad faith postjudgment conduct, and proof of that conduct was admissible to prove malice. Third-party defendant's alleged failure to conduct a reasonable investigation and its subsequent refusal to pay the claim, although occurring more than 2 years before commencement of plaintiff's cause of action, were, if proved, ostensibly part of the bad faith postjudgment conduct. The evidence of those acts was not time-barred. Federated Mut. Ins. Co. v. Anderson, 1999 MT 288, 297 M 33, 991 P2d 915, 56 St. Rep. 1152 (1999), followed in Disler v. Ford Motor Credit Co., 2000 MT 304, 302 M 391, 15 P3d 864, 57 St. Rep. 1288 (2000).

Sanctions Warranted by Petition in Workers' Compensation Court When Jurisdiction of District Court Previously Invoked: After Dunn brought an action in District Court pursuant to 39-71-515 and 39-71-516 against an uninsured employer, CNA Insurance brought a petition in the Workers' Compensation Court for that court to determine Dunn's insurance coverage. The Supreme Court held that since the employer could admit liability, the petition in Workers' Compensation Court served no purpose other than to attempt to circumvent or delay the District Court action. The Supreme Court therefore awarded a $500 sanction against CNA and its counsel. CNA Ins. Co. v. Dunn, 273 M 295, 902 P2d 1014, 52 St. Rep. 981 (1995), distinguished in Neustrom v. St., 283 M 179, 939 P2d 990, 54 St. Rep. 552 (1997). See also Krause v. Neuman, 284 M 399, 943 P2d 1328, 54 St. Rep. 937 (1997), and Grenz v. Fire & Cas. of Conn., 2001 MT 8, 304 M 83, 18 P3d 994 (2001), in which the court enjoined the claimant from filing further civil appeals until the sanction was paid.

Appeal From Order Removing Counsel From Duties as Personal Representative — No Basis for Sanctions for Bringing Meritless Appeal: An attorney appealed an order removing him for cause from his duties as personal representative in an informal probate proceeding. Based on the record in this case, there was no basis for sanctions to be assessed against appellant for attorney fees and costs pursuant to this rule for bringing a meritless appeal. In re Estate of Peterson, 265 M 104, 874 P2d 1230, 51 St. Rep. 454 (1994).

Costs Denied Winner of Trust Invalidation Case: Under the circumstances of the case, the Supreme Court declined to order that the sons challenging parts of their father's trust benefiting his wife be assessed costs of appeal on the grounds that they appealed without substantial or reasonable grounds. In re McKittrick Trust, 262 M 406, 865 P2d 1099, 50 St. Rep. 1613 (1993).

Appeal Taken Without Reasonable Grounds — Sanctions Imposed: Sanctions were imposed against a pro se appellant who was no stranger to litigation when the appeal was not warranted by existing law, no good faith argument was made for a change in the existing law, and the appeal was taken without substantial or reasonable grounds under the circumstances. Mogan v. Cargill, Inc., 259 M 400, 856 P2d 973, 50 St. Rep. 851 (1993).

Appeal of Dismissal of Parties After Prior Concurrence — Fees and Costs Warranted: Despite the fact that he agreed to dismissal of several parties at the District Court level, plaintiff argued on appeal that dismissal was improper. The appeal was barred by plaintiff's prior acquiescence to the dismissal. Assessment of attorney fees and costs of appeal against him was appropriate. Buck v. Billings Mont. Chevrolet, Inc., 248 M 276, 811 P2d 537, 48 St. Rep. 431 (1991).

Insurance Company's Appeal of Lower Court's Interpretation of Insurance Law Not Without Merit: An applicant for an insurance policy answered "no" to a question on the insurance form as to whether he had visited a physician for any purpose during the previous 3 years. In fact, the applicant had been treated for alcoholism and depression. Subsequently, the insurance company alleged that the insured committed suicide, and the insurance company refused to pay on the policy. The death was later ruled to not be suicide. The Supreme Court held that if alcoholism was a material concern of the insurance company, then it should have specifically requested information concerning alcohol use on the application form as it did with respect to other medical conditions, such as heart or kidney disease. The court also held that the defendant was not liable for damages on the basis that its appeal was without merit because the questions presented on

appeal were not clearcut but delved into an area in which there was little state case law. Schneider v. Minn. Mut. Life Ins. Co., 247 M 334, 806 P2d 1032, 48 St. Rep. 224 (1991).

Sanctions Imposed in Visitation Rights Case: Parental and visitation rights were the subject of at least five separate legal actions or proceedings over a 2-year period, all but one of which were initiated by the father. Each proceeding caused unnecessary emotional and financial distress for all parties involved, including a profound adverse effect on the well-being of the child involved. Wishing to put an end to the father's abuse of the judicial system, especially regarding appeals taken without substantial or reasonable grounds, the Supreme Court imposed $250 in damages on the father. Thomas v. Hale, 246 M 64, 802 P2d 1255, 47 St. Rep. 2261 (1990).

Modification of Support and Maintenance — Not Frivolous Appeal: In a divorce action, the husband brought a motion to modify support and maintenance on the basis that he had remarried and had a new family to support. The lower court refused to modify the original decree, and the husband appealed. The wife argued that she was entitled to damages and attorney fees incurred as a result of the appeal. The Supreme Court held that the appeal was not without merit and therefore the wife was not entitled to fees and costs. In re Marriage of Jones, 242 M 119, 788 P2d 1351, 47 St. Rep. 595 (1990).

Appeal of Settled Issue — Sanctions Appropriate: After several trials and hearings concerning the construction of an airfield on the appellants' land by the respondent, the appellants brought a motion to set aside most of the prior rulings by the District Court, arguing that the court did not have subject matter jurisdiction. The Supreme Court held that the issue of jurisdiction could have been raised on several prior occasions and public policy dictated that at some time litigation must come to an end. The court additionally held that the appellants were merely attempting to open the case and relitigate previously settled issues and therefore imposed damages in the amount of $500 on the appellants. Searight v. Cimino, 238 M 218, 777 P2d 335, 46 St. Rep. 1217 (1989), followed in S. Gallatin Land Corp. v. Yetter, 245 M 320, 801 P2d 575, 47 St. Rep. 2139 (1990), and cited in Shull v. First Interstate Bank of Great Falls, 269 M 32, 887 P2d 193, 51 St. Rep. 1345 (1994).

Damages to Respondent for Appeal Taken Without Substantial Grounds — Skimpy Briefs: Damages to respondent were proper when counsel for appellant was repeatedly informed by the trial judge of the need to establish a duty owing by the respondent, but no evidence of a duty was presented. Assessment of damages was further warranted because appellant's brief did not contain: (1) a statement of the case; (2) citations to authority for numerous contentions; (3) citations to pages of the record relied upon; and (4) accurate quotations of case law, commissioners' comments, and the record. Rookhuizen v. Blain's Mobile Home Court, Inc., 236 M 7, 767 P2d 1331, 46 St. Rep. 139 (1989).

Attorney Fees Denied: When a reasonable ground for an appeal exists, no sanctions under this rule will be imposed. Tope v. Taylor, 235 M 124, 768 P2d 845, 45 St. Rep. 2242 (1988), followed in Bickler v. The Racquet Club Heights Associates, 258 M 19, 850 P2d 967, 50 St. Rep. 409 (1993), and Bi-Lo Foods, Inc. v. Alpine Bank, 1998 MT 40, 287 M 367, 955 P2d 154, 55 St. Rep. 131 (1998). See also In re Estate of Goick, 275 M 13, 909 P2d 1165, 53 St. Rep. 12 (1996). However, see Tipp v. Skjelset, 1998 MT 263, 291 M 288, 967 P2d 787, 55 St. Rep. 1084 (1998).

Frivolous Appeal in Dissolution Case From Distribution of Property and Award of Child Support: In dividing a modest amount of marital property and awarding child support in this dissolution action, the District Court apparently tried to make certain that each party had an automobile and his own pension benefits and personal property and set the child support amount well within child support guidelines. The husband's appeal was obviously trifling, without substantial basis, and perhaps mean-spirited. The wife is entitled to an award of damages in the form of her attorney fees incurred in the appeal. In re Marriage of Larson, 234 M 400, 763 P2d 1109, 45 St. Rep. 2003 (1988).

Repeated Custody Challenges — Attorney Fees Proper — Meritless Appeal Warranting Sanctions: The District Court's determination that the father's repeated actions for sole custody were intended to harass, obstruct, and delay the mother's right to joint custody and were an abuse of process highly detrimental to the best interests of the children was sufficient to trigger the award of attorney fees and costs against the father under 40-4-219. Appeal of the custody question to the Supreme Court was meritless, and sanctions were proper under this rule. In re Marriage of West, 233 M 47, 758 P2d 282, 45 St. Rep. 1281 (1988).

Intervening Statutory Amendment as Justification for Appealing Question of Law Decided Previously: When appellant based its appeal on a question of law previously decided, its appeal was not taken without reasonable grounds when the law in question had since been amended. Mortensen Constr. Co. v. Burlington N., Inc., 218 M 415, 708 P2d 1006, 42 St. Rep. 1699 (1985).

Workers' Compensation Claim — Penalty Denied: A penalty under this section was inappropriate when the insurer pursued substantial and reasonable legal grounds throughout the protracted litigation. Conway v. Blackfeet Indian Dev., Inc., 217 M 54, 702 P2d 970, 42 St. Rep. 1020 (1985).

Frivolous Appeal Without Purpose of Delay — No Attorney's Fees Awarded: Although appeal appeared to be taken without substantial reasonable grounds, the rule allowing damages for a frivolous appeal has another prong. The appeal must be taken for purposes of delay only. Finding no such purpose, the Supreme Court denied respondent's petition for attorney's fees and costs for the appeal, except as provided in Rule 33, M.R.App.P. Smith v. Smith, 212 M 223, 686 P2d 912, 41 St. Rep. 1695 (1984).

Damages for Frivolous Appeal on Claim of Judicial Prejudice: On November 17, 1981, the Supreme Court decided Larry C. Iverson, Inc. v. Bouma, 195 M 351, 639 P2d 47, 38 St. Rep. 1911 (1981). In that case the court partially affirmed a summary judgment for the plaintiff and remanded the case to modify the accounting decree in accordance with its opinion. Defendant sought to disqualify the District Court Judge, and a hearing was held. No bias or prejudice was found, and at a later hearing the accounting decree was modified. Defendant then appealed, claiming that the District Court Judge and the Supreme Court had violated his rights to due process because of prejudice. The Supreme Court dismissed the appeal as frivolous and assessed damages in the amount of $500 against the appellant. Larry C. Iverson, Inc. v. Bouma, 39 St. Rep. 2126 (1982) (apparently not reported in Pacific Reporter or Montana Reports).

Award of Fees Reasonable — Appeal to Clarify Alternative Judgment Not Frivolous: In an original judgment of October 31, 1979, plaintiffs were given the alternatives of either repairing a damaged irrigation ditch or paying damages of $5,500. The case was appealed to the Supreme Court, and in Marta v. Smith, 191 M 179, 622 P2d 1011, 38 St. Rep. 28 (1981), the court found substantial evidence to support the District Court's findings. This became the law of the case. The case was remanded for a determination of attorney fees to be awarded to defendant. On remand, attorneys for defendant requested fees of $11,000. The District Court awarded fees of $2,000 based on testimony received. The Supreme Court found that this finding was not clearly erroneous. The court also declined to award attorney fees under Rule 32, M.R.App.P., for the appeal because plaintiffs were justified in bringing the appeal to clarify the alternative judgment. Marta v. Smith, 200 M 414, 650 P2d 1387, 39 St. Rep. 1839 (1982).

Appeal Taken to Prevent Amendment — Sanction Imposed: After respondent moved to amend the judgment of the District Court, appellant filed a notice of appeal. The Supreme Court held that the filing of the notice of appeal divested the trial court of jurisdiction to amend the judgment. The court further stated that sanctions under Rule 32, M.R.App.P., would be imposed on parties using this type of unfair procedural tactic. United Farm Agency v. Blome, 198 M 435, 646 P2d 1205, 39 St. Rep. 1115 (1982).

Abuse of Process to Delay Possession of Real Property — Damages Awarded: In a suit brought by Sun Dial to regain possession of land from Gold Creek, a settlement was reached on the day set for trial. The settlement required Gold Creek to pay Sun Dial $1.3 million within 1 year of the settlement date. Payment was not made and the court ordered judgment for Sun Dial's immediate possession of the land. Gold Creek then began various legal maneuvers that culminated in this appeal. The Supreme Court found that the purpose of these maneuvers was to give Gold Creek more time to sell the land and that this amounted to abuse of the appeal process. A judgment was entered against Gold Creek under this rule. Sun Dial Land Co., Inc. v. Gold Creek Ranches, Inc., 198 M 247, 645 P2d 936, 39 St. Rep. 908 (1982).

Unequal Division of Marital Assets — Reasonable Grounds for Appeal: Where the court divided the marital assets unequally, abuse of discretion was reasonably at issue, thereby precluding respondent from recovering attorney fees on appeal. In re the Marriage of Martens v. Martens, 196 M 71, 637 P2d 523, 38 St. Rep. 2135 (1981).

Child Custody Case — Appeal Held Not Frivolous: Where, following a decree awarding all of the children of the parties to the father, the mother appealed, alleging generally that the record did not support the award of custody, the Supreme Court refused to find that the appeal was frivolous. The court held that, unlike the case of Billings v. Billings, 189 M 520, 616 P2d 1104 (1980), the mother did not appear to be motivated by a desire to needlessly tie up the litigation process and that, although the facts afforded the appellant little hope of prevailing an appeal, the court would find an appeal in a child custody case to be frivolous in only the most limited circumstances. In re Marriage of Bier v. Sherrard, 191 M 215, 623 P2d 550, 38 St. Rep. 158 (1981).

Frivolous Appeal From Workers' Compensation Court: An appeal by an insurance company from a decision of the Workers' Compensation Court to not assume jurisdiction over an action

filed by the insurance company was frivolous where the insurance company filed the action in Workers' Compensation Court subsequent to an action filed in District Court for the purpose of obtaining a declaratory ruling on an issue being addressed in District Court. This is "an instance where an insurance company has abused the court system in its efforts to avoid meeting the issues head-on in District Court", and as a real party in interest, the insurance company bears the responsibility for the appeal and is liable for penalties to be paid to the parties forced into Workers' Compensation Court proceedings. Alaska Pac. Assurance v. L.H.C., Inc., 191 M 120, 622 P2d 224, 38 St. Rep. 23 (1981). The Supreme Court declared its opinion to be substituted for the opinion in Alaska Pac. Assurance Co. v. L.H.C., Inc., 37 St. Rep. 1616 (1980).

Removal of Child From State — Appeal Held Not Frivolous: The mother, custodian of the couple's child, moved to North Carolina without informing the District Court as required by the divorce decree. The father brought suit for change of custody, which was denied. The mother contended that his appeal was frivolous and sought attorney fees. The Supreme Court held that neither of the mother's contentions was proper, as she had forced the father to initiate the litigation by moving to North Carolina without first getting a change in the visitation privileges. In re Marriage of Winn, 190 M 73, 618 P2d 870, 37 St. Rep. 1734 (1980).

Motion for Modification of Divorce Decree Not New Action Supporting Venue Change: After a divorce was granted, the husband filed three petitions for modification of the divorce decree over a period of 6 years, the third of which sought custody of the minor son of the marriage. Since the divorce, the mother had moved to another county, and upon the third petition by her former husband, she moved for a change of venue to her county of residence. Her primary argument for this motion was that she was entitled to a change of venue under 25-2-108 (renumbered 25-2-118) because the former husband's petition was the commencement of a new action. The Supreme Court called this frivolous and said it would assess damages under Rule 32, M.R.App.P., in future appeals of this nature. In re Billings v. Billings, 189 M 520, 616 P2d 1104, 37 St. Rep. 1704 (1980).

Workers' Compensation Court — Declaratory Judgment — Frivolous Appeal: The Workers' Compensation Court properly refused to take jurisdiction of a petition seeking, in essence, a declaratory judgment that petitioner, Raines, was an employee rather than an independent contractor so as to relieve him of liability in a wrongful death action filed in District Court. The decision was one for the District Court since the workers' compensation court is not empowered to issue declaratory judgments. The insurance company and its counsel are charged with such minimum knowledge and, thus, must pay a $500 penalty for filing a frivolous appeal. Alaska Pac. Assurance Co. v. L.H.C., Inc., 37 St. Rep. 1616 (1980). (This opinion was withdrawn by the opinion in Alaska Pac. Assurance Co. v. L.H.C., Inc., 191 M 120, 622 P2d 224, 38 St. Rep. 23 (1981).)

No Frivolous Appeal — Bona Fide Difference of Opinion: Albertson's requested the court to impose sanctions upon the Department of Business Regulation for a frivolous appeal under Rule 32, M.R.App.P. The request was denied. The Department's position is well within the bounds of legitimate argument on a substantive issue on which there is a bona fide difference of opinion. The appeal is not frivolous within the meaning of the rule. Albertson's v. Dept. of Business Regulation, 184 M 12, 601 P2d 43 (1979).

Sanctions Inappropriate — Sufficiency of Evidence as to Competency to Make Will: The specifications of error raised by appellants regarding sufficiency of evidence as to competency of decedent to make a will are not groundless or unreasonable. Thus Rule 32 damages are not appropriate in this appeal. In re Holm, Holm v. Parsons, 179 M 375, 588 P2d 531 (1979).

Arguable Contentions: While the Supreme Court did not find that the arguments advanced by the plaintiff on appeal were controlling, his contentions were certainly arguable. Hence defendant's request for costs and attorney's fees under this rule was denied. LaForest v. Texaco, Inc., 179 M 42, 585 P2d 1318 (1978), followed in Medders v. Joyes, 233 M 183, 758 P2d 769, 45 St. Rep. 1409 (1988).

Sanctions Not Authorized Against Respondent: The sanctions for bringing a frivolous appeal are authorized against an appellant, not a respondent in whose favor the District Court ruled. McGee v. Burlington N., Inc., 179 M 1, 585 P2d 1296 (1978).

Sufficiency of Evidence at Issue: The question of the sufficiency of the evidence to support the court's findings of fact and conclusions of law and judgment was reasonably in issue, thus respondent was not entitled to damages under this rule. Erdman v. C & C Sales, Inc., 176 M 177, 577 P2d 55 (1978).

Damages Denied: The Supreme Court held that an appeal of the granting of motion for summary judgment was not taken "without substantial or reasonable grounds" and declined to grant damages under this rule. Keller v. Llewellyn, 175 M 164, 573 P2d 166 (1977).

Reasonable Grounds for Appeal: The Supreme Court failed to find substantial evidence that an appeal was taken without substantial or reasonable grounds or only for purposes of delay. Poeppel v. Fisher, 175 M 136, 572 P2d 912 (1977).

Quiet Title Action — Tax Deed: Appeal from judgment against plaintiff in action to obtain a tax deed from the county and quiet title to property was not frivolous. Niles v. Carbon County, 174 M 20, 568 P2d 524 (1977).

Frivolous Appeal — Writ of Execution: Where defendants, who were liable under two judgments to pay plaintiff in excess of $16,000, offered him $152 as satisfaction in full pursuant to a stipulation by the parties' attorneys allegedly authorizing such a settlement, then appealed issuance of a Writ of Execution to enforce the judgment after plaintiff's rejection of their tender, they were guilty of attempting to delay payment of their debt by means of a frivolous appeal, and plaintiff was entitled to damages under this rule. Heller v. Osburnsen, 169 M 459, 548 P2d 607 (1976).

Damages Denied — Question Not Previously Decided: Assessment of damages against appellants was declined where issue of penalty payment due to professional employee was arguable and had not previously been decided by the appellate court. Hammill v. Young, 168 M 81, 540 P2d 971 (1975).

Frivolous Appeal — Striking of Documents: Strangers to action who filed various documents which were stricken as frivolous, then appealed from such striking, were assessed $1,000 damages under this rule. Farmers St. Bank of Conrad v. Iverson, 162 M 130, 509 P2d 839 (1973).

Damages Not Allowed: Appellee was not entitled to recover additional damages under this rule where appellant had a reasonable ground for appeal. Larry Larson & Assoc. v. John R. Daily, Inc., 158 M 231, 490 P2d 355 (1971).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

Heller v. Osburnsen: Slapping Down the Frivolous Appellant, Gorman, 38 Mont. L. Rev. 377 (1977).

Cost of Appeal, Lessley, 27 Mont. L. Rev. 49 (1965).

Collateral References

5 C.J.S. Appeal and Error §§1072, 1073.

5 Am. Jur. 2d Appellate Review §§937 through 966.

Rule 33. Costs in civil cases.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule is a combination of Rule 39 of the Federal Draft and Montana Supreme Court Rule XVIII. With some adjustment of language, subdivision (a) is taken from the Montana Rule; subdivisions (b) and (c) from the Federal Draft; and subdivisions (d), (e) and (f) from the Montana Rule.

NOTE TO SEPTEMBER 10, 1968, AMENDMENT

The amendments to Rule 33(a), (b), (c) and (f) are to make it clear that all costs on appeal are claimed in the court below after remittitur and eliminate the former duplication of cost bills in both the supreme court and district court.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, in (a) inserted "in civil cases" and made minor changes in phraseology in first sentence; and in (f) inserted "civil" before "cases" in first sentence.

Amendments: The amendment of September 10, 1968, in subdivision (a), added the last sentence; in subdivision (b), deleted "in the supreme court" after "taxable" and deleted a second sentence reading "A party who desires such costs to be taxed shall state them in a verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after entry of judgment"; in subdivision (c), substituted the present caption for "costs taxable in the District

Court[s]"; in subdivision (f), inserted "the" before "costs in accordance", deleted "in the supreme court" before "in accordance" and substituted "by" for "to" before "him".

Supreme Court Rules Superseded: As to the above advisory committee note, see the compiler's comments to Rule 43 (now Rule 53), M.R.App.P., and to this chapter.

Case Notes

Prevailing Party Entitled to Costs of Appeal on Remand: In Muri v. Frank, 2001 MT 29, 304 M 171, 18 P3d 1022 (2001), the Supreme Court found for defendants and remanded. Defendants asked for costs of the appeal, but the District Court refused to award them on remand. Defendants appealed, and the Supreme Court reversed. As the prevailing party in the 2001 appeal, defendants were entitled to the costs of their appeal as a matter of law, and the District Court abused its discretion in failing to award reasonable costs for that appeal. Muri v. Frank, 2003 MT 316, 318 M 269, 80 P3d 77 (2003).

Statute Allowing Attorney Fees in Appeal From Small Claims Court Not Applicable to Appeal From District Court: Plaintiffs prevailed in an appeal from District Court to the Supreme Court, which began as an appeal from Small Claims Court, and sought attorney fees and costs related to the appeal, citing 25-35-806. The Supreme Court held that 25-35-806 applies only to appeals from Small Claims Court to District Court, and declined to award plaintiffs their attorney fees incurred during the appeal from District Court to the Supreme Court. However, as the prevailing party in the Supreme Court appeal, plaintiffs were entitled to costs under this rule. Allen v. Hubbard, 2002 MT 95, 309 M 375, 46 P3d 639 (2002).

Costs and Attorney Fees Awarded to Prevailing Party on Appeal of Civil Rights Case: Laudert was the prevailing party in a civil rights case and was awarded full attorney fees. That award was appealed, and Laudert prevailed again. The Supreme Court cited Ihler v. Chisholm, 2000 MT 37, 298 M 254, 995 P2d 439 (2000), in holding that as the prevailing party in the underlying civil rights action, Laudert was entitled to reimbursement of fees reasonably incurred, whether the fees were incurred in the original civil rights trial and appeal, in proving those fees, or in defending the District Court's fee award. Laudert v. Richland County Sheriff's Dept., 2001 MT 287, 307 M 403, 38 P3d 790 (2001).

Award of Attorney Fees Based on Contract — Prevailing Party Entitled to Attorney Fees on Appeal: When an award of attorney fees is based on a contract, the prevailing party is entitled to reasonable attorney fees on appeal. Eschenbacher v. Anderson, 2001 MT 206, 306 M 321, 34 P3d 87 (2001). See also Smith v. Johnson, 245 M 137, 798 P2d 106 (1990).

Fees for Posttrial Work and Appeal Denied in Light of Generous Award of Attorney Fees at Trial: The Slacks accepted a Department of Transportation offer to pay $168,069, plus interest and necessary litigation expenses, in a property condemnation case, but the amount of litigation expenses was disputed and was not settled by the District Court until some years later. The Department appealed the award, and the Slacks cross-appealed, seeking attorney fees for posttrial work and for responding to the appeal. The Supreme Court noted that although the District Court's findings justifying its award of necessary litigation expenses were not clearly erroneous, the District Court's attorney fee award was clearly generous and that Slack's attorney was granted everything that he requested despite two witnesses for the Department who testified that the attorney's claims were excessive and duplicative. The Supreme Court declined to award additional attorney fees for posttrial work and the appeal. State ex rel. Dept. of Transportation v. Slack, 2001 MT 137, 305 M 488, 29 P3d 503 (2001).

Transcript Cost Recoverable if Necessary for Appeal Determination: Parents for whom the Department of Public Health and Human Services had filed a petition for temporary investigative services appealed an order by the District Court that denied recovery of the cost for reproducing a transcript incurred on a previous appeal. The parents argued that Rule 9(b), M.R.App.P., required them to order a transcript of the entire proceedings not already on file. In affirming the District Court's denial of recovery, the Supreme Court held that although Rule 9 is the general authority that guides the ordering, preparation, and filing of transcripts, this rule is the specific rule controlling whether the cost of reproducing the transcript can be taxed as a cost. This rule clearly establishes that appeal transcript costs are recoverable only if the transcript was necessary for the determination of the appeal. The District Court did not abuse its discretion in denying recovery because the transcript was not required to resolve the legal issue on appeal. In re Inquiry Into A.W., 2000 MT 311, 302 M 447, 14 P3d 1252, 57 St. Rep. 1317 (2000).

Recovery of Attorney Fees, Including Appeal Costs, Based on Indemnification Provision in Underlying Contract: Four people decided to start a business, but ultimately three decided to opt out and exchange their respective corporate shares of stock for cash. The release agreement also held the three harmless from all causes of action relating to the incorporation and provided an indemnification clause that held each party harmless from and against all liability, claim, loss,

damage, or expense, including attorney fees, incurred or required to be paid by the other parties by reason of any breach or failure of observance or performance of any representation, warranty, or covenant or other provision of the agreement. Nevertheless, the corporation subsequently sued one of the three resigning members for breach of fiduciary duty, conversion, actual and constructive fraud, and negligent misrepresentation, seeking $110,000 in general damages and also punitive damages. Defendant counterclaimed that by filing a claim that was barred by the release agreement, the corporation had breached its contract. Following trial, the District Court awarded only $3,673.53 for constructive fraud, but also concluded that all claims based on the parties' contractual relationship were barred. Each party then requested attorney fees as the prevailing party pursuant to the indemnification clause, but the court denied the motions, holding that there was no prevailing party because each party had gained a victory but also suffered a loss. The corporation appealed, seeking attorney fees. The Supreme Court held that pursuant to the reciprocal right under 28-3-704, the corporation had the statutory right to recover attorney fees, but only the fees incurred in defending the breach of contract counterclaim as the prevailing party, pursuant to the contractual indemnification provision. Under the same reasoning, the Supreme Court awarded attorney fees for costs of appeal as well, remanding for a determination of fees. Transaction Network, Inc. v. Wellington Technologies, Inc., 2000 MT 223, 301 M 212, 7 P3d 409, 57 St. Rep. 920 (2000), followed in Peschel Family Trust v. Colonna, 2003 MT 216, 317 M 127, 75 P3d 793 (2003).

Performance of Public Service in Enforcement of Constitutional Provisions Through Litigation — Costs and Attorney Fees Payable: Plaintiffs successfully contested the constitutional validity of a Department of Revenue administrative rule regarding the confidentiality of corporate tax information. In doing so, plaintiffs performed a public service by enforcing a portion of the Montana Constitution that would otherwise have been violated. Because of the public benefits gained through plaintiffs' efforts, the Supreme Court spread the cost of the litigation among its beneficiaries and awarded plaintiffs their costs and reasonable attorney fees, including those incurred on appeal. Assoc. Press, Inc. v. Dept. of Revenue, 2000 MT 160, 300 M 233, 4 P3d 5, 57 St. Rep. 657 (2000).

Bond for Costs on Appeal May Not Include Attorney Fees: When allowed by law, attorney fees that a party incurs on appeal may be recovered by that party if that party prevails on appeal. Section 39-2-915 provides that if a party in a wrongful discharge proceeding declines an offer to arbitrate and then loses in court, the party that offered to arbitrate is entitled to reasonable attorney fees incurred after the offer was made, including those incurred on appeal. However, for purposes of determining the amount of a bond or security under Rule 6, M.R.App.P., a District Court may not include anticipated attorney fees for the future defense of an appeal as part of the anticipated costs on appeal. Moore v. Imperial Hotels Corp., 285 M 188, 948 P2d 211, 54 St. Rep. 1104 (1997).

Award of Attorney Fees and Costs on Appeal of Contract Action: Under this rule, costs in civil actions are automatically awarded to the prevailing party and, additionally, when an award of attorney fees is based on a contract, the prevailing party is also entitled to an award of reasonable attorney fees incurred on appeal. Chamberlin v. Puckett Constr., 277 M 198, 921 P2d 1237, 53 St. Rep. 593 (1996). See also Quigley v. Acker, 1998 MT 72, 288 M 190, 955 P2d 1377, 55 St. Rep. 295 (1998), and Riverview Homes II, Ltd. v. Canton, 2001 MT 309, 307 M 517, 38 P3d 848 (2001).

Future Fees Payable Under Underlying Mortgage: Attorney fees incurred in an appeal were payable by debtor when an underlying mortgage obligated debtor to pay creditor's attorney fees incurred in connection with any future foreclosure action. Farm Credit Bank of Spokane v. Newton, 252 M 336, 829 P2d 931, 49 St. Rep. 267 (1992).

Provision for Fees by Contract or Statute: Attorney fees are allowed when they are provided for by statute or contractual provision. Poulsen's, Inc. v. Wood, 232 M 411, 756 P2d 1162, 45 St. Rep. 1154 (1988), followed in Wise v. Sebena, 248 M 32, 808 P2d 494, 48 St. Rep. 309 (1991), and in Farm Credit Bank of Spokane v. Hill, 266 M 258, 879 P2d 1158, 50 St. Rep. 726 (1993).

Attorney Fees as Element of Costs Granted Against Governmental Entity: In a case where the Department of Revenue sought back child support, received and cashed a check from defendant in an accord and satisfaction, then 1 year later levied execution on defendant's accrued and future wages and, although under a restraining order not to attempt collection or enforcement of a distraint warrant, intercepted defendant's federal and state income tax refunds, the District Court properly awarded costs to the defendant in the form of attorney fees under 25-10-711. The Supreme Court affirmed, citing the holding in State ex rel. Florence-Carlton Consol. School District v. District Court, 193 M 413, 632 P2d 318, 38 St. Rep. 1204 (1981), that if, under all the circumstances of a case, justice would require the imposition of costs, equity can further provide

in extreme cases to allow attorney fees as an element of those costs. St. v. Frank, 226 M 283, 735 P2d 290, 44 St. Rep. 657 (1987), distinguished, in the absence of proof of extreme state conduct, in Weber v. St., 253 M 148, 831 P2d 1359, 49 St. Rep. 397 (1992).

Minor Changes in Grant of Custody on Remand — No Legal Issues Reversed: In affirming a decision on remand by the District Court to hold each party responsible for its own costs of the original appeal and to equally divide the costs of the children's lawyer, the court followed State ex rel. Nesbitt v. District Court, 119 M 198, 173 P2d 412 (1946), in holding that under Rule 33, M.R.App.P. (Title 25, ch. 21), the slight modification in the previous decree did not make appellant the successful party on appeal and that absent reversal of legal questions in favor of either party, assignment of individual costs was proper. In re Marriage of Kuzara, 224 M 124, 728 P2d 786, 43 St. Rep. 2068 (1986).

Law Review Articles

Contract Damages in Montana—Part I: Expectancy Damages, Burnham, 44 Mont. L. Rev. 1 (1983).

Cost of Appeal, Davis, 27 Mont. L. Rev. 49 (1965).

Collateral References

5 Am. Jur. 2d Appellate Review §§909 through 936.

Rule 34. Petitions for rehearing.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule is patterned in part after Rule 40 of the Federal Draft. However, the first sentence is added from Montana Supreme Court Rule XV, as is the statement of the grounds for the petition and the procedure for serving and filing objections; also the 14 days for filing provided in the Federal Draft has been shortened to conform to state practice, and the number of copies required has been reduced from 25 to 6. The second sentence provides for filing of the petition within 10 days after "the decision of the supreme court has been rendered," rather than after "entry of judgment" as provided by the Federal Draft. The purpose is to avoid uncertainty as to when a judgment has been entered, which might exist under the language of the Federal Draft where the mandate of the supreme court is returned to the district court and there entered.

NOTE TO SEPTEMBER 29, 1967, AMENDMENT

Source: None.

This amendment would dispense with requests by the court as a condition to filing replies to petitions for rehearing, and would permit petitions and objections thereto be typewritten in the form prescribed by Rule 27(b).

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1996 Amendment: In last sentence substituted requirement for a signed original and 7 copies for six copies and deleted option of typewritten form. Amendment effective August 27, 1996.

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Amendments: The amendment of September 29, 1967, substituted "fact" for "facts" following the colon; deleted a former, next to last sentence reading: "No reply to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will not ordinarily be granted in the absence of such a request"; and substituted "and six copies of objections . . . form" for "produced in accordance with Rule 27(a)".

Supreme Court Rules Superseded: As to the above advisory committee notes, see the compiler's comments to Rule 43 (now Rule 53), M.R.App.P., and to this chapter.

Case Notes

Improper Denial of Motion to Amend Prior Judgment on Remand Under Law of Case Doctrine: Following remand of Muri v. Frank, 2001 MT 29, 304 M 171, 18 P3d 1022 (2001) (Muri I), defendants moved to amend the judgment to conform to the Supreme Court decision. The District Court denied the motion and instead made new findings of fact that conflicted with the previously unchallenged findings upon which the Supreme Court's decision was based. Defendants appealed the denial of their motion, and the Supreme Court reversed. Under the doctrine of the law of the case, a prior Supreme Court decision resolving an issue between the

same parties is binding and may not be relitigated. Because plaintiff did not appeal the findings upon which the Supreme Court relied in Muri I, the District Court had no authority to reconsider the findings on remand, and denial of the motion to amend the previously amended judgment was reversible error. Muri v. Frank, 2003 MT 316, 318 M 269, 80 P3d 77 (2003).

Retroactivity of New Judicial Rules and Judicial Interpretation — Section 46-23-1012 (1999) Applied Retroactively to Parole Revocations Between April 28, 1999, and May 1, 2001: On April 26, 2001, the Supreme Court held that a probable cause hearing was mandatory only when an offender had been arrested pursuant to a warrant issued by a judge. On May 4, 2001, Goebel petitioned the court to look beyond the plain language of 46-23-1012 and hold that the probable cause hearing was mandatory only when an offender has been arrested by a probation officer rather than pursuant to a warrant issued by a judge. Effective May 1, 2001, the Legislature amended 46-23-1012 to delete the requirement for a probable cause hearing. On May 9, 2001, Giddings filed a petition for rehearing, asking the court to direct the District Court to dismiss the petition to revoke Giddings' suspended sentence on grounds that the District Court lacked jurisdiction to revoke the suspended sentence because of the amendment to 46-23-1012, contending that application of the new statute would violate the constitutional ban on ex post facto legislation. The Supreme Court declined to modify the decision in either Goebel or Giddings because no material fact or question decisive of the cases themselves was overlooked and the decisions did not conflict with any express statute or controlling decision. However, the court did discuss the retroactive application of judicial rules of criminal procedure and the judicial interpretation of a statute, as well as the claim that the retroactive application of 46-23-1012 was a violation of the ex post facto clause. Citing Rivers v. Roadway Express, 511 US 298 (1994), the court held that a court's interpretation of a statute is never new law because the decision declares what the statute meant from the day of its enactment, not from the date of the decision. In determining whether a statute violates the ex post facto clause, the court referred to the test in St. v. Duffy, 2000 MT 186, 300 M 381, 6 P3d 453 (2000), which provided that to be in violation of the clause, a statute must be retrospective and must disadvantage the offender affected by it. In this case, Giddings was not disadvantaged because the statutory change did not alter the definition of or punishment for the probation violation that Giddings was charged with. Further, the error that was the basis for reversal of Giddings' case was jurisdictional, so all proceedings in the District Court were void ab initio, and the state was entitled to proceed anew, following the procedure outlined in the newly amended version of 46-23-1012. The Supreme Court's decisions based on the 1999 version of 46-23-1012 were applicable retroactively to persons whose probation or parole was revoked between April 28, 1999, and May 1, 2001. Thus, if a person was arrested during that period pursuant to a warrant issued by a judge and was not afforded a probable cause hearing within 36 hours of arrest, then the District Court did not have jurisdiction to hold a revocation hearing, so the state could refile the petition to revoke the person's probation pursuant to the 2001 version of 46-23-1012, as long as the probationer was still under the custody or supervision of the Department of Corrections on May 1, 2001. If the person was afforded a probable cause hearing within 36 hours of arrest, then the District Court did have jurisdiction to hold a revocation hearing. St. v. Goebel, 2001 MT 155, 306 M 83, 31 P3d 340 (2001), followed in St. v. Finley, 2003 MT 239, 317 M 268, 77 P3d 193 (2003), and in St. v. Van Haele, 2005 MT 153, 327 M 400, 114 P3d 225 (2005).

Failure of District Court to Properly Consider Prior Supreme Court Decision Regarding Suppression of Evidence as Law of Case — Grant of Request for Further Evidentiary Hearing Reversible Error: In St. v. Gilder, 1999 MT 207, 295 M 483, 985 P2d 147 (1999) (Gilder I), the Supreme Court concluded that the District Court erred when it denied Gilder's motion to suppress evidence obtained during the stop of Gilder's vehicle because the investigating officer did not have a particularized suspicion to justify the stop; however, the Supreme Court did not remand for further proceedings. Following the issuance of remittitur in Gilder I, the state requested an evidentiary hearing to present additional evidence to meet its burden of establishing particularized suspicion, arguing that a hearing was appropriate because Gilder I had referenced the District Court's failure to conduct an evidentiary hearing prior to its original denial of the motion to suppress. The request for an evidentiary hearing was granted over Gilder's objection, and the arresting officer was allowed to testify and supplement the evidence offered by the state in Gilder I. The District Court then issued an order again denying Gilder's motion to suppress, and Gilder appealed. The state's interpretation of Gilder I as an invitation for further proceedings on the suppression issue was incorrect. Although the District Court could have properly revisited factual determinations in regard to other issues, the suppression issue in Gilder I was foreclosed from further consideration. Gilder I constituted the law of the case regarding the lack of particularized suspicion for the investigative stop and the suppression of

evidence obtained from the stop, and the District Court abused its discretion by not properly treating Gilder I as the law of the case and by conducting further evidentiary hearings on a matter that was conclusively decided by the Supreme Court in the previous proceedings. St. v. Gilder, 2001 MT 121, 305 M 362, 28 P3d 488 (2001), following Zavarelli v. Might, 239 M 120, 779 P2d 489 (1989).

Postconviction Reconsideration Untimely: Petitioner, sentenced to two terms of 100 years plus 3 years for use of a weapon and to two 10-year terms plus 2 years for use of a weapon, filed a motion requesting that the Montana Supreme Court reconsider its order denying his second amended petition for postconviction relief. In denying the motion, the Supreme Court ruled that the petitioner's reconsideration motion was untimely because it was filed more than 10 days after the court entered its denial order. Hans v. St., 1998 MT 255, 291 M 227, 967 P2d 396, 55 St. Rep. 1052 (1998).

Court Invested With Full Jurisdiction on Remand Except for Issues Controlled by Law of Case: In a dispute concerning the common boundary line between parcels of real property, defendant argued that the District Court erred in allowing a new affirmative defense of mutual mistake when the court received the case again upon remand. Under the doctrine of the law of the case, the District Court was properly reinvested with full jurisdiction of the cause and the issues raised in the cause are generally open for the court's decision, except for the legal conclusions controlled by the law of the case established in the reversal. The general principle of the doctrine of the law of the case applies only to determinations of questions of law identical to those on the former appeal and not to questions of fact. Zavarelli v. Might, 239 M 120, 779 P2d 489, 46 St. Rep. 1558 (1989), followed in Story v. Bozeman, 259 M 207, 856 P2d 202, 50 St. Rep. 761 (1993), Trustees, Carbon County School District No. 28 v. Spivey, 262 M 513, 866 P2d 208, 50 St. Rep. 1664 (1993), in which the County Superintendent had latitude beyond the parameters of the first county decision to terminate a teacher, Haines Pipeline Constr., Inc. v. Mont. Power Co., 265 M 282, 876 P2d 632, 51 St. Rep. 514 (1994), AgAmerica, FCB v. Robson, 272 M 413, 901 P2d 100, 52 St. Rep. 800 (1995), and St. v. Gilder, 2001 MT 121, 305 M 362, 28 P3d 488 (2001).

Appeal of Prior Issue — Dismissed: The Supreme Court dismissed an appeal raising the same issue of attorney fees that was addressed in a prior determination of the court that constituted a final adjudication. Belgrade St. Bank v. Swainson, 176 M 444, 578 P2d 1166 (1978), followed in In re Marriage of Gies, 218 M 433, 709 P2d 635, 42 St. Rep. 1715 (1985).

Who May Participate in Rehearing Decisions: Only those Justices participating in the original decision and substituting District Judges may decide whether or not a case may be reheard. In re Petitions for Rehearing, 34 St. Rep. 5 (1977) (apparently not reported in Pacific Reporter or Montana Reports).

Collateral References

5 C.J.S. Appeal and Error §677, et seq.

5 Am. Jur. 2d Appellate Review §§878 through 908.

Rule 35. Notice and copy of decision — remittitur — mandate from United States supreme court.

Advisory Committee Notes

This rule incorporates Montana Supreme Court Rules XIV, XXI, and XXII.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, in (c) inserted "In civil cases" in second sentence.

Supreme Court Rules Superseded: As to the above advisory committee note, see the compiler's comments to Rule 43 (now Rule 53), M.R.App.P., and to this chapter.

Case Notes

Record on Appeal — Lack of Transcript: Arguments on the sufficiency of the evidence in action on charges of unfair labor practices could not be considered without a transcript of the testimony at the original administrative hearing. The cause was remanded to the trial court for election by the employee either to order and pay for the transcript so the trial court could receive it and enter further judgment or to accept affirmation of the trial court's decision. Klundt v. St., 222 M 172, 720 P2d 1181, 43 St. Rep. 1148 (1986).

Collateral References

5 Am. Jur. 2d Appellate Review §§826, 827, 843.

Rule 36. Voluntary dismissal.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule is taken from Rule 42 of the Federal Draft.

NOTE TO JUNE 16, 1986, AMENDMENT

In many cases previously the clerk of the supreme court has not been notified of dismissals by the district courts thereby enabling him to clear the supreme court docket.

Compiler's Comments

1986 Amendment: The Supreme Court Order of June 16, 1986, inserted last sentence providing that a copy of the order of dismissal be sent to the Clerk of the Supreme Court.

Case Notes

Perfected Appeal — No District Court Jurisdiction Unless Properly Dismissed: The father filed a notice of appeal after the District Court denied his motion for a change of custody. He then filed a document entitled "Withdrawal of Appeal" with the District Court. Later the father filed a petition for change of custody and a motion to consolidate his petition with a dependency and neglect action filed by the State. After a trial, the mother appealed. On appeal, the Supreme Court stated that when a notice of appeal has been filed, jurisdiction passes to the Supreme Court. All that is required to perfect an appeal is the timely filing of a notice of appeal. The District Court could have dismissed the appeal before it was docketed upon motion and notice. The record discloses no motion or notice. The District Court was therefore without jurisdiction to hear the case. In re M.L.Y. & M.Y., 201 M 467, 655 P2d 499, 39 St. Rep. 2238 (1982).

Collateral References

5 C.J.S. Appeal and Error §634.

5 Am. Jur. 2d Appellate Review §§872 through 875, 877.

Rule 37. Substitution of parties in civil cases.

Advisory Committee Notes

This rule is taken from Rule 43 of the Federal Draft.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

1986 Amendment: The Supreme Court Order of June 16, 1986, in the catchline inserted "in civil" before "cases"; and in (a) inserted "in a civil case" in first sentence.

Case Notes

Death of Defendant in Criminal Case Abates Case Entirely — Prior Cases Clarified: Holland was convicted in District Court of criminal syndicalism by accountability and other offenses and appealed his conviction. Holland died after the case had been briefed to the Supreme Court but before it was decided, so the state moved to dismiss. Holland's counsel opposed the motion to dismiss, arguing that it was in the best interests of society and the judicial system to allow the appeal to be decided on its merits. The Supreme Court noted that its earlier opinions in the cases of St. v. Lawrence, 122 M 277, 201 P2d 756 (1949), St. v. Pichette, 125 M 327, 237 P2d 1076 (1951), St. v. Hale, 128 M 116, 270 P2d 993 (1954), St. v. Koble, 129 M 605, 285 P2d 837 (1955), St. v. Clark-Kotarski, 156 M 527, 486 P2d 876 (1971), and St. v. Cripps, 177 M 410, 582 P2d 312 (1978), all held that the death of a defendant abates an appeal. The Supreme Court pointed out that 37-61-401(2) requires that a civil case go forward notwithstanding the death of a party but that in criminal cases, no case or controversy remains when a defendant dies and that if a deceased defendant's sentence were affirmed on appeal, it would be impossible to execute the sentence. The Supreme Court also noted, citing State ex rel. Fletcher v. District Court, 260 M 410, 859 P2d 992 (1993), that it does not render advisory opinions and that the Montana Rules of Appellate Procedure provide for substitution of a personal representative in the case of the death of a party in a civil action, but there is no such provision for criminal cases. The Supreme Court held that upon the death of the defendant, the prosecution of a criminal case, including fines,

abates in its entirety. The Supreme Court's prior opinions were clarified to the extent that opinions in those cases were not consistent with its present opinion. St. v. Holland, 1998 MT 67, 288 M 164, 955 P2d 1360, 55 St. Rep. 282 (1998).

Appellate Review Upon Death of Respondent: Under the authority of this rule, the Supreme Court rendered an opinion upon appellate review even though the respondent had died since submission of the case. Absent a motion for substitution of a personal representative, the court assumed there was no representative and proceeded as if respondent were still living. Bieber v. Broadwater County, 232 M 487, 759 P2d 145, 45 St. Rep. 1218 (1988).

Collateral References

4 C.J.S. Appeal and Error §243, et seq.

5 Am. Jur. 2d Appellate Review §§278 through 284.

Rule 38. Cases involving constitutional questions where the state is not a party.

Advisory Committee Notes

This rule is patterned after Rule 44 of the Federal Draft.

Compiler's Comments

1997 Amendment: In first sentence, after "duty of", substituted "a party" for "counsel", after "in any" inserted "action", after "to which" substituted "neither the state nor any agency" for "the state of Montana, or any agency thereof", after "employee, is" deleted "not", after "party" deleted "upon the filing of the record", and at end substituted "notice to the supreme court and to the Montana attorney general of the existence of the constitutional issue" for "immediate notice in writing to the court of the existence of said question"; at beginning of second sentence inserted "This notice shall be in writing" and at end inserted "and shall be given contemporaneously with the filing of the notice of appeal or with the filing of an original proceeding in the supreme court"; and deleted former last sentence that read: "The clerk shall thereupon certify such fact to the attorney general of the state of Montana." Amendment effective October 1, 1997.

Case Notes

Failure to Give Notice of Constitutional Challenge to Landowner's Liability Law — Consideration of Constitutional Challenge Precluded: Plaintiff was injured on a sledding hill at a city park. Plaintiff contended that legislation that provided immunity to landowners was defective because the title did not mention that liability was also extended to governmental units, including municipalities. However, plaintiff failed to give notice to the Supreme Court or to the Attorney General, pursuant to this rule, that an action in which neither the state nor a state agency or employee was a party was being challenged for constitutionality. The municipality was not a state agency, so the rule applied, and absent plaintiff's compliance with the notice requirements, the Supreme Court declined to address the constitutional issue. Weinert v. Great Falls, 2004 MT 168, 322 M 38, 97 P3d 1079 (2004).

Failure to Comply With Immediate Notice Requirements Precluding Consideration of Constitutional Issue on Appeal: Haider filed a wrongful discharge action against her former employer. During negotiations, Haider offered to submit the case to arbitration, but the employer refused to arbitrate. The matter went to a jury, which awarded Haider $44,995.26. After a subsequent evidentiary hearing, the District Court determined that Haider was the prevailing party and awarded her $15,000 in attorney fees pursuant to 39-2-915. The employer filed a notice of appeal seeking to challenge the constitutionality of 39-2-915 and, nearly 3 months later, filed its notice of challenge to the constitutionality of the statute pursuant to this rule. The employer failed to comply both with the immediate notice requirement of this rule that was in effect in 1997 when the action arose and with the contemporaneous notice requirement of the rule in effect since October 1, 1997. Because notice was not timely, the Supreme Court was precluded from reaching the constitutional challenge and dismissed the appeal with prejudice. Haider v. Frances Mahon Deaconess Hosp., 2000 MT 32, 298 M 203, 994 P2d 1121, 57 St. Rep. 138 (2000).

Delay of Twenty Days Not Constituting Immediate Notice: Appellant sought to test the constitutionality of 40-8-111 (now repealed), which allows the termination of parental rights based on nonpayment of support for a 1-year period, on the grounds that a liberty interest is taken away without the showing of a compelling state interest. However, he failed to file notice of a constitutional challenge until 20 days after filing of the record and offered no explanation for the delay. The Supreme Court declined to consider the constitutional question because a 20-day delay was not considered "immediate notice" as required by this rule. In re Adoption of C.J.H., W.L.H., & T.A.H., 246 M 52, 803 P2d 214, 47 St. Rep. 2258 (1990).

Challenge to Constitutionality of Statute — Failure to Provide Notice — Issue Not Before Supreme Court: In an action involving Workers' Compensation coverage but without any state parties, the appellant raised the constitutionality of 39-71-2905 for the first time in briefs to the Supreme Court. Appellant failed to comply with the notice provisions of this rule. The Supreme Court held that this rule precludes the challenge to the constitutionality of the statute from properly being before the court. Billings Deaconess Hosp. v. Angel, 219 M 490, 712 P2d 1323, 43 St. Rep. 115 (1986), followed in Haider v. Frances Mahon Deaconess Hosp., 2000 MT 32, 298 M 203, 994 P2d 1121, 57 St. Rep. 138 (2000).

When Issue of Constitutionality Not Properly Before Court: The issue of constitutionality of 3-1-523 was not properly before the Supreme Court when it was not first raised in the District Court and when a notice of constitutional challenge was not properly filed as required by Rule 38, M.R.App.P. In re Marriage of Robbins, 219 M 130, 711 P2d 1347, 42 St. Rep. 1897 (1985).

Attorney General Not Required to Appear: Where petitioner, in his case on appeal, challenged the constitutionality of a Statute of Limitations and the Attorney General failed to appear to argue the constitutionality of the statute, the Supreme Court held that this rule has never been interpreted as meaning that the State of Montana has an absolute duty to appear whenever a constitutional challenge arises. The Rule only requires notice of the challenge to the Attorney General. In re W.C., 206 M 432, 671 P2d 621, 40 St. Rep. 1762 (1983).

Constitutional Questions — Early Presentation: A question of constitutionality will not be considered on appeal if it has not been raised initially. A constitutional issue is waived if not presented at the earliest possible opportunity. Dodd v. East Helena, 180 M 518, 591 P2d 241 (1979), following Johnson v. Doran, 167 M 501, 540 P2d 306 (1975), and followed in Billings Deaconess Hosp. v. Angel, 219 M 490, 712 P2d 1323, 43 St. Rep. 115 (1986). Billings Deaconess was followed in Haider v. Frances Mahon Deaconess Hosp., 2000 MT 32, 298 M 203, 994 P2d 1121, 57 St. Rep. 138 (2000).

Spirit and Intent of Rule Met: While this rule was not strictly complied with, the spirit and intent were met by filing of a "notice of existence of constitutional question" in an earlier proceeding; therefore, the constitutional issue was properly before the Supreme Court. State ex rel. Morales v. City Comm'n, 174 M 237, 570 P2d 887 (1977).

Constitutionality Challenge on Appeal — Noncompliance With Rule: A challenge to the constitutionality of certain statutes was not properly before the Supreme Court because of noncompliance with Rule 38, M.R.App.P. Bradbrook v. Billings, 174 M 27, 568 P2d 527 (1977).

Notice to Attorney General — Time: Notice to Attorney General in compliance with this rule, given on the same day the case was certified to the Supreme Court, was sufficient to allow adequate preparation for the hearing, set 2 ½ months later, and satisfied the "immediate notice" requirement. U.S. Mfg. & Distrib. Corp. v. Great Falls, 169 M 298, 546 P2d 522 (1976).

Constitutional Questions Not Considered: Constitutional questions presented for review on appeal which were not raised in the trial court and were not certified to the Supreme Court with notice to the Attorney General will not be considered by the court. Gilbert v. Gilbert, 166 M 312, 533 P2d 1079 (1975).

Notice to Attorney General Required: If the procedures of Rule 38 have not been followed and there has been no notice to the Attorney General that a legislative act is being challenged on constitutional grounds, the issue is not properly before the court. Clontz v. Clontz, 166 M 206, 531 P2d 1003 (1975); Grant v. Grant, 166 M 229, 531 P2d 1007 (1975).

Rule 39. Calendar — withdrawal of records.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

Montana Supreme Court Rules XIII and XVI have been substituted for the provisions of Rule 45 of the Federal Draft.

NOTE TO JUNE 16, 1986, AMENDMENT

The amendments bring the provisions up-to-date and differentiate between civil and criminal appeals.

Compiler's Comments

1986 Amendment: The Supreme Court Order of June 16, 1986, in (a) substituted present language (for text see 1987 MCA) for "Thirty days after the appellant's brief has been filed, the cause shall be placed on the calendar as ready for oral argument"; in (b), at beginning of first sentence, deleted "As often as found convenient", inserted "upon which oral argument is allowed", and made minor grammatical change; and in (c), at beginning of first sentence,

substituted "In calendaring appeals of civil cases" for "Appeals" and inserted second sentence concerning calendar priorities among criminal cases.

Supreme Court Rules Superseded: As to the above advisory committee note, see the compiler's comments to Rule 43 (now Rule 53), M.R.App.P., and to this chapter.

Collateral References

5 C.J.S. Appeal and Error §§662, 663, 667.

Rule 40. Appeals from injunction orders.

Advisory Committee Notes

This rule incorporates the substance of Supreme Court Rule XXIII, as amended effective April 3, 1963.

NOTE TO MAY 1, 1990, AMENDMENT

The above [sic] amendments are designed to neutralize the gender language presently found in the rule. No substantive change is intended.

Compiler's Comments

1990 Amendment: The May 1, 1990, amendment made language in the rule gender neutral.

Supreme Court Rules Superseded: As to the above advisory committee note, see the compiler's comment to Rule 43 (now Rule 53), M.R.App.P., and to this chapter.

Case Notes

Mootness — No Appeal Absent District Court Ruling on Declaratory Judgment: The high school sports association decided that Grabow was ineligible to play basketball because his eligibility pursuant to the semester rule had elapsed while Grabow was an exchange student in Germany. Grabow filed a complaint in District Court asking for a declaratory ruling that the association lacked rulemaking and adjudicatory authority and requested a hearing on whether a preliminary injunction should be issued precluding enforcement of the association rule until the case could be adjudicated on its merits. After deciding that it was unlikely that Grabow would ultimately prevail, the District Court denied the injunction. Grabow appealed. The Supreme Court granted the injunction pending final disposition of the appeal, and Grabow played basketball during his senior year. The Supreme Court found that the 1999-2000 season was the only one in which Grabow claimed that he had a right to participate and that because the season was completed, the initial grounds for application of the mootness doctrine to the preliminary injunction issue were met. The declaratory judgment issue was not one capable of repetition, but was one that would evade review, so the Supreme Court remanded for further consideration of Grabow's complaint for declaratory judgment, which would then be subject to appeal following final judgment by the District Court. Grabow v. Mont. High School Assn., 2000 MT 159, 300 M 227, 3 P3d 650, 57 St. Rep. 654 (2000). See also Shamrock Motors, Inc. v. Ford Motor Co., 1999 MT 21, 293 M 188, 974 P2d 1150 (1999).

Rule 44. Certification of questions of law.

Advisory Committee Notes

The rule is entirely new and is based upon Rule I of the Rules of the Supreme Court of Montana dated January 31, 1967, which heretofore has covered certification of questions of law in Montana, and upon the Uniform Certification of Questions of Law Rule promulgated by the National Conference of Commissioners on Uniform State Laws. For comments as to subdivisions (c), (d), (e), (g) and (h) see the Uniform Rule. (Uniform Certification of Questions of Law Act; 12 Uniform Laws Annotated, p. 52.)

Case Notes

Insufficient Facts in Certification Order to Render Precedential Opinion — Dismissal Without Prejudice: The Supreme Court accepted a certified question from the U.S. District Court regarding the constitutionality of 39-71-413. However, after receiving briefs, including amicus curiae briefs, and conducting an oral hearing, the court determined that it had improvidently accepted the certified question and that there were not sufficient relevant facts in the certification order to permit a decision on the important constitutional issues presented. The matter was dismissed without prejudice. Brady v. PPL Mont., LLC, 2003 MT 262, 317 M 425, 77 P3d 523 (2003).

Accidental Death Coverage Considered Life Insurance for Purposes of Conversion Rights: Golt worked as a civilian employee of the Army and Air Force Exchange Service (AAFES) until he was discharged from employment in 1994 for cause. Thirty days after termination, Golt died of carbon monoxide poisoning. As a benefit of employment, Golt was covered by an accident

insurance policy issued by General American Life Insurance Company (General), which provided that if he died while covered by the policy, his estate was eligible to receive $200,000. The policy also provided that coverage would terminate on the first premium due date after Golt ceased to be an employee, which in this case was 6 days after Golt was terminated from employment. The General policy also allowed the group accident policy to be converted to an individual policy within 31 days of discharge upon written application and payment of the first premium. In addition to the General policy, Golt was also insured by Aetna Life Insurance Company (Aetna) under a group life and accident and health insurance policy, which provided a life insurance benefit of $32,000 if Golt died from any cause while insured, plus an accidental death benefit of $32,000 in the event of Golt's accidental death. The Aetna policy provided that coverage ceased upon termination of employment, but allowed the group life insurance policy to be converted to individual life insurance within 31 days of discharge and provided that if Golt died during that period, benefits would be payable. AAFES transmitted the Aetna claim, which paid $32,000 under the life insurance provisions but denied the claim for accidental death benefits on grounds that the coverage ended when employment was terminated. AAFES did not transmit the General claim. A subsequent request for benefits from General was denied because the claim was not submitted within 20 days after the covered loss occurred. Golt's wife commenced an action in 1996 in federal court, seeking accidental death benefits from both Aetna and General. The federal District Court concluded that there was no coverage under either policy and entered final judgment in favor of the insurers. In 1999, the Supreme Court agreed to address three questions certified by the Ninth Circuit Court of Appeals pursuant to this rule regarding the Montana statutory definitions of life insurance for purposes of determining an insured's conversions rights. The Supreme Court held that under 33-1-205, an insurance coverage may come within the definition of two kinds of insurance. Therefore, although accidental death coverage is disability insurance, for purposes of conversion rights, it is also life insurance as defined in 33-1-208. As life insurance, accidental death coverage is subject to a 31-day conversion right upon termination of coverage pursuant to 33-20-1209 and, in the event of death within the 31-day conversion period, is subject to automatic conversion under 33-20-1211. With regard to Golt's policies, the accidental death policy remained in effect, even when Golt died during the 31-day grace period without exercising the right to convert the policy by making application and paying the first premium. Golt v. Aetna Life Ins. Co., 2000 MT 155, 300 M 142, 2 P3d 841, 57 St. Rep. 613 (2000).

Rule 51. Statutes and rules amended.

Advisory Committee Notes

Because of the addition of substantive Rule 44 in the amendments, Rule 41 has been renumbered to Rule 51, Rule 42 to Rule 52, and Rule 43 to Rule 53 for editorial convenience and in order to reserve numbers 45 through 50 for future substantive rules.

Rule 52. Applicability in general.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This Rule is patterned after Rule 81 of the Montana Rules of Civil Procedure. It excepts inconsistent special statutory proceedings and appeals to and reviews by the district courts to the extent that they are governed by inconsistent statutes and it is impracticable to incorporate procedures provided by these rules. But statutes such as sections 93-9302, 93-9303, 93-9718, 93-9719, and 93-9922[, R.C.M. 1947; see Table of Corresponding Code Sections, R.C.M. to MCA], which contain catch-all references to the applicability of statutes which have been superseded, are brought into line with these rules in so far as practicable.

NOTE TO JUNE 16, 1986, AMENDMENT

See advisory commission note on Rule 51.

Compiler's Comments

1986 Amendment: The Supreme Court Order of June 16, 1986, in (c) deleted references to "civil" before "proceeding" and "action".

Table A: The Code Commissioner has not reprinted Table A in the MCA because it was never intended to be a complete listing, has not been updated since 1963, contains a high percentage of repealed sections, and is generally obsolete and not very useful. Interested persons may find it at p. 1039 of the 1964 main volume of R.C.M 1947, Vol. 7, and at p. 310 of the 1977 Cumulative Supplement to Vol. 7.

Rule 53. Title — effective date — statutes superseded.

Advisory Committee Notes

NOTE TO ORIGINAL RULE

This rule incorporates provisions similar to those contained in Rules 85 and 86 of the Montana Rules of Civil Procedure. Subdivision (c) refers to statutes and rules only in so far as they relate to civil proceedings, to make it clear that criminal proceedings are in no way affected by these rules.

NOTE TO JUNE 16, 1986, AMENDMENT

See advisory commission note to Rule 51. Table D has been added. The superseded statutes heretofore covered appeals in criminal cases to the supreme court.

Compiler's Comments

1986 Amendment: The Supreme Court Order of June 16, 1986, in (a) deleted references to "civil" before "procedure"; and in (c) substituted "Tables A, B, C, and D" for "Tables A, B, and C, insofar as they relate to civil proceedings".

List of Statutes and Rules Amended or Superseded by Montana Rules of Appellate Procedure: The following four tables show those sections of R.C.M. 1947, sections of MCA, Rules of the Supreme Court of Montana, and M.R.Civ.P., superseded or amended, in whole or in part, by the M.R.App.P.:

Table A. List of Statutes Superseded or Amended.

Statutes Superseded (R.C.M. 1947, sections)	except as applicable to criminal procedure	R.S.C.M. Superseded, M.R.Civ.P. Rule Superseded
93-5501	Rule	62(a)
93-5503	I	62(d)
93-5504	II	
93-5505	III (1st par.)	Amended
93-5506	IV	72
93-5507	VI	
93-5508	VII	
93-5509	VIII	
93-5607	IX	
93-5608	X	
93-5702	XI	
93-5707	XII	
93-8003	XIII	
93-8004	XIV	
93-8005	XV	
93-8006	XVI	
93-8011	XVII	
93-8012	XVIII	
93-8014	XIX	
93-8015	XXI	
93-8016	XXII	
93-8017	XXIII	
93-8018	XXIV	
93-8019		
93-8020		
93-8021		
93-8022		
93-8023		
93-8024		
93-8025		
Amended		
93-5708		
93-8001		
93-8002		
93-8013		
93-9905(3)		

Table B. List of Rules of Appellate Procedure Superseding, in Whole or in Part, or Amending, Statutes and Rules.

M.R.App.P. Rule	Statutes and Rules Superseded or Amended (R.C.M. 1947, sections)
1	93-8001, 93-8002, 93-8003, 93-8017
2	93-8022
3	93-8019, R.S.C.M. XXIV
4	93-8005, 93-8019
5	93-8004
6	93-8005, 93-8006, 93-8012, 93-8015, 93-8019
7	93-5607, 93-8011, 93-8012, 93-8014, M.R.Civ.P. 62(a), 62(d)
8	93-8013
9, 10, and 25	93-5504 to 93-5509, incl., 93-5608, 93-5707, 93-8018, 93-8019, 93-8021 R.S.C.M. VII, VIII, IX, XVIII subd. 3
11	93-8019, R.S.C.M. VI
12	93-8020
13	93-8016
14	93-8023
15	93-8024
16	93-8025
17	R.S.C.M. IV
19	R.S.C.M. I
20	R.S.C.M. III (1st par.)
22	R.S.C.M. XI
23	R.S.C.M. X
26	R.S.C.M. II subd. 4, III (1st par.)
27	R.S.C.M. II
29	93-5702, R.S.C.M. XII
32	R.S.C.M. XIX
33	R.S.C.M. XVIII
34	R.S.C.M. XV
35	R.S.C.M. XIV, XXI, XXII
37	R.S.C.M. XVII
39	R.S.C.M. XIII, XVI
40	R.S.C.M. XXIII
41	M.R.Civ.P. 72, 93-5708, 93-9905(3), 93-8001, 93-8002, 93-8013

Table C. List of Statutes and Rules Superseded, in Whole or in Part, or Amended, by Designated Rules of Appellate Procedure.

Statutes (R.C.M. 1947, sections)	M.R.App.P. Rule
93-5504 to 93-5509, incl.	9, 10, 25
93-5607	7
93-5608	9, 10, 25
93-5702	29
93-5707	9, 10, 25
93-5708	41
93-8001	1, 41
93-8002	1, 41
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93-8004	5
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93-8011	7
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XV. 34
XVI 39
XVII. 37
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XXIII 40
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Table D. List of Statutes Superseded by Supreme Court Order of June 16, 1986.

46-20-102	46-20-315	46-20-410
46-20-201	46-20-316	46-20-501
46-20-202	46-20-317	46-20-502
46-20-203	46-20-318	46-20-503
46-20-301	46-20-319	46-20-504
46-20-302	46-20-401	46-20-511
46-20-303	46-20-402	46-20-512
46-20-304	46-20-403	46-20-513
46-20-305	46-20-404	46-20-601
46-20-306	46-20-405	46-20-602
46-20-311	46-20-406	46-20-603
46-20-312	46-20-407	46-20-604
46-20-313	46-20-408	46-20-704
46-20-314	46-20-409	46-20-705

Supreme Court Rules Amended: The order of the Montana Supreme Court of December 17, 1965, effective January 1, 1966, which ordered that the Rules of the Supreme Court of Montana (R.S.C.M.) would be embodied in the M.R.App.P. also adopted Rule I, R.S.C.M., which rule contained the language ordering the R.S.C.M. superseded by the M.R.App.P. and also renumbered Rule XXV, concerning licensing of attorneys, as Rule VI, and then amended the renumbered Rule VI.

Rule I of the R.S.C.M. was again amended by the order of the Montana Supreme Court of January 31, 1967, effective March 1, 1967. The text of Rule I, entitled "Civil Matters", now provides as follows:

"All rules with respect to the operation of this Court, procedure and practice therein, are contained in the Montana Rules of Appellate Civil Procedure, except that whenever in an action pending in a United States court it shall appear that there is a controlling question of Montana law as to which there is a substantial ground for difference of opinion, a party to such action may institute suit in the Montana Supreme Court for a declaratory judgment or decree, and, if the judge of the United States court wherein the action is pending shall certify that the question upon which adjudication is sought is controlling in the federal litigation and the adjudication by the Montana Supreme Court will materially advance ultimate termination of the federal litigation, a declaratory judgment or decree may be rendered. Rendition of a declaratory judgment or decree is discretionary with the Montana Supreme Court, and it may refuse to render such a judgment or decree if it appears that there is another ground for determination of the case pending in the United States court, or if the question for adjudication is not clearly defined, or if the question is not adequately briefed or argued.

This amended Rule shall be in full force and effect from and after the first day of March, 1967."

Rule 54. Mandatory appellate alternative dispute resolution procedures.

Commission Notes

COMMITTEE ON APPELLATE ALTERNATIVE DISPUTE RESOLUTION — COMMENTS TO RULE 54, MONTANA RULES OF APPELLATE PROCEDURE

Rule 54

Committee Comment to Rule 54(a): The categories were selected based on substantial discussion of the types of appeals amenable to the alternative dispute resolution/mediation process. The selection of these categories was also based on the number of these types of cases appealed to the Montana Supreme Court.

The Workers' Compensation and Domestic Relations categories are specifically defined in the Rule. The Money Judgments category includes appeals in all civil cases in which money damages or monetary recovery are sought.

Rule 54(b)

Committee Comment to Rule 54(b): A time limitation of seventy-five days was provided to complete the process and to avoid unreasonable delay in using the appellate alternative dispute resolution process. A shorter (sixty-day) period was originally contemplated, but would have resulted in timelines for each portion of the process which were simply too short to be workable.

Rule 54(c)

Committee Comment to Rule 54(c): The process is supplemental to the existing appeal process and will not delay the ordinary appeal process absent agreement of the parties. The timelines established by the Montana Rules of Appellate Procedure are applicable and must be met unless the parties stipulate otherwise.

Rule 54(d)

Committee Comment to Rule 54(d): The selection/appointment procedures for mediators strongly encourage voluntary selection of a mediator by the parties and their counsel. Absent voluntary selection, a listing of Montana attorneys who meet minimal requirements to participate in the program as mediators, and who have identified themselves as willing to mediate in one or more of the listed categories, will be maintained and the next mediator on the list automatically will be appointed to mediate the appeal.

The pilot mediation program is a "users pay" system. In the ordinary appeal involving one appellant and one respondent, each will be responsible for 50% of the mediator's fee and incidental expenses. In appeals involving multiple appellants and/or respondents, the Committee's intent is that each "side" will pay 50%, with the respective appellants/respondents apportioning the 50% on a pro rata basis.

Considerable discussion centered on setting or strongly encouraging a maximum hourly or per mediation charge; ultimately, the potential problems in doing so outweighed other concerns. In addition, the Committee was certain that the ethics and professionalism of Montana lawyers would keep fees well within reasonable bounds and, in this regard, the Committee specifically intends that the fee-related standards set forth in the Rules of Professional Conduct apply to mediation services provided under Rule 54. With regard to in forma pauperis appeals, Rule 18, M.R.App.P., appears sufficient to clarify that a party proceeding in forma pauperis will not be responsible for paying its share of the mediator's fee and incidental expenses.

Rule 54(e)

Committee Comment to Rule 54(e): The mediation process is to encourage both the parties and their counsel to examine and evaluate prospects for success and for settlement in the appellate process in a meaningful manner. The mediator's role is to assist with this examination or evaluation via an expeditious mediation process. The Statements of Position to be submitted by the parties are in a format encouraging a brief written narrative; the Rule also contemplates a separate and confidential submission to the mediator of other information and factors impacting on settlement.

Rule 54(f)

Committee Comment to Rule 54(f): The proceedings are an opportunity for the parties and their counsel to reach a settlement or resolution of their disputes. The proceedings and discussions constitute offers to compromise and will be treated as such. If settlement is not reached, the discussions are not admissible for any purpose, or to be used in any way, during the appeal.

Rule 54(g)

Committee Comment to Rule 54(g): This subsection is intended to provide a means for proceeding to full and final settlement and dismissal where a mediation is successful and, where resolution is not reached, for re-entering the case into the usual appeal stream if the parties have stipulated to hold other appellate timelines in abeyance. The forms, notices and mediator's report which the rule requires to be filed are to be used for statistical and process-oriented purposes only, and intentionally do not contain substantive information.

MEDIATOR BACKGROUND INFORMATION FORM

Name ..... Occupation.....
Firm/Business.....
Mailing Address ..... City.....
State..... Zip..... Business Phone (....).....
FAX No.....

Indicate the categories of cases you can mediate:

..... Workers' Compensation
..... Domestic Relations
..... Money Judgments

Estimate what percentage of your practice during the last two years involved the following cases:

..... Workers' Compensation
..... Domestic Relations
..... Money Judgments

Academic/Professional Education or Training:

Degree	Dates	Location
.....	.....	.....
.....	.....	.....
.....	.....	.....

ADR training, membership in professional ADR organizations/panels:

.....
.....

Describe the types of ADR services you have provided within the last two years:

.....
.....
.....
.....
.....

ATTESTATION: I certify the accuracy of the above information, that I am a member in good standing of the State Bar of Montana, that I have been licensed as an attorney for no less than 5 years and that I currently reside in the State of Montana. I agree if retained as a mediator that my fees will be governed by the ethical guidelines in the Rules of Professional Conduct.

Signature: ..... Date:.....

MEDIATOR INSTRUCTIONS

Mediator's Responsibility pursuant to Rule 54, M.R.App.P.

1. The mediator shall comply with all procedural and notice provisions required by Rule 54, M.R.App.P.
2. The mediator must disclose any conflicts of interest, possible bias, or prejudice.
3. Upon selection or appointment, the mediator shall provide a written explanation of fees and expenses, including the time and manner of payment, to the parties.
4. The mediator shall establish a schedule for the mediation consistent with the requirements of Rule 54, M.R.App.P.
5. The mediator shall file, and provide copies of, a mediator's report immediately upon conclusion of the mediation conference, pursuant to the requirements of Rule 54(g), M.R.App.P.
6. The mediator shall preserve and maintain the confidentiality of all proceedings.
7. At the conclusion of the mediation, the mediator shall submit an evaluation form, and shall furnish participating attorneys and parties with evaluation forms, to be mailed to:

STATE BAR OF MONTANA
Appellate ADR Project
P.O. Box 577
Helena, MT 59624

MEDIATOR'S EVALUATION FORM

NAME OF CASE: .....
CASE #:.....
TYPE OF CASE:.....

My Name is..... and I was the mediator in the above-referenced case. The mediation was held on ....., 20.. Length of Mediation:.....
Total time for Mediation:.....

1. Appellant was/was not present/or available by telephone.
2. Appellant's counsel was/was not present/or available by telephone.
   If either not present, why?.....
3. Respondent was/was not present/or available by telephone.
4. Respondent's counsel was/was not present/or available by telephone.
   If either not present, why?.....
5. Both sides were/were not prepared to meaningfully discuss settlement of the case. If not prepared, it was for these reasons: **(DO NOT** list facts of the case. List reasons such as: seriously disputed liability, pending motions, etc.)
   .....
   .....
   .....
6. Meaningful settlement negotiations did/did not take place.
7. The case was settled/not settled.
8. Other (specify): .....
   .....
   .....
   .....

PLEASE MAIL TO:

STATE BAR OF MONTANA
Appellate ADR Project
P.O. Box 577
Helena, MT 59624

ATTORNEY'S MEDIATION EVALUATION FORM

NAME OF CASE: .....
CASE #: .....
TYPE OF CASE: .....

My Name is: .....
I am the attorney for the .. Appellant; .. Respondent
Date Mediation Held: .....
Length of Mediation: .....
Total time for Mediation: .....

Mediator's Name: ..... (voluntarily selected/on list)

Have you ever been involved with Mediation before? .. No; .. Yes, if yes, please describe: .....
.....

How was Mediation helpful in the present case?
.....
.....
.....
.....

Was your mediator knowledgeable about the Mediation process?
... Yes; ... No Comments: .....
.....

Did you feel your mediator was impartial and fair? ... Yes; ... No

How would you change the process you experienced if you could?
.....
.....

Do you think the Montana Supreme Court ADR project is a good idea?
... Yes; ... No Please explain: .....
.....

Comments and suggestions:
.....
.....
.....
.....

PLEASE MAIL TO:

STATE BAR OF MONTANA
Appellate ADR Project
P.O. Box 577
Helena, MT 59624

PARTY'S MEDIATION EVALUATION FORM

NAME OF CASE: .....
CASE #: .....
TYPE OF CASE: .....

My Name is: .....
I am the .. Appellant; .. Respondent
Date Mediation Held: .....
Length of Mediation: .....
Total time for Mediation: .....

Mediator's Name: ..... (voluntarily selected/on list)

Have you ever been involved with Mediation before? ... No; ... Yes, if yes, please describe: .....
.....

How was Mediation helpful in the present case?
.....
.....
.....
.....

Was your mediator knowledgeable about the Mediation process?
... Yes; ... No Comments: .....
.....

Did you feel your mediator was impartial and fair? ... Yes; ...No

How would you change the process you experienced if you could?
.....
.....

Do you think the Montana Supreme Court ADR project is a good idea?
... Yes; ... No Please explain: .....
.....

Comments and suggestions:
.....
.....
.....
.....

PLEASE MAIL TO:

STATE BAR OF MONTANA
Appellate ADR Project
P.O. Box 577
Helena, MT 59624

Compiler's Comments

1997 Amendment: In (c), in first sentence after "filed with the", deleted reference to Clerk of the Supreme Court and inserted second sentence concerning filing stipulation with Clerk of the Supreme Court; in (d), near end, inserted clause requiring mailing of copy of notice of selection or order of appointment; and in (d)(5) inserted second and third sentences concerning pro bono appointments. Amendment effective October 1, 1997.

Case Notes

Mediation Failure Because of Parties Being Too Far Apart Not Grounds for Dismissal: Marks argued that Marcher's appeal should be dismissed on the grounds that Marcher had not engaged in meaningful arbitration as required by rule. The Supreme Court disagreed, pointing out that Marcher was represented at the mediation hearing by his attorney and that the attorney's affidavit indicated that Marks' attorney offered only a take-it-or-leave-it offer and therefore arbitration failed because the two parties were too far apart to negotiate. Marcher v. Bonzell, 2004 MT 294, 323 M 364, 104 P3d 436 (2004).

Mandatory Dispute Resolution on Appeal — No Remand: While a jurisdictional question was pending in a civil action seeking monetary damages in Nielsen v. Brocksmith Land & Livestock, Inc., 2004 MT 101, 321 M 37, 88 P3d 1269 (2004) (Nielsen I), the parties entered mandatory alternative dispute resolution pursuant to this rule. Nielsen contended that a settlement agreement was reached and filed a complaint in District Court to enforce the alleged agreement. The Brocksmiths disagreed that a settlement agreement was reached and moved to dismiss on grounds that the District Court did not have jurisdiction because Nielsen I was still pending on appeal. Nielsen moved the Supreme Court to remand the pending appeal to the District Court for adjudication of the settlement agreement, but that motion was denied. The District Court then dismissed the present action because Nielsen I was still pending, and Nielsen appealed, but the Supreme Court affirmed. Jurisdiction passes from District Court to the Supreme Court when a notice of appeal is filed. Although Nielsen contended that the matter was resolved in mediation and that a settlement was reached, the Supreme Court cannot consider a matter resolved until a stipulation for dismissal is filed in either the Supreme Court or the trial court. The only stipulation filed here was that the parties were unable to complete and close the tentative agreement, and this rule does not provide for remand to the District Court when there is a disagreement whether a settlement was reached because returning the case to trial court before resolution would delay finality. Nielsen v. Brocksmith, 2004 MT 259, 323 M 98, 99 P3d 181 (2004).

Appellate Mediation Rule Mandatory and Self-Executing in Actions for Money Damages: Plaintiff sued for money damages, and the District Court issued an order on motion for a change of venue. Plaintiff's notice of appeal from that order stated that the appeal was subject to mediation required under this rule. Nevertheless, 5 days later, plaintiff filed an unopposed motion to dispense with mediation. The Supreme Court dismissed the motion to dispense with

mediation and ordered mediation. It is the nature of the underlying action, not the type of order or judgment on appeal, that determines whether the appeal is subject to mediation under this rule, and because the underlying action sought money damages, which is clearly within the rule, mediation was mandatory. This rule is self-executing, and the Supreme Court will not entertain motion practices on the rule. Liang v. Lai, 2003 MT 281, 317 M 524, 78 P3d 1212 (2003), following Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71 (2000).

Allowance of Additional Time After Service by Mail Applicable Only to Response-Type Pleadings — Inapplicable When Filing Deadline Specified: The Supreme Court entered an opinion in this case on December 31, 2002. On January 16, 2003, remittitur was entered, and the next day, defendants filed a petition for rehearing. After being advised that the petition was beyond the 10 days allowed under this rule, defendants claimed that Rule 21(3), M.R.App.P., provided an additional 3 days for timely filing. The Supreme Court took the opportunity to clarify the application of Rule 21(e), M.R.App.P., holding that the rule applies only to response-type pleadings when parties are required or permitted to file a document or brief after having been served with a document or brief. When a filing deadline is specified by the Supreme Court or when a document is required to be filed with the court within a specified time, the rule does not apply and the party does not get the benefit of an extra 3 days for mailing. This rule allows petitions for rehearing to be filed within 10 days after a Supreme Court decision is rendered. Because this time period is specified by court rule, and because the petition for rehearing was not a response-type pleading, defendants' petition was not timely. However, defendants did not have the benefit of this interpretation when their petition was filed, so in the interest of fairness, the court applied this holding prospectively only and decided to entertain defendants' petition in this instance. Mont. Fair Housing, Inc. v. Barnes, 2003 MT 16, 314 M 73, 68 P3d 653 (2003).

Failure to Address Applicability of Alternative Dispute Resolution Process in Appeal of Child Support Case Not Grounds for Automatic Dismissal — Complicity of Clerk of District Court in Appellant's Failure to Follow Statutory Requirements: A father appealed a District Court determination of past-due child support amounts, but failed to address the applicability of alternative dispute resolution in the appeal notice, as provided in Rule 4(c), M.R.App.P., and this rule. The Clerk of the District Court subsequently failed to notify the father of the necessity to file an amended notice of appeal within 7 days. The mother contended that the appeal should be dismissed, citing Dobrocke v. Columbia Falls, 2000 MT 179, 300 M 348, 8 P3d 71 (2000), for the proposition that failure to comply with applicable appellate rules will result in dismissal. The Supreme Court held that a court may dismiss an appeal for failure to comply with Rule 4(c), M.R.App.P., and this rule, but overruled Dobrocke to the extent that failure to comply will result in automatic dismissal. The court found the Dobrocke rule to be too severe, particularly when the Clerk of Court is complicit in the appellant's failure to abide by the statutory requirements, because it is unfair for all the consequences to fall on the appellant when the Clerk of Court also fails to adhere to the statutes. Rather, the Supreme Court will look at all circumstances surrounding the appeal before deciding whether to dismiss for failure to comply with Rule 4(c), M.R.App.P., and this rule. In this case, dismissal was not proper because the Clerk of Court never issued the father the proper notice to file an amended appeal. Roberts v. Nickey, 2002 MT 37, 308 M 335, 43 P3d 263 (2002).

Submission of Matter to Mediation Not Assisting in Resolution of Appeal — Motion to Dismiss for Failure to Mediate Denied: The third-party plaintiff respondents to a counterclaim sought to dismiss an appeal on grounds that the third-party defendant failed to comply with the mediation requirements of this rule. In the notice of appeal, the third-party defendant certified that the appeal was not subject to the mediation process and opposed the motion to dismiss. The third-party plaintiffs contended otherwise, stating that because the cause of action appealed from was one in which monetary damages were sought, the appeal was subject to mediation. The third-party defendant noted that the appeal centered on the three primary issues of whether the District Court erred when it: (1) created an easement by grant in favor of the original plaintiff and across property owned by the third-party plaintiffs; (2) failed to recognize the real property interest of the plaintiff in maintaining a utility easement; and (3) issued an injunctive order and found both the plaintiff and third-party defendant in violation of the order. The third-party defendant further maintained that the money award portion of the judgment was incidental to and entirely dependent on the court's rulings related to the easement interests and injunctive relief and that this rule does not require parties to mediate matters that are totally incidental to the outcome of the substantive issues on appeal. The Supreme Court agreed and relied on McDonald v. Cosman, 1999 MT 294, 297 M 108, 995 P2d 922 (1999), in holding that, given the subjects of the appeal and the fact that the money judgment aspect was merely incidental,

submission of the matter to mediation would not hasten or assist resolution of the appeal. The parties were advised that they did not have to comply with the mediation requirements of this rule, and the motion to dismiss for failure to mediate was denied. Hanley v. Lanier, 2001 MT 91, 305 M 175, 24 P3d 206 (2001).

Rule Inapplicable to Appeal Seeking Performance of Contract or Lease Term: McDonald received a favorable judgment for specific performance of an option to purchase land pursuant to a lease agreement, which also provided for an award of attorney fees to the prevailing party in the event of a dispute. Cosman moved for clarification regarding the applicability of this rule to the appeal. The mediation requirements of this rule apply inter alia to appeals in actions seeking monetary damages or recovery. The action underlying the appeal sought attorney fees as a matter incidental to the primary thrust of the action, but neither the award of the fees nor the amount of fees awarded was directly at issue in the appeal. An appeal seeking specific performance of a contract or lease term does not fall within any of the categories of appeals set forth in this rule, so this rule does not apply in those cases. The fact that the lease also provided for an award of attorney fees to the prevailing party in an action not otherwise subject to this rule did not render the appeal subject to the rule requirements. To conclude otherwise would require parties to mediate a matter totally incidental to the outcome of the substantive issue on appeal without providing a concomitant opportunity to resolve the substantive issue, which would delay ultimate resolution of the appeal. McDonald v. Cosman, 1999 MT 294, 297 M 108, 995 P2d 922, 56 St. Rep. 1179 (1999).

Failure to Attend Mediation in Person Not Violative of Rule if Party Participates Through Authorized Representative: Although his counsel appeared at a mediation meeting on his behalf, Moon did not personally attend the mediation conference. Plaintiff sought to have Moon's appeal dismissed and Moon sanctioned for failure to comply with the mandatory mediation requirements of this rule. Although in-person meetings are the preferred medium of communication for mediation conferences, subsection (e)(3) of this rule addresses only the means by which the conference may be conducted, not who is required to attend. That requirement is addressed in subsection (e)(8) of this rule, which provides that each party or a representative of each party is required to participate in the conference. Moon was represented by an attorney with full authority to engage in settlement negotiations and thus was within the bounds permitted by this rule, notwithstanding his failure to appear in person. Because there was no rule violation, the Supreme Court did not address whether a party may be sanctioned under this rule for failure to participate in mandatory alternative dispute resolution. Envtl. Contractors, LLC v. Moon, 1999 MT 178, 295 M 268, 983 P2d 390, 56 St. Rep. 696 (1999).

Object of Mandatory Arbitration Is to Hold Down Parties' Expenses and Ease Caseload of Supreme Court: The parties failed to agree to a mediator within 15 days of the filing of notice of appeal, and subsequently, the court appointed a mediator for them. Thereafter, the parties agreed to an alternative mediator and moved the Supreme Court for an order allowing them to select their own mediator. The Supreme Court denied the motion and stated that the reason for the rule was to allow parties to resolve their differences without incurring the high cost of appeals and to ease the Supreme Court's caseload. The Supreme Court held that the rule was self-executing and that the result would be self-defeating if the Supreme Court heard appeals concerning the rule except under unusual or extraordinary circumstances. Harwood v. Glacier Elec. Co-op, Inc., 282 M 38, 939 P2d 981, 54 St. Rep. 89 (1997), followed in In re Marriage of Nagra, 283 M 339, 943 P2d 82, 54 St. Rep. 280 (1997).

CHAPTER 23
MONTANA JUSTICE AND CITY COURT RULES OF CIVIL PROCEDURE

Chapter Compiler's Comments

TITLE 25

Table A. List of Statutes Superseded, in Whole or in Part, by Designated Montana Justice and City Court Rules of Civil Procedure

Statutes	M.J.C.C.R.Civ.P.
25-31-114	13B
25-31-116	21A(1)
25-31-201	3A
25-31-202	3A(1)(b)

25-31-203 . . . . . 3A(1)(c)
25-31-204 . . . . . 3A(1)(d)
25-31-301 . . . . . 3C(1)
25-31-302 . . . . . 3C(2)
25-31-303 . . . . . 3C(3)
25-31-304 . . . . . 3C(4)
25-31-305 . . . . . 3C(5)
25-31-306 . . . . . 3C(6)
25-31-307 . . . . . 3C(7)
25-31-308 . . . . . 3C(8)
25-31-401 . . . . . 3, 7A
25-31-403 . . . . . 4B(2)
25-31-404 . . . . . 4C(2)
25-31-408 . . . . . 4D(1)(a)
25-31-501 . . . . . 7D(1)
25-31-502 7
25-31-503 7
25-31-504 . . . . . 7A
25-31-505 . . . . . 7B
25-31-506 . . . . . 7C
25-31-507 . . . . . 7D(3)
25-31-511 . . . . . 7A
25-31-521 . . . . . 8A
25-31-522 . . . . . 8B
25-31-701 20
25-31-804 . . . . . 15C
25-31-811 16
25-31-812 . . . . . 18B
25-31-901 . . . . . 21A(7)
25-31-902 . . . . . 21A(7)
25-31-903 . . . . . 21A(2)
25-31-904 . . . . . 21A(5), (6)
25-31-905 . . . . . 21B
25-31-913 23
25-31-915 . . . . . 22A
25-31-1001 17
25-31-1003 17
25-31-1004 17
25-31-1005 . . . . . 3C(6)
25-31-1101 . . . . . 23B
25-31-1102 . . . . . 23C
25-31-1103 . . . . . 23D
25-31-1105 . . . . . 23E
25-32-101 1
25-32-102 . . . . . 3, 7A
25-32-103 . . . . . 4C
25-32-104 . . . . . 7B, 8B, 19

TITLE 25

Table B. List of Montana Justice and City Court Rules of Civil Procedure Superseding Statutes, in Whole or in Part

M.J.C.C.R.Civ.P.	Statutes
1	25-32-101
3	25-31-401, 25-32-102
3A	25-31-201
3A(1)(b)	25-31-202
3A(1)(c)	25-31-203
3A(1)(d)	25-31-204
3C(1)	25-31-301
3C(2)	25-31-302

3C(3) 25-31-303
3C(4) 25-31-304
3C(5) 25-31-305
3C(6) 25-31-306, 25-31-1005
3C(7) 25-31-307
3C(8) 25-31-308
4B(2) 25-31-403
4C. 25-32-103
4C(2) 25-31-404
4D(1)(a). 25-31-408
7 . . . . . 25-31-502, 25-31-503
7A 25-31-401, 25-31-504, 25-31-511, 25-32-102
7B 25-31-505, 25-32-104
7C. 25-31-506
7D(1) 25-31-501
7D(3) 25-31-507
8A. 25-31-521
8B 25-31-522, 25-32-104
13B 25-31-114
15C 25-31-804
16 25-31-811
17 . . . . . 25-31-1001, 25-31-1003, 25-31-1004
18B 25-31-812
19 25-32-104
20 25-31-701
21A(1) 25-31-116
21A(2) 25-31-903
21A(5) 25-31-904
21A(6) 25-31-904
21A(7) 25-31-901, 25-31-902
21B 25-31-905
22A 25-31-915
23 25-31-913
23B 25-31-1101
23C 25-31-1102
23D 25-31-1103
23E 25-31-1105

Chapter Law Review Articles

Civil Practice in Montana's "People's Courts": The Proposed Montana Justice and City Court Rules of Civil Procedure, Ford, 58 Mont. L. Rev. 197 (1997).

Refining Federal Civil Justice Reform in Montana, Tobias, 56 Mont. L. Rev. 539 (1995).

Rule 1. Scope of rules.

Compiler's Comments

1997 Amendment: In second sentence, after "construed", inserted "and administered" and inserted third sentence concerning consulting other appropriate rules and statutes. Amendment effective October 1, 1997.

Case Notes

Client Bound by Attorney's Waiver of Right to Speedy Trial — Purpose of Statute: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that he, the defendant, was not bound by his attorney's waiver. Defendant asserted that 37-61-401 makes the waiver binding only if it was entered with the defendant's knowledge or upon the record in open court. Citing Bush v. Baker, 46 M 535, 129 P 550 (1913), the Supreme Court ruled that 37-61-401 has been applied only as to agreements between attorneys and that the purpose of that section is to relieve the presiding judge of the burden of determining disputes between attorneys concerning their unexecuted agreements. The Supreme Court stated that it would not apply 37-61-401 literally as to agreements between an attorney and the court; to do so would lead to absurd consequences and greatly retard the business of the courts. The Supreme Court held that the defendant was

thus bound by his counsel's waiver. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Speedy Trial Clock to Start With Date of De Novo Appeal From Justice's Court to District Court: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that his right to a speedy trial was violated because the clock should have started with the date of his arrest, not the date of appeal to District Court. Citing St. v. Sanders, 163 M 209, 516 P2d 372 (1973), the Supreme Court noted that it had adopted Standard 12-2.2(c) of the American Bar Association Standards for Criminal Justice. The standard provides that in cases of appeal or an order for a new trial, the time for trial should begin running with the order granting the new trial or, in this case, the date of appeal to District Court. The Supreme Court determined not to abandon that standard and therefore held that defendant's trial was within the 6-month limitation of 46-13-401. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Speedy Trial Not Denied by Application of Six-Month Speedy Trial Limitation to De Novo Appeal From Justice's Court to District Court: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that his right to a speedy trial was violated because it is prejudicial to apply the speedy trial standards of 46-13-401 to an appeal from Justice's Court to District Court. The Supreme Court held that the argument was without merit because the 6-month limit was met in this case, both in the time for trial in Justice's Court and in the time for trial de novo in District Court. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Uncertain Testimony of Defense Counsel Insufficient to Disprove Oral Waiver of Right to Speedy Trial: At the time scheduled for defendant's trial in Justice's Court on a DUI charge, the Justice of the Peace called defense counsel into his chambers and informed him that a different date for trial was necessary because of another trial then in progress. The Justice of the Peace then issued a written order reciting the fact that an oral motion for a continuance was made by defense counsel, along with an oral waiver of defendant's right to a speedy trial. Trial was then set for a date beyond the 6-month limitation provided for in 46-13-401. In a de novo appeal to District Court, defendant raised the issue of his right to a speedy trial, and defense counsel testified he could not remember whether he made an oral motion for continuance and a waiver. The Supreme Court found that the Justice's Court's order was presumed correct under 26-1-602(17) and that the testimony of defense counsel did not demonstrate that the order was in error in reciting the waiver. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Rule 2. Commencement of action.

Compiler's Comments

1997 Amendment: Renumbered former Rule 3 as Rule 2; in (a) deleted former third sentence that read: "The party filing or the party's attorney shall sign the complaint" and inserted third through sixth sentences concerning who must file or sign complaint and requirements for complaint; inserted (b) concerning filing fees; and moved substance of remainder of section concerning place of trial or venue to Rule 3. (Former Rule 2 was deleted by the same order.)

Rule 3. Place of trial or venue.

Case Notes

Cases Decided Under Statute
Place of Trial 1349
Improper Place of Trial 1350
Change of Venue 1350

CASES DECIDED UNDER STATUTE

PLACE OF TRIAL

Agreement to Send Deposit to New Address — Special Contract: The plaintiffs brought an action in the county where they resided to recover their rental deposit from the defendant. The defendant moved for a change of venue to the county where he resided and the property was located. The Supreme Court held that the provision in the lease requiring the defendant to forward the deposit to the new address of the plaintiffs constituted a special contract and that proper venue was the county in which the money was to be paid. Olson v. Long, 245 M 492, 801 P2d 1340, 47 St. Rep. 2216 (1990).

Certiorari to Review Jurisdiction: Since the District Court on appeal from a Justice's Court would have no jurisdiction of a cause over which the latter court had none, certiorari is available to annul a default judgment rendered by a Justice in a cause over which he had no jurisdiction

because commenced in the wrong county. State ex rel. Gen. Oil Corp. v. Kelly, 94 M 445, 23 P2d 555 (1933).

Contractual Obligations: An action to recover money due may not be maintained in a Justice's Court of a county other than that in which the contract was made or the obligation incurred and in which the defendant resides, unless there is a special agreement as to the place of performance or payment. State ex rel. Gen. Oil Corp. v. Kelly, 94 M 445, 23 P2d 555 (1933).

Jurisdiction Not Presumed: A Justice's Court is one of limited jurisdiction, and there are no presumptions in favor of its jurisdiction; all facts necessary to confer it must appear affirmatively from the docket. State ex rel. Gen. Oil Corp. v. Kelly, 94 M 445, 23 P2d 555 (1933).

Lack of Jurisdiction — Change of Venue Improper: If an action is commenced in a Justice's Court of a county other than the one fixed by 25-31-201 through 25-31-204 (all repealed), the court acquires no jurisdiction, and in such a case, 25-31-301 (now repealed), enumerating the cases in which a change of place of trial may be had, has no application. State ex rel. Gen. Oil Corp. v. Kelly, 94 M 445, 23 P2d 555 (1933).

Foreign Corporation as Nonresident: In the absence of statute giving foreign corporations a domestic residence, they remain nonresidents of the state and may, under section 93-6601(5), R.C.M. 1947 (prior to the 1973 amendment providing for suits in any county), be sued in a Justice's Court in any township of the state. Pue v. N. Pac. Ry., 78 M 40, 252 P 313 (1926).

Jurisdiction by Service Upon Resident Agent: Plaintiff performed work for defendant railway company in Lewis and Clark County, where defendant's principal place of business was located and where the agent designated for service of process resided; the defendant also did business and had an agent in Silver Bow County. A Justice's Court in the latter county had jurisdiction of a suit brought there, summons being served on the agent there. Pue v. N. Pac. Ry., 78 M 40, 252 P 313 (1926).

IMPROPER PLACE OF TRIAL

Docket Entries — Jurisdiction to Be Shown: The docket of a Justice of the Peace must show affirmatively all the facts necessary to confer jurisdiction. Such Justice cannot enter a default judgment in favor of the plaintiff unless the docket shows that he was present at the time specified or within 1 hour thereafter. State ex rel. Kenyon v. Laurendeau, 21 M 216, 53 P 536 (1898). See also Driscoll v. Creighton, 24 M 140, 60 P 989 (1900).

CHANGE OF VENUE

Refusal to Pay Costs: Where defendant on being granted a change of venue refused to pay the accrued costs, as provided by 25-31-306 (now repealed), it was the duty of the original Justice of the Peace to proceed with the trial. Taney v. Vollenweider, 28 M 147, 72 P 415 (1903).

Rule 4. Persons — jurisdiction — process — service.

Compiler's Comments

2002 Amendment: Adopted civil summons form as an appendix to C. Amendment effective February 26, 2002.

1997 Amendment: In A(3), D(1)(b)(i), two places in D(2)(b)(iv), and D(2)(b)(iv)(C) substituted "limited liability company" for "unincorporated association"; in B(1), after "who", inserted "reside or" and at end substituted "State of Montana" for "county or city, respectively, or who can be served as provided in these rules"; in B(2), near end of first sentence after "attorney or", deleted "through" and inserted second sentence concerning separate service; in C(2)(b), after "day of service", inserted "or such other period as may be specified by law"; in D(2)(b)(v), after "city", deleted "village"; and made minor changes in style. Amendment effective October 1, 1997.

Case Notes

Cases Decided Under Statute

Jurisdiction of Persons 1350
Process 1351

CASES DECIDED UNDER STATUTE

JURISDICTION OF PERSONS

Waiver Allowed by Appearance and Pleading: Under 25-31-403 (now repealed), defendant in a Justice's Court may waive issuance of summons by appearance and pleading. State ex rel. St. George v. Justice Court, 84 M 173, 274 P 495 (1929).

Answer and Motion as Waiver of Summons: Where defendant in an action on an account before a Justice of the Peace filed an answer to the merits coupling it with a counterclaim, making an offer at the same time to allow judgment to be taken against him for a stated amount

with costs, and thereafter on appeal to the District Court asked leave to amend his answer, he waived irregularity of service of summons by his general appearance and was precluded from challenging the court's jurisdiction over his person or the subject matter of the action. Stoffels v. Cherry, 67 M 443, 215 P 1098 (1923).

Motion to Dismiss as Waiver of Summons: By joining with his codefendant in a motion to dismiss an action against them in a Justice's Court, a party waives service of summons and appears for all purposes. State ex rel. Beadle v. Smith, 42 M 492, 113 P 294 (1911).

PROCESS

Simulation of Legal Process Condemned: The practice of a collection agency of addressing to debtors, on regular legal paper used in court proceedings bearing the names of the parties as plaintiff and defendant, what was designated "final notice" containing the legend "original to the defendant, and duplicate to the clerk of the court", before any action was commenced, thus simulating legal process, is condemned. State ex rel. Freebourn v. Merchants' Credit Serv., Inc., 104 M 76, 66 P2d 337 (1937).

Rule 5. Service and filing of pleadings and other papers, excluding summons.

Compiler's Comments

1997 Amendment: In A, in first sentence after "20 days", inserted "unless otherwise provided by law" and at end, inserted "M.J.R.Civ.P." and inserted second through fourth sentences concerning filing and service of pleadings; in B(2) substituted "if not represented by an attorney" for "if so ordered, by mailing it to the attorney or party at the last-known address or, if no address is known, by delivering it to the judge"; in B(2)(a), after "copy", inserted "to an attorney"; in B(2)(a)(i), after "attorney", deleted "or the party if so ordered"; in B(2)(a)(iii), before "office", inserted "attorney's"; substituted B(2)(a)(iv) concerning mailing to attorney for former text that read: "if the office is closed or the person to be served has no office, by leaving it at the defendant's place of residence with a person of suitable age and discretion who resides there"; inserted B(2)(b) concerning meaning of delivery of copy to a party; and made minor changes in style. Amendment effective October 1, 1997.

Rule 6. Time.

Case Notes

Time of Filing Appeal Running From Date of Rendition of Judgment: Under 25-33-102, the time for filing an appeal does not run from the date of service of a notice of the judgment. It runs from the date of rendition of the judgment. This rule does not extend the time allowed by statute when that time begins to run upon rendition of judgment instead of upon service of a notice or other paper. NW. Collectors, Inc. v. Vanorio, 1998 MT 80, 288 M 225, 956 P2d 1375, 55 St. Rep. 342 (1998). See also Grimes Motors, Inc. v. Nascimento, 244 M 147, 796 P2d 576 (1990).

Notice of Appeal Timely Filed: Defendant was convicted by a City Court jury of driving under the influence of alcohol and resisting arrest. Defendant's notice of appeal was filed 14 days after conviction and sentencing. The appeal was dismissed on the basis that the appeal was not timely filed. The District Court erred in dismissing the appeal because it failed to exclude intermediate weekend days and legal holidays as required by rule. St. v. Price, 271 M 409, 897 P2d 1084, 52 St. Rep. 527 (1995).

Rule 7. Pleadings allowed.

Compiler's Comments

1997 Amendment: In introductory clause, at end of first sentence, inserted reference to reply to a counterclaim and at end of second sentence deleted reference to a counterclaim; in A, at end, inserted reference to type and amount of relief requested; in B, near beginning of first sentence, substituted "must contain a denial" for "may contain a general denial", before "a defense" substituted "constituting" for "containing", and after "defense" deleted "or counterclaim upon which an action might be brought by the defendant against the plaintiff in a justice or city court" and inserted second sentence concerning matter not denied and third sentence concerning entry of default; in C, at end of first sentence, deleted "arising out of an action or occurrence", inserted second sentence concerning required counterclaims, at end of third sentence substituted "the type or amount of relief requested" for "must be stated or the defendant waives the right to maintain an action for it against the plaintiff at a later time", deleted former third sentence that read: "However, the claim need not be stated if it is the subject of another pending action", and inserted fourth sentence concerning dismissal without prejudice of counterclaim that exceeds the jurisdiction of the court; inserted C(2) concerning filing of dismissed counterclaim in District Court; inserted D concerning reply to counterclaim; inserted E concerning cross claims; in F(3),

after "answer or", inserted "reply to" and at end substituted "opposing party" for "plaintiff"; and made minor changes in style. Amendment effective October 1, 1997.

Chapter Case Notes

Cases Decided Under Statute
Complaint 1352
Answer 1352
Counterclaim 1352
General Rules of Pleading 1353

CASES DECIDED UNDER STATUTE

COMPLAINT

Contractual Actions — Complaint to Be Liberally Construed: Under the rule that complaints filed in Justices' Courts must be construed with great liberality and upheld if a person of common understanding is able to know therefrom what is intended, a complaint stating that plaintiff wrote and delivered to defendants a fire insurance policy the premium on which was $42, which defendants agreed to pay, was sufficient as against the contention that it failed to set out the terms of the contract. Coover v. Davis, 112 M 605, 121 P2d 985 (1941).

Cause of Action for Conversion Not Stated: A "supplemental" complaint, as distinguished from an amended one, has no place in Justice's Court proceedings, there being no provision of law therefor. In conversion, an allegation that the plaintiff is the owner or entitled to the possession of the property in question and that the defendant has converted it to his own use must be shown. In tort, for damages, a duty on the part of the defendant must be shown, a violation of which resulted in an injury to plaintiff. When such facts are not stated and cannot be inferred from the facts stated, the complaint is insufficient. Radosevich v. Engle, 111 M 504, 111 P2d 299 (1941).

Complaint for Conversion Insufficient: The language in 25-31-401 (now repealed) is almost exactly the same as used in section 93-3202(2), R.C.M. 1947 (repealed in 1961), dealing with complaint in District Courts, requiring that the complaint contain "a statement of facts constituting the cause of action in ordinary and concise language"; a complaint framed in the form of an account but including items alleged to have been converted or misappropriated, but containing no allegations as to ownership, possession, or the circumstances of the conversion, was insufficient no matter how liberal a rule of construction was applied. Radosevich v. Engle, 111 M 504, 111 P2d 299 (1941).

Nature of Demand to Be Shown: The pleadings in Justices' Courts are not required to be in any particular form; a complaint filed in such a Court must be construed with great liberality, the plaintiff being required only to state facts sufficient to show the nature of his demand so as to enable a person of common understanding to know what is intended. Rhule v. Thrasher, 88 M 468, 295 P 266 (1930).

Liberal Construction of Pleadings on Appeal: On appeal from a Justice's Court to the District Court, the sufficiency of the complaint must be tested by the rules applicable to the former and construed with great liberality, plaintiff being required only to state facts sufficient to show the nature of his demand in such a way as to enable a person of common understanding to know what is intended. Woody v. Sec. St. Bank, 67 M 109, 214 P 1096 (1923).

Account Action — Complaint Sufficient: A complaint in an action brought in a Justice's Court to recover the balance of an account for goods, wares, and merchandise, reading as follows: "E. to M. & W., Dr. To balance for merchandise (describing it), $255.12", was sufficient under 25-31-501 and 25-31-504 (both repealed). Moran v. Ebey, 39 M 517, 104 P 522 (1909).

Complaint Required for Further Action: Since an action can be instituted only by the filing of a formal complaint or its equivalent, by the filing of a copy of the account, bill, bond, or instrument upon which the action is brought, with a statement of the amount due thereon, a Justice cannot issue an attachment or proceed to judgment without this prerequisite. Shandy v. McDonald, 38 M 393, 100 P 203 (1909).

ANSWER

No Waiver of Jurisdictional Defects: A defendant in an action in a Justice's Court does not waive objection to want of jurisdiction over his person by presenting an answer containing a counterclaim, where he insists at every stage of the proceedings that the Justice has no jurisdiction. Wilcox v. Toston St. Bank, 53 M 490, 165 P 292 (1917).

COUNTERCLAIM

Counterclaim Required: Where the defendant in an action before a Justice of the Peace failed to set up a then subsisting counterclaim upon which an action might have been brought in that

court, he could not under 25-31-505 and 25-31-506 (both repealed), thereafter, on appeal to the District Court, have it adjudicated. Walter v. Cox, 36 M 20, 91 P 1063 (1907).

Policy of Legislature: Sections 25-31-505 and 25-31-506 (both repealed) demonstrate that it was the policy and purpose of the Legislature in enacting them that all petty claims existing between the parties and falling within the limited jurisdiction of Justices' Courts should be adjusted in one action. Walter v. Cox, 36 M 20, 91 P 1063 (1907).

GENERAL RULES OF PLEADING

Complaint on Account — Insufficient and Confusing: Where a Justice's Court complaint consisted of an "account", concededly without any of the elements of an account involving the relationship of debtor and creditor, a memorandum filed in response to a demand for a bill of particulars, including items not set forth in the account, and a "supplemental complaint" substantially amounting to a complaint in conversion coupled with an action for damages as for tort were fatally defective and so confusing that a person of common understanding would not know what the pleader meant. Radosevich v. Engle, 111 M 504, 111 P2d 299 (1941).

Essential Facts Omitted From Pleadings: While pleadings in Justice's Court are not required to be in a particular form and technical rules of pleading are not to be applied, nevertheless, under 3-10-501, 25-31-501 (now repealed), and 25-31-504 (now repealed), where there is an absolute omission to state a fact essential to a cause of action and such fact is not deducible from those stated, the defect is fatal if proper objection be made to the sufficiency of the pleading. The complaint must disclose the presence of all of the elements necessary to make out the nature of the cause of action, whether brought in Justice's or District Court. Radosevich v. Engle, 111 M 504, 111 P2d 299 (1941).

Joinder of Parties as Sharp Practice: Joining of husband and wife by a collection agency in all actions where a claim against either was involved, although the facts in nowise justified the practice under 40-2-106 on the necessity of life theory, at least amounted to sharp practice. State ex rel. Freebourn v. Merchants' Credit Serv., Inc., 104 M 76, 66 P2d 337 (1937).

Simulation of Legal Process Condemned: The practice of a collection agency of addressing to debtors, on regular legal paper used in Court proceedings bearing the names of the parties as plaintiff and defendant, what was designated "Final Notice" containing the legend "Original to the defendant, and duplicate to the clerk of the court", before any action was commenced, thus simulating legal process, is condemned. State ex rel. Freebourn v. Merchants' Credit Serv., Inc., 104 M 76, 66 P2d 337 (1937).

Inferences From Pleadings: Under the liberal construction of pleadings required by the Code, whatever is necessarily implied from allegations directly or reasonably to be inferred therefrom is to be treated as averred directly. Rhule v. Thrasher, 88 M 468, 295 P 266 (1930).

Confession of Judgment: Where defendant, in an action to recover a debt, in response to a summons out of a Justice's Court appeared in person on the day set for trial and orally "acknowledged" judgment, he in effect admitted the allegations of the complaint and the judgment entered thereon was to all intents and purposes a judgment on the pleadings and not open to the objection that as a "confession of judgment" it was void because not evidenced by a writing executed by defendant as required by 27-9-101(part) through 27-9-104. State ex rel. Kennedy v. Hubbard, 77 M 170, 253 P 271 (1926), overruling Hunter v. Eddy, 11 M 251, 28 P 296 (1891).

Docket Entry — Pleadings Liberally Construed: Under the rule that the pleadings in a Justice's Court as well as the statutory requirements with relation thereto must be liberally construed, 3-10-501 and 25-31-501 (now repealed), declaring that the Justice must enter in the docket a concise statement of the material parts of all oral pleadings, mean no more than that he shall enter such a recital thereof as would advise a person of common understanding of the nature of the pleadings. Malano v. Bressan, 76 M 366, 245 P 871 (1926).

Technical Rules Not to Be Applied: Technical rules of pleading should not be applied in a Justice's Court, and a complaint filed therein must be construed with great liberality. Lambert v. Helena Adjustment Co., 69 M 510, 222 P 1057 (1924).

Statute of Frauds Defense: The filing of an amendment to defendant's answer pleading the Statute of Frauds to an action to recover the price of certain land sold did not require a replication. Duane v. Molinak, 31 M 343, 78 P 588 (1904).

Rule 8. Amendment of pleadings.

Compiler's Comments

1997 Amendment: Substituted A concerning when amendment of pleadings is allowed for former text that read: "Amendment of pleadings is allowed by written motion at the discretion of

the court"; inserted C concerning reply to amended counterclaim; in D, at end, deleted "or counterclaim"; and made minor changes in style. Amendment effective October 1, 1997.

Rule 10. Naming of parties to action.

Compiler's Comments

1997 Amendment: Substituted B concerning amendment and dismissal of pleadings with regard to naming real party in interest for former text that read: "Until 5 days have passed from the date upon which a party is served with an order of the justice or city court requiring an amendment, an action may not be dismissed for the reason that the real party in interest is not named in the pleadings. A dismissal for failure to name the real party in interest must be without prejudice." Amendment effective October 1, 1997.

Rule 11. Substitution of parties.

Compiler's Comments

1997 Amendment: In B substituted 20 days for "a reasonable time"; and made minor changes in style. Amendment effective October 1, 1997.

Rule 12. Joinder of claims and parties necessary for just adjudication.

Compiler's Comments

1997 Amendment: In A(2), at end, inserted "without being named"; in A(3), after "obligations", inserted "incurred"; and in C, in first sentence after "add or", substituted "dismiss" for "drop" and after "at any" substituted "stage" for "state" and in second sentence, after "may be", inserted "added or" and after "proceed to" inserted "joint or". Amendment effective October 1, 1997.

Rule 13. Discovery.

Compiler's Comments

1997 Amendment: In A substituted introductory clause for former text that read: "Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows"; in A(1), at beginning of first sentence, substituted "Either party may make a motion for an order to obtain discovery through the use of requests for production, depositions and written interrogatories" for "Parties may move for a hearing to obtain discovery through the use of motions to produce or through written interrogatories, or both"; inserted A(2) concerning request for formal discovery; in A(4), at end of first sentence, deleted "at the hearing" and inserted second sentence concerning hearing on discovery motion; deleted former B that read: "B. DEPOSITIONS. Depositions to be used in justice or city courts must be taken as provided in Rules 26 and 28 through 30, M.R.Civ.P."; inserted B concerning sanctions; and made minor changes in style. Amendment effective October 1, 1997.

Rule 14. Pretrial conferences.

Compiler's Comments

1997 Amendment: In A(5) inserted sentence concerning scheduling; inserted B concerning subject matter of pretrial conferences; and made minor changes in style. Amendment effective October 1, 1997.

Rule 15. Right to jury trial.

Compiler's Comments

1997 Amendment: In A inserted reference to United States Constitution; and made minor changes in style. Amendment effective October 1, 1997.

Rule 16. Failure to appear or proceed.

Compiler's Comments

1997 Amendment: In A, after "defendant", inserted "who has been properly served". Amendment effective October 1, 1997.

Rule 17. Costs.

Compiler's Comments

1997 Amendment: In two places inserted "M.C.A."; deleted reference to part 2 of Title 25, chapter 10; and at end inserted last clause concerning procedures. Amendment effective October 1, 1997.

Rule 19. Order of trial.

Compiler's Comments

1997 Amendment: In (5) inserted last sentence concerning instructions ordered at pretrial conference. Amendment effective October 1, 1997.

Rule 20. Notice of trial.

Case Notes

CASES DECIDED UNDER STATUTE

Taking Under Advisement: Where a Justice of the Peace, after submission of a cause to him for determination, took it under advisement without the consent of the parties, appointing neither time nor place for the rendition of judgment, he lost jurisdiction and the judgment, rendered about a month thereafter without notice to the parties, was void. State ex rel. Collier v. Houston, 36 M 178, 92 P 476 (1907), distinguished in In re Graye, 36 M 394, 93 P 266 (1907).

Rule 21. Entry of judgment.

Compiler's Comments

1997 Amendment: Substituted A(2)(c) concerning improper venue under Rule 3B for "when it is objected at the trial and appears by the evidence that the action is brought in the wrong county"; in A(4), at beginning of second sentence, deleted "If, on a motion for judgment on the pleadings", substituted "may not be presented to" for "are presented to and not excluded by", and after "court" deleted "the motion must be treated as one for summary judgment and disposed of as provided in Rule 56, M.R.Civ.P.", deleted former third sentence that read: "All parties must be given reasonable opportunity to present all material made pertinent to a motion by Rule 56, M.R.Civ.P.", and inserted third and fourth sentences concerning judgment on the pleadings for either party and basis for judgment; inserted A(5) concerning summary judgment; in A(8)(a)(1), after "failed to", substituted "answer or reply" for "plead or otherwise defend", after "rules" deleted "the judge", and substituted "written motion by the plaintiff or counterclaiming defendant, the judge or clerk" for "written application or motion by the plaintiff"; in A(8)(a)(2), near beginning, substituted "answer" for "appear and it is otherwise proper under these rules", after "certain" deleted "the judge", and after "due" inserted "the judge or clerk" and deleted second sentence that read: "In all cases the party entitled to a judgment of default shall apply to the court for the judgment"; in A(8)(2)(b), after "necessary", deleted "to take an account or", after "any" substituted "allegation" for "averment", after "evidence" deleted "or to make an investigation of any other matter", after "hearings" deleted "or order references", and at end deleted "and shall accord a right of trial by jury to the parties as required by statute"; inserted A(8)(2)(c) concerning kind and amount of default judgment; and made minor changes in style. Amendment effective October 1, 1997.

Disapproval of Rules: Section 3, Ch. 285, L. 1991, provided: "Pursuant to Article VII, section 2, of the Montana constitution, Rules 21C and 23(2), Montana Justice and City Court Rules of Civil Procedure, are disapproved."

Case Notes

CASES DECIDED UNDER STATUTE

Failure of Plaintiff to Appear — Record Required: The record of a Justice's Court must affirmatively show all jurisdictional facts and particularly that plaintiff appeared at the time set for hearing of the case or within an hour thereafter; if he did not then appear, the Justice lost jurisdiction for all purposes, save to dismiss the action without prejudice. Peterson v. Feely, 88 M 459, 293 P 667 (1930).

Failure to Appear at Trial — Judgment Not in Default: A Justice of the Peace could not enter judgment by default on failure of defendant to appear at the time set for trial, when defendant had filed an answer putting in issue the allegations of the complaint. Where the record showed that such Justice tried the issues and entered judgment on proof adduced by plaintiff, the judgment was not one by default, although the Justice's docket recited the notice and entry of defendant's default. State ex rel. Grissom v. Justice Court, 31 M 258, 78 P 498 (1904); Clark v. Great N. Ry., 30 M 458, 76 P 1003 (1904).

Rule 22. Relief from judgment.

Compiler's Comments

1997 Amendment: In A. in first sentence after "judgment" inserted "or other order". Amendment effective October 1, 1997.

Case Notes

CASES DECIDED UNDER STATUTE

Challenge of Justice's Court Judgment as Void Not Allowed — No Recourse Under Justice's Court Rules Once Time for Applying for Relief Passes: The Justice's Court entered a default judgment in favor of plaintiff, and 64 days later, plaintiff executed judgment against defendant. Defendant moved to quash the judgment 14 days later on due process grounds of lack of notice, but the motion was denied. On appeal, the District Court affirmed, reasoning that defendant had only 30 days after judgment during which to apply for relief. On appeal to the Supreme Court, defendant essentially contended that the Justice's Court judgment was void because defendant was not given notice of the judgment. However, Justice's Court procedural rules do not allow a party to challenge a Justice's Court judgment as being void, so once the 30-day time for seeking relief from the judgment expired, defendant could not challenge the judgment. The Supreme Court did note that defendant could still file an independent action collaterally attacking the Justice's Court judgment for lack of personal jurisdiction. CBM Collections, Inc. v. Ferreira, 2005 MT 170, 327 M 479, 115 P3d 211 (2005).

Default Judgment Set Aside: The record shows the plaintiff took a default after the defendant felt she had been assured she would be given time to negotiate a settlement, and the judgment entered exceeds by $150 the amount defendant owed plaintiff at the time the Court entered judgment. The default judgment was, therefore, set aside because it is preferable to dispose of cases on their merits than to maintain too strict a regard for technical rules of procedure. Little Horn St. Bank v. Real Bird, 183 M 208, 598 P2d 1109 (1979).

Modification of Judgment: A Justice of the Peace who, upon the return of a verdict for plaintiff for the amount of a note and interest, and for defendant for the costs of the action, has rendered a judgment in accordance with such verdict immediately, has no jurisdiction 8 days afterward to set aside such judgment as to the defendant and to add to the judgment for plaintiff an attorney's fee and the costs of suit. State ex rel. Johnson v. Case, 14 M 520, 37 P 95 (1894).

Rule 23. Execution.

Compiler's Comments

2002 Amendment: In C in form at end of last full paragraph substituted "120 days after the date of receipt" for "60 days after the date of issuance subscribed thereon, with a record of your actions endorsed thereon"; and in D near middle of first sentence substituted "120 days from the date of receipt by the sheriff or levying officer" for "60 days from the date of issuance". Amendment effective February 26, 2002.

2001 Amendment: In B in second sentence increased time from 6 years to 10 years and after "entry of judgment" deleted "or within the time extended pursuant to 25-13-102"; in C in form substituted "120 days" for "60 days" and in two places substituted "20.." for "19.." to reflect new millennium; and in D in first sentence and in D.(1) increased time from 60 days to 120 days. Amendment effective October 16, 2001.

1998 Amendment: In A(1) at end inserted "or the clerk thereof"; in B near end after "office" inserted "or the clerk"; in C in second sentence after "judge" inserted "or clerk"; and in form in signature block after "Justice of the Peace" and "City Judge" inserted "or Clerk". Amendment effective June 25, 1998.

1997 Amendment: In A(1) substituted "boundaries of the state" for "county or city in which the judgment was obtained"; in A(2), in two places before "clerk", inserted "judge or", substituted "justice or city court" for "justice's court", and after "sheriff" inserted "constable, or levying officer"; in form, in paragraph following amounts, after "writ", inserted "not less than 10 days nor more than 60" and after "days after" substituted "the date of issuance subscribed thereon with a record of your actions" for "your receipt of it, with what you have done", inserted D concerning return of execution, and near end of last sentence of E, before "court", inserted "justice or city"; and made minor changes in style. Amendment effective October 1, 1997.

Disapproval of Rules: Section 3, Ch. 285, L. 1991, provided: "Pursuant to Article VII, section 2, of the Montana constitution, Rules 21C and 23(2), Montana Justice and City Court Rules of Civil Procedure, are disapproved."

Case Notes

CASES DECIDED UNDER STATUTE

Control of Execution: Though the Clerk of the District Court may issue the execution, he issues it upon the judgment of the Justice, as such, made such by transformation of the Justice's judgment. The fact that the Clerk issues the execution does not divest the Justice of his control

over it, for the statute does not so provide. Since the control of its process is vested exclusively in the court upon whose authority it issues, the Justice has exclusive control of the execution, whether issued by himself or by the Clerk of the District Court. Pierson v. Daly, 49 M 478, 143 P 957 (1914).

CHAPTER 24
MONTANA UNIFORM RULES FOR THE JUSTICE AND CITY COURTS

Chapter Law Review Articles

Refining Federal Civil Justice Reform in Montana, Tobias, 56 Mont. L. Rev. 539 (1995).

Rule 3. Files and exhibits.

Compiler's Comments

1994 Amendment: In (a), in first sentence before "court", deleted "clerk of" and at end substituted "all court files" for "the files of the court" and in second sentence, before "court", deleted "office of the clerk of"; in (b), at end of first sentence, substituted "court" for "clerk"; in (c), in second sentence after "final", substituted "a party" for "the clerk" and after "notify the" substituted "other party" for "parties" and in last sentence substituted "disposition" for "the clerk to dispose"; and made minor changes in style. Amendment effective August 31, 1994.

Rule 4. Docket and index.

Compiler's Comments

1994 Amendment: In (a) and (b), before "court", deleted "clerk of"; and in (a), in two places after "docket", inserted "or case". Amendment effective August 31, 1994.

Rule 11. Filing of discovery.

Compiler's Comments

1994 Amendment: In last sentence, after "relevant", inserted "portions of". Amendment effective August 31, 1994.

Rule 14. Representation.

Compiler's Comments

2000 Amendment: At end of (b) substituted "allowed under Section IV, Pro Hac Vice, of the 1998 Rules for Admission to the Bar of Montana" for "provided for under Section 37-61-208, MCA". Amendment effective February 15, 2000.

Rule 15. Office hours.

Compiler's Comments

1994 Amendment: In (a) and (b) substituted "court's office" for "office of the clerk of court". Amendment effective August 31, 1994.

Rule 16. Pre-trial conference.

Compiler's Comments

1994 Amendment: In (a), after "conferences", deleted "and omnibus hearings". Amendment effective August 31, 1994.

Rule 17. Payment of bonds.

Compiler's Comments

1994 Amendment: In (a), in first sentence before "court", deleted "clerk of" and at end of second sentence substituted "court's office" for "office of the clerk of court". Amendment effective August 31, 1994.

Rule 18. Continuances.

Compiler's Comments

1994 Amendment: In (a), at end of second sentence, inserted "and served upon the opposing party or counsel". Amendment effective August 31, 1994.

Explanatory Note: Former Rule 18, pertaining to mechanical recordings, was deleted by the Supreme Court Order dated August 31, 1994. Order Effective August 31, 1994.

Rule 19. Jury instructions.

Compiler's Comments

1997 Amendment: In (a) deleted reference to section 400.509 of the deskbook; and in (b) deleted reference to section 400.505 of the deskbook. Amendment effective May 13, 1997.

Rule 21. Time computation.

Case Notes

Period of Time Prescribed or Allowed — Ten Days or Less: The Justice's Court sentenced Schindler on March 4, 1994. On appeal, the state contended that Schindler's notice of appeal filed by fax on March 14, 1994, was untimely. The Supreme Court applied this rule, in interpreting 46-17-311 to mean that when the period of time prescribed or allowed is 10 days or less, intermediate Saturdays, Sundays, and legal holidays are excluded from the calculations. St. v. Schindler, 268 M 489, 886 P2d 978, 51 St. Rep. 1421 (1994), distinguishing St. v. Arthur, 234 M 75, 761 P2d 806 (1988).

CHAPTER 30
PROCEDURE IN MUNICIPAL COURTS

Part 1
General Provisions

25-30-101. Applicability of district court and justice's court rules.

Compiler's Comments

1991 Amendment: In (1) deleted references to 3-10-305, 3-10-306, 25-31-114 through 25-31-116, 25-31-304, and subsection (2) of 25-31-402 and in exception parenthetical deleted references to 25-31-915, 25-31-1004, and 25-31-1005; and made minor change in style.

1981 Amendment: In (1), deleted "25-31-111" before "25-31-114" (now repealed), "25-31-701" before "25-31-915" (now repealed), "and part 1 of" before "chapter 17", and "of Title 27, 27-17-401" after "chapter 17"; in (2), inserted "and the supreme court's rules on disqualification of judges"; made minor changes in punctuation and phraseology.

Collateral References

Courts *key* 188(1).

25-30-102. Fees and fines — collection.

Compiler's Comments

2003 Amendment: Chapter 510 inserted (1)(b) prohibiting fees assessed in municipal court from exceeding fees authorized to be paid to justice's court in 25-31-112; in (2)(a) inserted second sentence requiring fee incurred by municipal court to be added to judgment; and made minor changes in style. Amendment effective October 1, 2003.

2001 Amendment: Chapter 515 in (2)(a) at beginning deleted "If a final judgment is entered for a fine and the fine is immediately due" and at end after "collection of" substituted "any final judgment that requires a payment to the municipal court" for "the fine"; in (2)(b) near beginning after "collect a" substituted "judgment" for "fine", near middle after "judgment" deleted "for the fine", and near end after "collection procedure" inserted "and other postjudgment remedies"; at end of (2)(c) after "collecting the" substituted "judgment" for "fine"; and made minor changes in style. Amendment effective October 1, 2001.

1999 Amendment: Chapter 63 in (1) inserted exception clause; inserted (2)(a) authorizing municipal court to contract for collection of fine if final judgment entered and fine immediately due; inserted (2)(b) authorizing assignment to and collection of fine by private person or entity if retained by municipal court; inserted (2)(c) authorizing municipal court to pay private person or entity for fine collection after deduction of charges; and made minor changes in style. Amendment effective October 1, 1999.

Collateral References

Costs *key* 146.

20 C.J.S. Costs §184.

25-30-105. Jury trial.

Collateral References

Jury *key* 11(1).

50 C.J.S. Juries §12.

25-30-107. Costs.

Collateral References

Costs *key* 9.
20 C.J.S. Costs §264.

25-30-108. Appeals.

Collateral References

Courts *key* 190(1), (2).

25-30-109. Pretrial conferences or hearings — appearance by telephone conference.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

MONTANA UNIFORM MUNICIPAL COURT RULES OF APPEAL TO DISTRICT COURT

Part 2100
Applicability of Rules

Part Compiler's Comments

Source of Compiler's Notes: The compiler's comments for this part are derived from endnotes prepared for a draft copy of the rules as promulgated by the Montana supreme court. The compiler has modified the endnotes for the compiler's comments format.

Rule 1. Scope of rules—limitation of appeal.

Compiler's Comments

Compiler's Note: Section 46-17-404 uses the term "amount in controversy" in criminal actions to mean a fine or restitution.

Case Notes

No District Court Jurisdiction of Appeal From Municipal Court When Defendant Not Incarcerated and Fine Less Than $300: Koestner was convicted in Municipal Court of reckless driving and was fined $175, court costs of $20, and a witness fee of $10, and no jail time was ordered. Koestner appealed the conviction and the denial of a request for a jury trial to District Court, but that court concluded that it did not have jurisdiction to hear the appeal. Koestner appealed to the Supreme Court, arguing that under the Montana Uniform Municipal Court Rules of Appeal to District Court (Title 25, ch. 30, part 2100), a city must have an ordinance in place to trigger the statutory amount necessary to bring an appeal and that because the city never presented evidence that such an ordinance existed, the District Court had jurisdiction under 3-6-110 to review the Municipal Court decision. The Supreme Court agreed that because Koestner was not incarcerated and the fine imposed was less than $300, the District Court properly concluded that it was bound by subsection (b)(2) of this rule which limits appeals in criminal cases to those in which the minimum amount in controversy is greater than $300, unless jail time is ordered. Although Koestner, under Rule 3, U.M.C.R.App., could have petitioned the District Court to hear the appeal in the interests of justice, no petition was filed. Koestner's arguments regarding lack of a city ordinance were not raised before the District Court, and the Supreme Court declined to address the issue for the first time on appeal. Kalispell v. Koestner, 2001 MT 53, 304 M 315, 21 P3d 622 (2001).

Rule 2. District court review on appeal.

Compiler's Comments

Compiler's Note: Subsection (a), see 3-6-110.

Rule 3. Interests of justice.

Compiler's Comments

Compiler's Note: See 25-30-108 and 46-17-404.

Part 2200
Appeals From Municipal Court Judgments

Rule 4. How appeals are taken.

Compiler's Comments

Compiler's Note: Subsection (f), see 25-33-303.

Rule 5. Time for filing notice of appeal.

Compiler's Comments

Compiler's Note: Subsection (a), see 25-30-101 and 25-33-102. Subsection (a)(2), see 25-33-201 and Goldsmith v. Lane, 226 M 341, 735 P2d 306 (1987), holding that an undertaking is required in municipal court to perfect an appeal. Subsection (a)(3), see 40-4-124 and 40-15-302. Subsection (b), see 3-6-110 and 46-17-311. The appeal time is the same as in city court.

Rule 6. Undertaking on appeal.

Compiler's Comments

Compiler's Note: Subsection (a), see 25-30-101 and 25-33-201. Subsection (b), see 25-33-202.

Rule 7. Stay of judgment pending appeal.

Compiler's Comments

Compiler's Note: Subsection (a), see 25-30-101. Title 25, ch. 33, applies to municipal courts. Subsection (a)(1), see Rules 6 and 7, M.R.App.P., and 25-30-101. Subsection (a)(3), see 25-33-204. Subsection (a)(4), see Rule 7(c), M.R.App.P. Title 25, ch. 33, does not specifically address perishable property. Rule 7(c) would appear to be the appropriate rule. Subsection (b), see 46-17-401. Proceedings in criminal cases are the same in municipal court as district court unless provided otherwise in Title 3, ch. 6. Scope of appeal and stay of sentence in criminal actions are not specifically addressed in statutes. It would appear that under 46-17-401, the statutes relating to scope of appeal and stays in appeals from district court to the supreme court would logically apply. Subsection (b)(1), see 46-20-204(2). Subsection (b)(2), see 46-20-204(3). Subsection (b)(4), see 46-20-205.

Rule 8. Sureties and their justification.

Compiler's Comments

Compiler's Note: Subsection (a), see 25-33-203. Subsection (b), see 25-33-205. Subsection (c), see 25-33-206. Subsection (d), see 25-33-207.

Rule 9. The record on appeal.

Compiler's Comments

Compiler's Note: Subsection (d), see Rule 9(c), M.R.App.P. Subsection (e), see Rule 9(d), M.R.App.P. Subsection (f), see Rule 9(e), M.R.App.P. Subsection (g), see Rule 9(f), M.R.App.P.

Rule 10. Transmission of the record.

Compiler's Comments

Compiler's Note: Subsection (a), see 25-33-104. Subsection (b), see 46-17-311(3).

Part 2300
Appeals in Forma Pauperis

Part Compiler's Comments

Compiler's Note: See Rule 18, M.R.App.P.

Part 2400
General Provisions

Part Case Notes

Failure to File Brief Within Fifteen Days of Municipal Court Judgment — Summary Judgment Not Abuse of Discretion: Frazier was convicted of speeding in Justice's Court. Frazier filed a timely appeal to District Court, but failed to file a brief within 15 days after the record was filed with the District Court, as required by Rule 14(a), U.M.C.R.App. (Title 25, ch. 30, part 2400). The District Court summarily dismissed the appeal, and Frazier appealed, but the Supreme Court affirmed, noting that under 25-33-304, the District Court has discretion to order an appeal to be dismissed for failure to prosecute an appeal or for unnecessary delay in bringing an appeal to a hearing. The Supreme Court declined to reverse the District Court for insisting that parties comply with statutory directives and rules of civil procedure, holding that it was not

an abuse of discretion for the District Court to dismiss Frazier's appeal for failure to file a timely brief. St. v. Frazier, 2005 MT 99, 326 M 524, 111 P3d 215 (2005).

Rule 14. Filing and service of briefs.

Compiler's Comments

Compiler's Note: Subsection (c), see Rule 6, M.U.R.J.C.C., and Rule 26(c), M.R.App.P. Subsection (d), see 40-4-121, 40-4-124, 40-15-201, 40-15-204, and 40-15-302.

Case Notes

Failure to File Brief Within Fifteen Days of Municipal Court Judgment — Summary Judgment Not Abuse of Discretion: Frazier was convicted of speeding in Justice's Court. Frazier filed a timely appeal to District Court, but failed to file a brief within 15 days after the record was filed with the District Court, as required by Rule 14(a), U.M.C.R.App. (Title 25, ch. 30, part 2400). The District Court summarily dismissed the appeal, and Frazier appealed, but the Supreme Court affirmed, noting that under 25-33-304, the District Court has discretion to order an appeal to be dismissed for failure to prosecute an appeal or for unnecessary delay in bringing an appeal to a hearing. The Supreme Court declined to reverse the District Court for insisting that parties comply with statutory directives and rules of civil procedure, holding that it was not an abuse of discretion for the District Court to dismiss Frazier's appeal for failure to file a timely brief. St. v. Frazier, 2005 MT 99, 326 M 524, 111 P3d 215 (2005).

Rule 15. Time for decision and oral argument.

Compiler's Comments

Compiler's Note: Subsection (d), see 40-4-124, 40-15-201, and 40-15-302.

Rule 16. Dismissal of appeal in civil actions—costs and damages.

Compiler's Comments

Compiler's Note: Subsection (a), see 25-33-304. Subsection (b), see 25-33-305.

Rule 17. Effect of dismissal.

Compiler's Comments

Compiler's Note: See Rule 12, M.R.App.P.

Rule 21. Voluntary dismissal.

Compiler's Comments

Compiler's Note: See Rule 36, M.R.App.P.

CHAPTER 31
PROCEDURE IN JUSTICES' COURTS

Chapter Law Review Articles

Civil Practice in Montana's "People's Courts": The Proposed Montana Justice and City Court Rules of Civil Procedure, Ford, 58 Mont. L. Rev. 197 (1997).

Montana's Judicial System—A Blueprint for Modernization, Mason & Crowley, 29 Mont. L. Rev. 1 (1967).

Montana Justices' Courts—According to the Law, Mason & Kimball, 23 Mont. L. Rev. 62 (1961).

Part 1
General Provisions

25-31-101. Issues which cannot be presented in justice's court.

Case Notes

Evidence of Title Admissible in Unlawful Detainer Action: Where defendants unlawfully entered and took possession of the plaintiff's mining claim, evidence of title to the claim in question was admissible in Justice's Court as evidence of the plaintiff's right to possession where it appeared that such right would be disputed in plaintiff's action for forcible entry and unlawful detainer. Hamshaw v. Justice's Court, 108 M 12, 88 P2d 1 (1939).

Allegations as Surplusage: Since allegations relating to title to or possession of real property are not pertinent to forcible entry and unlawful detainer cases and if pleaded are surplusage,

such an action is not subject to certification to the District Court under this section. Lambert v. Helena Adjustment Co., 69 M 510, 222 P 1057 (1924).

Forcible Entry and Unlawful Detainer — Jurisdiction Proper: If the question of title is not raised in an action in unlawful detainer, all allegations respecting it in the pleadings are surplusage and the Justice's Court has jurisdiction to hear the cause, of which jurisdiction it cannot divest itself by certifying the cause to the District Court. State ex rel. Lott v. District Court, 33 M 356, 83 P 597 (1905).

Law Review Articles

The Montana Justices' Courts—According to the Law, Mason & Kimball, 23 Mont. L. Rev. 62 (1961).

Collateral References

Justices of the Peace *key* 75.

51 C.J.S. Justices of the Peace §§30, 31.

25-31-102. Transfer to district court — dismissal.

Compiler's Comments

1981 Amendment: In (1), substituted "the certification of" for "filing"; made minor changes in grammar, punctuation, and phraseology.

Case Notes

Remedy for Criminal Prosecution of Public Nuisance: Panasuk, convicted in City Court of misdemeanor criminal public nuisance charges under 45-8-111, contended that because 3-10-301, Rule 4(B), M.R.Civ.P. (Title 25, ch. 20), and this section preclude a nonrecord court from hearing actions involving the title to or possession of real property, jurisdiction for prosecution of the public nuisance charge must lie with the District Court. He cited 45-8-112 as authority that any action to abate a nuisance must be brought in the name of the state and that because abatement is a form of injunctive relief, the District Court has exclusive jurisdiction. He also argued that 27-30-202 provides the exclusive civil and criminal remedies for public nuisance. His claims were dismissed for the following reasons: (1) charges filed under 45-8-111 were criminal rather than related to a civil action involving title to or possession of real property, which is regulated by the sections cited by Panasuk; (2) the remedy created by 27-30-202 has been supplemented by subsequent legislative action regarding a City Court's jurisdiction over misdemeanors and by the enactment of 46-17-101, which requires that all prosecutions brought in City Court be commenced by a sworn complaint; and (3) because Panasuk's interpretation would result in a direct contradiction between 27-30-202 and statutes subsequently enacted, the argument that 27-30-202 provides the exclusive remedies for public nuisance is erroneous. Billings v. Panasuk, 253 M 403, 833 P2d 1050, 49 St. Rep. 499 (1992).

Allegations as Surplusage: Since allegations relating to title to or possession of real property are not pertinent to forcible entry and unlawful detainer cases and if pleaded are surplusage, such an action is not subject to certification to the District Court under this section. Lambert v. Helena Adjustment Co., 69 M 510, 222 P 1057 (1924).

Complaint Beyond Justice's Jurisdiction: A complaint filed in a Justice's Court, if stating a cause of action in ejectment, does not give the Justice jurisdiction for any purpose, and he cannot confer jurisdiction on the District Court by certifying the case to it. State ex rel. Lott v. District Court, 33 M 356, 83 P 597 (1905).

Forcible Entry and Unlawful Detainer: If the question of title is not raised in an action in unlawful detainer, all allegations respecting it in the pleadings are surplusage and the Justice's Court has jurisdiction to hear the cause, of which jurisdiction it cannot divest itself by certifying the cause to the District Court. State ex rel. Lott v. District Court, 33 M 356, 83 P 597 (1905).

Undertaking for Costs: If the question of title to real estate is raised in an action in unlawful detainer, a Justice cannot certify the cause to the District Court without the bond required by this section having been filed. State ex rel. Lott v. District Court, 33 M 356, 83 P 597 (1905).

25-31-111. What provisions of code applicable to justices' courts.

Compiler's Comments

1981 Amendment: Substituted "and Titles 3 and 27" for "chapter 10 of Title 3, 27-9-101, 27-17-102, 27-17-401, and part 10 of chapter 16 and part 15 of chapter 18 of Title 27".

Collateral References

Justices of the Peace *key* 32, 64, 66.

51 C.J.S. Justices of the Peace §§26, 53.

25-31-112. Fees.

Compiler's Comments

1989 Amendment: In (1) and (3) increased from $10 to $25 the fee for filing a complaint in a civil action.

1985 Amendment: Increased all fees in (1) through (5) from $7.50 to $10; and deleted former (6) that read: "$1 for issuing each writ of execution or attachment".

1983 Amendment: In (1) through (5), changed "$5" to "$7.50"; and inserted (6). See 1985 note for text.

1981 Amendment: Inserted "except as provided in 25-35-605" in introductory clause.

Law Review Articles

Montana Justices' Courts—According to the Law, Mason & Kimball, 23 Mont. L. Rev. 62 (1961).

Collateral References

Justices of the Peace *key* 16.

51 C.J.S. Justices of the Peace §§15 through 17.

25-31-113. When fees payable.

Collateral References

Counties *key* 79.

20 C.J.S. Counties §116.

25-31-115. Deposit of money in lieu of undertaking.

Compiler's Comments

1981 Amendment: Substituted "by this chapter" for "as prescribed in this code".

Case Notes

Appeal Costs: This section has application to all undertakings other than those on appeal, and 25-33-201, 25-33-203(part), and 25-33-205(1), so far as they permit a deposit in lieu of cash, are special statutes relating to undertakings on appeal and are controlling as to them. Ross v. Greenwald, 112 M 324, 115 P2d 290 (1941).

25-31-119. Interpleader actions.

Compiler's Comments

1999 Amendment: Chapter 51 in (3) near end of interpleader form and near middle and end of order form after "day of....." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

Applicability: Section 6, Ch. 326, L. 1991, provided: "[Sections 2 and 4] [25-31-119 and 25-35-508] apply to actions arising on or after October 1, 1991."

Part 2
Venue

Part Law Review Articles

The Montana Justices' Courts—According to the Law, Mason & Kimball, 23 Mont. L. Rev. 62 (1961).

25-31-205. Actions for forcible entry or unlawful detainer.

Collateral References

Justices of the Peace *key* 72.

51 C.J.S. Justices of the Peace §61.

77 Am. Jur. 2d Venue §18.

Part 4
Commencement of Action — Summons

25-31-402. Security for costs.

Compiler's Comments

1991 Amendment: Deleted former (1) that read: "(1) The court must endorse on the complaint the date upon which it was filed, and at any time within 1 year thereafter the plaintiff may have summons issued"; and made minor change in style.

Collateral References

Costs *key* 105, et seq.; Justices of the Peace *key* 80.

20 C.J.S. Costs §§59 through 86; 51 C.J.S. Justices of the Peace §66, et seq.
47 Am. Jur. 2d Justices of the Peace §51.

25-31-405. Designating unknown person as defendant.

Collateral References

Justices of the Peace *key* 77, 80(2), 83(2), 90.
51 C.J.S. Justices of the Peace §§65, 68, 71, 72, 80, 83.

25-31-406. Time for answer or appearance.

Compiler's Comments

1991 Amendment: In (2) substituted "20 days" for "6 days"; and made minor changes in style.

Case Notes

Time of Service of Summons: Where service of summons was made less than the 4 days formerly required by this section before time for appearance, the Justice did not acquire jurisdiction over the person of defendant, and a judgment entered upon such service was void. State ex rel. Duffy v. Justice of Peace Court, 69 M 450, 222 P 1055 (1924).

Part 5
Pleadings

Part Law Review Articles

The Montana Justices' Courts—According to the Law, Mason & Kimball, 23 Mont. L. Rev. 62 (1961).

Part 6
Parties

25-31-601. Who may act as attorney.

Case Notes

Denial of Lay Counsel in City Court — Any Prejudice Cured by Trial De Novo on Appeal: Henry was charged with driving under the influence and was tried in City Court. The City Court refused to permit a family friend to represent Henry in the trial. Henry then appealed to the District Court for a trial de novo in which Henry was represented by counsel. The Supreme Court refused to address the merits of Henry's claim of violation of the right to counsel. The trial de novo on appeal to the District Court cured any prejudice that may have resulted from the City Court's decision regarding representation. St. v. Henry, 271 M 491, 898 P2d 1195, 52 St. Rep. 516 (1995).

Limitation on Lay Representation in Courts of Limited Jurisdiction: Petitioners sought a declaration by the Supreme Court that under 37-61-210 and this section, nonattorneys have the right to represent clients in Montana courts of limited jurisdiction on a regular and recurring basis. After accepting original jurisdiction of the petition, the Supreme Court held that only practice before courts of limited jurisdiction as is specifically authorized by statute or court rule may be undertaken by lay people. This representation does not extend to criminal proceedings in any court or to representation in any jurisdiction on a regular and recurring basis. This section provides for a one-time only grant of the privilege in Justice Court civil cases to enable a friend or relative to assist and speak on behalf of a party at one proceeding. Recurring representation constitutes the unauthorized practice of law. Sparks v. Johnson, 252 M 39, 826 P2d 928, 49 St. Rep. 124 (1992).

Corporations Not "Person": The word "person" as used in this section does not include a corporation. State ex rel. Freebourn v. Merchants' Credit Serv., Inc., 104 M 76, 66 P2d 337 (1937).

Fee for Appearance of Unlicensed Person: The allowance of an attorney's fee by any court is unlawful in an action where the party to whom allowed is represented by one other than a duly licensed attorney; demand for such allowance by one not an attorney in a Justice's Court amounts to an unlawful practice of law. State ex rel. Freebourn v. Merchants' Credit Serv., Inc., 104 M 76, 66 P2d 337 (1937).

Collateral References

Justices of the Peace *key* 84.
51 C.J.S. Justices of the Peace §73, et seq.

25-31-602. When guardian necessary — how appointed.

Compiler's Comments

1997 Amendment: Chapter 490 in introductory clause and in (1), in introductory clause, near beginning after "minor", deleted "or seriously mentally ill or" and after "incompetent person" inserted "or person who has been committed pursuant to 53-21-127"; in (1)(b), after "old", deleted "or a seriously mentally ill or" and after "incompetent person" inserted "or person who has been committed pursuant to 53-21-127"; in (2), in introductory clause after "minor", deleted "or seriously mentally ill or" and after "incompetent person" inserted "or person who has been committed pursuant to 53-21-127"; in (2)(b), after "old", deleted "or a seriously mentally ill or" and after "incompetent person" inserted "or person who has been committed pursuant to 53-21-127"; and made minor changes in style. Amendment effective July 1, 1997.

Saving Clause: Section 40, Ch. 490, L. 1997, was a saving clause.

1981 Amendment: Substituted "minor or seriously mentally ill" for "infant, insane" in the first sentence, (1), and (2); in (1)(a) substituted "in the case of a minor who is 14 or more years old, upon the application of the minor" for "upon application of the infant, if he be of the age of 14 years"; in (1)(b) substituted "in the case of a minor who is less then 14 years old or a seriously mentally ill or incompetent person" for "if under that age or if insane or incompetent"; inserted (1)(c) allowing appointment on motion of Justice; in (2)(a) substituted "in the case of a minor who is 14 or more years old and who applies before the summons is returned or at the time of the return, upon the application of the minor" for "upon the application of the infant, if he be of the age of 14 years and apply at the time or before the summons is returned"; in (2)(b) substituted "in the case of a minor who is less than 14 years old or a seriously mentally ill or incompetent person, upon the application of a relative or friend or any other party to the action" for "if he be under the age of 14 years or be insane or incompetent or neglect so to apply, then upon the application of a relative or friend or any other party to the action, or by the justice, on his own motion"; inserted (2)(c) allowing appointment on motion of Justice; and made minor changes in grammar, punctuation, and phraseology.

Collateral References

Infants *key* 78 through 80, et seq.; Insane Persons *key* 94.

43 C.J.S. Infants §321, et seq.; 56 C.J.S. Mental Health §266.

Protection of one who is mentally incompetent, but not so adjudicated, and who sues in his own name, by appointment of guardian ad litem or special guardian. 71 ALR 2d 1260.

Part 7
Time of Trial — Postponements

Part Case Notes

Client Bound by Attorney's Waiver of Right to Speedy Trial — Purpose of Statute: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that he, the defendant, was not bound by his attorney's waiver. Defendant asserted that 37-61-401 makes the waiver binding only if it was entered with the defendant's knowledge or upon the record in open court. Citing Bush v. Baker, 46 M 535, 129 P 550 (1913), the Supreme Court ruled that 37-61-401 has been applied only as to agreements between attorneys and that the purpose of that section is to relieve the presiding judge of the burden of determining disputes between attorneys concerning their unexecuted agreements. The Supreme Court stated that it would not apply 37-61-401 literally as to agreements between an attorney and the court; to do so would lead to absurd consequences and greatly retard the business of the courts. The Supreme Court held that the defendant was thus bound by his counsel's waiver. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Speedy Trial Clock to Start With Date of De Novo Appeal From Justice's Court to District Court: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that his right to a speedy trial was violated because the clock should have started with the date of his arrest, not the date of appeal to District Court. Citing St. v. Sanders, 163 M 209, 516 P2d 372 (1973), the Supreme Court noted that it had adopted Standard 12-2.2(c) of the American Bar Association Standards for Criminal Justice. The standard provides that in cases of appeal or an order for a new trial, the time for trial should begin running with the order granting the new trial or, in this case, the date of appeal to District Court. The Supreme Court determined not to abandon that standard and therefore held that defendant's trial was within the 6-month limitation of 46-13-401. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Speedy Trial Not Denied by Application of Six-Month Speedy Trial Limitation to De Novo Appeal From Justice's Court to District Court: After defendant's attorney orally waived defendant's rights to a speedy trial in Justice's Court, defendant argued in his trial de novo appeal to District Court that his right to a speedy trial was violated because it is prejudicial to apply the speedy trial standards of 46-13-401 to an appeal from Justice's Court to District Court. The Supreme Court held that the argument was without merit because the 6-month limit was met in this case, both in the time for trial in Justice's Court and in the time for trial de novo in District Court. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Uncertain Testimony of Defense Counsel Insufficient to Disprove Oral Waiver of Right to Speedy Trial: At the time scheduled for defendant's trial in Justice's Court on a DUI charge, the Justice of the Peace called defense counsel into his chambers and informed him that a different date for trial was necessary because of another trial then in progress. The Justice of the Peace then issued a written order reciting the fact that an oral motion for a continuance was made by defense counsel, along with an oral waiver of defendant's right to a speedy trial. Trial was then set for a date beyond the 6-month limitation provided for in 46-13-401. In a de novo appeal to District Court, defendant raised the issue of his right to a speedy trial, and defense counsel testified he could not remember whether he made an oral motion for continuance and a waiver. The Supreme Court found that the Justice's Court's order was presumed correct under 26-1-602(17) and that the testimony of defense counsel did not demonstrate that the order was in error in reciting the waiver. St. v. Nelson, 251 M 139, 822 P2d 1086, 48 St. Rep. 1129 (1991).

Part Law Review Articles

Montana Justices' Courts—According to the Law, Mason & Kimball, 23 Mont. L. Rev. 62 (1961).

25-31-702. Trial to be timely.

Compiler's Comments

1991 Amendment: Near middle substituted "Rule 20, Montana Justice and City Court Rules of Civil Procedure" for "25-31-701"; and made minor changes in style.

Collateral References

Justices of the Peace *key* 107, 109.
51 C.J.S. Justices of the Peace §96, et seq.
47 Am. Jur. 2d Justices of the Peace §58.

25-31-703. Postponement by motion of court.

Compiler's Comments

1985 Amendment: Near middle after "trial", substituted "for not exceeding 4 months for good cause" for former (1), (2), and (3) that read: "(1) for not exceeding 1 day if, at the time fixed by law or by an order of the court for the trial, the court is engaged in the trial of another action;
(2) for not exceeding 2 days if, by an amendment of the pleadings or the allowance of time to make such amendment or to plead, a postponement is rendered necessary;
(3) for not exceeding 3 days if the trial is upon issues of fact and a jury has been demanded".

Case Notes

Justice Hearing Another Case: The Justice has the power to postpone a case when he is hearing another one at the time set for hearing. State ex rel. Beadle v. Smith, 42 M 492, 113 P 294 (1911).

Docket Entry of Adjournment Required: While it appears that a Justice of the Peace may, with the consent of the parties, take a case under advisement, the adjournment of the trial, so brought about by stipulation, must be to a time and place appointed for that purpose and an order to that effect entered upon his docket. State ex rel. Collier v. Houston, 36 M 178, 92 P 476 (1907), distinguished in In re Graye, 36 M 394, 93 P 266 (1907).

25-31-705. Postponement upon application of a party — proof required.

Case Notes

Improper Continuance — Judgment Void: Where a Justice of the Peace continued a cause upon the oral application of plaintiff, made out of court without a showing such as required by this section, and refused to dispose of the cause at the time originally set for hearing, he lost jurisdiction and a judgment entered by him, after hearing testimony in support of the complaint at the time to which the cause had been continued, was void. State ex rel. Akin v. Williams, 50 M 582, 148 P 333 (1915).

25-31-709. Time limit on adjournment — undertaking.

Compiler's Comments

1981 Amendment: Substituted "No adjournment . . . applying files" for "No adjournment must, unless by consent, be granted for a period longer than 10 days upon the application of either party except upon condition that such party file".

Collateral References

Justices of the Peace *key* 107.

51 C.J.S. Justices of the Peace §96.

25-31-710. Pretrial conferences or hearings — appearance by telephone conference.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Part 8
Trial

Part Law Review Articles

Montana Justices' Courts—According to the Law, Mason & Kimball, 23 Mont. L. Rev. 62 (1961).

25-31-802. When issues of fact arise.

Compiler's Comments

1981 Amendment: In (2) substituted "whenever the answer contains new matter which raises questions of fact and not merely an issue of law" for "upon new matter in the answer, except an issue of law is joined thereon"; made minor changes in phraseology.

25-31-803. By whom issues tried.

Law Review Articles

Jury Trial in Civil Cases, Clark, 10 Mont. L. Rev. 38 (1949).

Collateral References

Justices of the Peace *key* 95, 111, 115.

51 C.J.S. Justices of the Peace §§99 through 101.

Part 9
Judgment

Part Law Review Articles

Statutory and Common Law Presumptions in Montana, Clarke, 37 Mont. L. Rev. 91 (1976).

25-31-906. Judgment when amount found due exceeds the jurisdiction of the court.

Case Notes

Demand as Basis for Jurisdiction: This section recognizes the principle that in an action for the recovery of a fine, penalty, or forfeiture given by statute or ordinance, where the amount in controversy does not exceed $300, the jurisdiction of the Justice's Court is not dependent upon the amount which the plaintiff might recover but upon the amount which he demands. Reynolds v. Smith, 48 M 149, 135 P 1190 (1913).

25-31-914. Lien on real property.

Compiler's Comments

2001 Amendment: Chapter 515 in third sentence after "continues for" substituted "10 years" for "6 years"; and made minor changes in style. Amendment effective October 1, 2001.

1991 Amendment: Near beginning of first sentence, after "creates", substituted "a" for "no" and after "defendant" substituted "upon the filing of a transcript of the original docket, certified by the clerk of the justice's court, with" for "unless such abstract is filed as aforesaid in".

Applicability: Section 5, Ch. 285, L. 1991, provided: "[This act] applies to proceedings begun after October 1, 1991."

Case Notes

Duration of Lien: It is clear from the provisions of this section and 25-31-1101 (now repealed) that the lien of the judgment continues for the period of 6 years from the date of the judgment and not from the date of the filing and docketing. (See 2001 amendment.) Pierson v. Daly, 49 M 478, 143 P 957 (1914).

Attorney General's Opinions

Filing Abstracts of Judgment in Another County: An abstract of a Justice's Court judgment may be filed in the office of the Clerk of any District Court. Alternatively, the abstract may be filed and docketed in the county in which the judgment was rendered and may then be issued and filed with the District Court Clerk of another county pursuant to 25-9-302. Under either procedure, the Justice's Court judgment then becomes a lien on any real property owned by the judgment debtor in the county in which the abstract is filed. 37 A.G. Op. 24 (1977).

Collateral References

Justices of the Peace *key* 131.

51 C.J.S. Justices of the Peace §118.

Issuance or levy of execution as extending period of judgment lien. 77 ALR 2d 1064.

Part 11
Execution of Judgment

Part Law Review Articles

Montana Justices' Courts—According to the Law, Mason & Kimball, 23 Mont. L. Rev. 62 (1961).

CHAPTER 33
APPEAL TO DISTRICT COURT FROM JUSTICES' AND CITY COURTS

Chapter Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

Montana Justices' Courts—According to the Law, Mason & Kimball, 23 Mont. L. Rev. 62 (1961).

Part 1
Filing the Appeal

25-33-101. Exclusive method of review.

Advisory Committee Notes

Subdivisions (c), (d), (e) of Rule 41, M.R.App.P. amend this section, and sections 93-8002[, R.C.M. 1947; 25-12-102 and 25-33-101(part), MCA,] and 93-8013[, R.C.M. 1947; 25-33-205(2) and 25-33-206, MCA,] which contain references to appeals from justices' courts to district courts, so as to preserve the existing procedure applicable to such appeals.

Case Notes

Dismissal of Appeal From City Court to District Court — No Final Judgment: Appellant sought to appeal from City Court to District Court a decision made at a show cause hearing regarding forfeiture of bail bonds. However, because no order or final judgment issued out of the hearing, there was no right of appeal from that hearing. Helena v. Buck, 247 M 313, 806 P2d 27, 48 St. Rep. 213 (1991).

Rendition of Judgment as Commencement of Time for Appeal From Justice's to District Court: Section 25-33-102 and this section, rather than Rule 6(e), M.R.Civ.P. (Title 25, ch. 20), or a former rule of the Justice's Court, exclusively govern the time for filing a notice of appeal from Justice's Court to District Court. The time for appeal commences with rendition of the judgment of the Justice's Court and runs for 30 days, as provided in 25-33-102. Grimes Motors, Inc. v. Nascimento, 244 M 147, 796 P2d 576, 47 St. Rep. 1536 (1990).

Party Aggrieved: Appellant was permitted to present his counterclaim in Justice's Court and prevailed. He then moved to file the counterclaim in District Court. The District Court denied the motion and dismissed the action. The Supreme Court affirmed the District Court on appeal. Having prevailed on his counterclaim in Justice's Court, appellant was not a "party aggrieved" entitled to appeal to District Court. Mont. Agri-Chem., Inc. v. Jacobson, 225 M 119, 731 P2d 910, 44 St. Rep. 87 (1987).

Justice's Court Appeals: The Supreme Court does not have jurisdiction to review directly the judgments or orders of the Justices' Courts of this state. State ex rel. Estes v. Justice Court, 129 M 136, 284 P2d 249 (1955).

Jurisdictional Limitations: This statute is both prohibitory and jurisdictional, and it prohibits an appeal after expiration of the time prescribed by this chapter. McVay v. McVay, 128 M 31, 270 P2d 393 (1954).

Judgment or Order Required: The right of appeal is purely statutory and is not available for review of findings and conclusions of law in a condemnation case where there has been no order. Sheridan County Elec. Co-op v. Anhalt, 127 M 71, 257 P2d 889 (1953).

Collateral References

Appeal and Error *key* 1 through 16, 136, et seq., 151, 335.

4 C.J.S. Appeal and Error §§154, 157, 184.

Attorney's right to institute or maintain appeal where client refuses to do so. 91 ALR 2d 618.

Right of winning party to appeal from judgment granting him full relief sought. 69 ALR 2d 701.

Parties entitled to appeal from an order on application for removal of personal representative, guardian, or trustee. 37 ALR 2d 751.

Appeal by applicant for intervention from final judgment in the cause. 15 ALR 2d 368.

Right of express trustee to appeal from order or decree not affecting own personal interest. 6 ALR 2d 147.

25-33-102. Time for appeal.

Case Notes

Trial De Novo Allowed in District Court Despite Failure to Request Jury Trial in Justice's Court — No Waiver of Right to Jury Trial: The District Court erred in determining that under 25-33-301, a waiver of the right to a jury trial in Justice's Court waives the right to a jury trial de novo on appeal in District Court. The court disregarded the interplay of Rule 3, M.R.Civ.P. (Title 25, ch. 20), with Rule 38, M.R.Civ.P.(Title 25, ch. 20), and 25-33-301 in attempting to harmonize the statute and the rules. The language in 25-33-301, limiting appeals from Justice's Court to the pleadings filed in Justice's Court, does not limit jury trial demands in appeals from Justice's Court because jury trial demands are not pleadings. The plain meaning of Rule 81(b), M.R.Civ.P. (Title 25, ch. 20), requires that Rules 3 and 38 be given meanings that are consistent with 25-33-301 and the right to trial by jury. Thus, when a party makes a jury trial demand under Rule 38 for a trial de novo on appeal in District Court, the action commences when the party serves and files notice of appeal pursuant to 25-33-103 and this section. In appeals from Justice's Court, jury trial demands must be made within 10 days of the filing of notice of appeal. Further, participation in a bench trial in District Court without objection does not constitute waiver of the right to a jury trial so long as a timely jury trial demand is made in District Court. Balyeat Law, P.C. v. Harrison, 1999 MT 144, 295 M 13, 983 P2d 902, 56 St. Rep. 566 (1999), following U.S. v. Calif. Mobile Home Park Management Co., 107 F3d 1374 (9th Cir. 1997), and Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998).

Time of Filing Appeal Running From Date of Rendition of Judgment: Under this section, the time for filing an appeal does not run from the date of service of a notice of the judgment. It runs from the date of rendition of the judgment. Rule 6, M.J.C.C.R.Civ.P. (Title 25, ch. 23), does not extend the time allowed by statute when that time begins to run upon rendition of judgment instead of upon service of a notice or other paper. NW. Collectors, Inc. v. Vanorio, 1998 MT 80, 288 M 225, 956 P2d 1375, 55 St. Rep. 342 (1998). See also Grimes Motors, Inc. v. Nascimento, 244 M 147, 796 P2d 576 (1990).

Dismissal for Failure to File Undertaking on Appeal — No Thirty-Day Filing Requirement — Goldsmith Overruled: On January 23, 1996, the Gallatin County Justice's Court rendered a decision against ISC Distributors (ISC) in favor of Dime Insurance Agency (Dime). On February 1, 1996, ISC filed a notice of appeal in Justice's Court. On March 7, ISC deposited its undertaking on appeal with the Clerk of the District Court. When Dime moved to dismiss, the District Court granted the motion, holding on the basis of Goldsmith v. Lane, 226 M 341, 735 P2d 306 (1987), that the undertaking must be filed within the statutorily prescribed time provided for taking the appeal. The Supreme Court reversed, overruling Goldsmith and holding that as long as an aggrieved party takes an appeal within 30 days from the Justice's Court's judgment and as long as the undertaking is filed before the hearing on the motion to dismiss for failure to file an undertaking, the District Court has jurisdiction to hear the appeal. Dime Ins. Agency v. Scott Johnson/ISC Distrib., 279 M 121, 926 P2d 733, 53 St. Rep. 1078 (1996).

Dismissal of Appeal From City Court to District Court — No Final Judgment: Appellant sought to appeal from City Court to District Court a decision made at a show cause hearing regarding forfeiture of bail bonds. However, because no order or final judgment issued out of the hearing, there was no right of appeal from that hearing. Helena v. Buck, 247 M 313, 806 P2d 27, 48 St. Rep. 213 (1991).

Rendition of Judgment as Commencement of Time for Appeal From Justice's to District Court: Sections 25-33-101 and this section, rather than Rule 6(e), M.R.Civ.P. (Title 25, ch. 20), or a

former rule of the Justice's Court, exclusively govern the time for filing a notice of appeal from Justice's Court to District Court. The time for appeal commences with rendition of the judgment of the Justice's Court and runs for 30 days, as provided in this section. Grimes Motors, Inc. v. Nascimento, 244 M 147, 796 P2d 576, 47 St. Rep. 1536 (1990).

Motion to Set Aside Default Judgment — Time for Appeal Suspended: On a motion to set aside a default judgment in a Justice's Court, the judgment was suspended until the motion to set it aside was disposed of and the time for taking the appeal commenced to run from the date on which the motion was denied. Davis v. Bell Boy Gold Min. Co., 101 M 534, 54 P2d 563 (1936), overruling State ex rel. Cobban v. District Court, 30 M 93, 75 P 862 (1904).

Time for Appeal as Statute of Limitations: The provisions of this section are a Statute of Limitations and unless the appeal is taken within the time prescribed, the appellate court acquires no jurisdiction and the appeal must be dismissed. Davis v. Bell Boy Gold Min. Co., 101 M 534, 54 P2d 563 (1936).

Levy of Execution Not Covered: Under this section and 25-33-301, an appeal lies to the District Court only from a judgment of a Justice's Court or from an order of the Justice setting aside or refusing to set aside a default judgment and not from an order setting aside a levy of execution. White v. Corbett, 101 M 1, 52 P2d 156 (1935).

Statute to Be Followed: Appeals are statutory, and the appellant must proceed as the statute requires, particularly with respect to appeals from such bodies as a Board of County Commissioners. Thien v. Wiltse, 49 M 189, 141 P 146 (1914); In re Searles, 46 M 322, 127 P 902 (1912).

Setting Aside Dismissal — Certiorari Improper: An appeal lies to the District Court, from a judgment of the Justice's Court, setting aside an order of dismissal; for this reason, such order cannot be reviewed on certiorari. State ex rel. Beadle v. Smith, 42 M 492, 113 P 294 (1911).

Statutory Basis for Appeal: Appeals from Justice of the Peace to District Courts are matters of statutory regulation, and the provisions of the law relative to the method to be pursued in taking such appeals must be strictly followed in order to divest the former of and invest the latter with jurisdiction. State ex rel. Hall v. District Court, 34 M 112, 85 P 872 (1906).

Scope of Review: Only such questions as were raised and presented in the Justice's Court can be tried on appeal in the District Court. Clark v. Great N. Ry., 30 M 458, 76 P 1003 (1904).

Failure to Perfect Appeal: Where it appears that appellant, without any excuse for his delay, did not demand the transcript until 29 days after judgment with the result that the transcript was not filed with the District Court until 32 days after judgment and 31 days after notice of the appeal, an order dismissing the appeal was properly granted and was not an abuse of discretion. Meyers v. Gregans, 20 M 450, 52 P 83 (1898), distinguished in Bush v. Baker, 46 M 535, 129 P 550 (1913).

Attorney General's Opinions

Court Reporter Filing Fee — Clerk of District Court to Collect Fee in Appeal From Justice's Court or City Court — Appeal Is "Civil Action" Under Statutes: The Attorney General was asked whether a Clerk of District Court must collect the $20 filing fee, required by 25-1-202 and used to help pay the salary of the court reporter, in appeals filed in District Court from judgments of a Justice's or City Court. The Attorney General concluded that: (1) a private legal action in a Justice's or City Court is a civil action; (2) an appeal from a Justice's or City Court may include appeal of a civil action; (3) an appeal from either of those courts results in most cases in a new trial in District Court and that the need for a court reporter in that instance is obvious; and (4) the payment of the additional $20 filing fee required by 25-1-202 is mandatory. 48 A.G. Op. 1 (1999).

Collateral References

Courts *key* 185, et seq.; Justices of the Peace *key* 139 through 181.

51 C.J.S. Justices of the Peace §126, et seq.

47 Am. Jur. 2d Justices of the Peace §§88, 89.

25-33-103. How appeal taken.

Case Notes

Dismissal for Failure to File Undertaking on Appeal — No Thirty-Day Filing Requirement — Goldsmith Overruled: On January 23, 1996, the Gallatin County Justice's Court rendered a decision against ISC Distributors (ISC) in favor of Dime Insurance Agency (Dime). On February 1, 1996, ISC filed a notice of appeal in Justice's Court. On March 7, ISC deposited its undertaking on appeal with the Clerk of the District Court. When Dime moved to dismiss, the District Court granted the motion, holding on the basis of Goldsmith v. Lane, 226 M 341, 735 P2d 306 (1987), that the undertaking must be filed within the statutorily prescribed time provided for taking the

appeal. The Supreme Court reversed, overruling Goldsmith and holding that as long as an aggrieved party takes an appeal within 30 days from the Justice's Court's judgment and as long as the undertaking is filed before the hearing on the motion to dismiss for failure to file an undertaking, the District Court has jurisdiction to hear the appeal. Dime Ins. Agency v. Scott Johnson/ISC Distrib., 279 M 121, 926 P2d 733, 53 St. Rep. 1078 (1996).

Proof of Service Not Required: Under this section an appeal from a Justice's Court to the District Court is perfected by service of the notice of appeal upon the adverse party or his attorney and the filing thereof with the Justice, proof of service not being made a jurisdictional requirement; therefore dismissal of such an appeal because the record did not show that service had been made upon the adverse party was error. Farmers' & Miners' St. Bank v. Probst, 76 M 284, 246 P 249 (1926).

Order of Service and Filing: The appeal from a Justice's Court to the District Court is taken by serving a copy of the notice of appeal on the adverse party or his attorney and by filing the original notice of appeal with the Justice or Judge. The order in which these acts are done is not important. State ex rel. Hackshaw v. District Court, 48 M 477, 138 P 1100 (1914).

Description of Judgment Appealed From: The notice of appeal must describe the particular judgment or order appealed from by reference to the court that rendered it, to the parties litigant, and to the date and amount or character of the judgment, in terms sufficiently specific to identify it, without resort to extrinsic evidence. State ex rel. Rosenstein v. District Court, 41 M 100, 108 P 580 (1910), distinguished in Krause v. Ins. Co. of N. Am., 73 M 169, 235 P 406 (1925). See also Valadon v. Lohman, 46 M 144, 127 P 88 (1912); Stephens v. Conley, 48 M 352, 138 P 189 (1914).

Purpose and Contents of Notice of Appeal: The notice of appeal has a purpose to fulfill. It performs the office of a summons; and, if it fails to inform the adverse party of what he is to meet, as where the date of the judgment is not given so that the judgment can be identified, the notice of appeal is insufficient to give the District Court jurisdiction. State ex rel. Rosenstein v. District Court, 41 M 100, 108 P 580 (1910), distinguished in Krause v. Ins. Co. of N. Am., 73 M 169, 235 P 406 (1925). See also Valadon v. Lohman, 46 M 144, 127 P 88 (1912); Stephens v. Conley, 48 M 352, 138 P 189 (1914).

"Adverse Party" Defined: An adverse party is one who has an interest in opposing the object sought to be accomplished by the appeal; but it does not follow that one who is neither a necessary nor a proper party to the action must be considered adverse merely because he appears as such upon the record. Anderson v. Red Metal Min. Co., 36 M 312, 93 P 44 (1907).

Assignor Not Adverse Party: Where in an action before a Justice of the Peace brought by an assignee on an account, the debtor interpleaded the assignor, who admitted the assignment and disclaimed any interest in the subject matter of the controversy, the latter was not an adverse party, within the meaning of this section, upon whom it was necessary to serve notice of an appeal to the District Court. Anderson v. Red Metal Min. Co., 36 M 312, 93 P 44 (1907). See also Mettler v. Adamson, 38 M 198, 99 P 441 (1909).

Presumption of Service of Notice: In the absence of any showing to the contrary, it is to be presumed that a notice filed with the Justice was properly served. Morin v. Wells, 30 M 76, 75 P 688 (1904).

Collateral References

Courts *key* 185, et seq.; Justices of the Peace *key* 139 through 181.

51 C.J.S. Justices of the Peace §149, et seq.

47 Am. Jur. 2d Justices of the Peace §88, et seq.

25-33-104. Papers to be transmitted.

Compiler's Comments

1991 Amendment: Near beginning after "undertaking", substituted "when required by" for "as required in".

1981 Amendment: Substituted "Upon the filing of the notice of appeal and the undertaking" for "Upon receiving the notice of appeal and filing an undertaking"; deleted "filed" before ";".

Case Notes

Compelling Preparation of Transcript: One who appeals from a Justice's to the District Court and has paid the Justice his fee for transmitting the transcript of the cause to the District Court may, if without fault himself, upon failure of the Justice so to do within 10 days after perfection of the appeal, compel the performance of such duty, and in a flagrant case, the court may impose a fine for dereliction on the part of the Justice. Bush v. Baker, 46 M 535, 129 P 550 (1913).

Delay in Filing of Transcript — Penalty: Prompt action is required of the appellant insofar as he is responsible for the filing of the papers. He is subject to the penalty of having his appeal dismissed if, without excuse, he is guilty of laches. He cannot hold the appeal in abeyance and

prevent the adverse party from bringing the case to a hearing in the District Court. Bush v. Baker, 46 M 535, 129 P 550 (1913).

Fees of Justice to Be Tendered: A Justice of the Peace is not obliged to make out papers on appeal until his fees have been paid or tendered. Meyers v. Gregans, 20 M 450, 52 P 83 (1898).

Part 2
Undertaking on Appeal — Stay of Execution

25-33-201. Undertaking on appeal.

Compiler's Comments

1991 Amendment: At beginning of (1), (2), and (3) inserted exception clause; and inserted (4) requiring waiver in case of indigency.

1981 Amendment: Inserted "or judge" after "justice" near the end of (3)(b).

Case Notes

Statutory Requirement for at Least Two Sureties for Filing Valid Undertaking Not Met When One of Two Sureties Is Person Acting as Own Surety: Following a Justice's Court award of attorney fees and costs against Miller in a lease action, Miller filed an appeal and an undertaking in District Court. Under this section, two or more sureties are required to validate an undertaking. As defined in 28-11-401, a surety is one who becomes responsible for performance by another or hypothecates property as security for another; so by definition, a person may not act as surety for oneself. The undertaking in this case listed only Miller and another person as sureties. Therefore, the undertaking did not meet the requirement for two or more sureties and was deficient. The District Court did not have jurisdiction to consider the appeal because the undertaking was invalid, and the appeal was properly dismissed. Miller's contention that the provisions of 25-33-205 worked as an alternative to filing the undertaking on appeal also failed because there was no money that could be considered as a deposit filed within 10 days after notice of appeal. Red Lodging v. Miller, 2001 MT 135, 305 M 477, 29 P3d 477 (2001). See also Adams v. Crismore, 211 M 245, 683 P2d 497 (1984).

Perfection of Appeal From Small Claims Court — No Requirement to File Undertaking or Pay Transfer Fee: Petersen cited 25-35-807 and this section in arguing that the appeal from Small Claims Court filed by Aladdin Steel Products, Inc. (Aladdin), was deficient for failing to file an undertaking. However, this section applies to appeals from Justice's Court and City Court, and 25-35-807 concerns proceedings to enforce or collect a judgment and is not relevant to perfecting an appeal from Small Claims Court. There is in fact no statutory requirement to file an undertaking on appeal from Small Claims Court, and Aladdin's appeal was not deficient for failing to do so. Further, although the transfer fee required under 25-1-201(1)(k) does apply to appeals from Small Claims Court, payment of the fee is not a prerequisite to perfecting an appeal. It is the duty of the Clerk of the District Court to collect the fee, and that duty is unrelated to the duty of the appealing party to perfect an appeal under 25-35-804. Thus, an appeal from Small Claims Court to District Court is properly perfected upon filing a notice of appeal under 25-35-804 and requesting that the Small Claims Court transmit the record to the District Court. Petersen v. Aladdin Steel Prod., Inc., 1999 MT 262, 296 M 394, 989 P2d 385, 56 St. Rep. 1061 (1999).

Dismissal for Failure to File Undertaking on Appeal — No Thirty-Day Filing Requirement — Goldsmith Overruled: On January 23, 1996, the Gallatin County Justice's Court rendered a decision against ISC Distributors (ISC) in favor of Dime Insurance Agency (Dime). On February 1, 1996, ISC filed a notice of appeal in Justice's Court. On March 7, ISC deposited its undertaking on appeal with the Clerk of the District Court. When Dime moved to dismiss, the District Court granted the motion, holding on the basis of Goldsmith v. Lane, 226 M 341, 735 P2d 306 (1987), that the undertaking must be filed within the statutorily prescribed time provided for taking the appeal. The Supreme Court reversed, overruling Goldsmith and holding that as long as an aggrieved party takes an appeal within 30 days from the Justice's Court's judgment and as long as the undertaking is filed before the hearing on the motion to dismiss for failure to file an undertaking, the District Court has jurisdiction to hear the appeal. Dime Ins. Agency v. Scott Johnson/ISC Distrib., 279 M 121, 926 P2d 733, 53 St. Rep. 1078 (1996).

Statutory Requirements for Filing Undertaking Not Met — Appeal Not Perfected: The District Court did not err in dismissing an appeal from a Justice's Court decision when appellant failed to comply with the statutory requirements for filing an undertaking. The undertaking was defective on its face, so the appeal was not perfected and the District Court therefore did not obtain jurisdiction over the action. Berry v. Seman, 245 M 335, 801 P2d 589, 47 St. Rep. 2169 (1990).

Undertaking Insufficient but Not Void — Appeal Preserved: The District Court dismissed an appeal from Justice's Court on the grounds that appellant's undertaking failed to meet the requirements of this section, because it was filed with only one surety, or 25-33-205, because the certificate of deposit filed with the Clerk of Court was not properly assigned and the amount was insufficient. On appeal to the Supreme Court, it was found that 25-33-205 controlled and that, although the deposit of money in lieu of the undertaking was $28.36 short, the undertaking was merely insufficient but was in substantial compliance with the statute. Therefore, the appeal from Justice's Court was improperly dismissed. The case was remanded pending deposit of the correct amount with the Clerk of Court. Franklin v. Swenson, 244 M 446, 798 P2d 122, 47 St. Rep. 1712 (1990).

No Determination of Indigency: The Supreme Court held that from the sparse record in front of it, the case should be remanded so that the lower court could determine if the appellants were indigent. The court stated that if indigency was found, the case would be governed by Merchants Ass'n v. Conger, 185 M 552, 606 P2d 125 (1979), which held that the requirement that the appellant post an undertaking in an amount equal to twice the judgment is unconstitutional when applied to indigents. Credit Associates, Inc. v. Harp, 243 M 281, 794 P2d 343, 47 St. Rep. 1222 (1990).

Until Undertaking Filed, No Question of Sufficiency: A void undertaking is the functional equivalent of no undertaking. The question of the sufficiency or insufficiency of an undertaking cannot arise until the undertaking has been filed. Goldsmith v. Lane, 226 M 341, 735 P2d 306, 44 St. Rep. 705 (1987), overruled on other grounds in Dime Ins. Agency v. Scott Johnson/ISC Distrib., 279 M 121, 926 P2d 733, 53 St. Rep. 1078 (1996).

Failure to Perfect Appeal — Appeal Dismissed: The defendant appealed a default judgment entered in Justice Court. Defendant filed an undertaking, but the undertaking was defective. Plaintiff filed a motion to dismiss the appeal for failure to perfect the appeal. Defendant had adequate time to cure the defect prior to the hearing on plaintiff's motion but failed to do so. Since defendant failed to cure the defect, the District Court lacked jurisdiction to hear the appeal and properly granted plaintiff's motion to dismiss the appeal. Adams v. Crismore, 211 M 245, 683 P2d 497, 41 St. Rep. 1338 (1984). See also Roche v. Sabo, 259 M 76, 853 P2d 1258, 50 St. Rep. 689 (1993), and Red Lodging v. Miller, 2001 MT 135, 305 M 477, 29 P3d 477 (2001).

Constitutionality of Double Undertaking Requirement: Section 25-33-201(1), as applied to the indigent appellant, violates her 14th amendment equal protection rights based on the traditional equal protection test. The classification established by the double undertaking requirement for an appeal to District Court is arbitrary and rests on grounds wholly irrelevant to the achievement of the state's objectives in enactment of this provision. Merchants Ass'n v. Conger, 185 M 552, 606 P2d 125 (1979).

Contents of Undertaking: On appeal from a money judgment from a Justice's to the District Court, the appellant must file an undertaking agreeing to pay the amount of the judgment appealed from together with all the costs if the appeal be withdrawn or dismissed or the amount of any judgment and all costs that may be recovered against him in the District Court. State ex rel. Gregory v. District Court, 86 M 396, 284 P 537 (1930).

Real Property Actions: On appeal from a judgment directing the delivery of possession of real property, the undertaking on appeal must be conditioned that the appellant will pay any judgment and costs that may be recovered against him in the District Court, not exceeding a sum to be fixed by the Justice, and specified in the undertaking; and where a stay is desired the undertaking must set forth that during the possession of the property by appellant he will not commit or suffer to be committed any waste thereon, and that if the appeal be dismissed or withdrawn or the judgment affirmed or judgment recovered against him in the District Court, he will pay the value of the use and occupation of the property for the time of the appeal until the delivery of possession thereof. State ex rel. Gregory v. District Court, 86 M 396, 284 P 537 (1930).

District Court Costs Taxed by District Court: This section impliedly authorized the District Court to tax against the unsuccessful party in that court the costs incurred in the trial of the cause in the Justice's Court, where they were included in the cost bill, although the Justice of the Peace had failed to make entry of costs on his docket. Duckett v. Biggs, 57 M 443, 188 P 938 (1920).

Stages of Appeal: An appeal from a Justice's Court presents three defined stages. First, the taking of the appeal, which occurs when notice of the proper character is properly filed and served; second, the perfecting of the appeal or rendering it effectual, which occurs upon the filing of the undertaking; third, the hearing, which occurs when the trial de novo is had in the District Court. Thien v. Wiltse, 49 M 189, 141 P 146 (1914).

Taking and Perfection of Appeal Distinguished: There is a clear distinction between the taking and the perfecting of an appeal. An appeal is taken when a notice of appeal is served and filed. The filing of an undertaking perfects the appeal, but it is not a part of the taking in the statutory sense. Thien v. Wiltse, 49 M 189, 141 P 146 (1914).

Requirements for Effective Appeal: To make an appeal from a Justice's Court effective, a notice of appeal, as provided in 25-33-103, as well as an undertaking, provided for in this section, must be filed with the Justice; and, within 10 days after receiving the notice and the undertaking, the Justice must, as required by 25-32-104 (now repealed), transmit all the papers to the Clerk of the District Court. State ex rel. Hackshaw v. District Court, 48 M 477, 138 P 1100 (1914).

Conditions in Undertaking — Surplusage: An undertaking on appeal to the District Court which meets all the requirements of this section relative to amount and conditions is not rendered invalid by the insertion of additional conditions not in anywise affecting the liability of the sureties under the statute. Marlowe v. Mich. Stove Co., 48 M 342, 137 P 539 (1913).

Notice Ineffectual Without Undertaking: The appeal is taken by filing and serving the notice of appeal, but it is ineffectual for any purpose unless the required undertaking is filed. State ex rel. Rosenstein v. District Court, 41 M 100, 108 P 580 (1910).

Statute Controlling — Dismissal Required: Unless an appeal from a Justice's Court is taken within the time and effectuated in accordance with the regulations prescribed by law, the District Court has no jurisdiction of the appeal except to dismiss it. State ex rel. Cobban v. District Court, 30 M 93, 75 P 862 (1904).

25-33-203. Justification of sureties.

Case Notes

Type of Notice Required: This section not specifying the character of notice, whether written or oral, that must be given by appellant to the adverse party as to when and where the sureties on the undertaking on appeal will justify, 3 days' oral notice given by appellant's counsel to counsel for adverse party was sufficient. State ex rel. Strunk v. District Court, 113 M 58, 120 P2d 831 (1942).

Waiver of Irregularities as to Sureties: Where counsel for the successful party to an action in a Justice's Court had orally agreed that, owing to illness of opposing counsel, justification of the sureties on an undertaking on appeal to the District Court should be deemed sufficient, even though not made strictly within the time prescribed by this section, and where, after the sureties had been examined and the undertaking approved, no objection was offered, he will be held to have waived any irregularity in this respect. Bush v. Baker, 46 M 535, 129 P 550 (1913).

Waiver of Sureties: The right to require sureties on an undertaking on appeal from a Justice's to the District Court to justify is personal to the exceptant and may therefore be waived by him. Bush v. Baker, 46 M 535, 129 P 550 (1913).

Exceptions to Sureties — Waiver: An exception to the sureties does not divest the jurisdiction of the District Court of the appeal; the requirement of the statute concerning the justification of the sureties is directory, for appellee's benefit, and he may waive his privilege of excepting to the sureties or may except to the sureties and afterward withdraw such exception; the statute is mandatory only where the appellee insists that the sureties justify within 5 days. Morin v. Wells, 30 M 76, 75 P 688 (1904).

Extension of Time by Stipulation: Where appellee excepted to the sufficiency of the sureties and they failed to justify within the statutory period, counsel for the parties had the right to stipulate for an extension of time within which the sureties might justify or a new undertaking be furnished. Morin v. Wells, 30 M 76, 75 P 688 (1904).

Notice on Qualification of Sureties: The notice required to be given the adverse party is not notice of the filing of a new undertaking but notice of the time and place when and where the sureties will be examined touching their qualifications. State ex rel. Allen v. Napton, 24 M 450, 62 P 686 (1900).

Collateral References

Contempt by false justification by surety on appeal bond. 89 ALR 2d 1283.

Failure of sureties on appeal bond to justify after exception to their sufficiency, and consequent dismissal of appeal, as releasing them from liability. 96 ALR 1371.

25-33-205. Deposit of money in lieu of undertaking.

Compiler's Comments

1981 Amendment: Deleted former subsection (1) relating to deposit of money equivalent to undertaking; substituted "Whenever" for "In all cases where"; substituted "plus $300 . . . order of the court" for "and $300 in addition shall be equivalent to filing the undertaking".

Case Notes

Statutory Requirement for at Least Two Sureties for Filing Valid Undertaking Not Met When One of Two Sureties Is Person Acting as Own Surety: Following a Justice's Court award of attorney fees and costs against Miller in a lease action, Miller filed an appeal and an undertaking in District Court. Under 25-33-201, two or more sureties are required to validate an undertaking. As defined in 28-11-401, a surety is one who becomes responsible for performance by another or hypothecates property as security for another; so by definition, a person may not act as surety for oneself. The undertaking in this case listed only Miller and another person as sureties. Therefore, the undertaking did not meet the requirement for two or more sureties and was deficient. The District Court did not have jurisdiction to consider the appeal because the undertaking was invalid, and the appeal was properly dismissed. Miller's contention that the provisions of this section worked as an alternative to filing the undertaking on appeal also failed because there was no money that could be considered as a deposit filed within 10 days after notice of appeal. Red Lodging v. Miller, 2001 MT 135, 305 M 477, 29 P3d 477 (2001). See also Adams v. Crismore, 211 M 245, 683 P2d 497 (1984).

Undertaking Insufficient but Not Void — Appeal Preserved: The District Court dismissed an appeal from Justice's Court on the grounds that appellant's undertaking failed to meet the requirements of 25-33-201, because it was filed with only one surety, or this section, because the certificate of deposit filed with the Clerk of Court was not properly assigned and the amount was insufficient. On appeal to the Supreme Court, it was found that this section controlled and that, although the deposit of money in lieu of the undertaking was $28.36 short, the undertaking was merely insufficient but was in substantial compliance with the statute. Therefore, the appeal from Justice's Court was improperly dismissed. The case was remanded pending deposit of the correct amount with the Clerk of Court. Franklin v. Swenson, 244 M 446, 798 P2d 122, 47 St. Rep. 1712 (1990).

Deposit in Lieu of Undertaking: Section 25-31-115 has application to all undertakings other than those on appeal, and this section (prior to the 1981 amendment), so far as it permitted a deposit in lieu of cash in the amount of the judgment plus costs in the Justice's Court, is a special statute relating to undertakings on appeal and is controlling as to them; where appellant deposited with the Justice a cashier's check, treated by both parties as cash, it may not be required that the deposit cover costs incurred in the District Court. The statute secures respondent in the judgment he holds, including costs already incurred in the Justice's Court, without securing against costs in the District Court. Ross v. Greenwald, 112 M 324, 115 P2d 290 (1941).

Collateral References

Check or money as meeting requirement of appeal bond. 65 ALR 2d 1134.

25-33-206. Waiver of undertaking or deposit.

Case Notes

Waiver of Undertaking: The statute requiring a justification of sureties on a stay bond is directory and meant to be for respondent's, not appellant's, benefit and may be waived by respondent. State ex rel. Reins v. District Court, 22 M 449, 57 P 89 (1899). See also Morin v. Wells, 30 M 76, 75 P 688 (1904).

25-33-207. Defective undertaking.

Case Notes

Statutory Requirement for at Least Two Sureties for Filing Valid Undertaking Not Met When One of Two Sureties Is Person Acting as Own Surety: Following a Justice's Court award of attorney fees and costs against Miller in a lease action, Miller filed an appeal and an undertaking in District Court. Under 25-33-201, two or more sureties are required to validate an undertaking. As defined in 28-11-401, a surety is one who becomes responsible for performance by another or hypothecates property as security for another; so by definition, a person may not act as surety for oneself. The undertaking in this case listed only Miller and another person as sureties. Therefore, the undertaking did not meet the requirement for two or more sureties and was deficient. The District Court did not have jurisdiction to consider the appeal because the undertaking was invalid, and the appeal was properly dismissed. Miller's contention that the provisions of 25-33-205 worked as an alternative to filing the undertaking on appeal also failed because there was no money that could be considered as a deposit filed within 10 days after notice of appeal. Red Lodging v. Miller, 2001 MT 135, 305 M 477, 29 P3d 477 (2001). See also Adams v. Crismore, 211 M 245, 683 P2d 497 (1984).

Dismissal for Failure to File Undertaking on Appeal — No Thirty-Day Filing Requirement — Goldsmith Overruled: On January 23, 1996, the Gallatin County Justice's Court rendered a decision against ISC Distributors (ISC) in favor of Dime Insurance Agency (Dime). On February 1, 1996, ISC filed a notice of appeal in Justice's Court. On March 7, ISC deposited its undertaking on appeal with the Clerk of the District Court. When Dime moved to dismiss, the District Court granted the motion, holding on the basis of Goldsmith v. Lane, 226 M 341, 735 P2d 306 (1987), that the undertaking must be filed within the statutorily prescribed time provided for taking the appeal. The Supreme Court reversed, overruling Goldsmith and holding that as long as an aggrieved party takes an appeal within 30 days from the Justice's Court's judgment and as long as the undertaking is filed before the hearing on the motion to dismiss for failure to file an undertaking, the District Court has jurisdiction to hear the appeal. Dime Ins. Agency v. Scott Johnson/ISC Distrib., 279 M 121, 926 P2d 733, 53 St. Rep. 1078 (1996).

Failure to Perfect Appeal — Appeal Dismissed: The defendant appealed a default judgment entered in Justice Court. Defendant filed an undertaking, but the undertaking was defective. Plaintiff filed a motion to dismiss the appeal for failure to perfect the appeal. Defendant had adequate time to cure the defect prior to the hearing on plaintiff's motion but failed to do so. Since defendant failed to cure the defect, the District Court lacked jurisdiction to hear the appeal and properly granted plaintiff's motion to dismiss the appeal. Adams v. Crismore, 211 M 245, 683 P2d 497, 41 St. Rep. 1338 (1984). See also Red Lodging v. Miller, 2001 MT 135, 305 M 477, 29 P3d 477 (2001).

Motion to Dismiss Appeal With Substituted Undertaking: As against the contention of relator that an appeal to District Court from a Justice's Court judgment should be dismissed unless a new undertaking be filed within 30 days after the filing of the notice of appeal, for insufficiency of the first undertaking, under this section, all that is required is that it be filed at or before the hearing of the motion to dismiss the appeal, and in any event, where the appeal has otherwise been perfected, relator cannot object to the filing of the new undertaking given for his own benefit and protection. State ex rel. Strunk v. District Court, 113 M 58, 120 P2d 831 (1942).

Time of Taking Appeal With Substituted Undertaking: The filing of the undertaking is no part of the taking of the appeal. The appeal may be preserved, notwithstanding the undertaking is defective or irregular, if a good one is substituted at or before the hearing of the motion to dismiss. Thien v. Wiltse, 49 M 189, 141 P 146 (1914).

Substituted Undertakings: The rule that where the original undertaking on appeal to the Supreme Court is not wholly void but merely defective and therefore amendable, the filing of a substituted one preserves the appeal if approved by a Justice of the Supreme Court under section 93-8019, R.C.M. 1947 (superseded by Rules 4, 6, 9, 10, 11, 25, M.R.App.P.), is applicable to substituted undertakings on appeals to District Courts, filed and approved as provided by this section. Marlowe v. Mich. Stove Co., 48 M 342, 137 P 539 (1913).

25-33-208. Dismissal for failure to timely file required undertaking.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Part 3
Proceedings in District Court

25-33-301. Trial de novo — pleadings — conduct of trial.

Compiler's Comments

2005 Amendment: Chapter 557 in (3) after "justice's" deleted "court established as a". Amendment effective July 1, 2005.

2003 Amendment: Chapter 389 in (1) at beginning of first sentence inserted exception clause; inserted (3) providing that an appeal from a justice's court established as a court of record is on the record as provided in 3-10-115; and made minor changes in style. Amendment effective July 1, 2003.

Case Notes

General 1376
Default Judgment 1378

GENERAL

Trial De Novo Allowed in District Court Despite Failure to Request Jury Trial in Justice's Court — No Waiver of Right to Jury Trial: The District Court erred in determining that under this section, a waiver of the right to a jury trial in Justice's Court waives the right to a jury trial

de novo on appeal in District Court. The court disregarded the interplay of Rule 3, M.R.Civ.P. (Title 25, ch. 20), with Rule 38, M.R.Civ.P.(Title 25, ch. 20), and this section in attempting to harmonize the statute and the rules. The language in this section, limiting appeals from Justice's Court to the pleadings filed in Justice's Court, does not limit jury trial demands in appeals from Justice's Court because jury trial demands are not pleadings. The plain meaning of Rule 81(b), M.R.Civ.P. (Title 25, ch. 20), requires that Rules 3 and 38 be given meanings that are consistent with this section and the right to trial by jury. Thus, when a party makes a jury trial demand under Rule 38 for a trial de novo on appeal in District Court, the action commences when the party serves and files notice of appeal pursuant to 25-33-102 and 25-33-103. In appeals from Justice's Court, jury trial demands must be made within 10 days of the filing of notice of appeal. Further, participation in a bench trial in District Court without objection does not constitute waiver of the right to a jury trial so long as a timely jury trial demand is made in District Court. Balyeat Law, P.C. v. Harrison, 1999 MT 144, 295 M 13, 983 P2d 902, 56 St. Rep. 566 (1999), following U.S. v. Calif. Mobile Home Park Management Co., 107 F3d 1374 (9th Cir. 1997), and Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998).

Denial of Lay Counsel in City Court — Any Prejudice Cured by Trial De Novo on Appeal: Henry was charged with driving under the influence and was tried in City Court. The City Court refused to permit a family friend to represent Henry in the trial. Henry then appealed to the District Court for a trial de novo in which Henry was represented by counsel. The Supreme Court refused to address the merits of Henry's claim of violation of the right to counsel. The trial de novo on appeal to the District Court cured any prejudice that may have resulted from the City Court's decision regarding representation. St. v. Henry, 271 M 491, 898 P2d 1195, 52 St. Rep. 516 (1995).

Failure to Raise Claim of Erroneous Denial of Counsel in City Court Not Deficient Performance — District Court Not Court of Review: Henry was convicted of driving under the influence, first in City Court and then in District Court. Henry appealed the District Court conviction, claiming ineffective assistance of counsel based on counsel's failure to present Henry's claim of erroneous denial of counsel by the City Court. The Supreme Court held that the District Court does not sit as a court of review on appeal from City Court proceedings. There was no legal basis to present the claim of error, and failure to present it cannot constitute deficient performance. St. v. Henry, 271 M 491, 898 P2d 1195, 52 St. Rep. 516 (1995).

City Court Error to Refuse Waiver of Jury Trial — Error Waived by De Novo Appeal: McCarvel was charged with DUI within the city limits of Billings and scheduled for trial in the City Court. The city demanded a jury trial, but McCarvel waived his right to trial by jury. The City Court refused to accept the waiver, and the jury convicted McCarvel. On appeal to the District Court, McCarvel moved to dismiss on the grounds that the City Court committed error. The District Court refused to dismiss, and McCarvel changed his plea to guilty. Citing St. v. O'Brien, 35 M 482, 90 P 514 (1907), the Supreme Court held that because the trial in District Court is a trial de novo, in which a defendant has an opportunity for a trial without a jury, the opportunity for a District Court trial cured whatever prejudice resulted from the City Court's refusal to grant the right to a waiver provided under the provisions of 46-17-201. Billings v. McCarvel, 262 M 96, 863 P2d 441, 50 St. Rep. 1460 (1993).

Dismissal of Appeal for Unnecessary Delay: Where defendant filed notice of appeal of adverse verdict in Justice's Court with an undertaking on May 8, 1969, but took no further action, District Court properly granted plaintiff's motion to dismiss for unnecessary delay on July 1, 1970, since it was appellant's burden as moving party to bring appeal on for hearing. Eide Ins. v. Correll, 156 M 167, 478 P2d 272 (1970).

Time for Appeal Following Motion: In order to bring this section into harmony with the mandate of Art. VIII, sec. 23, 1889 Mont. Const. (now Art. VII, sec. 4(2), 1972 Mont. Const.), providing for appeals from Justices' Courts "in all cases", on timely motion to set aside a default judgment in a Justice's Court, the judgment is suspended and the time for taking an appeal therefrom begins to run from the time the motion is disposed of. Davis v. Bell Boy Gold Min. Co., 101 M 534, 54 P2d 563 (1936).

Trial de Novo in Misdemeanor Case: On appeal from a Justice's Court in a misdemeanor case, the cause must be tried de novo in the District Court on the papers and files in the former, unless the latter court allows other or amended pleadings, and each party has the benefit of all legal objections made in the Justice's Court. St. v. Benson, 91 M 109, 5 P2d 1045 (1931).

Appeal as Trial de Novo: The District Court does not, on appeal from a Justice's Court, sit as a court of review but tries the cause de novo. Thien v. Wiltse, 49 M 189, 141 P 146 (1914); Jenkins v. Carroll, 42 M 302, 112 P 1064 (1910); In re Graye, 36 M 394, 93 P 266 (1907); St. v. O'Brien, 35 M 482, 90 P 514 (1907); Duane v. Molinak, 31 M 343, 78 P 588 (1904); State ex rel. Seres v.

District Court, 19 M 501, 48 P 1104 (1897); St. v. Deslauries, 13 M 398, 34 P 490 (1893); Missoula Elec. Light Co. v. Morgan, 13 M 394, 34 P 488 (1893); State ex rel. Gleim v. Evans, 13 M 239, 33 P 1010 (1893).

Irregularities Waived by Appeal: Since the District Court does not, on appeal from a Justice's Court, sit as a court of review but tries the cause de novo, any irregularities attending the rendition of the judgment in a case in which the Justice had jurisdiction are waived by taking the appeal. Hosoda v. Neville, 45 M 310, 123 P 20 (1912); In re Graye, 36 M 394, 93 P 266 (1907); St. v. O'Brien, 35 M 482, 90 P 514 (1907).

Appellate Jurisdiction to Affirmatively Appear: On appeal from a Justice's Court the trial is de novo, but the District Court, though proceeding with the trial as in other cases, acquires its jurisdiction by appeal under the statute, and its jurisdiction must affirmatively appear. Jenkins v. Carroll, 42 M 302, 112 P 1064 (1910).

Attachment of Jurisdiction — When: Until the notice of appeal is filed and served as prescribed and the undertaking given and, if required, the sureties thereon, or others in their stead, justify after notice and within 5 days, the District Court does not acquire jurisdiction of the subject matter or of the parties. Jenkins v. Carroll, 42 M 302, 112 P 1064 (1910).

Jurisdictional Defects — Statutory Requirements Exclusive: If any of the necessary steps in taking an appeal from a Justice's Court to the District Court are omitted, the District Court is without jurisdiction to entertain the appeal. Such appeals, though provided for by the Constitution, are subject to statutory regulation, and the mode prescribed for taking them is exclusive. Jenkins v. Carroll, 42 M 302, 112 P 1064 (1910).

Rule Applicable in Criminal Cases: The rule of practice under this section applies in criminal cases. In re Graye, 36 M 394, 93 P 266 (1907).

Jurisdiction on Appeal: The District Court on appeal sits as a Justice's Court, and with no greater jurisdiction, and either party may have reviewed any question of law or fact which was raised before the Justice and presented to the District Court. State ex rel. Grissom v. Justice Court, 31 M 258, 78 P 498 (1904).

Motion to Dismiss Not Properly Before District Court: Only such questions as were raised and presented in the Justice's Court can be tried on appeal in the District Court, and where there was no showing that a motion was made in the Justice's Court to set aside the judgment and dismiss the cause but the record showed that the case was tried on issues of fact raised by the answer, it was proper for the District Court, on appeal from a judgment for plaintiff, to overrule a motion to dismiss the cause and to try the issues of fact that had been raised before the Justice. Clark v. Great N. Ry., 30 M 458, 76 P 1003 (1904).

Scope of Review: Only such questions as were raised and presented in the Justice's Court can be tried in the District Court. Clark v. Great N. Ry., 30 M 458, 76 P 1003 (1904); State el rel. Shanahan v. Lindsay, 22 M 398, 56 P 827 (1899).

DEFAULT JUDGMENT

Questions of Law — Review by Appeal: The District Court properly sustained a motion to quash a Writ of Certiorari where the only questions sought to be raised to annul a default judgment entered by Justice's Court were questions of law, appealable under this section. Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937).

Discretion Determined by Review: Under this section there is no appeal from a default judgment in a Justice's Court except where the court has abused its discretion in refusing to set it aside; on such appeal the District Court can go no further than to determine whether discretion was abused, its action on appeal being a review rather than a trial de novo. Davis v. Bell Boy Gold Min. Co., 101 M 534, 54 P2d 563 (1936).

Denial of Motion — Review by Certiorari: Where a Justice overruled a motion to vacate a default judgment, this section authorized an appeal and the judgment could not be reviewed by certiorari. State ex rel. Reynolds v. Laurendeau, 27 M 522, 71 P 754 (1903).

Discretion of Justice Determined on Appeal: Where a Justice refuses to set aside a judgment by default, an appeal lies, and it is for the court to determine on the papers filed in the Justice's Court as to whether the discretion of the Justice has been abused. State ex rel. Reynolds v. Laurendeau, 27 M 522, 71 P 754 (1903); State ex rel. Shanahan v. Lindsay, 22 M 398, 56 P 827 (1899).

Conditions for Affirmance of Default: A judgment by default will be affirmed, on appeal, where no motion was made in the Justice's Court to set aside the default, or other appropriate relief sought, if the complaint was sufficient for the court in which it was originally filed. Gage v. Maryatt, 9 M 265, 23 P 337 (1890).

Attorney General's Opinions

Court Reporter Filing Fee — Clerk of District Court to Collect Fee in Appeal From Justice's Court or City Court — Appeal Is "Civil Action" Under Statutes: The Attorney General was asked whether a Clerk of District Court must collect the $20 filing fee, required by 25-1-202 and used to help pay the salary of the court reporter, in appeals filed in District Court from judgments of a Justice's or City Court. The Attorney General concluded that: (1) a private legal action in a Justice's or City Court is a civil action; (2) an appeal from a Justice's or City Court may include appeal of a civil action; (3) an appeal from either of those courts results in most cases in a new trial in District Court and that the need for a court reporter in that instance is obvious; and (4) the payment of the additional $20 filing fee required by 25-1-202 is mandatory. 48 A.G. Op. 1 (1999).

Collateral References

Costs *key* 259 through 263; Courts *key* 190, et seq.; Justices of the Peace *key* 166, 176 through 180, 188.

51 C.J.S. Justices of the Peace §§185, et seq., 207, et seq., 220, et seq.

Reviewability, on appeal from final judgment of Justice of the Peace resulting in trial de novo, of interlocutory order, as affected by fact that order was separately appealable. 79 ALR 2d 1367.

Plea of guilty in Justice of the Peace Court as precluding appeal. 42 ALR 2d 995.

25-33-303. Appeal from judgment by default.

Case Notes

Question of Law — Certiorari Improper: The District Court properly sustained a motion to quash a Writ of Certiorari where the only questions sought to be raised to annul a default judgment entered by Justice's Court were questions of law, appealable under this section. Shaffroth v. Lamere, 104 M 175, 65 P2d 610 (1937).

Abuse of Discretion to Be Determined: Under this section there is no appeal from a default judgment in a Justice's Court except where the court has abused its discretion in refusing to set it aside; on such appeal the District Court can go no further than to determine whether discretion was abused, its action on appeal being a review rather than a trial de novo. Davis v. Bell Boy Gold Min. Co., 101 M 534, 54 P2d 563 (1936).

Refusal to Set Aside Default — Appeal Abuse of Discretion: Where a Justice refuses to set aside a judgment by default, an appeal lies, and it is for the court to determine on the papers filed in the Justice's Court as to whether the discretion of the Justice has been abused. State ex rel. Reynolds v. Laurendeau, 27 M 522, 71 P 754 (1903); State ex rel. Shanahan v. Lindsay, 22 M 398, 56 P 827 (1899).

Review by Appeal — Certiorari Improper: Where a Justice overruled a motion to vacate a default judgment, this section authorized an appeal, and the judgment could not be reviewed by certiorari. State ex rel. Reynolds v. Laurendeau, 27 M 522, 71 P 754 (1903).

Default Judgment — Motion to Be Made in Justice's Court: A judgment by default will be affirmed, on appeal, where no motion was made in the Justice's Court to set aside the default, or other appropriate relief sought, if the complaint was sufficient for the court in which it was originally filed. Gage v. Maryatt, 9 M 265, 23 P 337 (1890).

25-33-304. Dismissal of appeal upon delay — costs and damages.

Case Notes

Failure to File Brief Within Fifteen Days of Municipal Court Judgment — Summary Judgment Not Abuse of Discretion: Frazier was convicted of speeding in Justice's Court. Frazier filed a timely appeal to District Court, but failed to file a brief within 15 days after the record was filed with the District Court, as required by Rule 14(a), U.M.C.R.App. (Title 25, ch. 30, part 2400). The District Court summarily dismissed the appeal, and Frazier appealed, but the Supreme Court affirmed, noting that under this section, the District Court has discretion to order an appeal to be dismissed for failure to prosecute an appeal or for unnecessary delay in bringing an appeal to a hearing. The Supreme Court declined to reverse the District Court for insisting that parties comply with statutory directives and rules of civil procedure, holding that it was not an abuse of discretion for the District Court to dismiss Frazier's appeal for failure to file a timely brief. St. v. Frazier, 2005 MT 99, 326 M 524, 111 P3d 215 (2005).

Remand of Criminal Case Not Authorized: A District Court may dismiss the appeal of a civil case under this section, but the remand of a criminal case is not authorized. Rickett v. Billings, 262 M 339, 864 P2d 793, 50 St. Rep. 1586 (1993), affirming Hardin v. Myers, 194 M 248, 633 P2d 677 (1981).

Unnecessary Delay: Where defendant filed notice of appeal of adverse verdict in Justice's Court with an undertaking on May 8, 1969, but took no further action, District Court properly granted plaintiff's motion to dismiss for unnecessary delay on July 1, 1970, since it was appellant's burden as moving party to bring appeal on for hearing. Eide Ins. v. Correll, 156 M 167, 478 P2d 272 (1970).

Discretionary Power — Reasons for Dismissal: The power, discretionary in its nature, lodged by this section in the District Court, to dismiss an appeal from a Justice's Court for delay in bringing it to a hearing, should not be exercised where there is a reasonable excuse for the delay and where it is apparent that the adverse party has not suffered prejudice by reason of the delay. Bush v. Baker, 46 M 535, 129 P 550 (1913).

Dismissal as Abuse — Acquiescence in Delay: The District Court abused the discretionary power given it by this section, in dismissing on motion an appeal from a Justice's Court for alleged lack of diligence in prosecuting it, where counsel for appellant, by reason of illness, was prevented from attending to matters of business, respondent having suffered no detriment or inconvenience from the delay, but rather, by allowing the case to rest for over 3 months without any effort to have it brought to trial, tacitly acquiesced in the delinquency of the appellant. Bush v. Baker, 46 M 535, 129 P 550 (1913).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

Collateral References

Costs *key* 259 through 263; Courts *key* 190, et seq.; Justices of the Peace *key* 166, 176 through 180, 188.

20 C.J.S. Costs §184; 51 C.J.S. Justices of the Peace §§170, et seq., 207, et seq., 220, et seq.

CHAPTER 35
SMALL CLAIMS PROCEDURE — JUSTICE'S COURT

Chapter Compiler's Comments

Preamble: The preamble to SB 485 (Ch. 586, L. 1981) read:

"WHEREAS, in 1977 the Montana Legislature enacted the provisions of Chapter 572, Laws of 1977, creating a small claims court within justices' courts in Montana, which provisions are codified as Title 25, chapter 35, MCA; and

WHEREAS, the small claims procedure makes no provision for a jury trial, provides that one party may not be represented by an attorney if the other party is not so represented, and provides that an appeal from the small claims court is to be tried on the record of the case and is not to be tried as a trial de novo; and

WHEREAS, the Montana Supreme Court has held in the case of North Central Services, Inc. v. Hafdahl, 191 Mont. 440, 625 P2d 56 [38 St. Rep. 372], (Civil No. 80-228, decided March 11, 1981), that the cumulative effect of these provisions is to deny the right to a jury trial and the right to counsel at every stage of the factual determination of a case in small claims court; and

WHEREAS, the Supreme Court therefore held section 25-35-403(2), MCA, to be unconstitutional and also held the remainder of Title 25, chapter 35, unconstitutional and void for the reason that it could not be severed from section 25-35-403(2), MCA.

THEREFORE, it is the intent of the Legislature to cure the unconstitutionality of Title 25, chapter 35, by repealing and reenacting those provisions with such changes as to cure the unconstitutionality of those provisions."

Chapter Case Notes

Claims in Excess of Amount for Consideration in Small Claims Court Not Barred by Res Judicata From Consideration in District Court: Thornton contracted to purchase a modular home from Alpine Home Center (Alpine), agreeing to pay $3,000 down toward the $72,120 purchase price, and receiving $6,900 credit for trade-in of an older mobile home. Thornton complained of problems with the modular home necessitating $500 in repairs, and stopped payment on the downpayment check. Upon taking possession of Thornton's trade-in, Alpine discovered damage to the trade-in in the amount of $3,450, and also discovered that Thornton owed $210.09 in back taxes on the trade-in. Alpine subsequently filed a complaint in Small Claims Court for $3,000. The Small Claims Court offset the cost of Thornton's repairs against the amount of damages suffered by Alpine and awarded Alpine $2,500. Thornton did not appeal the

judgment, but instead filed a complaint in District Court alleging numerous theories for relief and seeking $65,000 for consequential damages, $100,000 for punitive damages, and general damages to be determined by the District Court. The District Court dismissed Thornton's claim on grounds that the action was barred by res judicata. Thornton appealed. The Supreme Court applied the elements of res judicata as set out in Whirry v. Swanson, 254 M 248, 836 P2d 1227 (1992), concluding that the issues raised by Thornton in District Court were different from the claims raised in Small Claims Court, and pointed out that the issues could not have been raised in the lower court in any case because 25-35-502 limits Small Claims Court jurisdiction to claims not exceeding $3,000. The District Court erred in holding that res judicata barred Thornton's action, so that holding was reversed and Thornton's case was remanded for further District Court proceedings. Thornton v. Alpine Home Center, 2001 MT 310, 307 M 529, 38 P3d 855 (2001).

Constitutionality — Severance Not Possible: Where the Supreme Court held that the small claims procedure in Justices' Courts was unconstitutional because it denied a litigant both the right to a jury trial and the right to counsel, the unconstitutional portions of the small claims statutes could not be severed from other portions of the small claims procedure, so the entire procedure was held unconstitutional and void. If severance of the unconstitutional provisions from the constitutional provisions would leave a complete procedure and if severance could be accomplished while honoring legislative intent, then severance should be made. Because an incomplete and incompatible appeal procedure would have resulted and because the Supreme Court could not ascertain legislative intent, no severance was made and the entire procedure was held unconstitutional. N. Cent. Serv., Inc. v. Hafdahl, 191 M 440, 625 P2d 56, 38 St. Rep. 372 (1981), distinguished, as to dicta stating that the constitutional right to a jury trial was satisfied if a trial was available at the District Court level, in Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998). (Annotator's note: This case was decided prior to 1981 repeal and enactment. See "Preamble" compiler's comment under Title 25, ch. 35, table of contents.)

Constitutionality — Small Claims Procedure as Denial of Right to Counsel and Trial by Jury: Where the plaintiff brought an action in Small Claims Court before a Justice of the Peace and, upon appeal to the District Court, the judgment in favor of the plaintiff was affirmed but the defendant was prohibited from appearing through counsel since the law provides only for appeal of questions of law, the District Court erred in holding the small claims procedure in Justice's Court constitutional. The small claims procedure makes no provision for a jury trial, prohibits a trial de novo in the District Court, and prohibits a party from being represented by counsel unless all parties are so represented. These provisions are unconstitutional because they effectively deny a litigant the right to counsel and the right to a jury trial at all stages of the factfinding process. N. Cent. Serv., Inc. v. Hafdahl, 191 M 440, 625 P2d 56, 38 St. Rep. 372 (1981), distinguished, as to dicta stating that the constitutional right to a jury trial was satisfied if a trial was available at the District Court level, in Woirhaye v. District Court, 1998 MT 320, 292 M 185, 972 P2d 800, 55 St. Rep. 1298 (1998). (Annotator's note: This case was decided prior to 1981 repeal and enactment. See "Preamble" compiler's comment under Title 25, ch. 35, table of contents.)

Chapter Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

Making Small Claims Courts Work in Montana: Recommendations for Legislative and Judicial Action, Alexander, 45 Mont. L. Rev. 245 (1984).

Small Claims Courts in Montana: A Statistical Study, Alexander, 44 Mont. L. Rev. 227 (1983).

Part 5
General Provisions

25-35-501. Purpose.

Case Notes

Admitting Exhibits Without Proper Evidentiary Foundation: Capital Ford Garage argued that the Small Claims Court erred in allowing the plaintiff to introduce exhibits without laying a proper foundation. The Supreme Court held that the Small Claims Court had not abused its discretion because the purpose of that court was to provide for the informal disposition of claims. Johnson v. Capital Ford Garage, 250 M 430, 820 P2d 1275, 48 St. Rep. 992 (1991).

25-35-502. Jurisdiction.

Compiler's Comments

1993 Amendment: Chapter 10 throughout section increased Small Claims Court jurisdiction from $2,500 to $3,000.

1991 Amendment: Inserted (2) setting amount applicable to jurisdiction of small claims court over an interpleader.

1989 Amendment: Increased amount of claims that may be heard by Small Claims Court from $1,500 to $2,500.

Case Notes

Claims in Excess of Amount for Consideration in Small Claims Court Not Barred by Res Judicata From Consideration in District Court: Thornton contracted to purchase a modular home from Alpine Home Center (Alpine), agreeing to pay $3,000 down toward the $72,120 purchase price, and receiving $6,900 credit for trade-in of an older mobile home. Thornton complained of problems with the modular home necessitating $500 in repairs, and stopped payment on the downpayment check. Upon taking possession of Thornton's trade-in, Alpine discovered damage to the trade-in in the amount of $3,450, and also discovered that Thornton owed $210.09 in back taxes on the trade-in. Alpine subsequently filed a complaint in Small Claims Court for $3,000. The Small Claims Court offset the cost of Thornton's repairs against the amount of damages suffered by Alpine and awarded Alpine $2,500. Thornton did not appeal the judgment, but instead filed a complaint in District Court alleging numerous theories for relief and seeking $65,000 for consequential damages, $100,000 for punitive damages, and general damages to be determined by the District Court. The District Court dismissed Thornton's claim on grounds that the action was barred by res judicata. Thornton appealed. The Supreme Court applied the elements of res judicata as set out in Whirry v. Swanson, 254 M 248, 836 P2d 1227 (1992), concluding that the issues raised by Thornton in District Court were different from the claims raised in Small Claims Court, and pointed out that the issues could not have been raised in the lower court in any case because this section limits Small Claims Court jurisdiction to claims not exceeding $3,000. The District Court erred in holding that res judicata barred Thornton's action, so that holding was reversed and Thornton's case was remanded for further District Court proceedings. Thornton v. Alpine Home Center, 2001 MT 310, 307 M 529, 38 P3d 855 (2001).

Lack of Small Claims Court Jurisdiction Over Out-of-State Corporation Whose Managing Agent Could Not Be Served: Under this section, the Small Claims Court has jurisdiction of certain claims if the defendant can be served in the county where the action commenced. Here, Aladdin Steel Products, Inc. (Aladdin), a Washington corporation with no office or registered agent in Montana, could not be served in Lincoln County, Montana, so the Small Claims Court lacked jurisdiction. Petersen's argument that process could have been served in Lincoln County on Aladdin's warranty service representative or sales representative failed for lack of evidence that either of those representatives was a managing agent or general agent for purposes of service of process. Petersen v. Aladdin Steel Prod., Inc., 1999 MT 262, 296 M 394, 989 P2d 385, 56 St. Rep. 1061 (1999), following State ex rel. Schmidt v. District Court, 111 M 16, 105 P2d 677 (1940).

Perfection of Appeal From Small Claims Court — No Requirement to File Undertaking or Pay Transfer Fee: Petersen cited 25-33-201 and 25-35-807 in arguing that the appeal from Small Claims Court filed by Aladdin Steel Products, Inc. (Aladdin), was deficient for failing to file an undertaking. However, 25-33-201 applies to appeals from Justice's Court and City Court, and 25-35-807 concerns proceedings to enforce or collect a judgment and is not relevant to perfecting an appeal from Small Claims Court. There is in fact no statutory requirement to file an undertaking on appeal from Small Claims Court, and Aladdin's appeal was not deficient for failing to do so. Further, although the transfer fee required under 25-1-201(1)(k) does apply to appeals from Small Claims Court, payment of the fee is not a prerequisite to perfecting an appeal. It is the duty of the Clerk of the District Court to collect the fee, and that duty is unrelated to the duty of the appealing party to perfect an appeal under 25-35-804. Thus, an appeal from Small Claims Court to District Court is properly perfected upon filing a notice of appeal under 25-35-804 and requesting that the Small Claims Court transmit the record to the District Court. Petersen v. Aladdin Steel Prod., Inc., 1999 MT 262, 296 M 394, 989 P2d 385, 56 St. Rep. 1061 (1999).

25-35-503. Removal from district court.

Compiler's Comments

1993 Amendment: Chapter 10 at end of first sentence increased Small Claims Court jurisdiction from $2,500 to $3,000.

1989 Amendment: Increased maximum amount of claims that may be removed to Small Claims Court from $1,500 to $2,500.

25-35-505. Parties — representation.

Compiler's Comments

1999 Amendment: Chapter 207 in (3) near end of third sentence inserted "directors, officers, or". Amendment effective October 1, 1999.

1997 Amendment: Chapter 135 at beginning of (4) inserted exception clause; at end of (5) inserted "unless it has been assigned pursuant to 27-1-718"; at beginning of (6) inserted exception clause; and made minor changes in style.

Applicability: Section 4, Ch. 135, L. 1997, provided: "[This act] applies to claims for civil penalties for shoplifting based on events occurring after [the effective date of this act]." Effective October 1, 1997.

1985 Amendment: In (6) increased number of claims a party may file in a year from three to ten claims.

Case Notes

Lack of Small Claims Court Jurisdiction Over Out-of-State Corporation Whose Managing Agent Could Not Be Served: Under 25-35-502, the Small Claims Court has jurisdiction of certain claims if the defendant can be served in the county where the action commenced. Here, Aladdin Steel Products, Inc. (Aladdin), a Washington corporation with no office or registered agent in Montana, could not be served in Lincoln County, Montana, so the Small Claims Court lacked jurisdiction. Petersen's argument that process could have been served in Lincoln County on Aladdin's warranty service representative or sales representative failed for lack of evidence that either of those representatives was a managing agent or general agent for purposes of service of process. Petersen v. Aladdin Steel Prod., Inc., 1999 MT 262, 296 M 394, 989 P2d 385, 56 St. Rep. 1061 (1999), following State ex rel. Schmidt v. District Court, 111 M 16, 105 P2d 677 (1940).

Partnerships — Capacity to Sue in Own Name: On certification from the Ninth Circuit Court of Appeals, the Montana Supreme Court held that a joint venture between two out-of-state corporations had the capacity to bring suit as a plaintiff against a corporation under Montana law. Relying on the Uniform Partnership Act and Montana statutes that allow a partnership to be sued in its own name and to sue in Small Claims Court, the Supreme Court found clear legislative intent to treat partnerships as distinct entities with the power to sue. Decker Coal Co. v. Commonwealth Edison Co., 220 M 251, 714 P2d 155, 43 St. Rep. 337 (1986).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

25-35-508. Interpleader actions.

Compiler's Comments

1999 Amendment: Chapter 51 in (3) near end of interpleader form and near middle and end of order form after "day of....." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

Applicability: Section 6, Ch. 326, L. 1991, provided: "[Sections 2 and 4] [25-31-119 and 25-35-508] apply to actions arising on or after October 1, 1991."

Part 6
Procedure Before Trial

25-35-601. Commencement of action — assistance to claimant.

Compiler's Comments

1983 Amendment: In (1), after "justice of the peace" inserted "or his clerk".

25-35-602. Form of complaint and order of court/notice to defendant.

Compiler's Comments

1999 Amendment: Chapter 51 in complaint form in two places and near end of order form after "day of....." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

1985 Amendment: Reduced time period for removal of an action from Small Claims Court to Justice's Court from 40 to 10 days from date of service of complaint.

25-35-604. Service on defendant — return.

Case Notes

Lack of Small Claims Court Jurisdiction Over Out-of-State Corporation Whose Managing Agent Could Not Be Served: Under 25-35-502, the Small Claims Court has jurisdiction of certain claims if the defendant can be served in the county where the action commenced. Here, Aladdin Steel Products, Inc. (Aladdin), a Washington corporation with no office or registered agent in Montana, could not be served in Lincoln County, Montana, so the Small Claims Court lacked jurisdiction. Petersen's argument that process could have been served in Lincoln County on Aladdin's warranty service representative or sales representative failed for lack of evidence that either of those representatives was a managing agent or general agent for purposes of service of process. Petersen v. Aladdin Steel Prod., Inc., 1999 MT 262, 296 M 394, 989 P2d 385, 56 St. Rep. 1061 (1999), following State ex rel. Schmidt v. District Court, 111 M 16, 105 P2d 677 (1940).

25-35-605. Removal to justice's court — effect of failure to remove.

Compiler's Comments

1983 Amendment: In first sentence of (1), substituted "10 days" for "40 days"; and in (2) near beginning of second sentence, inserted "except rules of pleading but".

25-35-606. Defendant's counterclaim.

Compiler's Comments

1999 Amendment: Chapter 51 in (3) in counterclaim form in two places after "day of....." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

1989 Amendment: In two places in (2) increased maximum amount of a counterclaim that may be determined in Small Claims Court from $1,500 to $2,500.

25-35-608. Fees.

Compiler's Comments

1989 Amendment: In (1)(a) increased from $5 to $10 the fee to be paid by plaintiff upon filing of a sworn complaint; in (1)(b) clarified that a $5 fee must be paid by defendant upon appearance and contesting the complaint or execution of counterclaim; and made minor change in style.

Severability Clause: Section 21, Ch. 572, L. 1977, was a severability clause.

25-35-609. Pretrial conferences or hearings — appearance by telephone conference.

Compiler's Comments

Effective Date: This section is effective October 1, 2001.

Part 7
The Trial

25-35-702. Witnesses — evidence — subpoena power.

Case Notes

Admitting Exhibits Without Proper Evidentiary Foundation: Capital Ford Garage argued that the Small Claims Court erred in allowing the plaintiff to introduce exhibits without laying a proper foundation. The Supreme Court held that the Small Claims Court had not abused its discretion because the purpose of that court was to provide for the informal disposition of claims. Johnson v. Capital Ford Garage, 250 M 430, 820 P2d 1275, 48 St. Rep. 992 (1991).

25-35-703. Record of proceedings.

Case Notes

Proper District Court Review of Small Claims Court Decision Precluded by Loss of Electronic Record — Reversible Error: When the electronically recorded proceedings of a Small Claims Court trial were lost, the District Court had no basis or record upon which to determine whether the findings of fact were clearly erroneous. A trial de novo was precluded by 25-35-803. Without the opportunity to review the record, it was reversible error for the District Court to affirm the judgment of the Small Claims Court. The Supreme Court remanded to the Small Claims Court for a new hearing. Spence v. Ortloff, 271 M 533, 898 P2d 1232, 52 St. Rep. 606 (1995), following Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285 (1991).

Part 8
Judgment — Appeal

25-35-802. Costs.

Compiler's Comments

Severability Clause: Section 21, Ch. 572, L. 1977, was a severability clause.

25-35-803. Appeal to district court — commencement and scope.

Case Notes

Weekends and Holidays Included in Statutory Time Applicable to Appeal From Small Claims Court: This section allows a party 10 days after entry of judgment to file a notice of appeal from a judgment of a Small Claims Court. Hubbard contended that the 10-day statutory period should not include weekends or holidays in the calculation, similar to the calculations in Rule 6(a), M.R.Civ.P. (Title 25, ch. 20), and Rule 21, M.U.R.J.C.C. (Title 25, ch. 24). The Supreme Court disagreed. If the Legislature had wanted to exclude weekends and holidays from the time allowed for Small Claims Court appeals, it could have done so, as in the case of the other rules of procedure. However, the language of this section is clear and unambiguous, and does not exclude weekends or holidays from the calculation of the 10-day appeal period. Allen v. Hubbard, 2002 MT 95, 309 M 375, 46 P3d 639 (2002).

Claims in Excess of Amount for Consideration in Small Claims Court Not Barred by Res Judicata From Consideration in District Court: Thornton contracted to purchase a modular home from Alpine Home Center (Alpine), agreeing to pay $3,000 down toward the $72,120 purchase price, and receiving $6,900 credit for trade-in of an older mobile home. Thornton complained of problems with the modular home necessitating $500 in repairs, and stopped payment on the downpayment check. Upon taking possession of Thornton's trade-in, Alpine discovered damage to the trade-in in the amount of $3,450, and also discovered that Thornton owed $210.09 in back taxes on the trade-in. Alpine subsequently filed a complaint in Small Claims Court for $3,000. The Small Claims Court offset the cost of Thornton's repairs against the amount of damages suffered by Alpine and awarded Alpine $2,500. Thornton did not appeal the judgment, but instead filed a complaint in District Court alleging numerous theories for relief and seeking $65,000 for consequential damages, $100,000 for punitive damages, and general damages to be determined by the District Court. The District Court dismissed Thornton's claim on grounds that the action was barred by res judicata. Thornton appealed. The Supreme Court applied the elements of res judicata as set out in Whirry v. Swanson, 254 M 248, 836 P2d 1227 (1992), concluding that the issues raised by Thornton in District Court were different from the claims raised in Small Claims Court, and pointed out that the issues could not have been raised in the lower court in any case because 25-35-502 limits Small Claims Court jurisdiction to claims not exceeding $3,000. The District Court erred in holding that res judicata barred Thornton's action, so that holding was reversed and Thornton's case was remanded for further District Court proceedings. Thornton v. Alpine Home Center, 2001 MT 310, 307 M 529, 38 P3d 855 (2001).

Proper District Court Review of Small Claims Court Decision Precluded by Loss of Electronic Record — Reversible Error: When the electronically recorded proceedings of a Small Claims Court trial were lost, the District Court had no basis or record upon which to determine whether the findings of fact were clearly erroneous. A trial de novo was precluded by this section. Without the opportunity to review the record, it was reversible error for the District Court to affirm the judgment of the Small Claims Court. The Supreme Court remanded to the Small Claims Court for a new hearing. Spence v. Ortloff, 271 M 533, 898 P2d 1232, 52 St. Rep. 606 (1995), following Interstate Prod. Credit Ass'n v. DeSaye, 250 M 320, 820 P2d 1285 (1991).

No Extension of Time Authorized for Filing Notice of Appeal — Appeal to Address Question of Law: Eagle brought an action in the small claims division of District Court, alleging that Russiff failed to properly repair Eagle's vehicle, causing further damage to the engine. Twenty days after judgment was entered against him, Eagle filed a notice of appeal, explaining that he was unable to get his mail. The clerk allowed the filing of the notice of appeal because of excusable neglect. The District Court dismissed the appeal as untimely. The Supreme Court held that there was no provision in the statute for an extension of the 10-day period in which to file the notice of appeal and that even if Justice Court did have such authority, Eagle's appeal was faulty in that it failed to specify any legal issues. Eagle v. Russiff Auto Repair, 254 M 422, 838 P2d 426, 49 St. Rep. 836 (1992).

Prohibition of Trial De Novo Constitutional: Capital Ford Garage argued that the statute limiting appeals from a Small Claims Court to questions of law rather than trial de novo with representation by counsel denied the garage its right to due process. The Supreme Court held

that the statute was constitutional because a defendant had the right to remove the case to District Court or waive the rights to trial by jury and representation by counsel by proceeding in a Small Claims Court. The Supreme Court further held that limiting the appeal in District Court to questions of law was constitutional. Johnson v. Capital Ford Garage, 250 M 430, 820 P2d 1275, 48 St. Rep. 992 (1991).

25-35-804. Record on appeal.

Case Notes

Perfection of Appeal From Small Claims Court — No Requirement to File Undertaking or Pay Transfer Fee: Petersen cited 25-33-201 and 25-35-807 in arguing that the appeal from Small Claims Court filed by Aladdin Steel Products, Inc. (Aladdin), was deficient for failing to file an undertaking. However, 25-33-201 applies to appeals from Justice's Court and City Court, and 25-35-807 concerns proceedings to enforce or collect a judgment and is not relevant to perfecting an appeal from Small Claims Court. There is in fact no statutory requirement to file an undertaking on appeal from Small Claims Court, and Aladdin's appeal was not deficient for failing to do so. Further, although the transfer fee required under 25-1-201(1)(k) does apply to appeals from Small Claims Court, payment of the fee is not a prerequisite to perfecting an appeal. It is the duty of the Clerk of the District Court to collect the fee, and that duty is unrelated to the duty of the appealing party to perfect an appeal under this section. Thus, an appeal from Small Claims Court to District Court is properly perfected upon filing a notice of appeal under this section and requesting that the Small Claims Court transmit the record to the District Court. Petersen v. Aladdin Steel Prod., Inc., 1999 MT 262, 296 M 394, 989 P2d 385, 56 St. Rep. 1061 (1999).

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25-35-806. Attorney's fees upon appeal or removal.

Case Notes

Statute Allowing Attorney Fees in Appeal From Small Claims Court Not Applicable to Appeal From District Court: Plaintiffs prevailed in an appeal from District Court to the Supreme Court, which began as an appeal from Small Claims Court, and sought attorney fees and costs related to the appeal, citing this section. The Supreme Court held that this section applies only to appeals from Small Claims Court to District Court, and declined to award plaintiffs their attorney fees incurred during the appeal from District Court to the Supreme Court. However, as the prevailing party in the Supreme Court appeal, plaintiffs were entitled to costs under Rule 33, M.R.App.P. (Title 25, ch. 21). Allen v. Hubbard, 2002 MT 95, 309 M 375, 46 P3d 639 (2002).

Law Review Articles

". . . And Attorney Fees to the Prevailing Party": Recovering Attorney Fees Under Montana Statutory Law, Williams, 46 Mont. L. Rev. 119 (1985).

25-35-807. Execution of judgment.

Case Notes

Perfection of Appeal From Small Claims Court — No Requirement to File Undertaking or Pay Transfer Fee: Petersen cited 25-33-201 and this section in arguing that the appeal from Small Claims Court filed by Aladdin Steel Products, Inc. (Aladdin), was deficient for failing to file an undertaking. However, 25-33-201 applies to appeals from Justice's Court and City Court, and this section concerns proceedings to enforce or collect a judgment and is not relevant to perfecting an appeal from Small Claims Court. There is in fact no statutory requirement to file an undertaking on appeal from Small Claims Court, and Aladdin's appeal was not deficient for failing to do so. Further, although the transfer fee required under 25-1-201(1)(k) does apply to appeals from Small Claims Court, payment of the fee is not a prerequisite to perfecting an appeal. It is the duty of the Clerk of the District Court to collect the fee, and that duty is unrelated to the duty of the appealing party to perfect an appeal under 25-35-804. Thus, an appeal from Small Claims Court to District Court is properly perfected upon filing a notice of appeal under 25-35-804 and requesting that the Small Claims Court transmit the record to the District Court. Petersen v. Aladdin Steel Prod., Inc., 1999 MT 262, 296 M 394, 989 P2d 385, 56 St. Rep. 1061 (1999).

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